Fire Dep't v. Gill

OATH Index No. 1871/10 (July 9, 2010)*

Firefighter who tested positive for cocaine during random drug test seeks to retire rather than be terminated and would also agree to pay considerable fine as penalty. In light of his unblemished 29 year record of service and the extreme hardship that would result from the loss of his pension, ALJ recommends that the Commissioner stay the imposition of termination to permit respondent to retire and pay a substantial fine.

* subsequent history: as a firefighter with more than 20 years of service, respondent retired pursuant to section 13-361.1 of the NYC Administrative Code.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
HAROLD GILL
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the New York Fire Department (the "Department") pursuant to Section 75 of the Civil Service Law. The Department alleges that Harold Gill, a firefighter, tested positive for cocaine on August 25, 2007, in a workplace random drug test, in violation of the Rules and Regulations for the Uniformed Force and the Department's Substance Abuse Policy, also known as All Units Circular 202 (October 12, 2005)("AUC 202") (ALJ Ex. 1; Resp. Ex. E).

At a hearing held before me, the parties stipulated to the accuracy and propriety of the random drug test (Tr. 4-5; Pet. Exs. 1-8). Petitioner relied on documentary evidence, while respondent produced documentary evidence, testified on his own behalf, and presented five character witnesses. For the reasons below, I recommend that respondent's termination be held in abeyance to permit respondent to retire. Additionally, I recommend that the Commissioner

enter into a post-trial settlement wherein respondent agrees to retire forthwith and also to pay a significant fine.

ANALYSIS

On December 5, 2008, respondent tested positive for the cocaine metabolite in a random workplace drug test (Tr. 32; Pet. Exs. 1, 2), at the level of 260 nanograms per milliliter. The cutoff for a positive test is 150 nanograms per milliliter (Pet. Ex. 4). Respondent testified that he had a fiftieth birthday party on Saturday, November 29, which began in the evening and lasted into the early morning hours of November 30. A friend gave him cocaine as a birthday present and he ingested it early in the morning on November 30. This was the first time, he testified, that he had ever ingested cocaine (Tr. 31-32, 44-45, 51).

Based upon the undisputed evidence, including respondent's admission, the charges are sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner proved by preponderance of the credible evidence that on December 5, 2008 respondent tested positive for cocaine in violation of the Rules and Regulations for the Uniformed Service § 25.1.5 and All Unit Circular 202 § 4.1.

2. Petitioner proved by a preponderance of credible evidence that respondent engaged in conduct which brought reproach or discredit upon the Department, in violation of the Rules and Regulations for the Uniformed Service § 25.1.3.

3. Petitioner proved by a preponderance of credible evidence that respondent engaged in conduct which violated the Firefighter's Oath of Office under Rules and Regulations for the Uniformed Service § 25.1.1

RECOMMENDATION

Respondent, who has been on a light duty assignment since this incident, does not seek to return to full duty but only to be permitted to retire. Petitioner contends that respondent should not be permitted to retire and should be terminated.

The Department's drug testing guidelines, AUC 202, call for termination for the first offense of testing positive for an illegal drug (Resp. Ex. E at § 8.3). However, the guidelines are not absolute. The prefatory language to the guidelines explicitly states that "there may be cases

that do not fit precisely within [the guidelines]" and that the Department "reserves the right to depart from these guidelines as the exacerbating or extenuating circumstances of each individual case require." Also noted is that "the Department's use of the guidelines will take into consideration any findings and recommendations" made after an OATH trial. Thus, an individualized assessment of penalty is contemplated in exceptional circumstances.

Such exceptional circumstances are present here. By all accounts, respondent has had a long and distinguished career. This is the first time that he has ever been disciplined and he has been the recipient of multiple unit citations. Respondent was appointed a firefighter in 1980, at age 22. He began his career at Engine 232, "The Tin House" in Brownsville, Brooklyn, a fire station which saw 4,000-5,000 fire calls a year. When the Tin House closed in January 1988, respondent transferred to Engine Company 227, just a few blocks away in Brownsville (Tr. 19-23). Although eligible to retire in 2000, respondent chose to remain on the job because he loved it (Tr. 41). He was away on vacation on September 11, 2001, but assisted in follow-up search and rescue efforts without pay (Tr. 86). Respondent testified that he lost "quite a few" friends on 9-11 and began drinking heavily (Tr. 26).

