Fire Dep't v. Rolling

OATH Index No. 1615/11 (Sept. 23, 2011), *adopted*, Comm'r Dec. (Oct. 31, 2011), **appended,** *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-26-A (May 22, 2012), **appended**

EMT tested positive for marijuana in a workplace drug test. ALJ recommended that EMT be terminated from his employment.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
JONATHAN ROLLING
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Fire Department ("FDNY" or "Department"), pursuant to section 75 of the Civil Service Law. Petitioner alleges that Jonathan Rolling, an Emergency Medical Technician ("EMT"), tested positive for marijuana in a random workplace drug test in violation of section 4.2.50 of FDNY's General Regulations and section 6.1A of the Department's Substance Abuse Policy (ALJ Ex. 1).

A hearing was held on June 8, and July 11, 2011. Petitioner presented documentary evidence, two Department witnesses involved in the collection of the test sample from respondent, and one witness from the laboratory that tested it. When respondent declined to testify or present other evidence, petitioner called him as witness. Respondent claimed that his positive drug test was caused by multivitamins that contained hemp-seed oil. The record was held open until September 12, 2011, for the submission of closing briefs.

For the reasons below, I find that respondent tested positive for marijuana in violation of FDNY's rules and recommend that respondent be terminated from his employment.

ANALYSIS

Respondent has been an EMT for approximately 10 years (Tr. 180). On July 18, 2010, respondent was working as a dispatcher at the Emergency Medical Dispatch when he was

selected for a random drug test (Pet. Ex. 2; Tr. 181).

Petitioner's witnesses described in detail the manner in which respondent was selected for the drug test, how the urine sample was collected from respondent, the chain of custody procedures followed for the sample collected, and how it was tested by the laboratory (Samojedny: Tr. 18-21, 23, 25, 33, 38, 40, 43; Lin: Tr. 92, 93, 96, 109; Thomas: 127-28, 139-41; Pet. Exs. 1-4, 6). Based on the uncontroverted, credible testimony as supported by documentary evidence, I find that respondent was randomly selected for the drug test, that the sample was properly collected and the chain of custody maintained, and that the sample was scientifically tested by an independent laboratory using established methods.

The undisputed evidence also shows that on July 18, 2010, respondent provided a urine sample that tested positive for marijuana at a rate of 25 ng/L (Pet. Ex. 3; Tr. 21). The cut-off for a positive marijuana test is 15 ng/L measured by the GC/MS process (Pet. Ex. 3, 9). *See also* Fire Dep't Substance Abuse Policy, EMS Operating Guide Procedure No. 113-02 § 4.4 (May 7, 2007) ("OGP 113-02"). A positive drug test is prohibited conduct defined in the Department's Substance Policy. *See* OGP 113-02 § 6.

Here, there is no real dispute that respondent tested positive for marijuana. Instead, respondent argued that the positive test was the result of his legal ingestion of hemp-seed oil and that the testing method used failed to rule out this possibility (Tr. 156-57).

After being selected for a random drug test but before a urine sample is collected, employees must fill out a questionnaire that asks them to list all medications and dietary supplements consumed in the last 96 hours, as well as all foods consumed in the last 24 hours (Pet. Ex 6; Lin: Tr. 76). Respondent answered that he consumed "multi vitamins" in the previous 96 hours as well as various foods within the past 24 hours (Pet. Ex. 6; Tr. 182).

At the hearing respondent's counsel asserted that respondent's multivitamins contained hemp-seed oil that caused the positive drug test (Tr. 156). However, when questioned about his consumption, respondent could not name the type or brand names of the vitamins taken (Tr. 183, 191, 195, 202) even though he admitted to taking the same ones for the past two years (Tr. 184). When asked whether any contained hemp-seed oil, respondent claimed that he takes a variety of dietary supplements (not one type of multivitamin as suggested by the questionnaire) and that any one of them could have contained it. Respondent could not identify anything he consumed that contained hemp-seed oil (Tr. 192-93, 201-02).

