Dep't of Environmental Protection v. Segarra

OATH Index No. 2730/10 (Oct. 20, 2010), ***adopted in part, modified in part,*** Comm'r Dec. (Apr. 29, 2011), *reversed* Civ. Serv. Comm'n Item No. CD 11-94-R (Dec. 20, 2011), ***appended***

Petitioner failed to prove that senior sewage treatment worker neglected his duties. ALJ recommended dismissal of the charges.

Commissioner found that two of respondent's acts were unreasonable and constituted misconduct: respondent's failure to inquire as to proper procedure when he lacked instructions, and incorrectly instructing a subordinate. Therefore, he imposed a penalty of six days suspension without pay.

CSC reversed the Commissioner and found that none of respondent's acts were misconduct, adopting in full the ALJ's recommendation.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
ANTHONY SEGARRA
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Environmental Protection, pursuant to section 75 of the Civil Service Law. Respondent Anthony Segarra, a senior sewage treatment worker ("SSTW") is charged with neglecting his duties concerning the taking of water samples at the Tallman water pollution control plant ("Tallman") (ALJ Ex. 1).

A hearing was conducted on September 24, 2010. Petitioner presented documentary evidence and called Mr. Bassant, Tallman's plant superintendent and Mr. Prashad, a sewage treatment worker ("STW"). Respondent testified on his own behalf, presented documentary evidence, and called Deputy Chief Carty and STW Sadicario.

For the reasons below, I find that the charges should be dismissed.

ANALYSIS

The charges allege that on March 19, 2010, respondent failed to correctly instruct an STW about the procedures when a contact tank is out of service, failed to ensure that the proper samples were taken and sent for analysis, and falsified a log sheet in connection with these activities. The charges also allege that on April 6, 2010, respondent failed to take the first required fecal sample and failed to take required chlorine residual samples every 15 minutes during a hypo interruption which is an interruption in the feeding of chlorine to the tanks.

In a disciplinary proceeding, the Department "has the burden of proving its case by a fair preponderance of the credible evidence." *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (May 30, 2008). Preponderance has been defined as "the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence." Prince, *Richardson* on *Evidence*, 3-206 (11th ed. 1995); s*ee also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010). In order to sanction a civil service employee for misconduct, there must be some showing of fault on the employee's part, either that he acted intentionally or negligently. *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 at 3 (Dec. 1, 2006).

For the reasons below, I find that petitioner failed to demonstrate that respondent's actions rose to the level of either negligent or willful misconduct. Although respondent did not ensure that a required sample was taken and logged on March 19, respondent was not on notice of the procedures to be followed when a contact tank is out of service. Moreover, although respondent failed to ensure that an initial fecal sample was taken during the April 6 hypo interruption, respondent was given inconsistent instructions about when such action is necessary. His conduct was consistent with training he received before the incident. Moreover, respondent directed an STW to take and log chlorine residual samples every 15 minutes and the STW's failure to log the samples should not be attributed to respondent.

March 18-19, 2010

The Department's water pollution control plants ("WPCP") treat wastewater through a series of physical and chemical processes so that wastewater can be released into the surrounding

waterways (Tr. 85). The treatment process is governed by state law and a State Pollution Discharge Elimination System ("SPEDES") permit. A non-compliance event in violation of the SPEDES permit must be disclosed to state officials (Tr. 36-37).

The Tallman plant covers about 30 acres and consists of a number of buildings and equipment, including wastewater holding tanks, to process wastewater. The Superintendent is in charge of the plant, followed by the Assistant Plant Chief, the Stationary Engineer, the SSTW, and the STW (Tr. 13, 103). SSTWs supervise STWs in the performance of their duties (Tr. 13, 83). STWs are responsible for operating and maintaining WPCPs including the taking and logging of necessary water samples (Tr. 70, 85).

Respondent has been an SSTW for 23 years. Prior to that, he was an STW for eight years. Respondent testified that during his 31-year tenure he has never been disciplined and that his annual evaluations have always been "very good" to "outstanding" (Tr. 82-83). Respondent testified that he studied to be an SSTW, passed the civil service test, and received training to be a supervisor. He also attends annual training regarding safety and Department procedures and has received supplemental training inside the plant regarding specific procedures (Tr. 86).

On March 18, 2010, respondent worked the 11:00 p.m. to 7:00 a.m. shift. That night he was supervising three STWs including STW Prashad whose duties included collecting samples from the chlorine contact tanks. A chlorine contact tank is the last stage of the treatment process before wastewater is returned to the waterways (Tr. 14, 71). In the building where respondent was working there is a one old and one new chlorine contact tank (Tr. 72, 105). Generally, samples are taken from both tanks, combined into one bottle, and poured into separate bottles. One sample is acidified and the other is not. The samples are logged in a cooler log and sent to an outside lab for testing (Prashad: Tr. 72; Segarra: Tr. 105-07).