Soon afterwards, respondent decided to move upstate, although he continued working in Brownsville. Several years later he accepted details to the Bronx and City Island, which made his commute a little easier (Tr. 27). He then spent a year in a Hazmat company, for which he received specialized training, including Homeland Security Training. However, respondent missed fighting fires and at age 48 chose to join a detail in the Bronx. This was part of the Special Operations Command, and required that he go to rescue school for high angle and confined space training. Respondent stayed at the Bronx squad company for two years and then transferred to a Haz-Tech Engine company (Tr. 28-30). Over the years he has suffered numerous injuries in the course of his work (Tr. 21), which cause chronic pain in his back, hip, shoulder, and knee (Tr. 31). He also suffers from hypertension and anxiety attacks, which began after 9-11 (Tr. 27, 48).

Respondent has been married since 1987, and has three children, two of whom are still in high school. His wife works part-time. He is the primary supporter of his family (Tr. 23-25). If respondent were to retire today he would be entitled to a pension of $73,899.33 per year plus additional monetary retirement benefits such as an annual $12,000 disbursement (Resp. Ex. B). He would also receive health benefits. However, if respondent was terminated, he would receive

only $49,000 in total, the return of his contributions. He would also lose health insurance (Tr. 36; Resp. B). Respondent has no alternate means of supporting his family without his pension. If he was terminated he would have to sell his house and move his family out of state (Tr. 34-35, 39-40).

On January 8, 2009, following his positive drug test, respondent entered the Fire Department's Counseling Services Unit ("CSU") Day Treatment Program (Resp. Ex. A), where he participated in individual and group therapy. CSU counseling notes all focused on his use of alcohol. Respondent told a counselor that his cocaine use was an isolated incident but acknowledged that his use of alcohol was a problem. He also reported a history of panic attacks that started after 9-11. Treatment notes indicate that his primary diagnosis was alcohol abuse and his secondary diagnosis an adjustment disorder with anxiety. Therapy goals included supporting his sobriety and alleviating his anxiety and depression. The notes also indicate that after initial resistance, respondent began attending Alcoholics Anonymous meetings and outpatient therapy through Catholic Charities (Resp. Ex. A). On March 12, 2009, the Counseling Services Unit closed respondent's file, noting "Client completed treatment plan" (Resp. Ex. A). Respondent testified that he continued going to counseling and AA meetings after leaving the CSU program (Tr. 32).

What was particularly striking in this case was the number of former and present Battalion Commanders and Chiefs who testified on behalf of respondent. These included Chiefs James McNally, Patrick Ruddick, Thomas McCarthy, and Kevin McCabe. Chief McNally was a firefighter with respondent at the Tin House until 1988, and considered him a "good guy," who went above and beyond the call of duty. He thought so highly of respondent that he tried to recruit him as his driver when he was assigned to Battalion 44, and would not hesitate to work with him in the future if it were possible (Tr. 67). He never observed or heard of respondent reporting under the influence of drugs or alcohol on any occasion in the past. In his opinion, respondent made a "very foolish mistake." However, it would be "extremely severe" for respondent to lose his pension because of this mistake; instead, he should be permitted to retire, pay a fine, and keep his pension (Tr. 68).

Similarly, Chief Ruddick, who also worked with respondent at the Tin House and then supervised him at the City Island firehouse for about a year, also characterized respondent as "a good guy" which is "the highest compliment you can give a firefighter" (Tr. 76). He "never"

saw respondent report to duty impaired by either drugs or alcohol (Tr. 77). He testified that respondent "stepped up" by taking the City Island position because the Department was having difficulty getting firefighters to work there. However, respondent did not stay at City Island because the pace was "a little bit too slow" and he wanted a busier firehouse (Tr. 78). Although Chief Ruddick is aware of the Department's zero-tolerance policy, he believes it would be unfair for respondent to be terminated and lose his pension (Tr. 77). Like Chief McNally, he would be happy to have respondent work for him if it were possible (Tr. 78).

