Dep't of Sanitation v. C.L

OATH Index No. 760/11 (Nov. 8, 2010), ***rev'd,*** NYC Civ. Serv. Comm'n Item No. CD 11-89-R (Nov. 29, 2011), ***appended***

ALJ found that the Department proved that respondent sanitation worker refused to submit to a random drug test, and recommends that he be suspended for 25 days without pay.

CSC found that respondent's efforts at alternative testing demonstrated that he was not refusing to submit to a random drug test, and it was not clear from the record whether the testing procedure was followed completely. The test results are voided with reimbursement for suspension without pay.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
C. L.[1]
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

The Department of Sanitation brought this disciplinary proceeding pursuant to section 16-106 of the New York City Administrative Code. Petitioner alleged that respondent sanitation worker C. L., violated section 5.8 of its Substance Abuse Policy and Procedure ("PAP") 95-05, by refusing to submit to a substance abuse test on October 29, 2009 (ALJ Ex. 1).

A hearing was held on October 19, 2010. Petitioner presented the testimony of Thomas Prevete, its Drug and Alcohol Testing supervisor, and Dr. Remy Obas, its medical review officer ("MRO"), as well as documentary evidence. Respondent appeared with counsel and testified on his own behalf.

[1] Respondent holds a commercial driver's license and is subject to Department and federal regulations that require random drug testing. Pursuant to such federal regulations, respondent's name has been withheld from publication. *See* 49 CFR 40.321(b), 40.323(2)(b), 382.405(g), (h); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 (July 31, 2009); *Dep't of Environmental Protection v. Anonymous*, OATH Index No. 977/05 (June 3, 2005), *rev'd*, Comm'r Dec. (July 27, 2005).

For the following reasons, I find that the Department sustained its charge and recommend that respondent be suspended for 25 days without pay.

ANALYSIS

The Department's Substance Abuse Policy and Procedure, PAP 95-05, requires employees who are holders of commercial drivers' licenses ("CDLs") to undergo random drug testing. Under section 5.8 of the policy, "the inability to provide a sample within the time period established by Federal Regulations wherein a Medical Review Officer has conducted a medical inquiry and concludes that there exists no medical reason why the sample could not be provided" is considered a refusal to submit to testing and a violation of the policy. Section 4.7 of the policy provides that under such circumstances, the employee will be subject to disciplinary charges.

Mr. Prevete has been a supervisor with the Department since 1999, and its Drug and Alcohol Testing supervisor for approximately one year. He testified that in order to comply with the Department's regulations that require 50 percent of petitioner's CDL holders to be tested by year's end, an average of 20 employees are tested per day. Mr. Prevete further testified that testing normally takes place in a mobile van and is administered by a technician from a company ("Clarity") under contract with the Department. Besides himself, another Department employee is usually present for the testing. He admitted that he had no independent recollection of respondent, who was randomly selected for a drug test on October 29, 2009 (Tr. 8-12, 32-33).

Petitioner submitted a Federal Drug Testing Custody and Control Form ("Chain of Custody Form") signed by the technician, Dominik Russo, which identified respondent by his social security number only (Pet. Ex. 1).[2] Respondent acknowledged the social security number as his, but objected to the document's admission because Mr. Russo was not present to testify. Respondent's counsel asserted that the Department did not have control over Mr. Russo, in terms of hiring and firing, and therefore the document did not qualify as a business record as characterized by the Department. Mr. Prevete contended that the Chain of Custody Form is completed pursuant to the random drug tests administered by Clarity technicians who report to work at the site where the tests are conducted and sign in on a Department sign-in sheet. If the technician is not performing satisfactorily, Mr. Prevete could have him removed. He explained that Mr. Russo was absent because he no longer worked for Clarity (Tr. 12-33).

[2] At the commencement of the hearing, respondent stipulated to petitioner's exhibits 2 through 7 (Tr. 6).

