Fire Dep't v. Rivera

OATH Index No. 3416/09 (July 30, 2010), *superseding* (July 28, 2010)

Respondent, an emergency medical technician, tested positive for cocaine in a workplace random drug test. Termination of respondent's employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
CARLOS RIVERA
Respondent

SUPPLEMENTAL REPORT AND RECOMMENDATION

JULIO RODRIGUEZ, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Fire Department, pursuant to section 75 of the Civil Service Law[1]. The Department alleges that Carlos Rivera, an Emergency Medical Technician ("EMT"), tested positive for cocaine in a workplace random drug test on August 25, 2007, in violation of the Department's General Regulations and Emergency Medical Service ("EMS") Operating Guide Procedure, specifically, the Substance Abuse Policy (ALJ Ex. 1).

At trial petitioner presented the testimony of three witnesses including an expert. Respondent testified on his own behalf. Both parties presented documentary evidence. The record was held open for several weeks for the submission of closing briefs.

It is undisputed that respondent tested positive for cocaine during a workplace random drug test. For the reasons below, I recommend that respondent's employment be terminated.

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[1] The Report and Recommendation of July 28, 2010 incorrectly stated that respondent was charged under section 15-113 of the Administrative Code, a regulation regarding firefighter discipline. Although respondent works for the Fire Department, as an EMT he is correctly charged with misconduct under Civil Service Law section 75. Only the citation to statutory authority is changed; this Supplemental Report and Recommendation is identical in content to that issued on July 28, 2010.

ANALYSIS

Petitioner alleges that on August 25, 2007, respondent tested positive for cocaine and that he was under the influence of cocaine at work. Petitioner seeks termination of respondent's employment for his alleged misconduct. Respondent does not dispute that he tested positive for cocaine, but denies that he was under the influence of cocaine at work (Tr. 189). Respondent did not challenge the accuracy or sufficiency of the drug test (Tr. 121-22). The test results revealed that respondent's urine sample contained 42,250 nanograms per milliliter of cocaine metabolite, significantly above the cut-off level of 150 nanograms per milliliter. Respondent's defense is that he was addicted to cocaine and is now a recovered addict.

Respondent has been an EMT with the Department since 1993. He is certified in various aspects of emergency care, including, bleeding control, CPR and oxygen administration (Tr. 136). In the regular course of his job duties, respondent made decisions about patient care (Tr. 186) and drove the ambulance (Tr. 189-90).

Respondent testified that he used cocaine "on and off" for over 20 years (Tr. 184) including the 14 years he was employed as an EMT (Tr. 183, 219). He testified that he used cocaine four to five times per week (Tr. 177) but never used drugs at work. He specifically denied using cocaine in an ambulance and in the Medical Supply Unit while on restricted duty (Tr. 186-87, 189, 218). Respondent explained that he used cocaine when he had money to buy it; if he did not have money he did not purchase and use cocaine (Tr. 179, 187). He stated that his cocaine use made him feel "withdrawn" from his family and caused him to not want to participate in family gatherings (Tr. 149). Respondent testified that he would stop using drugs for periods of up to ten months but would eventually relapse (Tr. 184).

On May 9, 2007, respondent sought the Department's assistance in addressing his cocaine use (Tr. 139). Respondent was sent immediately to an in-patient rehabilitation care facility outside of New York City where he remained for 28 days concluding on June 6, 2007 (Tr. 140; Resp. Ex. B). Four days after he was released, respondent used cocaine and on June 11, 2007, he was sent back to the same facility for another 14 days (Tr. 143; Resp. Ex. B). After his release on June 25, 2007, respondent was referred to outpatient counseling services. Respondent testified that after attending a couple of sessions, he again used cocaine (Tr. 148-49).

On August 25, 2007, respondent tested positive for cocaine in a random drug test administered by the Department (Tr. 125-26; Pet. Ex. 7). On that day respondent's partner was

randomly selected for drug testing (Tr. 29). In accordance with Department policy, respondent was tested as well (Tr. 30). Respondent was in his regular duties and was in fact pulled off from driving the ambulance in order to be tested (Tr. 189-90).