Respondent further argued that the testing protocols used by the lab are faulty because

they cannot distinguish between illegal and legal activities and relied on *Doe v. Roe, Inc.*, 160 A.D.2d 255 (1st Dep't 1990). There, an employee alleged that his positive drug test was the result of eating bread with poppy seeds, not from an unlawful opiate, and that the GC/MS process could not distinguish between the two. The Court denied the employer's motion to dismiss and stated, "when challenged [the employer] must come forward with evidence establishing that its testing method accurately distinguishes between opiate users and consumers of lawful foodstuffs or medications." *Id*. at 256. There is a critical distinction between *Doe* and the instant case. On the motion, the *Doe* Court had to assume the employee's allegations to be true. Here, respondent's challenge was raised at the end of a hearing and such an assumption does not apply.

Moreover when recalled to the stand, Mr. Thomas, the supervisor of toxicology from the testing lab, testified credibly that the lab's testing methods distinguish between the lawful and unlawful consumption of tetrahydrocannabinol ("THC") found in marijuana. Specifically, the lab has a cutoff of 15 ng/L above zero in order to allow for low levels of THC that might exist from incidental contact with marijuana. The permitted range is based on studies from the Substance Abuse and Mental Health Administration (Tr. 165-67, 176).[1] Mr. Thomas also testified that hemp-seed oil comes from marijuana seeds and that he did not believe it was legal. Moreover, he was unaware of any medications or dietary supplements that contained hemp-seed oil and that even if it was in multivitamins, a person would have to consume them in "abusive" amounts to get a positive drug test above the established cut-off level (Tr. 159-63).

Although given the opportunity, respondent failed to rebut this testimony at the hearing. Instead, respondent attached exhibits and articles to his post-trial brief implying that THC can be found in commercially available hemp products, that there is no way to distinguish between the legal and illegal ingestion of THC, and that the United States Air Force makes the consumption of hemp seeds a violation of the military code. These exhibits lack foundation and may be unreliable. Petitioner objected and offered documents and case law suggesting science did not support the theory that hemp-seed products cause positive drug tests. Accordingly, respondent's post-trial submissions were deserving of little, if any, weight.[2]

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[1] The Substance Abuse and Mental Health Administration is a branch of the U.S. Department of Health and Human Services and is charged with, *inter alia*, improving treatment services for substance abusers. 42 U.S.C. § 290aa(d)(3); 42 C.F.R. § 93.220 (Lexis 2011).

[2] Petitioner's post-trial submission also included a decision from a Step I Disciplinary Hearing wherein the respondent's union representative allegedly stated that the positive drug test was a one-time mistake caused by respondent's past and casual drug use (Pet. Ex. 10). Respondent objected and asked that the document be struck from the record. Statements made during informal conferences or step hearings are admissible. *See Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 3 (Mar. 5, 2010). However, respondent was deprived of the

Respondent also failed to show that he ingested hemp-seed oil. Innocent ingestion is an affirmative defense that respondent must prove by preponderance of the evidence. *Green v. Sielaff*, 198 A.D.2d 113 (1st Dep't 1993); *Fire Dep't v. Milano*, OATH Index No. 2029/05 at 2 (July 3, 2006).

There is no evidence that respondent consumed hemp-seed oil in a lawful foodstuff, much less in a quantity that would trigger a positive test for marijuana above the level required by the testing procedure. Rather, respondent, an EMT who deals regularly with medical emergencies, made self-serving, incredible claims that his positive drug test may have come from hemp-seed oil contained in unidentified vitamins he was taking. Because this testimony was speculative and uncorroborated, it is rejected. *See Milano*, OATH 2029/05 at 2 (speculation that respondent innocently drank cocaine placed in his drink by unknown strangers at his wedding party at a Las Vegas hotel bar rejected); *Fire Dep't v. Persico*, OATH Index No. 2207/04 at 3 (July 25, 2005) (vague testimony that positive drug test came from consumption of an appetite suppressant that respondent could not recall the name of or when he took it rejected); *Transit Auth. v. Schooler*, OATH Index No. 264/92 at 9-12 (Jan. 10, 1992) (defense that cocaine was unknowingly ingested during oral sex rejected).