As an exception to the hearsay rule, business records are admissible into evidence as proof of the facts contained therein. CPLR 4518(a) (Lexis 2010). Not every record made in business falls within the exception. Richardson on Evidence § 8-301 (Lexis 2008) (citing *People v. Kennedy,* 68 N.Y.2d 569, 578-79 (1986)). However, under OATH's Rules of Practice, compliance with technical rules of evidence, including hearsay rules, shall not necessarily be required. 48 RCNY § 1-46(a); s*ee Dep't of Sanitation v. Abele,* OATH Index No. 2519/10 at 2 n.1 (Aug. 6, 2010). Thus, over respondent's objections, I admitted the document into evidence.

On the Chain of Custody Form, Mr. Russo indicated that on the day of the random test, respondent had been given 20 ounces of water at 6:32 a.m., and again at 9:00 a.m. but failed to provide a urine sample by the time Mr. Russo signed off on the form at 9:32 a.m. According to Mr. Prevete, employees are expected to produce a sample of approximately 45 milliliters of fluid. If an insufficient amount of urine is collected, the technician is required to record it on the chain of custody form. If no sample is produced within three hours, the time limit set by the federal regulations, the employee is escorted to the clinic (Tr. 33-37, 87).

Respondent testified that on October 29, 2009, his shift began at 6:00 a.m. When he arrived at work, he learned that he had been randomly selected for a drug test that day, and was instructed to stay within view of Mr. Prevete. When it was his turn to be tested, he stepped up to the van and was given a cup with markings made by a technician whose name he could not recall. After about three to four minutes without being able to produce a sample, he requested a bottle of water and left the bus, still within sight of Mr. Prevete. Respondent insisted that contrary to Mr. Russo's notation, he had only received one 20-ounce bottle of water because he had had breakfast that morning and could consume only one bottle. He claimed that the technician made pen markings on a new cup and informed him that his sample should, at the least, reach the level of the new marking. Respondent was unable to pinpoint times but testified that he eventually produced urine which did not reach the level of the pen marking. As a result, Mr. Prevete instructed the technician to dispose of his sample as being insufficient, and informed respondent that he would be taken to the medical unit (Tr. 181-89).

Respondent further testified that when he got to the medical unit, he informed the supervisor that he had more urine to pass but was told that it would not be accepted. When he was seen by the unit's doctor, he requested that his blood be drawn or a hair follicle sample taken in order to clear himself of any suspicion of drug use but was told that neither could not be done

at the unit. Respondent acknowledged signing for a form which instructed that he had five working days to provide an evaluation from a licensed physician, with objective evidence that he had a medical condition that prevented him from providing sufficient urine for the test (Obas: Tr. 82; Respondent: Tr. 189-91; Pet. Ex. 2). The form clearly indicated that the deadline for respondent to submit any documentation from his physician was November 6, 2009. MRO Dr. Remy Obas,[3] a board certified doctor who has been with the Department for about 30 years, explained that the five-day rule is a federal requirement (Tr. 78-79).

In any event, respondent testified that he randomly selected from the yellow pages a board certified urologist who accepted his medical insurance plan. The urologist examined him, performed an ultrasound, and took a urine sample from him before recommending medication if his bladder was not draining properly (Tr. 192-94). Respondent then submitted to the MRO what appeared to be a report prepared by urologist Sapan Polepalle. It is unclear when the report was submitted but there was no dispute that it was received prior to the deadline of November 6, 2009 (Pet. Ex. 4). The data was not reported on letterhead but reflected respondent's name and the date of the examination. The report contained many abbreviated terms which Dr. Obas clarified. It reflected that respondent has a history of kidney stones and pancreatitis with infrequent urination; he voids every three to four hours but not at night; and, has a moderate urinary stream with some terminal dribbling. While the report also indicated that there was no hesitancy or intermittency, Dr. Polepalle diagnosed respondent with incomplete bladder emptying and post void retention of 55 milliliters (Tr. 89-90; Pet. Ex. 4). Respondent elaborated that in 2008 he had atrophy of the pancreas, and in April 2009, had been hospitalized for kidney stones. He maintained that since then, it has taken some time for him to urinate (Tr. 199-207). Dr. Obas contended, however, that pancreatitis is related to the digestion of food, and has nothing to do with urination (Tr. 95, 107).

