Dep't of Transportation v. R.B.

OATH Index No. 1215/11 (July 13, 2011), *rev'd*, Comm'r Dec. (Dec. 2, 2011), **appended,** *aff'd,* 2012 N.Y. Misc. LEXIS 4851, 2012 NY Slip Op. 32587(U) (Sup. Ct. N.Y. Co. 2012)

Motion to dismiss by respondent, a maintenance worker employed within the Staten Island Ferry Division who tested positive for marijuana in a random drug test, is granted on Fourth Amendment grounds. Work which respondent performs or could be called upon to perform is not "safety-sensitive" and thus his random drug testing was not permissible.

The commissioner rejected the ALJ's recommendation, finding respondent held a safety sensitive position and therefore was properly subjected to random drug testing and terminated respondent's employment for the positive drug test. Commissioner's decision was affirmed on judicial review.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
-against-
R.B.
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding commenced by the petitioner, the Department of Transportation ("DOT"), against respondent, a maintenance worker assigned to the Staten Island Ferry Division, Department of Terminal Operations. The charges allege that respondent tested positive for marijuana in a random drug test. At the request of petitioner, pursuant to title 49, section 40.323(2)(b) of the Code of Federal Regulations, respondent's name has been withheld from publication. *See Dep't of Transportation v. Anonymous,* OATH Index No. 1997/07 at 1, n.1 (July 2, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-04-SA (Feb. 6, 2008); *Dep't of Environmental Protection v. Anonymous*, OATH Index No. 977/05 at 1 n.1 (June 3, 2005),

rev'd, Comm'r Dec. (July 27, 2005); *Dep't of Transportation v. Doe*, OATH Index No. 2035/04 at 1 n.1 (Nov. 26, 2004), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 09-64-SA (July 10, 2006).

Following a three-day trial involving the testimony of eight witnesses for petitioner and two witnesses for respondent, post-trial briefs were submitted on May 23, 2011. The record was then closed. As set forth below, I find that the respondent's motion to suppress the positive drug test result should be granted and that the charge against respondent should be dismissed.

ANALYSIS

Introduction

On September 13, 2010, respondent submitted to a random drug and alcohol test by providing a urine specimen for testing. The specimen tested positive for the presence of marijuana metabolite at 109 nanograms per milliliter (Pet. Exs. 3, 6, 9). Petitioner presented four witnesses who testified about the random testing procedures, including the generation of the employee list by computer, the procedures for collection of the specimen, the process by which the specimen bottles are sealed and sent to the testing laboratory, the laboratory's testing procedures, and the medical review officer's certification of the accuracy of the controlled substance test (Lehrer: Tr. 158; Stephen: Tr. 164, 171-79; Altholz: Tr. 183-91; Platman: Tr. 208-13). Dr. Platman, the medical review officer, also testified that when he informed respondent of the positive drug test, respondent denied using marijuana (Tr. 214). Respondent did not testify.

Respondent did not challenge the chain of custody of the test, nor the accuracy of the test results, but instead asserted that the test results should be suppressed, and the disciplinary charges dismissed, because the drug test was an unreasonable search and seizure under the Fourth Amendment of the United States Constitution. The positive drug test is the only evidence in the record of respondent's marijuana use.

If respondent's drug test was an impermissible search under the Fourth Amendment, the remedy is suppression, and dismissal of the charges. A drug test that is taken in violation of the Constitution can not provide grounds for disciplinary action. *See Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 24 N.Y.2d 647, 657, 662 (1969) (exclusionary rule applies to administrative hearings; evidence illegally obtained "may not form a predicate for the imposition of penalties"); *Fiorenza v. Gunn*, 140 A.D.2d 295, 300 (2d Dep't 1988) (employee's failure to submit to drug test order unsupported by reasonable suspicion could not provide grounds for disciplinary action); *see also Dep't of Correction v. Pettiford,* OATH Index No. 236/05 at 13 (Feb. 25, 2005)

(drug test suppressed where "the Department failed to meet its burden of proving that it conducted a valid random search"); *Dep't of Correction v. Flowers,* NYC Civ. Serv. Comm'n Item No. CD 04-55-M (Aug. 31, 2004), *aff'g in part, rev'g in part,* OATH Index No. 1902/02 (Apr. 7, 2003) (charges dismissed by CSC where Department failed to establish reasonable suspicion for drug test order, reversing employer's termination that was based upon failed drug test); *Dep't of Environmental Protection v. Bruni*, OATH Index No. 1038/96, mem. dec. (May 16, 1996) (motion to suppress results of drug test granted in absence of reasonable suspicion); *Dep't of Correction v. Fogle,* OATH OATH Index No. 126/86 at 19 (July 14, 1986) (excluding evidence of positive drug test where Department failed to show requisite reasonable suspicion).

Statutory and regulatory framework

In 1991, Congress passed the Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143 (Oct. 28, 1991), which required the United States Department of Transportation to issue regulations to establish a program requiring mass transportation operations which receive federal financial assistance to conduct pre-employment, reasonable suspicion, random, and post-accident testing "of mass transportation employees responsible for safety-sensitive functions (as determined by the Secretary) for use, in violation of law of Federal regulation, of alcohol or a controlled substance." Pub. L. No. 102-143, § 6(b) (current version at 49 U.S.C. § 5331(b)).

The Senate Committee which reported on the proposed legislation noted that "drug and alcohol abuse [had] become an increasing problem in the workplace," that "[i]n the transportation sector, the costs of drug and alcohol use are clearly magnified," and that, ". . . The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety-sensitive transportation positions mandates that every effort be made to eliminate the cause of that threat." Senate Committee on Commerce, Science, and Transportation, Omnibus Transportation Employee Testing Act of 1991, S. Rep. No. 102-54, at 2 (1991).

Regarding the constitutionality of drug and alcohol testing, the Committee noted "its view that the drug and alcohol testing of safety sensitive transportation employees complied with the Fourth Amendment." The Committee went on to cite the leading Supreme Court decisions holding, *inter alia,* that random drug testing of employees holding safety sensitive positions did not violate the Fourth Amendment. S. Rep. No. 102-54, at 7 (citing *Skinner v. National Railway*

Executives' Ass'n, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989)).

After the Omnibus Transportation Employee Testing Act became law, the Department of Transportation, Federal Transportation Authority ("FTA"), issued regulations which require a provider of mass transportation services to establish a drug testing program for its employees, including pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow up. 49 C.F.R. §§ 655.4, 655.21 (Lexis 2011). Random testing must be done of any "covered employee," defined as "a person . . . who performs or will perform a safety-sensitive function." 49 C.F.R. §655.4.

The regulations go on to define a safety-sensitive function as including four general duties, only one of which is relevant here. The relevant section defines as safety-sensitive "maintaining (including repairs, overhaul, and rebuilding) a revenue service vehicle or equipment used in revenue service." 49 C.F.R. § 655.4.[1] A vehicle includes a vessel. *Id.* The term "maintaining" is not defined in the regulations. However, as petitioner noted in its brief, the FTA shed some light on the term in response to comments from the public on the proposed definition of "safety sensitive." In those comments, the FTA noted that although some commentators viewed the maintenance category as encompassing workers who clean rather than repair transit equipment, "We do not mean to cover such workers and emphasize that only mechanics that repair vehicles or who perform routine maintenance are the types of maintenance workers covered by the rule." *See* Prevention of Prohibited Drug Use in Transit Operations, 59 Fed. Reg. 7572, 7575 (Dep't of Transportation Feb. 15, 1994).

The Department's drug testing policy (Pet. Ex. 1) explicitly references the FTA's regulations, as well as regulations promulgated by the United States Coast Guard. Neither party has asserted that the Coast Guard regulations, which pertain to crewmembers performing certain tasks, are applicable here.[2] The policy states that employees in 28 different job titles "assigned to work in connection with the Staten Island Ferry" "may be assigned" to perform "safety

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[1] The other duties are operating a revenue service vehicle, including when not in revenue service; operating a nonrevenue service vehicle, when required to be operated by the holder of a commercial driver's license; and controlling dispatch of movement of a revenue service vehicle. 49 C.F.R. § 655.4.