Respondent's additional attempts to characterize his status as one deserving protection under the New York State or New York City Human Rights Law are unavailing. These laws forbid an employer from discriminating against an employee based on an actual or perceived disability. Exec. Law § 296(1)(a) (Lexis 2011); Admin. Code § 8-107(1)(a) (Lexis 2011). The burden of proving the existence of such a disability rests on respondent. *Peltonen v. Scoppetta*, 2009 NY Slip Op 52001U, at *5 (Sup. Ct. Kings Co. 2009); *Fire Dep't v. Kirk*, OATH Index No. 441/06 at 7-8 (Apr. 26, 2006), *aff'd sub nom. Kirk v. City of New York*, 47 A.D.3d 406 (1st Dep't 2008). Except for vague arguments, there was no evidence that respondent suffers from a disability within the meaning of either law. 9 NYCRR § 466.11(h) (Lexis 2011); Admin. Code § 8-102(16)(c) (Lexis 2011).

In a second post-hearing submission, respondent requested that this tribunal take judicial notice of New York Labor Law section 201-D, "Discrimination against the engagement in certain activities."[3] Respondent failed to explain the basis for the request and did not make

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opportunity to rebut this double hearsay statement because it was not offered at the hearing. While it will not be struck from record, the exhibit will not be considered in rendering this decision.

[3] The relevant post-trial correspondence will be incorporated into the record as ALJ Exhibit 2.

arguments why this statute is applicable. Nothing in the law prohibits petitioner from disciplining respondent. Indeed, the ingestion of illegal drugs is a voluntary act that provides a legitimate, non-discriminatory basis for discipline. *Fire Dep't v. Rivera,* OATH Index No. 3416/09 at 6 (July 28, 2010).

Finally, respondent asked that his name be redacted from the decision because it would reveal his medical history and in effect accuse him of being a drug abuser. Petitioner objected. OATH rules provide that decisions "will" be published without redaction unless there are legally recognizable grounds to do otherwise. 48 RCNY § 1-49(d) (2011).

Respondent's claim that his privacy rights regarding his medical records will be violated is mistaken. No medical records were presented. The relevant evidence was the positive drug test. The regulations governing medical examinations under the Americans with Disabilities Act ("ADA") cited by respondent have no applicability here. A test to determine the illegal use of drugs in the workplace is not considered a medical examination under the ADA. 42 U.S.C. § 12114(d)(1) (Lexis 2011). Respondent did not provide support for the proposition that an EMT's positive drug test should remain confidential. *Cf. Dep't of Transportation v. R.B.*, OATH Index No. 1215/11 at 1 (July 13, 2011) (withholding employee's name where tested pursuant to federal regulations requiring confidentiality). Accordingly, respondent has failed to show good cause to redact his name for the decision.

FINDING AND CONCLUSION

> Petitioner demonstrated that respondent tested positive for the presence of marijuana in violation of section 4.2.50 of the FDNY's General Regulations 101-01 and section 6.1A of OGP 113-02.

RECOMMENDATION

As a result of respondent's positive drug test, the Department seeks termination of his employment. Respondent has worked for the Department since 2000. In 2006, respondent accepted an eight day suspension for failure to perform his duties adequately, insubordination, and falsifying an official report. His recent evaluations have been good or very good.