Respondent testified that he was not working on March 17 and that during his absence the old contact tank was taken out of service (Tr. 104-05). It was undisputed that at approximately 4:00 a.m., STW Prashad discovered that the old contact tank was empty and that he could not take a sample. Unsure how to proceed, STW Prashad asked respondent. Respondent told him to take a sample from the new tank, acidify it, log it, and send it to the lab. STW Prashad followed these instructions (Bassant: Tr. 19; Prashad: 71-74; Segarra: Tr. 108; Pet. Ex. 9). Respondent subsequently verified the cooler log (Pet. Ex. 2), which indicated that the "Contact

tank Auto Sampler Acid Preserved (daily)" was sent. The entry for "Contact tank Auto Sampler Acid Non-Preserved (daily)" was left blank.

According to Superintendent Bassant, respondent should have told STW Prashad to split the sample collected from the new tank, acidify one part, and send the acidified and non-acidified samples for testing (Tr. 67-68). These procedures are set forth in a November 10, 2008 memo, entitled "Plant Effluent Auto Samples When Contact tank is O/S" (Pet. Ex. 1). The memo is addressed to "All Engineers & Seniors" and states:

> Whenever a chlorine contact tank is taken out of service, the automatic sampler for the contact tank which remains in service continues to operate taking samples. At the 4am auto sampler retrieval, the composite sample, collected from the auto sampler in service, must be equally split into two samples (1 acid preserved, & 1 with no acid preservation). This morning, the North River lab received only 1 of the 2 plant effluent 2 liter sample bottles. The 2 liter sample bottle the lab received was acid preserved. As a result, the lab will not be able to perform suspended solids and a CBOD analysis, which is a violation of the plant's SPEDES permit requirement. Unless 8 oz individual grab samples are taken, there should always be 2 plant effluent sample bottles, 2 liter size, (1 acid preserved, & 1 with no acid preservation) loaded into the cooler each morning.

(Pet. Ex. 1).

Superintendent Bassant testified that the memo was posted on the day of the incident "in the lab" (Tr. 66). Respondent testified that prior to this disciplinary action he had never seen the memo (Tr. 109). Respondent also testified that whenever the Department issues a new policy it produces a list with each employee's name and the employee must sign for a copy. Employees are required to read the new procedure and to follow it (Tr. 94).

It was undisputed that neither respondent nor STW Prashad followed the procedures set forth in the November 10, 2008 memo. This resulted in only the acidified sample being logged and sent to the lab for testing, a non-compliance event. STW Prashad was not disciplined (Tr. 77). According to petitioner, respondent is being disciplined because he is a supervisor and is responsible for his subordinates (Tr. 68, 154).

It is well settled that actual or constructive notice of the rules of employment is required before an employee can be held liable for violating an employer's rule or regulation. *Transit*

Auth. v. Middleton, OATH Index No. 258/05 at 8 (Jan. 13, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-26-SA (Feb. 17, 2006); *Dep't of Correction v. Hodges*, OATH Index No. 222/82 (June 30, 1983).

Here, there is no evidence that respondent had actual notice of the November 10, 2008 procedure, when it was issued. Indeed, Superintendent Bassant acknowledged that he had no idea whether respondent had been given a copy of the memo (Tr. 47). Rather, petitioner relied on Superintendent Bassant's testimony that the memo was posted in order to demonstrate that respondent was on notice (Tr. 150). Thus, the issue is one of constructive notice.

Constructive notice requirements are satisfied if the employer posts or publishes a rule in a manner reasonably calculated to provide the employee with notice. *Hodges*, OATH No. 222/82; *Dep't of Correction v. Galarza*, OATH Index Nos. 348/90 & 433/90 at 15 (June 11, 1990) (employees are charged with notice of all rules that are properly published or posted).

In *Dep't of Sanitation v. Mackay*, OATH Index No. 1725/04 (Sept. 2, 2004), the petitioner established that a sanitation worker had constructive notice of a teletype order. A supervisor testified that the Department's procedures require that all teletype orders be read at roll call and posted on a bulletin board outside the garage office for workers to read. *See also Taxi & Limousine Comm'n v. Dubose*, OATH Index No. 177/11 at 5-6 (Aug. 13, 2010) (deputy commissioner's testimony that policy was e-mailed to all employees, posted on a bulletin board, and reviewed at various roll calls sufficient to establish that respondent had constructive notice of policy); *but see Taxi & Limousine Comm'n v. Kowal*, OATH Index No. 1614/10 at 8 (Mar. 16, 2010) (deputy commissioner's vague testimony that policy was covered at training and at roll call insufficient to establish that respondent had notice of policy).