On August 31, 2007, respondent re-entered the rehabilitation facility for another 28-day program (Tr. 151). In October 2007, respondent was reinstated by the Department and was placed on a restricted duty assignment in the Medical Supply Unit pending the outcome of this disciplinary matter. In the Medical Supply Unit, respondent had no access to narcotics (Tr. 135, 170; Resp. Brief at 7) or patient care responsibilities (Tr. 209). His duties consist of distributing basic emergency care supplies, such as bandages, breathing masks, and glucose for diabetics, to the different battalions (Tr. 170).

Respondent testified that in October 2007 he started another outpatient program but that he relapsed three times between then and July 2008 (Tr. 211-12). In July 2008, he changed programs and successfully completed outpatient care in October 2008 (Tr. 215; Resp. Ex. H) where he tested clean at every urine test (Tr. 215; Resp. Ex. I). Respondent testified that he attends Narcotics Anonymous meetings (Tr. 167) and that he is a recovered addict (Tr. 166-67, 177, 213).

On December 21, 2009, respondent tested negative for cocaine or any other illicit drug in a random drug test administered by the Department (Tr. 122). Respondent has not returned to active duty as an EMT since testing positive for cocaine (Tr. 153).

At issue is whether respondent's positive drug test is disciplinable as misconduct. Respondent argued that his positive drug test was the result of drug addiction, a disability recognized by the federal Americans with Disabilities Act (the "ADA") and New York State's Human Rights Law (the "HRL") and that terminating his employment would violate his right to have his disability accommodated in the workplace.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability..." 42 U.S.C. § 12112(a) (2010). The term "disability" is defined in part as a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(1)(A) (2010). The term "discriminate" is defined as including "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue

hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A) (2010). The word "reasonable" is "a relational term," meaning that whether or not something constitutes a reasonable accommodation is fact-specific. *Borkowski v. Valley Central School District*, 63 F.3d 131, 138 (2d Cir. 1995); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 385(2d Cir. 1996).

As Judge Merris explained *in Human Resources Admin. v. Varone*, OATH Index No. 695/01 at 4 (December 26, 2001), while this tribunal lacks jurisdiction to award relief under the ADA, it has previously held that OATH may consider an affirmative defense founded upon the ADA in a case brought pursuant to the Civil Service Law. *See Dep't of Parks and Recreation v. O'Connell,* OATH Index No. 1769/97 (Oct. 14, 1997) (reinstatement from section 72 medical leave); *Dep't of Correction v. Noriega-Harvey,* OATH Index No. 1250/97 (Aug. 14, 1997) (disability proceeding pursuant to section 71); *Human Resources Admin. v. Varone*, OATH Index No. 457/95 at 9 (Mar. 17, 1995) (disciplinary action pursuant to section 75)*; Dep't of Sanitation v. Troy,* OATH Index No. 842/95 at 9 (Feb. 1, 1995), *rev'd on other grounds,* Comm'r Decision (Feb. 10, 1995) (disability proceeding under section 73); *Dep't of Correction v. Noriega-Harvey,* OATH Index No. 575/93, mem. dec. at 10 - 12 (Feb. 17, 1993) (disability proceeding pursuant to section 72). OATH has entertained these affirmative defenses cognizant of its responsibility to "consider the legality of agency actions with regard to this federal law as part of our obligation to provide a complete evaluation of the legality of all options available to the appointing agency." *Noriega-Harvey*, 1250/97 at 9. However, OATH has not considered the ADA as a defense in cases where the respondent failed to make a request for accommodation prior to the date of the misconduct charged therein. *See Dep't of Correction v. Astacio,* OATH Index No. 1715/99 at 4 (July 14, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-36-SA (Apr. 17, 2001); *Human Resources Admin. v. Delgado,* OATH Index No. 1909/00 at 4 (Nov. 15, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-63-SA (Aug. 1, 2001).

While it is true that respondent sought the Department's assistance in addressing his cocaine use on May 9, 2007, this alone is insufficient to establish that respondent sought an accommodation. There is no evidence that respondent's drug use caused him to experience workplace problems. To the contrary, respondent maintained throughout the trial that he never used drugs while at work and that his drug use did not affect his ability to fulfill the functions of

his job. The record before me establishes that respondent failed to request an accommodation prior to his positive drug test on August 25, 2007.