[2] The Coast Guard regulations require drug and alcohol testing for crewmembers who "occupy a position or perform the duties and functions of a position required by the vessel's Certificate of Inspection," "perform the duties and functions of patrolmen or watchmen, or are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies." 46 C.F.R. § 16.230(a) (Lexis 2011).

sensitive" functions and thus are subject to drug and alcohol testing. Among the titles listed is "maintenance worker" (Pet. Ex. 1).

Respondent signed a statement acknowledging that he had received the controlled substance and alcohol abuse policy and amendments to the policy, and understood that he was required to comply with the policy (Pet. Ex. 2; Tr. 23). Agreement to comply with the controlled substance policy is a prerequisite to assignment within the Ferry Division (Tr. 127).

Respondent's Fourth Amendment Challenge

Respondent's constitutional challenge essentially has two prongs. The first is that his duties do not require him to work on the ferries and thus, because he does not perform work on a "revenue service vessel," or its equipment, he is not safety sensitive under the federal regulations. The second part of respondent's argument is that even if respondent were called upon to work on the ferry, or its equipment, his work, as defined by his job specification, is limited in scope and performed under the direct supervision of skilled trades people. Thus, any work that he could be called upon to perform would not be safety-sensitive, rendering random testing impermissible under the Fourth Amendment, as interpreted by controlling United States Supreme Court and Southern District of New York case law. Respondent could, however, be tested upon a finding of individualized, reasonable suspicion.

Prong One

Respondent's argument that he is not safety-sensitive because he does not work on the ferries or their equipment has substantial merit. However, this argument ultimately fails because the federal regulations provide a broad definition of a "covered employee" subject to random drug testing.

DOT's Staten Island Ferry Division is divided into various subdivisions or groups, including Ferry Engineering, Ferry Operations, and Terminal Operations (Resp. Ex. A). At the time of his drug test respondent worked for Terminal Operations; prior to that he worked for Ferry Engineering at the ferry maintenance building (Tr. 75, 230, 231, 235). Respondent is the only maintenance worker assigned to the Ferry Division (Tr. 105). Maintenance workers assigned elsewhere within the DOT are not considered safety-sensitive and thus are not subject to random drug testing (Tr. 18, 35).

John White, who has been the Ferry Terminal Supervisor for eleven years, was respondent's supervisor in September 2010 and provided the most detailed account of respondent's job duties (Tr. 228). At that time respondent had been assigned to him for over a year. Mr. White supervises the daily custodial operations at the two terminal buildings (at Whitehall Street in Manhattan and St. George in Staten Island) and described respondent as one of the custodial titles that reported to him.[3] These titles include custodial assistant, debris remover, city attendant, maintenance worker, and laborer. None of the workers in these titles work on the ferries (Tr. 230, 235). Respondent's duties encompassed a daily inspection of the grounds and building, including lights that were out, broken doors, and broken equipment in the restrooms. He would also assist in the office by moving supplies or equipment or cleaning. He would sometimes escort contractors onto the property. He was never ordered to perform any work on the ferries, maintenance or otherwise (Tr. 231-33). While acknowledging that respondent could have been given an order by a higher-level supervisor to work on the ferry (Tr. 246), Mr. White said that never happened while he supervised respondent. Rather, he was the only supervisor giving directives to respondent (Tr. 247).

Mr. White's testimony was credible and corroborated by that of John Collins, who has been the Director of Ferry Engineering since about 2006 (Tr. 72). Mr. Collins testified that Terminal Operations is not responsible for the repair and maintenance of ferries. While respondent was assigned to Terminal Operations, respondent did not report to him, was not within his chain of command, and did not perform any work within Ferry Engineering (Tr. 89, 90).

Thus, the only evidence submitted concerning respondent's actual job duties at the time of the drug test in September 2010 established that his work was custodial in nature and involved the ferry buildings and grounds. Respondent did not perform work on the ferries or on ferry equipment. Thus, the actual work he performed was not safety-sensitive.

However, the federal regulations state that a "covered employee is considered to be performing a safety-sensitive function" during "any period in which he or she is actually performing, ready to perform, or immediately able to perform such functions." 49 C.F.R. § 655.4. The First Department has interpreted this language broadly, finding that an assistant

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[3] Respondent is still assigned to Terminal Operations; he is not currently reporting to work, although he is receiving a salary (Tr. 139).

captain who was assigned to the dock could be called upon in an emergency to command a vessel and thus was a "covered employee" subject to random alcohol testing. *Sander v. NYC Dep't of Transportation,* 23 A.D.3d 156 (lst Dep't 2005). In an analogous case before the Eastern District of New York, an employee of the New York City Transit Authority holding the title of "conductor" but working as a mail clerk at the time of his drug test challenged the drug test by asserting that his position as a mail clerk was not safety-sensitive. The Court observed that the determinative factor under prior case law was the job title held by the employee and the job duties associated with that title. *Laverpool v. NYC Transit Auth.,* 835 F. Supp. 1440, 1455 (E.D.N.Y. 1993).[4]

Petitioner asserts that because respondent works in the Ferry Division, he is "immediately able" to perform maintenance work on the ferry, which the regulations consider to be a safety-sensitive function. Respondent argues, however, that prior to being assigned to a group within the Ferry Division, such as Ferry Engineering, which might require maintenance work on the ferry or its equipment,[5] the federal regulations require that he receive a "pre-employment" drug test. Respondent also contends that any assignment to duties on the ferry boat would constitute impermissible out-of-title work.

Without doubt, respondent's immediate supervisor testified that respondent never performed maintenance work on the ferry or its equipment. It was unclear given this history what the likelihood was that respondent might actually be called upon to perform such work during his assignment to Terminal Operations. However, petitioner's position that the Ferry Division is a fluid operation in which workers can be shifted from one unit to another depending on need was borne out by the testimony of its Chief Operating Officer, Captain James DeSimone.

Captain DeSimone testified that, as a maintenance worker assigned to the Ferry Division, respondent could "absolutely" be assigned to work on a vessel, even though his assignment within the Division of Terminal Operations (Tr. 110). Indeed, the budget code for the

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[4] While making these observations, the Court premised its finding that the drug test was reasonable under the Fourth Amendment on an alternative ground. The employee in question had previously tested positive for a controlled substance. The Authority's drug testing policy permitted drug screening once an employee had previously tested positive for drugs, which the Court concluded "satisfies the Fourth Amendment requirement for reasonableness." *Laverpool,* 835 F. Supp. at 1455.

[5] Respondent does not concede that his maintenance work would rise to the level of safety-sensitive work, as that term has been construed by the federal courts.

maintenance worker title is assigned to Ferry Engineering, where respondent had worked prior to working in Terminal Operations (Tr. 113). Although he did not directly supervise respondent, Mr. Collins testified that respondent would have worked both in the terminal buildings and on the ferries (Tr. 79).

Although acknowledging that he was unsure if respondent worked on any of the ferry boats in 2010, Captain DeSimone maintained that respondent could be assigned as needed to work on the ferry or in the ferry maintenance facility as needed (Tr. 123, 124). More specifically, he testified, "If we were to ramp up the facility this afternoon and require him to be over there [the maintenance facility], we would assign him . . . this is a possibility that could come up from time to time" (Tr. 124, 25). He said that there are other employees in the Ferry Division who have volunteered for positions outside of their title, who are considered safety-sensitive (Tr. 125). Although Captain DeSimone spoke in terms of "possibilities," rather than "probabilities," his testimony that a maintenance worker assigned to Terminal Operations could be assigned as needed to the ferry maintenance terminal was unrebutted.

Respondent argues that the Department could not assign him to maintenance work on a ferry boat or its equipment because that would constitute out-of-title work, which is prohibited under Section 61(2) of the Civil Service Law. The civil service job specification for "maintenance worker" does not use the word "ferry" or "vessel" or "boat" or "revenue service vehicle" anywhere within it (DeSimone: Tr. 127; Pet. Ex. 2). Rather, it provides, as a "general statement of duties and responsibilities," that a maintenance worker, "[u]nder direct supervision, assists in the routine maintenance, operation, and repair of public buildings and structures, and the equipment they contain" (Pet. Ex. 7). Similarly, in listing "examples of typical tasks," the job specification uses the word "building" four times, as in making "minor repairs to building electrical, plumbing and heating system," and aiding in "relocating building equipment as directed." The typical tasks also list the visual inspection of "public buildings, structures, and equipment." Respondent asserts that because the civil service job specification refers only to "buildings and structures," it would be out-of-title work for him to work on a ferry or its equipment.

