

Dep't of Sanitation v. Anonymous

OATH Index No. 1405/12 (Apr. 27, 2012), *modified on penalty*, Comm'r Dec. (June 12, 2012),
appended

Sanitation worker who tested positive for the presence of alcohol during randomly administered test defended on the ground of innocent ingestion. ALJ rejected the defense and found worker guilty of misconduct. ALJ recommended 30-day suspension. Commissioner imposes a thirty day suspension and lifetime drug/alcohol followup testing for the duration of respondent's employment with the Department.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
ANONYMOUS¹
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the New York City Administrative Code. Petitioner alleges that respondent, a sanitation worker, tested positive for alcohol use during a substance use test randomly administered on December 2, 2010, in violation of section 5.7 of the Department's Substance Abuse Policy and Procedure ("PAP") 95-05 (Nov. 1, 1995).

The hearing was conducted before me on March 28, 2012. Petitioner presented the testimony of Amita Desai from the Department's drug and alcohol testing unit. Respondent testified on his own behalf. The record was held open until March 30, 2012, at petitioner's request.

Based upon the record of the proceeding, I find respondent guilty of the misconduct charged and recommend a 30-day suspension.

¹ In accordance with title 49, sections 40.323(2)(b) and 382.405 of the Code of Federal Regulations, respondent's name has been withheld from publication.

ANALYSIS

PAP 95-05, the Department's substance use policy, requires all employees who hold commercial drivers licenses to undergo random substance use testing, in accordance with the federal Omnibus Transportation Employee Testing Act of 1991. PAP 95-05 § 8.1. Section 3.0 of the policy states that "Employees are prohibited from having in their system alcohol, controlled substances or unauthorized prescription drugs." Section 5.7 of the policy provides that "The presence of prohibited substances in one's body as demonstrated by a positive substance use test is a violation of this rule." A blood alcohol content of .020 or above is considered a positive result (Tr. 26).

There is no dispute that following his random selection on December 2, 2010, respondent tested positive for alcohol when his breathalyzer test measured his blood alcohol content at .027 (Pet. Ex. 2). The confirmation test administered 22 minutes later revealed a blood alcohol content of .023 (Tr. 36-37). The alcohol testing form indicates that respondent was administered the initial screen test at 7:08 a.m. and the confirmatory test at 7:30 a.m. (Pet. Ex. 2). Respondent attributes the positive alcohol test to innocent ingestion of herbal supplements.

Lab technologist Amita Desai testified that her duties include administering the alcohol breath test, for which she is certified (Tr. 9-11). She has performed this function for the Department for 16 years, administering 10 to 20 tests each day. She performs the breath tests inside the Department's mobile testing unit, a van that travels to the various work locations. Her supervisor chooses the location and generates the random list (Tr. 12). Respondent's name was on the random list generated on December 2, 2010 (Pet. Ex. 1).

Ms. Desai testified that she used the Draeger Alcotest 7410 Plus, a hand-held breathalyzer unit, to conduct respondent's breath test (Tr. 16). She credibly testified about the procedures she followed before, during, and after administering the test. She waited the obligatory 15 to 30 minutes – in this case 23 minutes – before administering the confirmatory test which also was positive (Tr. 27-28). After each positive result, the dry gas cylinder in the Draeger automatically performed an accuracy test to ensure that the machine has no residue in it between the screening test and confirmatory test (Tr. 29-32). If the accuracy test measures .040, plus or minus five points, the test result is considered accurate. In this case, it measured .040 (Pet. Ex. 2). The alcohol testing form confirms that the screening and confirmatory tests, and the air blank and accuracy tests were all performed and in the proper sequence (Pet. Ex. 2).