Drug use is not permitted in an agency whose mission is to safeguard the public safety. EMTs must be alert to handle life-threatening emergencies. Thus, absent exceptional mitigating circumstances, the Department has a "zero tolerance" policy for illegal drug use. *See Rivera*, OATH 3416/09 at 10 (EMT terminated where he tested positive for cocaine); *Milano*, OATH

2029/05 at 5 (firefighter terminated where he tested positive for cocaine); *Persico,* OATH 2207/04 at 4 (EMT who tested positive for a controlled substance terminated despite absence of any significant disciplinary record); *Fire Dep't v. O'Sullivan*, OATH Index No. 1914/05 at 12 (Sept. 29, 2005) (firefighter terminated where he tested positive for cocaine); *Fire Dep't v. Lumsden,* OATH Index No. 265/85 at 8 (Sept. 12, 1985), *adopted in pertinent part,* Comm'r Dec. (Oct. 2, 1985), *aff'd*, 134 A.D.2d 595 (2d Dep't 1987) (firefighter dismissed for positive drug test indicating the presence of marijuana). Here, there are no mitigating factors, exceptional or otherwise, and respondent does not have long tenure in his favor.

Accordingly, I recommend that respondent be terminated from his employment. *See Trotta v. Ward,* 77 N.Y.2d 827 (1991) (dismissal of police officer for one-time marijuana use not so disproportionate to the offense as to shock one's sense of fairness).

Alessandra F. Zorgniotti
Administrative Law Judge

September 23, 2011

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

APPEARANCES:

BELINDA DELGADO, ESQ.
Attorney for Petitioner

FAUSTO ZAPATA, ESQ.
Attorney for Respondent

Commissioner's Decision (Oct. 31, 2011)

On August 23, 2010, EMT Jonathan K. Rolling was served with disciplinary charges, specifying the following violations of the Fire Department's Operating Guide Procedure:

Charge 1: Positive Test Result of an Illegal Drug while On-duty, or while in Uniform, or while in any Department Premises, Property or Vehicles. On July 18, 2010, EMT Jonathan Rolling, of Emergency Medical Dispatch, violated Number 113-02, Section 6.1 A, of the New York City Fire Department's Bureau of EMS Operating Guide, by testing positive for marijuana while on-duty.

Charge 2: Conduct Prejudicial to the Good Order, Efficiency and Discipline of the Department. On July 18, 2010, EMT Jonathan Rolling, of Emergency Medical Dispatch, violated Number 101-01, Section 4.2.50 of the New York City Fire Department Bureau of EMS Operating Guide, by testing positive for marijuana while on-duty.

INTRODUCTION

A disciplinary trial on the charges was conducted at the New York City Office of Administrative Trials and Hearings ("OATH") on June 8, 2011, and July 11, 2011, before Administrative Law Judge ("ALJ") Alessandra Zorgniotti. I have carefully reviewed the Report and Recommendation issued by ALJ Zorgniotti dated September 23, 2011, as well as the transcript of the trial, exhibits introduced during the course of the proceeding as well as those attached to Respondent's closing brief.

OATH REPORT AND RECOMMENDATION

After a hearing that occurred on June 8, 2011 and July 11, 2011, during which the Petitioner had the opportunity to present evidence, ALJ Zorgniotti found the Respondent guilty of the charges:

Petitioner demonstrated that respondent tested positive for the presence of marijuana in violation of section 4.2.50 of the FDNY's General Regulations 101-01 and the section 6.1A of OGP 113-02. (OATH Report and Recommendation, page 5)

I concur with ALJ Zorgniotti's findings of facts and guilt that EMT Rolling violated the Department's Regulations 101-01 §4.2.50 and the Department's Substance Policy 113-02 §6.1A and agree with the recommended penalty of termination.

DISCUSSION

The mission of the Fire Department's Emergency Medical Services (EMS) is to provide timely, professional, pre-hospital emergency medical care and transportation that is of the highest quality to all who require such care within the City of New York. Additionally, the Fire Department operates a 911 communications center, to efficiently and effectively receive, prioritize, dispatch and coordinate the response of resources to medical emergencies. The efficient performance of this mission demands the highest level of mental and physical fitness, stamina and alertness. In order to ensure this highest quality of care, on May 7, 2007, the Fire Department implemented OGP 113-02, a revised Substance Policy for Drugs/Alcohol, applicable to all EMS employees. On July 18, 2010, EMT Rolling violated conduct standards set forth in the Substance Policy by testing positive for marijuana, while on-duty.