However, it is not clear that an assignment to work on a ferry or its equipment would be out-of-title. There was some evidence that the word "structure" or even "building" could be considered to include a vessel. While the *Merriam-Webster Free Dictionary* defines the word

"building" only as "a usually roofed and walled structure built for permanent use (as for a dwelling)," the 2009 Marine Dictionary defines "new building" as "a new vessel under construction or just completed." *Building,* Merriam-Webster (2011), http://www.merriam.webster.com/dictionary/building; *Building,* The Maritime & Shipping Dictionary 2010, http://maritimedictionary.org/ASP/MarineDictionary.asp?WORD=building. Similarly, while *Merriam-Webster* defines a "structure" broadly, as referring to "something (as a building) that is constructed," *Structure,* Merriam-Webster (2011), http://www.merriam-webster.com/dictionary/structure, *The Means Illustrated Construction Dictionary,* cited by petitioner, (Pet. Br. at 2 n.5), defines a "structure" as a combination of units fabricated and interconnected in accordance with a design and intended to support vertical and horizontal loads," which could arguably apply to a ferry boat.

The testimony about whether a vessel could be considered comparable to a building or a structure was inconsistent. Chief Operating Officer DeSimone said that he considered a vessel "absolutely comparative" to a public building and structure, and testified that the ferries were built under a building construction contract (Tr. 133). He also testified that there are multiple titles who work on the ferries, such as boilermakers and steamfitters, who do not have the word "vessel" in their job specification (as opposed to operating vessel personnel, for whom work on a vessel or ferry is specified) (Tr. 115, 116). However, Mr. Collins said that he would not generally refer to the ferries as "buildings" or "structures" (Tr. 90, 92). And Donald Arnold, the director of citywide and prevailing wage employees of Teamsters Local 237, said that he did not consider the maintenance worker job specification to include work on ferries (Tr. 257), that there are no questions on the civil service examination for the maintenance worker title which relate to vessels (Tr. 258), and that when the Comptroller's office surveys outside unions to determine comparability for the purpose of prevailing wage rate-setting, it never looks to a maritime union whose members work on boats (Tr. 257).

Even if work on a vessel or its equipment were to be considered out-of-title for a maintenance worker, the out-of-title prohibition is not absolute. Section 61(2) permits assignment to other duties during a "temporary emergency situation." Civ. Serv. Law § 61(2) (Lexis 2011). Section 64 of the Civil Service Law also authorizes temporary assignments, not to exceed three months, of workers to higher ranking positions, when the need for such service is urgent. Civ. Serv. Law § 64 (Lexis 2011); *see Miller v. Griffith*, 251 A.D.2d 1058 (4th Dep't

1998) (not an abuse of discretion for a Fire Chief to make temporary assignments of firefighters to serve in higher ranking positions because of unscheduled absences); *Nauta v. Poughkeepsie*, 610 F. Supp. 980, 984 (S.D.N.Y. 1985) ("While it is a violation of the law to require a civil service employee continually to perform the duties of a higher position, there is no prohibition against an employee taking on such tasks on an irregular, short-term basis").

Thus, whether or not work on the ferry or its equipment would be out-of-title for a maintenance worker, a short-term assignment of this nature appears to be permissible.

Respondent's additional contention, that he could not be required to work on a ferry boat or within the ferry maintenance terminal without "pre-employment" drug testing, is unavailing. "Pre-employment" drug-testing is required when an employee moves from a position that is not safety-sensitive to a position that is safety-sensitive (Pet. Ex. 1, V (1)(b)). *See also* 49 C.F.R. § 655.41 (Lexis 2011). Maintenance workers who are employed by the Department but not assigned to the Ferry Division would have to undergo such drug-testing prior to transfer to the Ferry Division (Tr. 39, 51). However, respondent stands in a different posture from these maintenance workers because he is already assigned to the Ferry Division and the evidence showed that he is subject to assignment anywhere within the Ferry Division based upon operational need. Thus, the fact that he was assigned to Terminal Operations at the time of testing is insufficient, in and of itself, to establish that his position is not safety-sensitive.

In sum, respondent is "immediately available" within the meaning of the federal regulations to be dispatched to work on the ferries or their equipment. Respondent thus loses on prong one. The question to be decided under prong two is whether respondent could be assigned to tasks on the ferries or their equipment which are safety-sensitive.

Prong Two

Respondent contends that even if he could be called upon to work on the ferries or their equipment, he would not be performing work which is safety-sensitive as that term has been construed by the United States Supreme Court and subordinate federal courts. As explained below, the record at trial showed that the work respondent could be called upon to perform on the ferries or in the ferry maintenance terminal is limited in scope and subject to direct review. Therefore, while petitioner established that respondent's work, if improperly done, could have some impact on public safety, petitioner failed to establish that an error on respondent's part

would cause a direct, immediate threat. Thus, under the applicable case law, petitioner failed to establish that respondent is in a safety-sensitive position subject to random testing. The case law dictates that his drug test be suppressed.

In *Skinner v. Railway Labor Executives Association,* 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), twin cases decided the same day, the Court held that the taking of urine from a public employee or applicant constitutes a search under the Fourth Amendment, which prohibits unreasonable searches and seizures. Thus, any such drug testing must meet the "reasonableness" requirement of the Fourth Amendment. *Von Raab,* 489 U.S. at 665; *Skinner,* 489 U.S. at 619. A public employer may dispense with the warrant requirement of the Fourth Amendment when the "intrusion serves special governmental needs, beyond the normal need for law enforcement." *Von Raab,* 489 U.S. at 665. The government's interest in regulating the conduct of public employees who engage in "safety–sensitive tasks" to ensure public safety presents such a "special need." *Skinner,* 489 U.S. at 620 (permitting warrantless drug testing of railroad employees including operating crews, persons engaged in the maintenance and repair of signal systems, and persons handling orders concerning train movements); *Von Raab*, 489 U.S. at 666 (permitting warrantless drug testing of U.S. Customs employees who were directly involved in drug interdiction, required to carry a firearm, or handled classified material).

The *Skinner* court concluded that the government interest in testing of safety-sensitive transportation workers was "compelling," because,

> Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities . . . employees who are subject to testing under the FRA [Federal Railroad Administration's] regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others.

489 U.S. at 628 (internal citations omitted).

The seminal case interpreting *Skinner* and *Von Raab* within the Second Circuit is *Burka v. New York City Transit Authority*, 739 F. Supp. 814 (S.D.N.Y. 1990), which was issued just a year before the Omnibus Transportation Employee Testing Act was passed. The *Burka* Court held, citing *Skinner,* that the New York City Transit Authority ("TA") possesses a "special need" to search employees who perform safety-sensitive positions by subjecting them to random drug

testing. Hence, the Court found that random drug testing of employees working in safety-sensitive jobs did not violate the Fourth Amendment. The Court went on to analyze a host of different jobs within the TA to determine which were safety-sensitive. In so doing, the Court stressed the language in *Skinner:* that to be safety-sensitive, a task must be so important that not paying attention, for even a minute, can cause disaster. If the risk to the public is "indirect," or is "through a chain of ensuing circumstances," the work is not safety-sensitive. *Id.* at 821 (citing *Harmon v. Thornburgh,* 878 F.2d 484 (D.C. Cir. 1989), *cert. denied sub nom. Bell v. Thornburgh,* 493 U.S. 1056 (1990)). The *Burka* Court further cited *Harmon* as follows:

> The public safety rationale adopted in *Von Raab* and *Skinner* focused on the *immediacy* of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs.

Id. (emphasis in the original).