Once a petitioner has demonstrated that it has a procedure that is reasonably calculated to provide employees with notice of institutional orders, petitioner may rely upon the presumption of regularity in asserting that it followed the procedure in disseminating a disputed order. *Dep't of Correction v. Allison*, OATH Index No. 1196/00 at 10 (Oct. 18, 2000), *modified on penalty*, Commr. Decision (Nov. 17, 2000), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD01-71-M (July 30, 2001) (presumption of regularity attached to dissemination of officials orders); *Dep't of Correction v. Burkert*, OATH Index No. 1494/96 at 5-6 (Sept. 9, 1996) (same); *Hodges*, OATH No. 222/82 (same).

Here, Superintendent Bassant testified that Bureau Directives are "usually . . . posted" on bulletin boards and that there are at least five boards in the Tallman facility (Tr. 21, 26). He acknowledged that only some boards are used for directives and that recently some had been encased in glass to keep posted documents secure (Tr. 56). He was also unaware whether anyone kept track of documents once posted (Tr. 58). According to Superintendent Bassant directives are also, "passed on at meetings, passed on through the engineers to their lower ranking supervisors and the regular employees" and that changes are communicated "by memorandum, by meeting" (Tr. 26). I found this equivocal testimony insufficient to demonstrate that there was an established Department procedure reasonably calculated to provide employees with notice of institutional orders. Nor was there any evidence presented about when, how, or where (on a bulletin board or otherwise) the November 10, 2008 memo, was posted. Indeed, it was only through questioning by this tribunal that it became evident that petitioner was claiming that the memo was posted "in the lab" where the disputed samples were prepared (Tr. 66). Like respondent, STWs Prashad and Sadicario testified credibly that they never saw the November 10, 2008 memo (Prashad: Tr. 74, 76, 78; Sadicario: Tr. 138). Despite Superintendent Bassant's conclusory claim that posting is an effective way of disseminating information (Tr. 47), there was insufficient proof to support a finding that the posting of the November 10, 2008 memo was done in a manner reasonably calculated to provide employees with notice of the procedures to be followed when a contact tank is out of service. Because petitioner failed to show that respondent had notice of the controlling procedure, he can not be held liable for violating this rule.

Petitioner argued that even if respondent was not on notice, he should have sought a supervisor's guidance or assumed that because two samples are normally sent to the lab that the only sample collected be spilt and handled in the customary manner (Tr. 151-52). I disagree.

I credit respondent's unrebutted testimony that the contact tank was taken out of service on his day off and that no directions were provided upon his return for the overnight shift (Tr. 104-05, 108). Moreover, there is no evidence that the situation where a contact tank is taken out of service reoccurred between November 10, 2008, and this incident, or that such a scenario was covered in a supplemental training at Tallman. It is notable that the employee responsible for taking the sample on the prior occasion made the same mistake as respondent. Under the circumstances, I find respondent's failure to seek guidance or assume that a split sample should

be made from the new tank was not unreasonable but rather was an unintentional error in judgment. Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06 at 2 (Sept. 26, 2006), *aff'd*, Comm'r Dec. (Oct. 13, 2006); *see also Dep't of Correction v. Messina*, OATH Index No. 738/92, at 16-17 (July 9, 1992) (officer cannot be penalized for a discretionary act because his judgment, in hindsight, turned out to be mistaken; the issue is whether, at the time, respondent acted reasonably). Accordingly, the charges that respondent failed to ensure that the proper samples were taken should be dismissed.

The charge that respondent falsified a log sheet should also be dismissed. First, Superintendent Bassant admitted that there were no false entries on the cooler log (Tr. 48). Indeed, the cooler log was accurate; it reflected that only one contact sample was taken and sent to the lab for testing. To the extent respondent verified a log where the entry for "Contact tank Auto Sampler Acid Non-Preserved (daily)" was left blank, no misconduct can be sustained because respondent was not on notice of the need to create such a sample when one of the contact tanks is out of service.

April 6, 2010

On April 6, 2010, respondent was supervising three STWs, including STW Sadicario who was working in the hypo building. At approximately 12:25 p.m., respondent was in the lunchroom with his supervisor, Stationary Engineer Brooks and STW Sadicario when he received a page that there was an alarm in the hypo building. Respondent told Sadicario to go to the hypo building, which was about a quarter of a mile away, install a drip system and take and log samples. Brooks and respondent went outside and met Assistant Chief Berry and advised him of the situation. Brooks and Berry went to the hypo building in a pickup truck and respondent followed them on foot (Segarra: Tr. 96-97).