At the close of petitioner's case, respondent moved for dismissal of the charge arguing that petitioner failed to make out a *prima facie* case (Tr. 62-63). Counsel argued that the evidence shows that the positive readings (.024 and .027) are within the margin of error from the cutoff reading of .020 and, therefore, are insufficient to sustain a charge of misconduct. The argument misapplies the facts as outlined in Ms. Desai's testimony. She testified that a breath test was confirmed as accurate if the accuracy test produced a reading of .040, plus or minus five points (.005), and that a reading of .040 meant the test was exactly accurate. Respondent contends that the range of .035 to .040 is a margin of error, but Ms. Desai did not testify that those numbers constituted a "margin of error." Rather, they are finite readings that attest to accuracy. In this case, the accuracy test established that the positive results were accurate, measuring exactly .040. Respondent's contention is without merit and his motion denied.

Aside from this argument, respondent did not contest the accuracy, calibration or proper functioning of the Draeger. Nor did he dispute the sequence of events occurring on the date of his alcohol test, or the positive test result (Tr. 110-11).

In his defense, respondent asserts that he innocently ingested alcohol contained in ginseng supplements he had taken that morning.

Respondent has worked for the Department since July 1997 (Tr. 65). He works a steady 6:00 a.m. to 2:00 p.m. shift and he gets up at 4:30 a.m. every day (Tr. 68). After arriving at work on December 2, 2010, respondent was notified that he was selected to take the random breath test (Tr. 69). He testified that in December 2010 he was sleep deprived because his son, who was born in March 2009 and suffered with various illnesses, kept him up late (Tr. 67-69). Lacking his normal energy, respondent had started taking herbal supplements recommended by a friend (Tr. 69, 74). At the time, he was taking two to three different herbal supplements that he purchased from a Chinese fruit and vegetable stand and from a health food store (Tr. 70).

Around 4:45 a.m. on December 2, 2010, respondent took two droppers full of a product named Ginseng Powermax 4X (Tr. 75, 78, Resp. Ex. A). According to the packaging, a dose of the product contains water, grain alcohol 15%, vegetable glycerin, and natural color. The recommended dosage is one dropper (Tr. 96), which is approximately 1 milliliter of liquid (Resp. Ex. A). After arriving at work about an hour early, respondent worked out and then took another product called Red Panax Ginseng Extractum (Resp. Ex. B), which he said gave him a boost in the middle of the day when he was feeling sluggish (Tr. 77-78). According to the packaging, one

or two 10 milliliter bottles of Rex Panax Ginseng Extractum may be taken daily. Besides ginseng, the ingredients include purified water, honey and alcohol in an unspecified amount. That day, respondent took four or five bottles of the Red Panax, even though one or two bottles is the recommended dosage (Tr. 78-79). He said he took two bottles after his work out – calisthenics, pull ups, weights – and he took another two bottles 10 to 15 minutes before going to take the breath test (Tr. 102, 104). Respondent produced as evidence the packages of Ginseng Powermax 4X and Rex Panax Ginseng Extractum that he said he used at the time he was tested in 2010 (Tr. 76). He said he did not know at the time that the supplements contained alcohol and was “astonished” when advised by the technician that he had a positive alcohol reading, because he had not been drinking (Tr. 76, 79-80). After the test, he read the ingredient list on the product packaging and learned that they contained alcohol (Tr. 81). He stopped taking them (Tr. 82).

Respondent denied familiarity with the Department’s drug testing policy but admitted being tested more than 40 times before (Tr. 84, 88). He was aware of the rule requiring workers not to drink alcohol within four hours of the start of their shift (Tr. 89).

Respondent failed to prove innocent ingestion. There was no evidence that the amount of alcohol contained in the supplements was sufficient to create a positive result in the breath test, particularly in the small amounts present in the supplements. Respondent offered no scientific or medical evidence regarding the possible effects of these supplements or their ability to cause the positive test results in this case.

According to expert testimony, innocent ingestion may be effectively corroborated, or contradicted, by the confirmation test because a high concentration of alcohol contained in a household item, such as mouthwash, would be expected to quickly dissipate on the breath during the time between the initial test and the confirmation test, and likely measure zero after the 15-minute delay. *See Dep’t of Sanitation v. Anonymous*, OATH Index No. 1921/10 at 2 (July 7, 2010), *modified on penalty*, Comm’r Dec. (July 30, 2010). Ms. Desai testified here that the high reading on the confirmation test, administered 22 minutes after the initial screening test, eliminates the possibility that a positive result was triggered by a substance such as an herbal dietary supplement containing small amounts of alcohol (Tr. 49). I find that the unacceptably high reading on the confirmatory test, .024, disproves the claim of innocent ingestion.