With this approach, the Court found that some jobs, if not properly done, would impact public safety but that the impact was only indirect and thus did "not rise to the level of safety-sensitivity." 739 F. Supp. at 822. Nonetheless, the Court found that the TA maintained a "legitimate interest" in disciplining employees who engaged in illegal drug use prior to or at work. 739 F. Supp. at 826. Thus, upon a finding of reasonable, individualized suspicion, the TA could drug-test employees in non-safety sensitive positions without having to seek a warrant. 739 F. Supp. at 828.[6]

Notably, the *Burka* Court found that many employees who actually performed repairs on train equipment and systems, including track workers, track cleaners, bus maintenance staff, power distribution maintainers, and laborers in the car equipment department, did not hold safety-sensitive positions, even though their work could impact the public, largely because supervisors and/or other workers check their work. For example, regarding track workers who fix the tracks, the Court noted "the degree of supervision . . . by co-workers and forepersons." 739 F. Supp. at 823. Regarding track cleaners who clean debris from the work area, the Court noted that they play "a role in the safety of the subway," because they help prevent fires and dispose of hazardous waste. Despite that role, however, the Court found their jobs fell short of

[6] The Court held that the standard of reasonable suspicion permits testing of non-safety-sensitive job titles after an incident or accident. 739 F. Supp. at 830.

safety-sensitive "because their work is checked and there is only an indirect connection between a negligent cleaning job and disastrous consequences." *Id.* Similarly, the Court noted that bus maintenance staff who repair buses engage in work which "is essential to the safety of buses." *Id.* at 825. However, the Court held that "the repair system operates in a manner which prevents a momentary lapse of attention from directly causing disastrous consequences," because there are multiple safety checks after the work is done and at the beginning of each shift. *Burka,* 739 F. Supp. at 825.

As to power distribution maintainers, responsible for maintaining the third rail, the Court noted that they work in a group or with forepersons, and held, "the only ramification of negligent power distribution is that the worker may hurt himself or not repair the third rail efficiently, and the foreperson's supervision should prevent such occurrences." 739 F. Supp. at 823. Regarding laborers in the car equipment department who perform repairs on train equipment, including critical parts such as the air brake and electrical system, the Court held they were not safety-sensitive because they work "under the scrutiny" of supervisors, forepersons, and co-workers, and that the train is tested by a team of workers following repairs on critical systems. *Id.* at 822.

The Court also found that a myriad of maintenance titles within the Track and Structures Department, including power carpenters, masons, ironworkers, tinsmiths, plumbers, sign painters, general painters and maintainers of air conditioning, and maintainers of lighting, elevators, escalators, ventilation, and hydraulic systems, did not work in safety-sensitive positions, even though they are "essential to the smooth operation of the subway system" and "negligence on their part can be part of a chain of events which ends in injury." 739 F. Supp. at 824. The Court stressed that there is no evidence that "a lapse of attention" on their part "could lead directly to a disastrous consequence." *Id.*

By contrast, the Court held that a number of other job titles, including high-pressure heating plant maintainers, signal maintainers within the electrical department, and power maintainers who work directly with power lines, were safety-sensitive positions because of the lack of supervision and/or critical nature of the tasks performed. The Court noted that if the high-pressure heating plant maintainers do not inspect the heating plants hourly, as required, an explosion could result, "endangering the public and other workers." 739 F. Supp. at 824. The Court found that the signal maintainers work subject to limited supervision: their work may be spot-checked or only checked weekly by a supervisor. If they fail to notice a problem with a

signal, it may go undetected until an accident occurs. 739 F. Supp. at 824. As to the power maintainers who work with power lines, the Court held that even though their work is supervised at the ratio of approximately eleven workers to one supervisor and is subject to testing, there is "the imminence of a dangerous explosion if they make a mistake" in their work, such as removing a high-voltage circuit breaker improperly. 739 F. Supp. at 824.

Respondent contends that, even if he were called upon to perform maintenance on the ferry or its equipment, that work would not be safety-sensitive under *Burka*, because his work would be limited in scope and under the direct supervision of skilled trades people. Thus, respondent argues (citing *Burka,* 739 F. Supp. at 821 (quoting *Skinner,* 489 U.S. at 628)), that his duties are not "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Rather, any risk to the public is minimal and indirect. Petitioner asserts that the regulations define safety-sensitive work as "maintaining (including repairs, overhaul, and rebuilding) a revenue service vehicle or equipment used in revenue service." 49 C.F.R. § 655.4. Petitioner argues further that the work which respondent could be assigned to perform on the ferries fits within the meaning of safety-sensitive as interpreted by the courts.

As a preliminary matter, the federal regulations must be read in conjunction with applicable Supreme Court and federal case law which limits random drug testing of public employees to those workers holding safety-sensitive positions. The Senate Report on the Omnibus Transportation Employee Testing Act of 1991 makes clear that the legislation was meant to codify the constitutional standards enunciated in *Skinner* and *Von Raab.* After citing these two cases as support for the constitutionality of drug and alcohol testing of safety-sensitive transportation employees, the Report stresses, "Since this particular legislation is narrowly tailored to include only those engaged in tasks which have a direct relation to public safety the Committee believes that the legislation will withstand any and all challenges." Report of the Committee on Commerce, Science, and Transportation, Omnibus Transportation Employee Testing Act of 1991, S. Rep. No. 102-54 at 8 (1991).

Burka is directly on point and is controlling. The *Burka* analysis on safety-sensitive positions was cited with approval in cases within this Circuit issued subsequent to the Testing Act, most notably, *Laverpool v. NYC Transit Authority,* 835 F. Supp. 1440, 1454, 1455 (E.D.N.Y. 1993), which contained an extensive discussion of the *Burka* decision. *See also*

Beharry v. Transit Authority, 1999 U.S. Dist. LEXIS 3157 at *27 n.2 (E.D.N.Y. 1999) (noting that the employee in question acknowledged holding a safety-sensitive position). As did *Burka,* the Third Circuit's decision in *Mollo v. Passaic Valley Sewerage Commissioners,* 406 Fed. Appx. 664 (3d Cir. 2011), cited by petitioner (Pet. Post-Trial Br. at 7-8) followed the *Skinner* holding that in order to be safety-sensitive, a worker must engage in tasks, "the discharge of which were fraught with risks of serious injury." 405 Fed. Appx. at 669. And in 1997, the United States Supreme Court, while not specifically addressing the issue of what constitutes safety-sensitive work, reiterated its holdings in *Skinner and Von Raab* that "the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller,* 520 U.S. 305, 318 (1997) (Georgia statute requiring that candidates for certain state offices certify that they have tested negative on urinalysis drug test held to violate Fourth Amendment). Writing for the Court, Justice Ginsburg stressed, ". . . where public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search." 520 U.S. at 323.

I am mindful, as petitioner notes, that there was a ferry accident on October 15, 2003, which resulted in numerous deaths and injuries, and that the ferry carries approximately 22 million people each year (Pet. Post-Trial Br. at 15; Tr. 107). There is without doubt a compelling public interest in maintaining the safe operation of the ferry. Even if respondent might be called upon only to assist skilled trades people on the ferry, or to make minor repairs, it would be myopic to conclude that there is no connection between such work and public safety. However, there were many employees in *Burka* whose work impacted public safety, but whose jobs did not rise to the level of safety-sensitivity required to justify random testing under the Fourth Amendment. Instead, public safety considerations permitted testing upon a finding of reasonable, individualized suspicion, including following an accident or incident.

The question to be determined here, as in *Burka,* is whether respondent could be called upon to perform "duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner,* 489 U.S. at 628. If so, then the Department acted properly in subjecting respondent to a drug test. If not, then the Department exceeded its authority and the remedy under controlling state case law is suppression of the drug test result.

Clearly, respondent's work within Terminal Operations does not involve work on the ferries or on ferry equipment, and is not safety-sensitive. The focus therefore must be on what tasks respondent could be required to perform if assigned, even temporarily, to the Ferry Maintenance Division. The most detailed testimony came from Mr. Collins, Ferry Engineering Director since about 2006, who testified that respondent worked for Ferry Maintenance from 2006 until about 2009 (Tr. 74). Apart from respondent, there has not been a maintenance worker assigned to the Ferry Division (Tr. 92).