Respondent testified that when he arrived at the hypo building at 12:35 p.m. STW Sadicario advised him that a drip had been installed. Respondent told STW Sadicario to take preliminary samples and log the entries. Upon checking the meters and pumps respondent discovered that there was no power. Respondent then went outside to inspect the tanks, piping, and valves to make sure that the correct valves were open and the contact tanks were working.

As he walked around, respondent observed electricians working on cables and wires. Respondent thought that maybe they had tripped something in the system. Unable to locate the problem respondent returned inside about 20 minutes later (Segarra: Tr. 97-98).

Respondent testified that he asked STW Sadicario about his initial readings because he wanted to know whether it was necessary to take fecal samples in addition to the required chlorine residual samples every 15 minutes whenever there is a hypo interruption (Segarra: Tr. 100-01, 131-32; Sadicario: Tr. 137). STW Sadicario advised him that he had logged a .06 mg/L effluent residual reading for the west/old side and a .05 mg/L effluent residual reading for the east/new side (Segarra: Tr. 100-01). The log sheet reflects that the samples were taken at 12:45 and 12:48 p.m. and logged at 12:52 and 12:56 p.m. respectively (Pet. Ex. 5). Because neither tank had an effluent residual reading that had fallen below .05, respondent determined that no fecal samples were necessary. Respondent testified that Stationary Engineer Brooks and Assistant Chief Berry were present when he made this decision and that no one disagreed with him. Respondent monitored the situation and re-inspected the equipment (Tr. 100-03).

Respondent and STW Sadicario testified that respondent advised Sadicario to take the chlorine residual samples every 15 minutes. STW Sadicario told respondent that the readings were normal (Tr. 134). STW Sadicario stated that because of the confusion he did not log the readings (Tr. 137). Respondent testified that when he later learned that Sadicario had failed to log the readings he counseled him on the necessity to do so (Tr. 104). Respondent stated that the reason he did not have Sadicario enter the readings when he learned of the omission was because one is not allowed to alter an official log after the fact (Tr. 133).

Superintendent Bassant testified that as he was leaving a meeting in another building, he was advised by an engineer that there had been a hypo interruption due to a loss of power. He told the engineer to make sure that all guidelines and protocols were followed to ensure that the situation came to a satisfactory conclusion (Tr. 28). Although Superintendent Bassant testified that he went to the hypo building, there was no evidence when he went there, what time he learned about the power loss, or whether the unidentified engineer followed his instructions.

Superintendent Bassant testified that based on Bureau Directive 10-03 (Pet. Ex. 3), whenever the effluent residual reading is “at or below .05 mg/L” it is necessary to put in a drip system, take a fecal sample, and follow-up by monitoring every 15 minutes to make sure that the

target numbers are in the normal range (Tr. 20-23). When Superintendent Bassant realized that a fecal sample had not been taken he ordered one (Tr. 40). According to the log (Pet. Ex. 5), Superintendent Bassant gave the order at 2:00 p.m. Respondent testified that he and other workers present were "surprised" by the order because at the 2009 training, employees had been instructed to take a fecal sample when the chlorine residual is less than 0.05 mg/L (Tr. 93).

By letter dated April 9, 2009, the Department notified New York State about the non-compliance event on April 6. The Department advised that at approximately 12:25 p.m., there was a power interruption at the Tallman plant. The loss of power caused an interruption in the feeding of chlorine to wastewater and that, "the initial additional fecal coliform sample was mistakenly not taken" (Pet. Ex. 6).

It was undisputed that a fecal sample was not taken as required by Bureau Directive 10-03 when STW Sadicario notified respondent that the effluent residual reading in the west/old side tank was .05 mg/L. STW Sadicario was not disciplined but was given a warning letter (Tr. 59). Similar to the prior incident, respondent is being charged with misconduct because he is a supervisor (Tr. 60, 154). Respondent argued that he should not be disciplined because he was following recent training which instructed that a fecal sample be taken when the chlorine residual is less than 0.05 mg/L.

Bureau Directive 10-03, effective February 26, 2010, provides in relevant part:

> Whenever the Chlorine Residual falls to *less than or equal to 0.05 mg/L*, or there is an interruption in feeding chlorine, the emergency gravity feed hypo system must be immediately turned on and notifications made. Additionally, if there is an interruption in feeding chlorine, the chlorine residual is to be monitored every 15 minutes for a period of 1 hour. This requirement is year round.

(Pet. Ex. 3 at 7, emphasis added). This protocol was in effect in the prior directive dated June 4, 2009 (Pet. Ex. 4 at 7). Superintendent Bassant testified that this has been the standard for the past five years (Tr. 25).