Ms. Desai was a credible witness and appropriately credentialed for purposes of demonstrating the reliability of the Department’s alcohol testing methodology. Her testimony

was clear and she had no motive to lie. On the other hand, respondent's claim that he innocently ingested ginseng supplements containing alcohol that caused the positive test results was not particularly credible, as it was heavily weighted by his significant interest in the outcome. Even if I credited respondent's testimony that he innocently ingested herbal supplements in the amounts he testified to, the claim was not corroborated by any medical or scientific evidence substantiating the possibility that the amounts of alcohol contained in the supplements were sufficient to cause the positive test results. Indeed, the claim was undermined by the positive confirmatory test result.

I find that petitioner has proved that respondent violated the Department's substance use policy. The charge should be sustained.

FINDING AND CONCLUSION

Respondent tested positive for the presence of alcohol on December 2, 2010, registering a blood alcohol content of .027.

RECOMMENDATION

In connection with my finding and conclusion, I obtained and reviewed an abstract of respondent's personnel record which was provided to me by the Department. Respondent was appointed to his position as a sanitation worker on July 7, 1997. His performance evaluation for the first six months of 2011, the only one provided by the Department, was "unsatisfactory" even though he scored "satisfactory" in five of six categories rated. His only unsatisfactory rating was in the category related to time and attendance, which for the six month period included one AWOL, four days of sick leave, and two days of "other" leave. Respondent's prior discipline includes written reprimands in 2002 and 2005 for discourtesy; forfeiture of one vacation day in 1998 for failure to submit medical documentation; an eight-day suspension in 2010 for absence without authorization and conduct prejudicial to good order and discipline; and a one-day suspension in 2010 for failure to submit medical documentation and failure to report to the clinic as required. In addition, respondent agreed to 12 months of drug and alcohol testing and counseling in 2004 for violating PAP 95-05.

Here, respondent has been found guilty of violating PAP 95-05 by testing positive for the presence of alcohol during work hours. Petitioner seeks his termination, citing the safety-

sensitive nature of his position which requires him to operate a sanitation truck. The circumstances of this case are distinguishable from the typical case in which termination has been upheld.

The Department has adopted a rigorous substance abuse program, outlined in PAP 95-05, to assure that it is meeting its obligation to ensure that its workforce is not driving heavy trucks while under the influence of drugs or alcohol. *See Dep't of Sanitation v. Anonymous*, OATH Index No. 1921/10 at 4-5 (July 7, 2010), *modified on penalty*, Comm'r Dec. (July 30, 2010). For a first or second offense, the Department has entered into agreements that impose a yearlong regime of random alcohol testing and a course of alcohol treatment if recommended by an alcohol counselor, a penalty that is not available under the Administrative Code. *See Dep't of Sanitation v. McLain*, OATH Index No. 233/11 at 6 (Oct. 26, 2010) (citing cases where the tribunal has recommended termination of employment for sanitation worker's who violated the Department's substance abuse policy by testing positive for a third time); *see, e.g., Dep't of Sanitation v. Betancourt*, OATH Index No. 1463/07 (May 7, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-103-SA (Nov. 5, 2007); *Dep't of Sanitation v. Anderson*, OATH Index No. 1135/06 (Sept. 22, 2006); *Dep't of Sanitation v. King*, OATH Index No. 1836/04 (Aug. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-03-SA (Apr. 15, 2005). To its credit, the Department's program seeks to address the needs of employees who want to keep their jobs and acknowledge that they have a problem. Thus, the Department's policy is not one of zero tolerance and employees have been able to retain their jobs once enrolled in an appropriate program.