Mr. Collins explained that Ferry Maintenance is one of two subgroups within Ferry Engineering. The other subgroup is Engineering, which includes the professional engineers and the port marine engineers. Ferry Maintenance includes the trades personnel, maintenance work control center, and marine electronic technicians (Resp. Ex. A). Mr. Collins testified that respondent might be called upon to perform any work within his job specification (Tr. 78), which, as noted above, provides that a maintenance worker, "[u]nder direct supervision, assists in the routine maintenance, operation, and repair of public buildings and structures, and the equipment they contain" (Pet. Ex. 7). Respondent's job specification goes on to list the following "examples of typical tasks":

> Maintains, adjusts and makes minor repairs of building hardware, furniture, shelving and equipment.
>
> Replaces broken window and door glass.
>
> Repairs windows and sash.
>
> Makes minor repairs to masonry, woodwork, flooring and walls.
>
> Makes minor repairs to building electrical, plumbing and heating systems.
>
> Assists in relocating building equipment as directed.
>
> Visually inspects public buildings, structures and equipment to assess and check for defects, malfunctions and hazardous conditions. Visually checks for and records the observable conditions of the premises. Files reports.
>
> Keeps records.
>
> Operates a motor vehicle to travel to and from work sites.

(Pet. Ex. 7).

Mr. Collins testified that respondent would have worked both on the ferry and in the ferry terminals when previously assigned to Ferry Engineering (Tr. 81). Notably, when asked if respondent had performed any work relating to the first "typical task" on the job specification – maintaining, adjusting, and making minor repairs to building hardware, furniture, shelving, and equipment, Mr. Collins demurred: "I can't specifically state that he actually did the work. But he would certainly have assisted the others doing that sort of work." (Tr. 78). When asked about the other typical tasks, Mr. Collins stated that respondent "may be assigned or directly assist others" in the performance of these duties (Tr. 79).

Asked for specific examples of making minor repairs to electrical, plumbing, or heating systems, Mr. Collins said that respondent might be called upon to do "minor electrical work, which perhaps might be minor wiring, or changing light bulbs, that sort of thing" or minor plumbing, such as "just tightening up leaking plumbing, that sort of thing" (Tr. 80). He went on to deem *any* type of electrical repair to involve "critical equipment," because "if a repair is done improperly, that might lead to failure of the system or component which might result in a casualty to the ferry or something to that effect" (Tr. 80). And, further, he testified that because the ferry carries passengers, and that repairs are sometimes done with thousands of passengers on board, this results in the "potential for passenger injury or casualty" (Tr. 86-87, 107).

Mr. Collins demurred when asked whether respondent would be called upon to make inspections of the ferries. He said that he did not think respondent would be specifically called upon to do so but that he would be expected generally to be aware of unsafe conditions and report them (Tr. 87). He was not asked any questions about whether respondent would be expected to drive to and from work sites. There is no indication in the record, however, that driving would be required to get to the ferry maintenance terminals.

Captain DeSimone, the Chief Operating Officer, gave similar testimony, relying on the tasks and standards for the maintenance worker title. He testified that a maintenance worker deployed to work on the ferry or with ferry equipment "would work and assist" with the various trades, both on board the ferry boats and in the maintenance terminals (Tr. 106). The work could include repairs to the electrical, plumbing, and heating systems, which are "crucial systems" (Tr. 106). He also noted that respondent has been vetted for an access card by the Transportation

Security Administration which allows him unrestricted access to all areas of the ferry, the maintenance facility and the terminals (Tr. 109). On board the vessels, he would have access to the engine room (Tr. 122).

Asked specifically what respondent could be called upon to do on the ferry, Captain DeSimone said he might be asked to assist with an engine problem. He might come aboard with the trades people, help them get their equipment on board, and "assist them to make a repair on a main engine" (Tr. 132). He testified that it would not be "unreasonable to imagine a person under the influence of drugs or alcohol down in the engine room, with machinery, moving machinery running, vital machinery, with a couple of thousand passengers on board, [who] either drops a bucket of tools on a piece of moving equipment or falls into moving equipment that stops the vessel" (Tr. 132). In addition, respondent could be directed to make minor repairs to the electrical or plumbing systems, such as fixing a light switch (Tr. 132). Captain DeSimone said that if this was not done properly, it could cause a fire, which could short out a system and "knock off all power" on the ferry (Tr. 133).

Captain DeSimone testified that he did not know whether respondent would be directly supervised in the performance of electrical work, such as closing up a switch plate, because respondent's position is not an entry-level position but requires as a qualification requirement that respondent have three years of full-time satisfactory experience as a mechanic, journeyperson or helper in the electrical trades (Tr. 118).

However, the qualification requirements are three years of full-time satisfactory experience as a mechanic, journey person or helper in the electrical trades, the mechanical trades, *or* the construction or maintenance of buildings, *or* at least two years of such experience plus relevant training, or comparable experience and/or education (Pet. Ex. 7). Thus, the job specification does not require experience in the electrical trades.

As did Mr. Collins, Captain DeSimone testified that doing minor electrical work "could have dramatic implications down the road" (Tr. 119). He acknowledged that he did not review the work orders that respondent has been given throughout his employment (Tr. 134-36). However, he believed he offered "a very accurate description" of what respondent could be doing (Tr. 135), based on his job specification. He believes that respondent, because he deals with electrical and plumbing systems, has "the potential to compromise the safe operation of the ferry boats" and the safety of the passengers on board the boats (Tr. 110). According to Captain

DeSimone, "If at any time you're involved with electrical or plumbing systems, you start getting into an area that is directly related to the safe operation of the ferry boats" (Tr. 106).

I agree with both Captain DeSimone and Mr. Collins that respondent could be assigned work that could impact public safety if improperly performed. It is understandable that the Ferry Division would consider random testing an appropriate mechanism to deter drug use and enhance public safety.

However, the issue, as framed by the United States Supreme Court in *Skinner* and as construed by the Southern District in *Burka*, is not whether any particular job could pose a risk to public safety if improperly performed. Rather, the issue is whether the job, if improperly done, poses a direct and immediate risk to public safety such that a mistake or error could cause disaster. If so, then the job is safety-sensitive and the employee holding that job is subject to random testing under the Fourth Amendment. However, if the risk to the public is not immediate or direct, if a supervisor has an opportunity to recognize and rectify the employee's mistake, then the employee is not a safety-sensitive employee and is not subject to random testing.

Here, petitioner failed to produce evidence that the work that respondent could be called upon to perform would rise to the level of safety-sensitivity, as that term was defined in *Skinner* and construed in *Burka.* Mr. Collins had little to say about what work respondent actually performed within the Ferry Maintenance Division when he worked there. He quite candidly testified that while respondent would have assisted some of the trades people in making repairs on the ferry, he could not say whether respondent would have made any of these repairs himself. Indeed, as respondent is not a skilled electrician, or plumber, and as his job specification does not require experience specific to the electrical or mechanical trades, it would appear unlikely that he would be called upon to perform a job requiring particular expertise or knowledge that a skilled trades person would possess.

Respondent's job specification is controlling regarding the work that he could be called upon to perform. That specification provides that he performs work "under *direct supervision*" (emphasis added). It also provides that he "*assists* in the routine maintenance, and repair of public buildings and structures, and the equipment they contain" (emphasis added), and lists as typical tasks "minor repairs" to "building hardware" or "building equipment" or "building electrical, plumbing, and heating systems." Any such work would be under "direct supervision." It is the degree of supervision, and the fact that respondent could only be assigned to *minor*

repairs, that makes him analogous to those train and bus workers in *Burka* whom the Court found were not safety-sensitive. The *Burka* court stressed that supervision is a significant factor in determining whether a job title is safety-sensitive. There were numerous employees discussed in the *Burka* decision whose work, if not properly done, could affect public safety, but the Court explicitly found that their work was not safety-sensitive because the degree of supervision would prevent a "momentary lack of attention from directly causing disastrous consequences." 739 F. Supp. at 825.