On February 26, 2009, respondent attended the 2009 annual field safety training (Resp. Ex. C). Respondent testified that there was a power point presentation regarding hypo interruptions (Tr. 88). Superintendent Bassant acknowledged that these procedures were reviewed at the training (Tr. 63). Respondent was given a manual which states that the cutoff for

taking a fecal sample is when the chlorine residual is *less than 0.05 mg/L* (Resp. Ex. A at 78, emphasis added). Respondent also submitted into evidence a page from the Operational Emergency Guide dated October 2009 which states that during beach season (May 15-September 30), the cutoff is when the chlorine residual is *less than 0.05 mg/*L (Resp. Ex. B, emphasis added). Respondent acknowledged that he did not see this document until after the incident (Tr. 92). The 2010 annual training manual also states that the cutoff is *less than 0.05 mg/L* (Resp. Ex. D at 28, 96, emphasis added). Even though there was training in March, respondent acknowledged that he took it after the incident (Tr. 91).

By email dated June 22, 2010, Deputy Chief Garfield notified staff that the 2010 training materials contained incorrect information and that the correct notation is "*less than or equal to 0.05 mg/L*" (Resp. Ex. E, emphasis added; Tr. 115). Deputy Chief Garfield also testified that changes to operational policies are not communicated during annual training but come from the deputy commissioner in the form of a directive (Tr. 116-17).

As a preliminary matter, petitioner failed to show that respondent had actual notice of Bureau Directive 10-03; there is no evidence that respondent was ever given a copy.

Petitioner also failed to establish that respondent had constructive notice of the directive. According to Superintendent Bassant, Bureau Directive 10-03 was posted on two bulletin boards in the hypo building, including where this event occurred (Tr. 21, 35). STW Sadicario testified that there are no directives pertaining to hypo interruptions posted on boards in the hypo building and that he has never seen Bureau Directive 10-03 posted anywhere (Tr. 137-38). As stated above, the proof as to whether the Department had a procedure that was reasonably calculated to provide employees with notice of bureau directives was ambiguous. Therefore, petitioner cannot rely on the presumption of regularity that it followed a reasonable procedure in posting Bureau Directive 10-03.

Moreover, I credit respondent's unrebutted testimony that over the years the cutoff for taking a fecal sample has changed several times (Tr. 130). It was also undisputed that prior to the incident respondent received training that the cutoff is when the chlorine residual is less than 0.05 mg/L and that other institutional documents in effect at the time of the incident contained the same misinformation. Even though changes to policies are not normally communicated during training, the conflicting instructions provided by the Department make it unreasonable to

conclude that respondent's actions constituted willful or negligent misconduct as required by section 75 of the Civil Service Law. *See also Dep't of Correction v. Page*, OATH 1358/96 at 19 (where an agency rule is subject to reasonable differing interpretations in a given circumstance, the employee should be given the benefit of the doubt in construing the rule); *Dep't of Correction v. Galarza and Harrison*, OATH Index Nos. 348/90 & 433/90 at 11-12 (June 11, 1990) (employee not liable where there is a facially ambiguous regulation). The benefit of the doubt is especially appropriate here because the unrebutted evidence demonstrated that Stationary Engineer Brooks and Assistant Chief Berry were present and did not object to respondent's decision not to take a fecal sample. *See Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 7 (Jan. 8, 2010) (since a captain was present and tacitly approved of the officers' action, the charge that they failed to notify a supervisor about an anticipated use of force was dismissed). Indeed, the Department admitted in its disclosure to the State that the sample "was mistakenly not taken" (Pet. Ex. 6).

At best the evidence presented by petitioner is equally balanced with the proof offered by respondent. Where the evidence is equally balanced, the charges must be dismissed. *See Health & Hospital Corp. (Metropolitan Hospital Ctr.) v. McCaskey*, OATH Index No. 2195/08 at 9 (Sept. 29, 2008); *see also Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 194 (1976) ("If the evidence is evenly balanced, plaintiff has not met its burden."). Thus, the charge that respondent failed to take the first required fecal sample during a hypo interruption must be dismissed.

Finally, the unrebutted and credible testimony from respondent and STW Sadicario was that respondent advised Sadicario to take chlorine residual samples every 15 minutes and that Sadicario did so but failed to log the readings. I found STW Sadicario's admission to be compelling because he left himself open to discipline. I also found respondent to be a credible witness as he readily admitted that he did not see the 2009 Operational Emergency Guide or the 2010 training manuals until after the incident. My overall impression was that respondent is a conscientious worker who took the hypo interruption seriously.