Assuming respondent had requested an accommodation, it is questionable whether he qualified for ADA and/or HRL protection. Respondent argues that his positive drug test was the result of drug addiction, a disability recognized by the ADA and HRL. The burden to prove the existence of the disability rests on respondent. *Fire Dep't v. Kelly*, OATH Index No. 804/06 at 10 (June 9, 2006), *modified on penalty*, Comm'r Dec. (Jan. 2, 2007), *aff'd sub nom. Kelly v. Scoppetta*, 56 A.D.3d 475 (2d Dep't 2008); *Fire Dep't v. Kirk*, OATH Index No. 441/06 at 7-8 (Apr. 26, 2006), *aff'd sub nom. Kirk v. City of New York*, 47 A.D.3d 406 (1st Dep't 2008).

Drug use, even frequent drug use, is not the same as legal addiction under either federal or state law. Both the ADA and the HRL recognize addiction as a disability, 42 U.S.C. § 12114(b) (2010); Executive Law § 292(21) (Lexis 2010); 9 N. Y. C. R. R. § 466.11(c)(2)(i), (h)(1) (Lexis 2010), only when the person claiming addiction as a disability can show that he has become rehabilitated and incidents of drug use are in the past. 42 U.S.C. § 12114(b); 9 N. Y. C. R. R. § 466.11(h)(1). A current addicted drug user has no protection, 42 U.S.C. § 12114(b); 9 N. Y. C. R. R. § 466.11(h)(4).

As opposed to addicts, casual users of drugs or alcohol are not protected. For the purposes of the Human Rights Law, the Mental Hygiene Law of New York State defines alcohol addiction as "compulsive ingestion beyond the control of the sick person." Mental Hyg. Law § 1.03(13) (Lexis 2010); *see also McEniry v. Landi*, 84 N.Y.2d 554, 559 (1994), and "chemical dependence" to include "a pattern of compulsive use." Mental Hyg. Law §1.03(44) (Lexis 2010). Therefore to be considered disabled, respondent must demonstrate that his past drug use was beyond his control. *Kirk*, OATH 441/06 at 9; *Kelly*, OATH 804/06 at 10. Under the HRL, voluntary drug use is simple misconduct, not a disability, even when the use is frequent and respondent seeks rehabilitation services for his use of drugs. *See Fire Dep't v. Peltonen*, OATH Index No. 2101/08 (Oct. 9, 2008), *aff'd sub nom. Peltonen v. Scoppetta*, 25 Misc. 3d 1208A (Kings Co. Sup. Ct. 2009); *see also Fire Dep't v. Zoda*, OATH Index No. 995/10 at 3 (Mar. 18, 2010).

Contrary to his assertion in his closing brief, respondent did not prove that his use of cocaine was compulsive and involuntary. Respondent did not offer any evidence to establish compulsive ingestion beyond his control. As discussed below, the evidence establishes the

opposite, that his cocaine use was knowing and voluntary, and therefore not a disability. The fact that he considers himself a former addict is insufficient to satisfy his burden.

Even if respondent had proven that he was an addict, to be entitled to an accommodation under either the ADA or the HRL he must also prove that it was a disability.

The ADA defines a disability as: "a physical or mental impairment that *substantially limits* one or more of the *major life activities* of [an] individual." 42 U.S.C. § 12102(2) (2010)(emphasis added). Respondent must prove he was substantially limited in addition to proving he was a cocaine addict. *Regional Economic Community Action Program v. City of Middletown*, 294 F.3d 35, 47 (2d Cir. 2002).

The HRL defines a disability as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques…" Exec. Law § 296(21)(a) (Lexis 2010).

Respondent failed to prove, medically or otherwise, that he suffered from psychological, physical, or employment problems. Nor was there any evidence that respondent suffered a physical or mental impairment that substantially limited one or more major life activities. Respondent's vague and unconvincing assertion that he felt "out of place" from his family and opted not to attend family gatherings (Tr. 149) is insufficient to establish a disability.

This tribunal has consistently held that the ingestion of illegal drugs is a knowing, voluntary act that provides a legitimate, non-discriminatory reason for discipline, including termination. *See e.g., Zoda*, OATH 995/10 at 3; *Peltonen*, OATH 2101/08; *Kelly*, OATH 804/06 at 10.