Nor does the Third Circuit decision in *Mollo* provide a ground for finding respondent safety-sensitive. Although petitioner's brief characterizes Mr. Mollo as a maintenance worker (Pet. Post-Trial Br. at 7-8), Mr. Mollo was not a maintenance worker at the time of testing. Instead he had been promoted to a landscaping position. The Court found that his job involved landscaping and snow removal duties throughout the sewage treatment plant, that he used vehicles and motorized equipment, that he sometimes worked alone, and that he used tools to detect whether employees could safely enter possibly dangerous airspaces. 406 Fed. Appx. at 664, 669. Thus, Mr. Mollo is not analogous to respondent, a directly supervised maintenance worker who could be called upon to assist in minor maintenance and repairs.

Mr. Miller's testimony that *any* type of electrical repair could cause system failure if done improperly is not taken lightly. Nor is Captain DeSimone's testimony that respondent could be called upon to fix a light switch, which could, if improperly performed, cause a fire, or that he could drop equipment into the engine or fall into moving equipment if under the influence of drugs or alcohol. It is also understood that respondent could be called upon, not only to do work in the ferry maintenance terminal, where his work would presumably be checked before the ferry was put into operation, but on board a ferry in passenger service.

However, respondent's job specification -- which is controlling -- provides that respondent will be assisting other people in routine maintenance under direct supervision. Thus, either he will be helping other people perform their work (for example, carrying tools for skilled trades people) or he will be performing minor repairs himself under the supervision of a skilled trades person or supervisor. This is not an individual who will be working on his own. Because respondent is directly supervised, his work is subject to a supervisor's scrutiny. Thus, his supervisor will be in a position to immediately intervene and should be able to rectify any mistake or error which respondent might make. Petitioner maintains that respondent could

possibly drop a piece of equipment into the engine or even fall into the engine. While such events may be possible, they are precisely the sort of indirect risks considered and rejected by the Southern District in *Burka*, which held that possible danger, alone, is not enough to prove that an employee subject to supervision holds a safety-sensitive position.

On this record petitioner has failed to establish that respondent is a safety-sensitive employee within the meaning of the federal regulations and controlling case law. Thus, while respondent is subject to warrantless testing after an incident or accident or upon a finding of individualized, reasonable suspicion, he is not subject to random drug testing under the "special needs" exception to warrantless testing under the Fourth Amendment.

Recommendation

Because the September 13, 2010 drug test was not reasonable under the Fourth Amendment, it must be suppressed. The charge against respondent must therefore be dismissed. *See Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 24 N.Y.2d 647, 657, 662 (1969); *Fiorenza v. Gunn*, 140 A.D.2d 295, 300 (2d Dep't 1988).

Faye Lewis
Administrative Law Judge

July 13, 2011

SUBMITTED TO:

JANETTE SADIK-KHAN
Commissioner

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Commissioner's Decision (Dec. 2, 2011)

I have received and reviewed the Report and Recommendation dated July 13, 2011 issued by Faye Lewis, Administrative Law Judge ("ALJ") of the City of New York Office of Administrative Trials and Hearings ("OATH"), the relevant sections of the record of the hearing held before the ALJ, which includes the transcripts, the exhibits introduced at the hearing and the "Fogel" letter dated August 25, 2011 submitted by the Respondent's counsel. In the Report and Recommendation, the ALJ recommends that all charges against the Respondent be dismissed. As the Commissioner of the Department of Transportation ("DOT"), I have the authority, pursuant to Section 75 of the New York State Civil Service Law, to accept or reject the recommendation.

For the reasons discussed below, while I am accepting the ALJ's finding rejecting the Respondent's claim that he was not in a safety sensitive position because he was not assigned to work on ferryboats, I reject the ALJ's finding that Respondent was not in a safety sensitive position under the pertinent Federal regulations because his job specification provides that his work is performed under direct supervision. Therefore, I am rejecting the ALJ's conclusion that subjecting Respondent to a random drug test violated his right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and I am rejecting the recommendation that the charges be dismissed. It should be noted that, with respect to the legal issues addressed in this Determination, I have been guided by DOT's Division of Legal Affairs.

I.

APPLICABLE STATUTORY PROVISIONS

Pursuant to 49 U.S.C §5331(b), the Omnibus Transportation Employee Testing Act of 1991 (the "Act") recipients of federal transit aid are required to establish programs to conduct pre-employment, reasonable suspicion, random and post-accident drug and alcohol testing for employees responsible for the performance of safety sensitive functions. As an employer that receives financial aid from the Federal Transit Administration ("FTA"), DOT is required to comply with the drug and testing alcohol regulations pursuant to the, the Act, set forth at 49 C.F.R. §655.1 et seq. Under these regulations, a "safety sensitive function" is defined as follows:

1. Operating a revenue service vehicle, including when not in service;

2. Operating a non revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

3. Controlling dispatch or movement of a revenue service vehicle;

4. Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service ... ; and

5. Carrying a firearm for security purposes.

49 C.F.R. §655.4.

Pursuant to 49 C.F.R. §655.45, safety sensitive employees are subject to random testing for drugs and alcohol. The testing procedures for all drug and alcohol testing covered by 49 C.F.R. Part 655 are governed exclusively under 49 C.F.R. Part 40 as promulgated by the United States Department of Transportation ("US DOT"). (*See*, 49 C.F.R. §40.1). It was under the authority of these regulations that the Respondent whose duties as a Maintenance Worker include "[m]aintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service" was properly subject to a random drug test on September 13, 2010.

II.

STATEMENT OF FACTS

The Respondent has been employed by DOT since November 26, 1990 and is assigned to the Maintenance Worker title at DOT's Staten Island Ferry Division. The Tasks and Standards[7] for the Maintenance Worker title requires the employee to assist in the routine maintenance, operation and repair of public buildings and structures[8], and any equipment it contains. The

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[7] Petitioner's Evidence #7.

[8] According to the *Means Illustrated Construction Dictionary*, 3rd Edition, Unabridged, a structure is defined as a combination of units fabricated and interconnected in accordance with a design and intended to support vertical and horizontal loads. Accordingly. the work required under the Maintenance Worker title can include boats.

Tasks and Standards also require that employees in the Maintenance Worker title visually inspect public buildings, structures and equipment to assess and check for defects, malfunctions and hazardous conditions. The Tasks and Standards also give examples of typical tasks[9].

The Respondent is designated as a safety sensitive employee pursuant to Federal Regulations and DOT's *Controlled Substance and Alcohol Abuse Policy For Employees Assigned To Work In Connection With The Staten Island Ferry* ("the Policy")[10]. Ferry Employees that are designated as safety sensitive are also referred to under the Policy as "covered employees." All covered employees under the Policy are required to undergo, random alcohol and drug testing in accordance with pertinent federal regulations found at 46 C.F.R. Parts 4 and 16, 49 C.F.R. Part 655 and 49 C.F.R. Part 40. Pursuant to the Policy, if a covered employee has a verified positive drug test, the employee will be immediately removed from duty. DOT will seek the termination of an employee who receives a verified positive drug or alcohol test result.[11]

Respondent's job title is classified under the Policy as safety sensitive because it requires "[m]aintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service," as set forth under 49 C.F.R. §655.4. On September 13, 2010, the Respondent submitted to a random drug test which resulted in a positive test result for marijuana at a level higher than permitted under the Federal Regulations and the Policy.[12] In accordance with Section 75 of the Civil Service Law, the Respondent was suspended, by letter dated September 20, 2011, without pay for the period of September 20, 2010 through October 19, 2010.[13] On October 13, 2010 the Respondent was duly served with the charges at issue in this matter. These charges accused the Respondent of violating:

1. The New York City Department of Transportation's Controlled Substance and Alcohol Abuse Policy For Employees Assigned To Work in Connection With, The Staten Island Ferry (Charge 1)

[9] Petitioner's evidence #7.

[10] Petitioner's evidence #1.

[11] Petitioner's Exhibit #1, DOT's Policy.

[12] ALJ's Exhibit, Disciplinary charges dated October 8. 2010.

[13] Petitioner's Evidence #4. Suspension Notice and Petitioner's Evidence #5, Lifting of Suspension Notice.

