

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 January 2006

In the Matter of

LEE ROSEBERRY
Complainant

v.

CITY OF PORTSMOUTH, NEW HAMPSHIRE
Respondent

Case No. 2005-WPC-00004

Lee Roseberry, *Pro Se*

Thomas M. Closson, Esq.
Exeter, New Hampshire
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a claim of discrimination arising under §507 of the Federal Water Pollution Control Act (hereinafter “the Act”), 33 U.S.C. §1367, and the corresponding regulations at 29 C.F.R. Part 24. A formal hearing was held on November 21-22, 2005 in Concord, New Hampshire. At the hearing, complainant filed 52 exhibits, and respondent filed 17. In addition, complainant and another witness on his behalf testified, and complainant called the Deputy Director of Public Works and the Police Chief as adverse witnesses.

Complainant contends that he was denied a taxi license by the city of Portsmouth, New Hampshire in retaliation for engaging in protected activity while employed at the waste water treatment plant for the City of Portsmouth’s Department of Public Works (“DPW”). At the hearing, subsequent to the presentation of the complainant’s case, the respondent moved for dismissal of the case, contending that the claimant had not presented a prima facie case. That motion was granted. This written decision memorializes the bench decision issued on November 22, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

Background

The claimant, Lee Roseberry, is a 53 year old resident of Portsmouth, New Hampshire. He is a high school graduate, and stated that he has completed about three years of college. Prior to his employment with DPW, he worked in construction, as a bartender, and drove a taxi (TR 22). He began working for DPW as a temporary employee in December, 1988, and became a permanent employee in 1989. All of his employment with DPW was as a wastewater treatment plant operator (TR 23). A wastewater treatment plant operator performs various jobs including processing sludge, maintenance, lab work, and general upkeep of the facilities (TR 23-24). DPW had two wastewater treatment plants, the Pierce Island plant and the Pease plant. Together, a work force of about 10 people manned the plants (TR 25).

Claimant contends that during the course of his employment with DPW he engaged in activity protected by the Act in the following instances:

- In the mid to late 1990's he complained on several occasions to one of three people – City Engineer and later Deputy Director of DPW Allen; Chief Operator Hoffman; and Director of DPW Parkinson - about a valve at the Deer Street pumping station that he believed was broken (TR 36-42).
- He complained to Hoffman, Allen and Assistant Chief Operator Anania that the overtorque alarm system had to be repaired (TR 42-46).
- He complained to Hoffman, Anania and Allen that the cables operating containers holding tons of sludge were in danger of snapping (TR 46-48).
- Starting in 1994, he complained about the build-up of hydrogen sulfide gas at the plant (TR 48-51).
- He complained to Hoffman, Anania, Allen and Parkinson about valves that were difficult to open and close (TR 51-52).
- In October, 2001, December, 2001, and on subsequent occasions, complainant asked Hoffman, Anania, and Acting Chief Plant Operator Peterson to tell him the contents of an incident report regarding a discharge of untreated wastewater into the Piscataqua River which he alleges occurred due to failure of the valve at the Deer Street pumping station that he had complained about years earlier. One of the times he asked about the incident report was at a staff meeting on or about December 21, 2001 (TR 52-55; RX 5).
- In the spring of 2003, he spoke up for a co-worker who was being suspended for allegedly not responding to an alarm (TR 61-62).

¹ Citations to the record of this proceeding will be abbreviated as follows: CX – Complainant's Exhibit; RX – Respondent's Exhibit; TR – Hearing Transcript.

- He complained to Hoffman and Anania about a list of problems in the sludge process building (TR 63-66).

Complainant alleges that because he raised these complaints with his supervisors he was suspended for three days beginning on December 28, 2001 (*e.g.*, TR 56; RX 5); five days beginning on July 30, 2002 (RX 7); and three days beginning on October 24, 2003 (RX 10). He was placed on administrative leave after this latest suspension was completed (CX 32, at 56; RX 15, at 63). He was terminated on January 30, 2004 (RX 13, 14). Two of the suspensions and the termination were the subject of arbitration in accordance with the collective bargaining agreement between complainant's union and the City of Portsmouth under which the arbitrators were selected by joint agreement of the union and the City (TR 86, 120). The suspensions and termination were upheld by the arbitrators (*see* RX 8, 9, 16), and apparently a whistleblower complaint related to one or more of these adverse actions has been filed with the New Hampshire Department of Labor (*e.g.*, CX 3, at 3). Neither of the suspensions nor complainant's termination are being challenged in this case.