Respondent's evidence that his cocaine use was involuntary is marginal. It consisted of his testimony during which he referred to himself as an addict and two summary information sheets from Veritas Villa Inc. The first information sheet shows that respondent was admitted on May 9, 2007 and June 11, 2007. Each admission listed a diagnosis/Diagnostic and Statistical Manual of Mental Disorders ("DSM") code of 303.9 and 304.2. The second information sheet reveals that respondent was admitted August 31, 2007. This admission listed a diagnosis/DSM code of 304.2 and 305.0. DSM code 304.9 is entitled alcohol dependence, 305.0 is entitled alcohol abuse, and 304.2 is entitled cocaine dependence. Task Force on DSM-IV, *Diagnostic and Statistical Manual of Mental Disorders* 195, 196, 222 (American Psychiatric Association 4th

ed. 1994). However, respondent offered no evidence to explain the diagnosis or the meaning and/or significance of the DSM codes. Without evidence/testimony, expert or otherwise, to explain the DSM codes, they shed no light on whether respondent's cocaine use was involuntary.

The evidence before me, however, establishes that respondent's use of cocaine was knowing and suggests that it was voluntary. Respondent testified that he used cocaine on and off for over 20 years (Tr. 184) and that he ingested cocaine four to five times a week (Tr. 177). He explained that he would stop using cocaine for extended periods of time up to ten months but would eventually start using again (Tr. 184). Respondent adamantly maintained that he "never" used cocaine while at work during the fourteen years he has been employed as an EMT (Tr. 186-87, 189, 218). Furthermore, respondent acknowledged that he used cocaine only when he had money to purchase it (Tr. 179, 187). Respondent's testimony establishes that he had the capacity to choose when and where to use cocaine; he also had the ability to limit his drug use to his budget. Based on a preponderance of the credible evidence, I find that respondent's cocaine use was knowing and voluntary and that his subsequent positive drug test violated the Department's drug policy and is misconduct.

The propriety and accuracy of the August 25, 2007 positive drug test are not at issue. Therefore, the charges are sustained, with the exception of Charge 1 which alleges that respondent worked under the influence of an illicit drug. While there is no doubt that respondent's urine sample tested positive for an exceedingly high level of cocaine metabolites, the Department's expert witness testified that "in the urine, it's different from the blood level in terms of the actual effect. . . [T]he cocaine and the cocaine metabolites have to be in the blood for the effect to occur. But if somebody has this kind of value in the urine [42,250 nanograms per milliliter of cocaine metabolite], we know that sometimes in the, at most 48 to 72 hours before they ingested a lot of cocaine and were influenced by that at the time" (Tr. 126). There is no evidence to establish when respondent ingested the cocaine or that he was under the influence of cocaine while at work on August 25, 2007, when he was tested.

FINDINGS AND CONCLUSIONS

1. Petitioner proved by a preponderance of the credible evidence that on August 25, 2007, while on duty, respondent's urine tested positive for the presence of cocaine metabolites at 42,250 nanograms per milliliter, above the cut-off level of 150

nanograms per milliliter in violation of the Department's General Regulations 101-01 §§ 4.2.12, 4.2.50, and 4.2.51 and the Department's Substance Policy 113-02 §§ 6.1A and 6.1D.

2. Petitioner failed to prove by a preponderance of the credible evidence that on August 25, 2007, respondent was under the influence of cocaine at work.

THEREFORE:

Charge 2, insofar as it alleges a violation of the Department's Substance Policy 113-02 § 6.1A, charge 3, charge 4, and charge 5 are sustained. Charge 1 is dismissed.

RECOMMENDATION

Respondent's personnel file contains two instances of prior discipline over a 17-year career with the Department, one in 2005 for improper signal, resulting in a loss of five days leave, and the other in 1996 for excessive absence, resulting in a loss of three days pay. The Department seeks termination of his employment, while respondent alleges he cannot be disciplined at all.