Moreover, it was undisputed that it was not respondent's responsibility to take the samples as charged, but STW Sadicario's duty. Respondent's reliance on his subordinate's representations that a required task was done was not unreasonable and should not be considered

misconduct. Petitioner argues that since the readings were not in the log sheet the fault is respondent's (Tr. 153-54). This claim is without merit. A supervisor can not be held strictly liable for acts of subordinates. *Dep't of Sanitation v. Richards*, OATH index No. 1579/01 (Nov. 16, 2001); *see also Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 9 (Mar. 9, 2007) (an agency cannot hold an employee to a strict liability standard in a disciplinary proceeding). Thus, the charge that respondent failed to take chlorine residual samples during a hypo interruption must be dismissed.

FINDING AND CONCLUSION

1. Petitioner did not establish that on March 19, 2010, respondent neglected his duties by failing to ensure that proper samples were taken and sent for analysis as alleged in Charge I, Specification 1, and Charge IV, Specification 1.

2. Petitioner did not establish that on March 19, 2010, respondent failed to properly instruct an STW about the proper procedures as alleged in Charge III, Specification 1.

3. Petitioner did not establish that on March 19, 2010, respondent falsified the log sheet as alleged in Charge II, Specification 1.

4. Petitioner did not establish that on April 6, 2010, respondent failed to take the first fecal sample as alleged in Charge I, Specification 2, and Charge IV, Specification 3.

5. Petitioner did not establish that on April 6, 2010, respondent failed to take chlorine residual samples as alleged in Charge I, Specification 3, and Charge IV, Specification 3.

RECOMMENDATION

The charges should be dismissed.

Alessandra F. Zorgniotti
Administrative Law Judge

October 20, 2010

SUBMITTED TO:

CASWELL F. HOLLOWAY
Commissioner

APPEARANCES:

ALISON GILGORE, ESQ.
Attorney for Petitioner

FAUSTO E. ZAPATA, ESQ.
Attorney for Respondent

Commissioner's Decision (Apr. 29, 2011)

Respondent was charged with, *inter alia*, failing to ensure that samples were properly taken and transported to the laboratory, and failing to provide his subordinate with proper instructions, when a contact tank was out of service on or about March 19, 2010, as well as failing to take the required samples during a hypo interruption on April 6, 2010.

I have reviewed the record of the disciplinary proceedings brought against respondent, and the recommendations of Administrative Law Judge Alessandra Zorgniotti (ALJ). After due deliberation and consideration, I adopt findings three, four and five as my own. However, I am unable to approve and adopt findings one and two, relating to the events of March 19, 2010, and therefore I am unable to adopt the recommended penalty.

The ALJ stated that "respondent's failure to seek guidance or assume that a split sample should be made from the new tank was not unreasonable but rather was an unintentional error in judgment." (Recommendation p. 6). For the reasons set forth below, I reject this conclusion. Rather, I find that respondent's conduct and actions on that date were not reasonable but, rather, constituted carelessness rising to the level of negligence. As supported by ample evidence in the record, the charges regarding the events that occurred on or about March 19, 2010 will be upheld and a penalty of suspension for six (6) work days will be issued.

A civil service employee can be sanctioned for misconduct for his negligent or careless actions. *See Administration for Children's Services v. Gold*, OATH Index No. 585105, 11 (April 13, 2005); *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979); *Department of Sanitation v. Beecher*, OATH Index No. 176/01 (March 7, 2001) (stating "[i]n the context of employee disciplinary proceedings, negligence, in the form of careless conduct, may be cognizable as misconduct") citing M*cLean v. Triboro Coach Corp.*, 302 N.Y. 49, 51 (1950) (negligence is defined as the failure to employ reasonable care - the care which the law's reasonably prudent person should use under the circumstances of a particular case).

As shown by evidence in the record, respondent was negligent in not ensuring these samples were properly taken and transported to the laboratory. "The Department's water pollution control plants ("WPCP") treat wastewater through a series of physical and chemical

processes so that wastewater can be released into the surrounding waterways." (Recommendation p. 2 [citing Tr. p. 851]). The contact tanks are the final steps before the water is released into the rivers. (Recommendation p. 3 [citing Tr. p. 14, 71]) Thus their sampling is critical. Respondent has been with the Agency for thirty-one years and has held the position of Senior Sewage Treatment Worker for twenty-three years. (Tr. p. 82) Knowing that acidified and non-acidified samples are required, respondent told his subordinate to acidify the entire sample. (Tr. p. 108) Therefore, respondent did not send the required non-acidified sample from the contact tank to the laboratory.

The issue regarding how to take samples when one of the contact tanks was out of service was brought to respondent's attention when his subordinate asked him "what we should do about the sample after the one tank was out." (Tr. p. 73, see also Tr. p. 19) Respondent testified that there were no memos and no clear direction as to what to do that day. (Tr. p. 107, 108) If respondent was, in fact, unaware of the memorandum that had been previously issued, then he should have inquired further into how to resolve the problem. The ALJ erroneously dismissed this course of action which could have prevented a non compliance issue.