2. Paragraph 46 of the NYC DOT Code of Conduct (the "Code") for testing positive for Marijuana during a random drug test on September 13, 2010 (Charge 2);

3. Paragraph 2 of the Code for engaging in conduct prejudicial to the good order and discipline of DOT (Charge 3); and

4. Paragraph 2 of the Code for engaging in conduct tending to bring the City, DOT or any other City agency into disrepute-(Charge 4).[14]

A trial was held at OATH on March 9 and March 14, 2011. DOT called eight witnesses and Respondent called two witnesses and did not testify on his own behalf. Post-trial briefs were submitted by DOT and the Respondent on May 23, 2011.

III.
THE ALJ'S FINDINGS

The ALJ rejected the Respondent's contention that because the Respondent was not assigned to work on the Ferryboats on the date he was tested he cannot be considered to have been performing safety sensitive work. (R & R at 10). The ALJ cited 49 C.F.R. §655.4. Under this provision, the performance of a safety sensitive function " ... includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions." The ALJ, properly relying on the First Department's decision in *Sander v. NYC Dep't of Transportation*, 23 A.D.3d 156 (lst Dep't. 2005), concluded that because the Respondent could have been immediately re-assigned from the Ferry Division's Terminal operations Unit, where he was performing custodial work on the day he was tested, to the Ferry Engineering Unit which is responsible for repairing and maintaining the Ferryboats, the Respondent's position on this point was in error (R & Rat 10). The ALJ also rejected the Respondent's contention that the potential re-assignment of the Respondent to work on the Ferryboats constitutes out-of-title work (R&R at 8-10).

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[14] ALJ Exhibit, Disciplinary Charges dated October 8, 2010.

However, the ALJ ultimately recommended that the charges against the Respondent be dismissed based on her conclusion that even if the Respondent were assigned to work on the Ferryboats, the work he could be required to perform under the Tasks and Standards for the Job Specification of a Maintenance Worker are not safety sensitive (R & R at 10). For the reasons discussed below, I respectfully reject the ALJ's recommendation.

IV.

DISCUSSION

The *Burka* Decision Was Not Properly Applied to the Facts Elicited at the Respondent's OATH Trial

In reaching her conclusion that work that could be assigned to the Respondent in connection with repair or maintenance of Ferryboats is not safety sensitive, the ALJ relied primarily on the decision of the Federal District Court for the Southern District of New York in *Burka v. New York City Transit Authority*, 739 F. Supp. 814 (S.D.N.Y. 1990) (R & R at 11). In *Burka*, the Court reviewed a challenge by several classes of workers employed by the New York City Transit Authority (NYCTA) as to the constitutionality under the Fourth Amendment of warrantless mandatory drug testing conducted by the NYCTA. Relying on the two leading United States Supreme Court decisions on the constitutionality of suspicionless drug testing of government employees, *Skinner, Secretary of State et al v. Railway Labor Executive Association, et al,* 489 U.S. 602 (1988) and *National Treasury Employees Union et al v. Von Raab*, *Commissioner, United States Custom Service*, 489 U.S. 656 (1988), the *Burka* court evaluated the safety sensitive nature of each job classification in determining whether the drug testing at issue was in violation of the Fourth Amendment. In the *Skinner* decision, warrantless mandatory drug tests of railway employees required by the Federal Railroad Administration were upheld on the ground that the "governmental interest in ensuring the safety of the traveling public plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty." *Skinner* at 621. The Court limited such warrantless searches to "...employees engaged in safety sensitive tasks," *Id.* at 620, and determined that such employees "...discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 629. In summary, the Court in *Skinner* found

that the government's interest in protecting the safety of the traveling public outweighed the employees' privacy interests under the Fourth Amendment. *Id*. at 634.

The U.S. Southern District Court in *Burka*, using the standard for determining safety sensitive work established in the *Skinner* and *Von Raab* decisions, determined that some of the duties performed by NYCTA employees were safety sensitive, while others were not The main litmus test the *Burka* Court used in making this determination was whether the degree of supervision the employees at issue were subject to made it likely that potentially serious mistakes by these employees would be corrected by their supervisors. *Burka* at 822. The court found that such supervision created an "... indirect connection between the public safety ..." and the repair work being performed and thus, such work " ... will not have the direct and immediate disastrous consequences required by *Harmon v. Thornburgh*." *Burka* at 822.

The ALJ in the instant case concluded that because most of the work performed by the Respondent requires supervision under the job specifications for a Maintenance Worker, the work he could be assigned to perform on Ferryboats is not safety sensitive since "his supervisor will be in a position to immediately intervene and should be able to rectify any mistake or error which respondent might make." (R&R at 20). This conclusion by the ALJ is mistaken and was contradicted by Captain James DeSimone, DOT's Chief Operating Officer of the Staten Island, whose trial testimony established precisely the type of direct and immediate threat the Respondent's conduct could pose to the riding public and his fellow employees, despite the Respondent's work being supervised. Captain DeSimone testified that as part of the Respondent's duties, he could be called upon to assist in the provision of repairs to the main engine room of a Ferryboat while it is in service carrying thousands of passengers.[15] The Respondent can also be required to carry equipment or tools into the engine room to help effect such repairs.[16] Additionally, the Tasks and Standards for the Maintenance Worker title provide that the Respondent would be expected to make visual inspections of the Ferryboats " ... to assess and check for defects, malfunctions and hazardous conditions."

As Captain DeSimone further stated in his testimony, it is not unreasonable for DOT to be concerned about the immediate dangers posed to Ferry passengers, personnel, and vessels that can result from an employee performing such tasks under the influence of drugs and/or alcohol.

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[15] DeSimone Cross, pp. 132.

[16] *Id.* at 132.

Such dangers include, but are not limited to, the equipment or tools being dropped into a piece of critical moving machinery that could stop the boats, or the employee himself falling into the machinery causing grave damage to himself, the boat and/or its passengers.[17] For instance, if the Maintenance Worker under the influence of drugs and/or alcohol is assisting in electrical repairs in the motor room of an operating Ferryboat (motors and drives running, propeller shaft turning and a variety of critical electronic and electrical equipment operating), and the Maintenance Worker falls into a turning propeller shaft as the result of being under the influence of drugs and/or alcohol, not only is the Maintenance Worker's health and well-being in jeopardy, the vessel's ability to maneuver is suddenly compromised and, therefore, the safety and well-being of thousands of passengers is jeopardized. Likewise, if the Maintenance Worker under the influence of drugs and/or alcohol is assisting a mechanic in the engine room of an operating Ferryboat (engines, pumps, auxiliaries and a variety of critical electronic and electrical equipment operating), and the Maintenance Worker drops a bucket of tools or spare parts into a rotating piece of machinery or onto vital control equipment this can immediately affect the ferryboat's main propulsion system, such that the vessel's ability to maneuver is suddenly compromised and, therefore, the safety and well-being of thousands of passengers is jeopardized.

In either of these instances, the Maintenance Worker's supervisor would not be able to immediately intervene to mitigate the consequences of such occurrence. Rather, such accidents, or any failure by the Respondent to identify or rectify a hazardous condition, or any action or inaction which arises out of being under the influence of alcohol and/or drugs would result in immediate consequences. Given the nature of the work as described, the mere fact that the Respondent's work is subject to supervision does not render it an indirect threat to public safety.
The engine room and/or machinery spaces on any operating vessel are critical, confined and hazardous spaces that contain significant vital equipment, such that any and all persons working in these spaces must be drug and/or alcohol free with their presence and wits about them. The ALJ's conclusion in this regard fails to recognize the inherent hazards associated with working in close proximity to operating machinery and high voltage.

The referenced case law, regulatory interpretation, witness testimony and the documentary evidence produced at the OATH hearing conclusively demonstrates that the Respondent was a safety sensitive employee of DOT at the time he was subject to random drug

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[17] *Id.* at 132.

and alcohol testing on September 13, 2010, in accordance with the pertinent Federal Regulations and the Policy.