Respondent is incorrect. With regards to the ADA, nothing in it forbids an employer from either engaging in drug tests in the workplace, or making employment decisions based on those tests. 42 USC § 12114(d)(2)(2010). An employer is specifically permitted to "…hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 USC § 12114(c)(4)(2010). In ADA cases involving alcoholism and illegal drug use, there is a distinction between disability-caused conduct and disability itself as a cause for termination. *Vandenbroek v. PSEG Power Conn. L.L.C.*, 2009 U.S. Dist. LEXIS 18320, at *16 (D. Conn. 2009), *aff'd*, 2009 U.S. App. LEXIS 26965 (2d Cir. 2009); *see also Daft v. Sierra Pac. Power Co.*, 251 Fed. Appx. 480, 482 (9th Cir. 2007) (alcoholic employee who tested positive for alcohol in the workplace was properly terminated for his misconduct, not for being an alcoholic). When an employee claims that they were fired for misconduct that was caused by substance addiction, it is not actionable under the ADA even if true. *Vandenbroek*, 2009 U.S. Dist. LEXIS at *17. Thus respondent may be disciplined,

including with termination, regardless of whether he can claim addiction as a disability and the cause of the positive drug test. *Id.* at *15-17. A violation of the employer's conduct rules is a legitimate, non-discriminatory reason for termination against which a claim under the ADA must fail unless the employee offers some proof that the reason given for the firing is just a pretext. *Id*. Respondent offered no evidence of pretext.

Respondent's final argument is that, pursuant to *McEniry v. Landi,* 84 N.Y.2d 554 (1994), he cannot be terminated because he is at present a recovered addict. While this tribunal is not convinced that *McEniry* is applicable to the circumstances present here, it is clear that respondent's failure to prove his rehabilitation alone would deny him a *McEniry* defense to termination.

The credible evidence does not support a finding that respondent is rehabilitated. The evidence of respondent's current rehabilitation consists of a schedule of completed therapy sessions, a completion certificate from his most recent rehab program (Resp. Ex. H, I), and one negative workplace drug test of December 21, 2009 (Resp. Ex. A; Tr. 122). This evidence is not persuasive in light of respondent's admitted long history of relapse. Respondent's testimony proves that after periods of sobriety, respondent frequently relapsed and used cocaine while employed as an EMT, and that he also relapsed and used cocaine after being placed on a restricted duty in the Medical Supply Unit. Respondent testified that he had stopped using drugs for periods of up to ten months in the past (Tr. 184) and then started using cocaine again, many times, with each relapse resulting in more severe drug use (Tr. 185).

The Court of Appeals held in *McEniry* that each review is individualized. "Thus, in the appropriate case, an alcoholic who is found not to be actually rehabilitated, or who is shown to have an established propensity to relapse may be found unable to perform the job in a reasonable manner." *McEniry* 84 N.Y.2d at 561.

The Department's EMS Substance Policy sections 2.1, 2.2, and 2.3 state that its mission is

> …to provide timely, professional pre-hospital emergency medical care and transportation that is of the highest quality, administered with skill, compassion and dignity, to all who require such services within the City of New York . . . The efficient performance of this mission demands the highest level of mental and physical fitness, stamina and alertness. The lives of citizens and first responders are dependent upon the fitness, stamina and alertness of EMS

> employees. Drugs and alcohol alter alertness, judgment, physical agility and the ability to fulfill one's work responsibilities. Any impairment of the employee's physical and mental capabilities increases the danger of accidents and injuries, not only to the employee, but also to other first responders and to the public. The FDNY must do all it can to ensure that its employees remain drug free.

Substance Abuse Policy: Drugs/Alcohol, EMS OGP 113-02 (May 7, 2007)

The Department's guidelines call for termination on the first offense when the Drug Policy is violated. Termination has been recommended when there is a positive workplace drug test even in cases where a respondent has shown exceptional mitigating circumstances leading to the drug use. *See Dep't of Sanitation v. Betancourt,* OATH Index No. 1463/07 at 6-7 (May 7, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-103-SA (Nov. 5, 2007)(sanitation worker relapsed and tested positive for cocaine after being traumatized by accidentally hitting and severely injuring a civilian with his truck); *Peltonen*, OATH 2101/08 at 21(firefighter who worked in search and rescue operations at the World Trade Center site and was traumatized by that experience relapsed and tested positive for cocaine). Respondent, by contrast, has shown little to nothing in terms of mitigation.

Respondent's misconduct is contrary to the Department's mission and poses a substantial safety risk that the Department must weigh heavily. I recommend that respondent's employment be terminated.

Julio Rodriguez
Administrative Law Judge

July 30, 2010

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

APPEARANCES:

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