Respondent's actions that day show no inquiry in a situation where he claims he had no direction. Respondent testified that "you [could not] give them what you [did] not have." (Tr. p. 108) He told his subordinate "to send what [he had]" and to acidify the sample. (Tr. p. 108) However, it was respondent's responsibility to ensure that all necessary samples went out. By not following the established procedure which involved splitting the samples, he omitted a required sample, the non-acidified sample, as shown on the log sheet by a blank space. (Pet. Ex. 2) Note that the log sheet itself indicates that the sample is required. (Pet. Ex. 2) A supervisor with respondent's many years of experience must know that not submitting this sample constitutes a non-compliance issue, which is a reportable event and for which the Agency may be subjected to fines. (Tr. p. 36) This event was reported to the New York State Department of Environmental Conservation. (Pet. Ex. 7 and Tr. p. 42) There is evidence in the record that respondent knows that generally, if he has a question, he could go to a Supervisor. (Tr. p. 123) Respondent should have done so in this situation. As a result of his actions, the Agency may be subject to substantial fines. I find that respondent neglected his duty as his actions in this situation constitute unacceptable carelessness, rising to a level of negligence.

In this case, respondent was specifically asked for guidance from his subordinate, a Sewage Treatment Worker. (Tr. p. 19 and p.73) Giving his subordinate inaccurate instructions that run afoul of the Agency's regulatory commitments is not reasonable. *See Department of Sanitation v. Cardaci*, OATH Index No. 276/11 at 7 (Dec. 13, 2010) (noting that respondent did not fulfill his supervisory responsibilities and sustaining the charge of failure to supervise where "respondent ha[d] 25 years' experience with the department and extensive supervisory experience."). Thus, I find that respondent failed to properly instruct his subordinate in violation of the Uniform Code of Discipline.

Based on the above, I reverse ALJ Zorgniotti's finding dismissing the charges relating to March 19, 2010. It is my determination that the penalty to be imposed for this misconduct shall be a six (6) day suspension without pay.

Sincerely,
Caswell F. Holloway

c: Alessandra Zorgniotti, Administrative Law Judge, OATH
Fausto Zapata, Esq.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION
---------- X
IN THE MATTER OF THE APPEAL OF:

ANTHONY SEGARRA
Appellant:
-against- :
NYC DEPT. OF ENVIRONMENTAL PROTECTION
Respondent:

Pursuant to Section 76 of the New York State Civil Service Law
---------- X

DATE: 12/20/11

ITEM NO. CD-11-94 R

PRESENT:
NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

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APPELLANT PRESENT

STATEMENT

On Thursday, September 8th 2011 the City Civil Service Commission heard oral argument in the appeal of **ANTHONY SEGARRA,** Sewage Treatment Worker, NYC Department of Environmental Protection (DEP), from a determination by the DEP, finding him guilty of charges of incompetency or misconduct and imposing a penalty of **SIX DAYS SUSPENSION** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

NEW YORK CITY CIVIL SERVICE COMMISSION

ANTHONY SEGARRA

ANTHONY SEGARRA appeals from a determination of the New York City Department of Environmental Protection ("DEP") finding him guilty of misconduct and incompetence and imposing a penalty of six (6) days' suspension following disciplinary proceedings conducted pursuant to Civil Service Law Section 75. The Civil Service Commission ("Commission") conducted a hearing on September 8, 20 11.

Appellant, a Senior Sewage Treatment Worker, was charged with: (1) violating Rule E.12 of the Uniform Code of Discipline by (a) on or about March 19, 2010, neglecting his duties to ensure that samples were properly taken and transported to the laboratory; (b) on or about April 6, 2010, neglecting his duties by failing to take the first fecal sample during a hypo interruption; and/or (c) on or about April 6, 2010, neglecting his duties by failing to take the required chlorine residual samples every 15 minutes during a hypo interruption; and (2) violating Rule E. 18 of the Uniform Code of Discipline by, on or about March 19, 2010, making false entries in agency documents indicating samples were sent to the laboratory when, in fact, the un-acidified contract tank sample was missing; and (3) violating Rule E. 46 of the Uniform Code of Discipline by, on or about March 19, 2010, failing to provide his subordinate with proper instructions regarding what to do when the contact tank was out of service; and (4) violating Rule E.6 of the Uniform Code of Discipline by, (a) on or about March 19, 2010, engaging in conduct prejudicial to good order and discipline by failing to ensure samples were properly taken; and /or (b) on or about April 6, 2010, engaging in

conduct prejudicial to good order and discipline by failing to ensure samples were properly taken.