***Burka's* Reliance on Supervision as a Determinative Factor of Safety Sensitive Work Frustrates the Purpose of the Omnibus Transportation Employee Testing Act**

The *Burka* case was decided in 1990, one year before the Omnibus Transportation Employee Testing Act went into effect. Its reliance on supervision as a determinative factor which renders a risk indirect is at odds with the Act, the FTA regulations adopted under the authority of the Act, as well as case law interpreting the Act.

The intent of Congress when it passed the Act was unquestionably the protection of the public by deterring the consumption of drugs and alcohol by transit employees who are assigned to safety sensitive tasks. In its report recommending passage of the Act, the Senate made very clear the problem it was seeking to address:

> In the transportation sector, the costs of drug and alcohol use are clearly magnified. Whenever individuals board an airplane, train or motor vehicle, they put their lives into the hands of those who are being paid to ensure safe passage. This trust relies upon the vigilance of trained employees to remain alert to any possible occurrence that might endanger the safety of the traveling public. The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety sensitive positions mandates that every effort to eliminate the cause of that threat.

S. Rep. No. 54, 102nd Cong., 1st Sess. 2 (1991) (emphasis added).

The report also unambiguously made drug and alcohol testing the primary weapon that Congress chose to protect the riding public:

> This legislation is intended to deter the use of illegal drugs and alcohol by employees in safety sensitive positions through increased alcohol and drug testing. The bill promotes deterrence by requiring the testing of such employees in several situations: prior to employment; after an accident, upon reasonable suspicion and on a random basis ...

> The committee believes that testing is necessary to deter the use of illegal drugs by employees in safety sensitive positions.

Id at 6 (emphasis added)

The Senate Report, as the ALJ mentions in her Report and Recommendation, made clear that the Act was intended to codify the constitutional standards held in *Skinner* and *Von Raab*. In addition, the Act neither contemplates nor specifies the position or title of the worker, (e.g., maintenance worker, supervisor, captain, pilot, etc.) but rather keeps the language broad enough to include all employees who perform safety-sensitive functions. 49 C.F.R. Part 655. As referenced above, the term safety sensitive function is defined by 49 CFR §655.4 in the following manner:

"Safety sensitive function means any of the following duties, when performed by employees of recipients of, sub-recipients, operators, or contractors:

> 1. Operating a revenue service vehicle, including when not in service;
>
> 2. Operating a non-revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
>
> 3. Controlling dispatch or movement of a revenue service vehicle;
>
> 4. Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service ...; and
>
> 5. Carrying a firearm for security purposes.

49 C.F.R. §655.4 (emphasis added).

The FTA regulations broadly state that employees performing the listed tasks are covered by these regulations. There is no language within 49 C.F .R. Part 655 that limits the types of employees that are required to undergo drug and alcohol testing to those who are unsupervised, as the decision in *Burka* would mandate. It is in this regard that *Burka* narrows the scope of the Act and Federal regulations. In fact, the only limitation contemplated in the FTA regulations are

that such employees perform the task that are listed under 49 C.F.R. §655.4. Had Congress or the FTA intended to exempt supervised employees from drug and alcohol testing, it stands to reason that such an exemption would have been specifically stated in the Act or the regulations that were promulgated under the authority of the Act.

Moreover, the regulatory history of the FTA drug testing regulations adopted after the enactment of the Act demonstrates that the FTA intended to subject the broadest spectrum of employees performing maintenance work to random alcohol and drug testing. In response to comments from the public on the proposed definition of "safety sensitive" functions, United States Department of Transportation ("USDOT") commented:

> Another ambiguity mentioned by several commentators concerns the maintenance category, which several commentators believed would include workers who clean rather than repair transit equipment. We do not mean to cover such workers and emphasize that only mechanics that repair vehicles or who perform routine maintenance are the types of maintenance workers covered by the rule.

59 F.R. §7572, §7575.

There is no qualifying language in the USDOT commentary that safety sensitive work must have limited or no supervision to qualify for drug or alcohol testing.

Additionally, the intent of Congress when it passed the Act was to protect the traveling public by using random drug and alcohol testing as a powerful deterrent to employees who would recklessly endanger the lives of themselves or their fellow workers. Nor is there any support in the regulations for *Burka's* reliance on supervision as a factor weighing against the classification of maintenance work as safety sensitive. 49 C.F.R Part 655 which was promulgated after the *Burka* decision was issued, defines *all* maintenance work on revenue service vehicles as safety sensitive. The level of supervision provided to maintenance workers is not mentioned.

Cases in the Second Circuit which have cited *Burka* do not rely on its analysis of an alleged safety sensitive position using the supervision standard. *See, United States v. Jones*, 566 F. Supp. 2d 288 (S.D.N.Y. 2008)(burden of proof); *Kennedy v. City of New York*, 1996 U.S. Dist. LEXIS 18411 (S.D.N.Y. 1996)(standard for state and federal search and seizure analysis); *Lappas v. City of New York*, 1995 U.S. Dist. LEXIS 1780 (S.D.N.Y. 1995)(testing methods and procedures); *Griffin v. Long Island R.R.*, 1998 U.S. Dist. LEXIS 19336 (E.D.N.Y. 1998); *Russell Pipe & Foundry Co. v. City of New York*, 1997 U.S. Dist. LEXIS 1970 (S.D.N.Y. 1997)(due

process rights); *Laverpool v. New York City Transit Auth.*, 835 F. Supp. 1440 (E.D.N.Y. 1993) (job titles within the NYCTA found to be safety sensitive).

Burka's emphasis on supervision as a decisive factor in the determination of whether work is safety sensitive is no longer applicable after the passage of the Act. This departure from the *Burka* analysis is supported by *Dwan v. Massachusetts Bay Transportation Authority*, 1998 U.S. Dist. Lexis.4121, which was decided seven years after the passage of the Act. In *Dwan* a bus mechanic whose duties included repairing and installing body panels and welding challenged random drug testing implemented under the Act by the Massachusetts Bay Transportation Authority. The Court in *Dwan* found this work to be safety sensitive based on its conclusion that the pertinent FTA regulations at the time deemed safety sensitive work to include "...maintenance performed on mass transit vehicles." *Id*. at 6. The court did not delve into whether the plaintiff's work was supervised but whether it fit the description of maintenance on a transit vehicle and whether his "failure to properly perform these duties could well endanger the public." *Id.* at 7.

Applying the *Dwan* analysis here, it is clear that Respondent's work must be categorized as safety sensitive. As the trial record demonstrates and the ALJ properly found, there is no question that he can be called upon to perform maintenance work on a transit vehicle. It is instructive to note that the term "routine maintenance" used in the Maintenance Worker Tasks and Standards governing the work of the Respondent is the same term used by the USDOT in its commentary on the term safety sensitive referenced above. Further, the testimony of Captain DeSimone demonstrates that the Respondent's failure to perform his work property can endanger the public.

As such, the ALJ's reliance on *Burka* to recommend dismissal of the charges against the Respondent runs counter to the legislative intent of the Act and regulations promulgated under the authority of the Act. I, therefore, reject the ALJ's conclusion that the work on the Ferryboats that the Respondent was not in a safety sensitive position as defined under 49 C.F.R. §655.4.

V.

DETERMINATION

Upon my review of the transcript of the Respondent's hearing, the exhibits that were produced, and the ALJ's findings and recommendations, it is my determination that the Respondent is guilty of all charges based on his positive marijuana test results

Given the Respondent's duties as defined in the Tasks and Standards for the Maintenance Worker in the DOT Ferry's Division, his positive test result for marijuana is an egregious dereliction of duty that puts at peril the safety of the DOT Ferry Division employees and the tens of thousands of passengers who ride the Ferry on a daily basis. Respondent's conduct here is further exacerbated by the fact that he was well aware of agency's drug testing Policy and the Federal regulations as evidenced by receipts of the Policy and its amendments that he signed, yet made a terrible decision to ingest marijuana knowing full well of the potential consequence if he tested positive.[18]

Accordingly, it is my determination that the Respondent's conduct warrants the penalty of termination.

Dated: New York, New York
December 2, 2011

NEW YORK CITY DEPARTMENT OF
TRANSPORTATION
55 Water Street, 9th floor
New York, New York 10041

By: Janette Sadik-Khan
Commissioner

[18] Petitioner's Evidence # 2.