In October and November, 2003, several unusual incidents occurred. For one thing, complainant had an acrimonious meeting on October 10, 2003 with his direct supervisor at that time, Geoff Howe (TR 88; RX 15, at 62). Two days later, on October 12th, a copy of complainant's gun permit was found on Howe's desk (RX 15, at 63). Complainant's explanation of how the gun permit got there is hard to believe (*see* TR 75-76, 90-93). Rather, it appears that the complainant deliberately left the gun permit on Howe's desk, possibly as a threat. In addition, on October 23, 2003, while the complainant, Howe, and two other DPW employees were working at one of the water treatment plants, Howe took off his ID badge. Later that day, he noticed that a swastika had been drawn on his photograph on the badge (CX 15, at 24). The complainant denies that he drew the swastika on Howe's badge. Another incident occurred on November 8, 2003, while complainant was on administrative leave. A note stating "PAY BACK is a Bitch F___ HeaD! Letsgo!!!" was found on the windshield of the car of the mother-in-law of Portsmouth's City Manager, John Bohenko. Her car was parked adjacent to the City Manager's residence. Bohenko's mother-in-law's car was a gold/tan SUV, which was similar in appearance to Bohenko's vehicle. Bohenko surmised that the note was intended for him, not his mother-in-law. When questioned by the police regarding who would have left him the note, the only person he could think of was the complainant, since it was possible that Bohenko, as City Manager, might have to decide whether to approve of complainant's termination as a city employee (CX 16, at 29-33). Each of these incidents was investigated by the Portsmouth Police Department as incidents of criminal threatening, but no arrests were made. *See* CX 15-16.

In addition, while complainant was on administrative leave, five of his DPW co-workers and two of his immediate supervisors, who together constituted more than half of the DPW workforce at its wastewater treatment plants, sent a petition to Dianna Fogerty, the City's Human Resources Director, stating that "we feel our safety is compromised due to Mr. Roseberry's personal conflicts, anger, and incompatibility with co-workers. . . . [The] employees feel it is not in our best interest or safety that Lee Roseberry return to work." (RX 11).

Sometime in early 2005, complainant applied for a taxi operator's license with the City of Portsmouth. Under a city ordinance, Section 7.211C, one of the steps required to receive a taxi operator's license is a written recommendation from the Chief of Police, which is to be based on an examination of the applicant's criminal and motor vehicle records (RX 3, at 6-7). The ordinance requires that a taxi operator's license shall be denied if the applicant has a poor driving record over a period of three years or has been convicted of a felony or misdemeanor over a period of seven years (15 years if the conviction involved drugs). *Id.* There is no contention that any of these disqualifying factors applied to the complainant (*e.g.*, TR 147). Yet on March 15, 2005, the Police Chief, Michael Magnant, denied complainant's application (RX 1), and that denial was upheld by the Portsmouth Taxi Commission on May 16, 2005 (CX 12). Claimant contends that Chief Magnant's denial of his taxi operator's license was due to the protected activity complainant engaged in while employed by DPW. Respondent denies this contention.

Discussion

Under the Water Pollution Control Act:

[n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. § 1367(a). To prevail under the Act and similar environmental whistleblower statutes, a complainant must establish that: (1) the complainant engaged in protected activity, (2) the employer knew of the complainant's protected activity, (3) an adverse employment action was taken, and (4) the adverse employment action was motivated, in whole or in part, by the complainant's protected activity (*see Dartey v. Zack*, 82-ERA-2 (1983); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)). If a complainant is successful in proving these points, the burden then shifts to the respondent to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason (*see Guttman v. Passaic Valley Sewerage Comm'rs v. DOL*, 992 F.2d 474 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993)). If the respondent can make this showing, the complainant then must prove that the respondent's asserted reason for taking the adverse action is not the true reason, but rather is a pretext for retaliation (*St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)).

For purposes of this decision, it will be assumed that the complainant's activities at DPW which are listed above were protected under the Act, and that the denial of a taxi operator's license by the City of Portsmouth was an adverse employment action under the Act. As far as whether the respondent was aware of complainant's protected activity, the respondent City is a multi-headed beast. For the purposes of this decision, it will be assumed that complainant's alleged protected activities took place and complainant's supervisors and others in supervisory positions in the city government, including the City Manager, John Bohenko, were aware of

those activities, while this assumption of knowledge will not be imputed to the entire city government.