The Administrative Law Judge ("ALJ") found Appellant not guilty of misconduct and recommended dismissal of all of the charges. DEP reversed the ALJ's findings, found Appellant guilty of charges l(a), 3, and 4(a), and imposed a penalty of six days' unpaid suspension.

Appellant's Position

Appellant was represented by counsel who argued that Appellant should not be penalized for failing to adhere to DEP's procedure because DEP did not provide him with notice of its tank failure policy. Counsel argued that tank failure is a rare occurrence and that the proper procedure in this instance was neither routine, nor a matter of common knowledge. Counsel argued that Appellant merely made a mistake in judgment and was not negligent because he had never been instructed as to how to proceed in this situation. Counsel further argued that in the alternative, even if Appellant were guilty of misconduct, the penalty imposed was so excessive and disparate in nature as to be shocking to the conscience. Further, counsel argued that the fact that Appellant's subordinate engaged in the same conduct and was never formally disciplined, only receiving a written reprimand, while Appellant, an employee with no disciplinary record and a longer tenure, received a greater penalty, was patently unfair.

Counsel further argued that the cases submitted by DEP were not on point and factually distinguishable from the case at bar. Specifically, counsel argued that McClean v. Triboro Coach Corp., 302 N.Y. 49 (1950), McGinigle v. Town of Greenberg, 48 N.Y. 2d

949 (1979), and Administration for Children's Services v. Gold, OATH Index No. 585/05 (Apr. 13, 2005), concerned facts that were not analogous to the case at bar and involved circumstances where negligence was clearly established. Counsel argued that the ruling in Dep't of Sanitation v. Cardaci, OATH Index No. 276/11 (Dec. 13, 2010), is applicable to the instant proceeding and necessitates that negligence charges be dismissed when an employer is unable to prove that it has provided an employee with notice and clear instruction of procedure and/or that the procedure is not a matter of common knowledge. Counsel concluded that because Appellant did not receive notice, his acts did not amount to misconduct.

DEP's Position

Counsel for DEP argued that a six day suspension was a penalty commensurate with the serious nature of Appellant's misconduct. Counsel maintained that contrary to Appellant's assertions, DEP provided Appellant with notice of its collection procedure in a memorandum that had been posted on a wall two years before the incident in question. Counsel further argued that, even if he had not been provided with the memorandum, Appellant's failure to provide two samples was unreasonable because it was established DEP practice for sewage treatment workers to send two samples during collection. The fact that this was an abnormal situation does not explain why Appellant neglected to follow the basic procedure for everyday sample collection. Further, if Appellant did not know what to do, he had an obligation to ask his superiors. Counsel further argued that, in failing to abide by proper collection procedure, Appellant could have subjected DEP to numerous compliance

and regulatory fines. Counsel concluded that a six day suspension was an appropriate penalty due to the possibly serious consequences of Appellant's misconduct.

Analysis

The Commission has carefully reviewed the record adduced below and considered the arguments on appeal. We note that the Appellant has been a DEP employee since 1986 and has no formal disciplinary record. We further note that it is the ALJ who was in the best position to make findings of fact and credibility determinations in this case.

The Commission finds no evidence in the record that Appellant's acts were anything but a mistake and therefore do not rise to the level of misconduct. Specifically, we find that DEP did not substantiate that Appellant was aware of its policy after posting its procedure on a wall, or that its posting was reasonably calculated to provide employees with notice of the proper procedures to be followed when a contact tank is out of service. Employees may only be disciplined for violations of rules of which they have notice. Dep't. of Sanitation v. Shinnick, OATH Index No. 1466/07 (June 29, 2007); Dep't. of Sanitation v. DeSantis, OATH Index No. 1494/05 (Oct. 31, 2005). Appellant, when faced with a unique and rare situation, simply acted according to his best judgment. The ALJ specifically found that "[Appellant's] failure to seek guidance or assume that a split sample should be made from the new tank was not unreasonable, but rather was an unintentional error in judgment" (Recommendation p. 6). We adopt this finding and note that the mere fact that DEP could be fined for Appellant's act does not, in and of itself, elevate such a mistake to misconduct.

Decision

Accordingly, this Commission hereby reverses the determination of DEP and reverts to the ALJ's finding that Appellant was not guilty of all of the charges. Appellant is to be reimbursed for the six-day suspension within thirty (30) days from this determination.

Nancy G. Chaffetz, Commissioner
Chair

Rudy Washington, Commissioner
Vice Chair

Matthew W. Daus, Commission

Charles D. McFaul, Commissioner

Date: 12/20/11