Chief McCarthy, Battalion Commander of the 7th Battalion, testified that he and respondent were probationary firefighters at the same time and worked together in the Tin House for approximately eight years (Tr. 80-81). He never observed respondent to have a problem with drugs or alcohol, and described him as a "great fireman, a great guy." Chief McCarthy stated that he would not hesitate to have respondent working under him; indeed, he testified that ". . . a fireman with that type of seniority and experience is tough to get… I would definitely jump on it, given the opportunity" (Tr. 82). He called the Department's intention to terminate respondent "an archaic policy" (Tr. 82), which did not recognize treatment programs that are used in other industries, and which would cause respondent's family to "suffer for something they didn't do" (Tr. 83).

Retired Chief McCabe has also known respondent for decades. They met in the 1980s, when respondent worked in a firehouse that was on the same street as Engine 227, where Chief McCabe, then a young firefighter, worked. Respondent transferred to Engine 227 when the Tin House closed. Chief McCabe continued to work with respondent until 1991, when McCabe was promoted and transferred, and then again after 1994, when he returned to the division as a lieutenant (Tr. 85). He described respondent as a "very dedicated firefighter, very unselfish," to an extent that he had rarely seen (Tr. 85-84). He does not believe that respondent has a drug problem and feels that it would be unfair to respondent and his family to terminate him for an isolated incident in an otherwise outstanding career (Tr. 86-88).

Robert Dolney, a firefighter, also testified on respondent's behalf. He worked with respondent for nine years, starting in 1989, and currently lives across the street from him. He described respondent as "respectable" and "dependable" (Tr. 71). Their families share holidays and social events. He has never observed respondent to have a drug or alcohol problem. He felt so strongly about respondent's situation, that on his own initiative he obtained letters of support

for respondent. Like the Chiefs, he opined that for respondent to lose his pension would be "devastating" (Tr. 73). "His family deserves the pension just as much as he does. I'm sure he missed many birthdays, many holidays with his kids" (Tr. 73).

In addition to the testimony of his five witnesses, respondent submitted 21 letters of support from firefighters past and present, including three current or retired captains, two current or retired lieutenants, a company commander, and a battalion Chief. The letters describe respondent as an able, dedicated, and hard-working firefighter who was eager to mentor new firefighters and always put in extra effort, and is dedicated to his family and community. All agree that while respondent made a serious mistake, forfeiting his entire pension is too harsh a penalty when balanced against his 29 years of service to the Department (Resp. Ex. D). Respondent's mother and sister also submitted letters of support (Pet. Exs. 5, 6). Among the more eloquent letters submitted is that of retired firefighter James Ryan, who had worked with respondent for over 20 years and wrote that respondent has "served the city of New York for 29 years with distinction and integrity without a blemish on this record. It seems a cruel punishment to deny him an entire careers [sic] worth of hard work and devotion for one mistake" (Resp. Ex D).

In urging termination, the Department has stressed its concern for the safety of the firefighting force and the general public. No one would dispute the Fire Department's interest in having a drug-free firefighting force. However, this case is not about whether it is safe to keep respondent on as a firefighter. Respondent loves his job, so much so that he kept working for almost ten years after he was eligible to retire. However, he understands the gravity of his misconduct and seeks only to retire with his pension so that he can continue to support his wife and his family. Under these circumstances, it would be unduly harsh to deprive him of a pension, for which he became eligible almost ten years ago, and which represents almost three decades of dedicated service.