Violation of the policy for a second time does not necessarily result in termination. *See Dep't of Sanitation v. Johnson*, OATH Index No. 746/05 (Oct. 5, 2005), *modified on penalty*, Comm'r Dec. (Dec. 4, 2005) (sanitation worker with positive alcohol test and a prior 44-day penalty for "substance abuse" given 30-day penalty for the alcohol charge, to which the Commissioner added a one-year probation with drug and alcohol testing). I find the penalty of termination to be excessive in this instance.

First of all, respondent's disciplinary record is not significant enough to reasonably place him in jeopardy for his job. Although he has a number of prior penalties, they are relatively light, ranging from reprimands to an eight-day suspension. Second, while I would agree that operating a sanitation truck while impaired is reckless conduct, there is no evidence that

respondent drove a truck in that condition. The quantum of alcohol found in respondent's system was relatively low, just above the threshold for a positive test (.027 vs. .020), an amount of alcohol not even close to the legal limit of .08. Last, I have considered his prior violation of PAP 95-05, which occurred eight years ago in 2004 and resulted in 12 months of testing and counseling, which was successfully completed.

While it is true that respondent's misconduct warrants a serious penalty, I disagree that termination is the appropriate penalty in this case. Under section 16-106 of the Administrative Code, short of termination, respondent may serve a maximum 30-day suspension for a finding of misconduct. Due to his prior penalty for substance abuse, I recommend a 30-day suspension for the misconduct proven here. Respondent should be forewarned, however, that, in accordance with the precedent cited above, any further findings of substance use will likely lead to termination of his employment.

Tynia D. Richard
Administrative Law Judge

April 27, 2012

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

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Commissioner's Decision (June 12, 2012)

A copy of the April 27, 2012 Report and Recommendation submitted by OATH Administrative Law Judge (ALJ) Tynia D. Richard was forwarded to this office following a disciplinary proceeding pursuant to Section 16-106 of the Administrative Code of the City of New York ("Section 16-106"), which governs the discipline of uniformed employees of the Department of Sanitation.

After reviewing the evidence, hearing transcript and report and recommendation, I agree with the specific findings that the Department has met its burden of demonstrating that *Anonymous* violated DSNY Policy and Procedure ("PAP") 95-05. However, I find the proposed penalty of a 30 day suspension without pay to be inappropriate.

The Department sought termination for this 95-05 violation since an employee who chooses to put the Department to its proof, that he only came up positive because of herbal supplements made from ginseng, should not get a better deal than someone who admits his/her drug use and has to agree to evaluation for rehabilitation. And most important, the employee who settles this type of charge is obligated to at least one (1) year of follow-up testing (which increases that employee's risk of termination if he/she should come up positive).

While ALJ Richard's recommendation is in line with her decision in *DSNY v. Bernard Johnson*, the penalty recommendation here of a mere 30 days without more, would not only turn the incentives in the Department's plea regime on its head, but it would expose the Department and the public to the serious risk of having an employee driving a sanitation truck who may very well have an alcohol problem and is in denial.

SW Johnson had to take his case to OATH, as it was his third positive, and he was not offered a plea. Here, since this was *Anonymous's* 2nd violation of PAP 95.05, he was offered a plea, a Last Chance Agreement, in the trial room; however, this settlement was rejected. This employee instead chose to go to trial where he tried to claim that the positive alcohol test resulted from innocent ingestion of herbal supplements. Please note ALJ Richard found these claims to be incredible based upon the "unacceptably high reading on the confirmatory test ..." Moreover, if this 30-day recommendation is followed, it would set a dangerous precedent that dilutes the Department's more than reasonable substance use policy. Further, *Anonymous* would escape follow-up substance use testing unlike others who run afoul of our policy. This fact alone would be patently unfair and unjust.

Therefore, the recommendation of ALJ Richard's recommendation is modified. Based on the severity of the misconduct and a review of *Anonymous's* prior disciplinary record, it is my decision that the appropriate penalty for the proven misconduct is a 30-day suspension and Lifetime drug/alcohol follow-up testing for the duration of his employment with the Department.

John J. Doherty, Commissioner

New York City Department of Sanitation