Counsel for EMT Rolling, in his *Fogel* letter, continued to assert that his client should not be terminated from his position because EMT Rolling's multivitamins allegedly contained hemp-seed oil which resulted in his positive drug test. However, I agree with the OATH Judge's conclusion that the undisputed evidence shows that on July 18, 2010, EMT Rolling provided a urine sample that tested positive for marijuana at a rate of 25ng/L.[4] Additionally, "[t]here is no evidence that respondent consumed hemp-seed oil .... much less in a quantity that would trigger a positive test for marijuana above the level required by the testing procedure. Rather, respondent an EMT who deals regularly with medical emergencies, made self-serving, *incredible* claims that his positive drug test may have come from hemp-seed oil contained in unidentified vitamins he was taking."[5] The ALJ went on to say that, "[b]ecause this testimony was speculative and uncorroborated, it is rejected" *citing Milano*, OATH 2029/05 at 2 (speculation that respondent innocently drank cocaine placed in his drink by unknown strangers at his

[4] OATH Report and Recommendation, page 2

[5] OATH Report and Recommendation. page 4.

wedding party at a Las Vegas hotel bar rejected); *Fire Dep't v. Persico*, OATH Index No. 2207/04 at 3 (July 25, 2005) (vague testimony that positive drug test came from consumption of an appetite suppressant that respondent could not recall the name of or when he took it rejected); *Transit Auth. v. Schooler*, OATH Index No. 264/92 at 9-12 (Jan. 10, 1992) (defense that cocaine was unknowingly ingested during oral sex rejected).[6]

After having reviewed the trial transcript, the OATH Report and Recommendation, the Respondent's post trial memorandum[7] and the *Fogel* letter submitted by EMT Rolling's counsel, my decision to terminate the respondent is based on the undisputed fact that he violated a Fire Department conduct standard when he tested positive for marijuana while on-duty. Such conduct cannot be tolerated by an organization that provides emergency medical care to the citizens of New York City.

Therefore, respondent is hereby terminated from his employment as an EMT with the Fire Department of the City of New York, effective this 31st day of October, 2011.

By Order of

Salvatore J. Cassano
Fire Commissioner

[6] *Id.*
[7] Although a Step I Hearing Decision was referenced in a footnote within the OATH Report and Recommendation, the ALJ did not consider it in her determination of a penalty against EMT Rolling. As a result, I did not review the Step I Decision or the Petitioner's post-trial submission to which it was attached.

NYC Civ. Serv. Comm'n Decision, Item No. CD 12-26-A (May 22, 2012)

THE CITY OF NEW YORK CIVIL SERVICE COMMISSION

In the Matter of the Appeal of:
JONATHAN ROLLING
Appellant
-against-
NYC FIRE DEPARTMENT
Respondent

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

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL, COMMISSIONER

ALINA A. GARCIA
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REPRESENTIVE FOR APPELLANT

BELINDA DELGADO, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, May 10, 2012 the City Civil Service Commission heard oral argument in the appeal of JONATHAN ROLLING, Emergency Medical Technician, NYC Fire Department, from a determination by the NYC Fire Department, finding him guilty of charges of incompetency or misconduct and imposing a penalty of TERMINATION following an administrative hearing conducted pursuant to Civil Service Law Section 75.

COMMISSIONERS' FINDINGS

After a careful review of the testimony adduced at the departmental hearing and based on the record in this case, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the New York City Fire Department.

NANCY G. CHAFFETZ*, Commissioner/Chair,* Civil Service Commission
RUDY WASHINGTON, *Commissioner/Vice Chair,* Civil Service Commission
CHARLES D. McFAUL, *Commissioner,* Civil Service Commission

May 22, 2012