I am aware that there have been many cases involving drug use by firefighters in which this tribunal has concluded that the fairest outcome was to permit the firefighter to apply for retirement prior to imposing termination. *See, e.g., Fire Dep't v. Zoda,* OATH Index No. 995/10 (Mar. 18, 2010), *modified on penalty,* Comm'r Dec. (Mar. 30, 2010); *Fire Dep't v. Maresca,* OATH Index No. 2564/08 (Nov. 19, 2008), *modified on penalty,* Comm'r Dec. (Feb. 11, 2009), *aff'd sub nom. Maresca v. Scoppetta,* Index No. 13478/09 (Sup. Ct. Kings Co. Nov. 30, 2009);

Fire Dep't v. Schroeder, OATH Index No. 1261/07 (Sept. 28, 2007), *modified on penalty*, Comm'r Dec. (Nov. 19, 2008); *Fire Dep't v. Kelly*, OATH Index No. 804/06 (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) (ALJ recommends that penalty be held in abeyance so that respondent may retire on work-related disability). I am also aware that in all of these cases, the Commissioner has disagreed and imposed termination.

However, I respectfully urge that the "zero tolerance" policy which has been relied upon in previous cases be reconsidered to permit respondent, a firefighter with an otherwise long and exemplary record, a chance to retire instead of being terminated. Respondent would agree to pay a substantial fine as penalty for his misconduct. Respondent earned his right to a pension in 2000. It is notable that the New York Assembly and State Senate have just passed legislation that would guarantee the pensions of New York City police officers and firefighters who serve 20 years or more. Assemb. Bill A10154 (N.Y. June 22, 2010); S. Bill S05631 (N.Y. July 1, 2010).[1] The memorandum accompanying the Senate Bill, which was introduced by the chair of the Civil Service and Pension Committee, declared that termination is sufficient punishment for a member of the force who has committed serious misconduct; deprivation of retirement benefits, including health insurance, are unduly punitive, both for the member and his family, and "totally violate . . . the principle and concept of pensions." *Id.* The legislature also expressed concern for the family of the dismissed officer: "There is no need to become so punitive as to then also punish his family by not allowing them to benefit from his pension upon which they depended." *Id*. The Governor has not yet acted on this bill. Here, for respondent to lose his pension would be financially devastating, both to himself and his family. The penalty imposed would be draconian, even considering the very serious misconduct.

Respondent is not charged with being impaired on the job, and there is absolutely no evidence that he ever went to work while impaired by drugs or alcohol. Respondent acknowledged taking cocaine early in the morning, Sunday, November 30; his first tour of duty after this incident was not until Monday at 6:00 p.m., more than 24 hours later (Tr. 60). Moreover, multiple current and former Chiefs testified credibly that they had never seen respondent impaired, and several testified that they would hire respondent immediately if given the chance. There is no evidence of an arrest, *cf. Maresca*, OATH 2564/08 at 2, or an underlying

[1] The Assembly bill and the Senate bill are identical.

purchase of a controlled substance, *cf. Zoda*, OATH 995/10 at 2. There is no evidence of persistent drug use or any unfitness for duty based on substance use or other factors, *cf. Zoda*, OATH 995/10 at 4, 6-9. As noted above, the treatment notes by CSU all relate to respondent's alcohol abuse, which he admits. Respondent was referred to Alcoholics Anonymous, not Narcotics Anonymous. The only treatment note relating to drugs is that indicating that respondent said his use of cocaine was an isolated incident.