That leaves complainant with having to prove at least one additional factor to meet his prima facie burden - that the adverse employment action was motivated by complainant's protected activities. But there is not a shred of evidence in this record to support complainant's contention. Complainant has not produced any documentary or testimonial evidence which in any way links the decision to deny his taxi operator's license to his protected activities at the DPW. His entire case appears to be his unsupported belief that the denial of the taxi operator's license must have been related to his work at DPW, *i.e.*, that he was being blackballed by the City of Portsmouth (*e.g.*, TR 7). On several occasions at the hearing, complainant was asked to explain how his protected activities had anything to do with Chief Magnant's refusal to grant him a taxi operator's license (*see, e.g.*, TR 67, 69, 70, 73, 99-100). He admitted to not knowing Chief Magnant, and having no basis to believe the Chief was conspiring with others in the City government to deny him a taxi operator's license. Rather, he alleged that "I don't believe the chief has the real story of what happened." (TR 73). He also contended that "the chief was acting according to the city administrator's wishes and instructions" (TR 133), but he had no evidence to support this contention. In regard to the latter point, Chief Magnant testified that the Portsmouth Police Department is autonomous from the City Manager. He stated that he works for an elected Police Commission. TR 144.

At the hearing, Chief Magnant testified as an adverse witness. He has been the Police Chief in Portsmouth for about three years, and prior to that was the Deputy Chief. All told, he has been a member of the Portsmouth Police Department for 26 years. *See* TR 139. He stated that he had never met or talked to the complainant prior to the hearing (TR 139). He also stated that, at the time he denied the taxi operator's license, he had no knowledge that complainant had raised complaints regarding the Deer Street pumping station or any other related complaints regarding his work for the DPW (TR 147-48). In his letter denying complainant's application for a taxi operator's license, Chief Magnant stated that he was relying on Section 7.211E of the City Ordinances, which states that the "Chief of Police . . . shall have the authority to immediately suspend the taxi operator's license of any individual who performs any act or makes any statement which creates an imminent threat or risk to the safety of any person." RX 3, at 7. In a letter to the Portsmouth Taxi Commission regarding complainant's appeal of Chief Magnant's denial of his license, the Chief set out his reasons for denying the license under Section 7.211E. He gave these as his reasons for believing complainant posed a danger to the safety of the public:

1. Complainant was suspended and terminated from his position at DPW for creating a hostile work environment where his co-workers were in fear of violence.
2. Complainant left a copy of his gun permit on the desk of a supervisor with whom he had a contentious relationship.
3. The same supervisor's ID card was defaced with a swastika drawn on the supervisor's photograph.

4. He was told many of complainant's co-workers signed a petition because they were afraid of working with him.

(RX 2). Chief Magnant learned of these incidents through the Police Department's criminal investigations of the gun permit issue, defacement of Howe's ID badge and the note found on the City Manager's mother-in-law's car windshield (TR 141; CX 15-16). The complainant was a suspect in each of these instances. The detective who investigated the two incidents regarding Howe wrote a report which goes into great detail regarding complainant's suspensions and problems dealing with his DPW colleagues. Complainant was never charged with a criminal offense regarding any of the incidents that were investigated by the Police Department; furthermore, complainant denied that he had engaged in the abusive conduct at the wastewater treatment plants which formed the basis of his suspensions and ultimate termination. Nevertheless, Chief Magnant believed that complainant engaged in all these actions (TR 146-47). In addition, although he did not put it in his letter to the Taxi Commission, Chief Magnant testified that he had been aware of the complainant since 1999, due to domestic disputes which were reported to the police. It was alleged that the complainant physically assaulted his daughter and threatened his son (TR 151-52). However, the claimant was not arrested for these alleged assaults. Due to all of these factors, Chief Magnant believed complainant posed a danger to the public, and on that basis he denied the license (TR 146-47).

Chief Magnant was a very credible witness, and I believe his testimony. Therefore, I find that Chief Magnant, at the time he denied complainant a taxi operator's license, was unaware of any protected activity complainant may have engaged in, and denied the application solely because he believed complainant posed a danger to the public. In doing so, I am taking no position regarding whether denying complainant a taxi operator's license based on the evidence before Chief Magnant was consistent with due process or was proper under City Ordinance Section 7.211E.² But it is abundantly clear that complainant was not denied a taxi operator's license due to any activity protected by the Water Pollution Control Act, and this claim must be denied.

RECOMMENDED ORDER

IT IS RECOMMENDED that Lee Roseberry's complaint of discrimination under the Water Pollution Control Act be denied.

A

JEFFREY TURECK
Administrative Law Judge

² Moreover, that a resident of Portsmouth, New Hampshire can be denied a license to drive a cab because he or she is suspected of posing a danger to the public, but based on the same evidence cannot be prohibited from owning an arsenal of firearms, must give one pause.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s Recommended Decision and Order. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).