Moreover, respondent admitted knowingly taking cocaine when given it by a friend. Thus, he is unlike the firefighter in *Fire Dep't v. McDougall*, OATH Index No. 862/08 at 5 (May 22, 2008), who denied knowing that the white powder he ingested was actually cocaine and whose refusal to acknowledge knowing misconduct was viewed as an aggravating factor. Petitioner attempts to make much of the fact that respondent tested positive for cocaine on December 5, 2008, five days after respondent acknowledged taking cocaine early Sunday morning, November 30, 2008. Petitioner asserts that respondent must have used cocaine on an additional occasion, closer to the positive drug test. In support, petitioner points to one line in a volume called "The Medical Review Officer's Manual," copyright 1999 (Pet. Ex. 9) stating that cocaine metabolites may be detected in the urine "up to 3 days" after consumption (Pet. Ex. 9 at 80). Although it was not rebutted, this is far from a comprehensive review of the medical literature pertaining to the accumulation of the cocaine metabolite in the body and its detection by drug screening. *Cf. Dep't of Sanitation v. Hernandez*, OATH Index No. 125/03 at 3-11 (July 8, 2003 (discussing multiple scientific studies relating to how the body processes the marijuana metabolite). Nor does it address such issues as whether alcohol affects how the body metabolizes cocaine, or whether medication, such as the blood pressure pills that respondent takes daily (Tr. 48), has any effect. This is of concern particularly because respondent did not test at a particularly high level; his test was at 260 nanograms per milliliter, 110 nanograms above the cut-off for a positive test.

Moreover, I credited respondent's testimony that this was an isolated incident, arising from his fiftieth birthday party. Respondent did not have a good reason why he had chosen to use cocaine this one time, admitting, "It's just plain stupidity, drinking too much" (Tr. 45). It was clear that respondent profoundly regrets his actions; he testified that he "can hardly face [his] friends" (Tr. 34). Petitioner contended that respondent must have been a chronic user because otherwise he would have taken steps to avoid coming to work over the next several

days, such as calling in sick or using a mutual (Tr. 48, 49, 60, 61). However, it is just as plausible, if not more so, that a firefighter for whom drug use was an aberration would not be so calculated to try to avoid detection. I credited respondent's testimony that he was not thinking about the Department's random drug testing procedures when he went to work Monday evening following his Sunday morning cocaine ingestion. All he was doing was going to work, as he had for almost thirty years (Tr. 61). Moreover, respondent's testimony about using the cocaine at his birthday party was corroborated in part by a memorandum from the investigator who served respondent with his notice of pretrial suspension. The investigator wrote that when he asked respondent if he understood what the notice of suspension meant, respondent replied, "man I had just turned 50 you know, I didn't think, I turned 50" (Pet. Ex. 7).

The worst-case scenario, assuming *arguendo* that petitioner's arguments regarding to the *Medical Review Officer's Manual* are correct, is that respondent must have used cocaine some time in the three days immediately prior to his positive test on December 5. In this case, respondent's lack of complete candor would be regrettable. However, the fact remains that there is not a scintilla of evidence that respondent reported to the job while impaired. Indeed, the credible testimony of prior and current Chiefs and Deputy Commanders suggests that it would be extremely out of character for respondent to do that. By all accounts he is a dedicated and hard-working firefighter who has earned the respect of many colleagues and officers. His almost 30 years of service and his outstanding record would still more than tilt the balance toward permitting him to retire, rather than depriving him and his family of a hard-earned pension and pension benefits. *See Puig v. McGuire*, 121 A.D.2d 853, 855 (1st Dep't 1986)(penalty of dismissal was disproportionate to police officer's refusal to give urine sample for drug test, in light of unblemished record, many years of service, and disoriented mental state at the time the misconduct occurred); *Pell v. Board of Educ.*, 34 N.Y.2d 222, 233 (1974) (administrative penalty may be set aside "if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness"); *see also Dep't of Correction v. Schick*, OATH Index No. 1380/95 at 12-13 (June 28, 1995), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 96-38 (Mar. 29, 1996) (despite agency's zero tolerance policy, penalty other than termination imposed in light of mitigating factors, such as employee's chronic depression).

The range of penalties which are available to this tribunal are limited by the New York City Administrative Code, to ". . . reprimand, forfeiture and withholding of pay for a specified time, or dismissal from the force; but not more than ten days' pay shall be forfeited and withheld for any offense." Admin. Code § 15-113 (Lexis 2009). Considering these penalties, I recommend that respondent be terminated, but that his termination be stayed in order to permit him to retire, with the understanding that he pay a substantial fine, in the Commissioner's discretion, in acknowledgement of and as a penalty for his misconduct.

Faye Lewis
Administrative Law Judge

July 9, 2010

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

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