Respondent testified that after leaving the urologist on October 29, 2009, he went to his children's pediatrician who, at respondent's request, took a urine sample from him and had it tested for drugs (Tr. 197). A November 2, 2009 report prepared by Quest Diagnostics for Dr. Zaheer Ahmed identified respondent by name and displayed an ID and specimen number. It reflected negative readings for all drugs (Tr. 197-98; Pet. Ex. 5). Dr. Obas testified that he was

[3] Dr. Obas testified that he became a medical doctor since 1965, and maintained a private practice for approximately 26 years, from 1981 until 2007 (Tr. 71-75).

provided with the Quest Diagnostics report just prior to trial, but stated that he never accepts reports from private laboratories (Tr. 95). Moreover, the report did not indicate what procedures were employed in arriving at the ultimate negative readings. Petitioner's counsel expressed concern because no Chain of Custody form accompanied the report.

Respondent testified that as a result of his failure to produce a sample on October 29, 2009, petitioner had him tested on a monthly basis thereafter and each test was negative (Tr. 198-99). Petitioner produced respondent's medical file which showed that respondent was tested nine times since October 2009 (Tr. 52-61). While most times, it took him at least one and a quarter hours to produce a urine sample after a second attempt, on three separate occasions, over two and a half hours elapsed before a sample was produced. On one of those occasions, respondent took approximately three hours to void. Thus, it appeared that even when the test is not random, respondent did not readily produce a urine sample. Rather, there were occasionally significant delays. Petitioner, on the other hand, offered evidence that on two occasions in early 2008 and once in early 2009, respondent demonstrated no problems with voiding.

Like the private lab report, Dr. Obas also rejected Dr. Polepalle's report because he found no objective evidence that respondent had post void retention of 55 milliliters. Dr. Obas insisted that post void retention can only be determined by sonogram or catheter (Tr. 89-91, 142-46). On November 6, 2009, he signed an MRO Verification Work-Sheet in respondent's name, on which he noted: "Physical examination negative – medical note does not give reasonable explanation for inability to give urine. Result: refusal to test" (Pet. Ex. 3).

By his November 12, 2009 supplemental report which respondent turned over to his counsel just before trial, Dr. Polepalle sought to clarify his October 29, 2009 report (Tr. 196; Pet. Ex. 6). He confirmed that on respondent's previous visit, he had performed an ultrasound which revealed an enlarged prostate and evidence of incomplete bladder emptying. Such a condition, according to Dr. Polepalle, "may occasionally make a patient unable to urinate with a strong stream and on demand." Dr. Obas was also skeptical of Dr. Polepalle's supplemental report, which he saw for the first time on the day of trial (Tr. 151). In rejecting it, he opined that it, too, did not provide any objective evidence to support respondent's inability to urinate on the day in question. He stated that the strength of the stream is not important so long as respondent could produce the required 44 ccs[4] of urine (Tr. 99). Moreover, while a sonogram would reveal any

[4] Dr. Obas testified that he use the terms ccs and milliliters interchangeably (Tr. 87).

post void bladder retention, the actual volume of retention could only be measured if extracted by catheter. Thus, Dr. Obas questioned the supplemental report as well, because it did not indicate that catheterization was performed on respondent, which, according to him, would validate the 55 milliliters reflected on Dr. Polepalle's report (Tr. 146-48, 152, 176-77).

In a final attempt to explain his inability to produce a sample, respondent also submitted to petitioner a note from Dr. Vijaypal Arya dated November 17, 2009, which revealed that a colonoscopy was performed on respondent on October 27, 2009. Respondent suggested that the physical preparation for a colonoscopy makes one somewhat dehydrated (Tr. 205). While noting the tardiness in submission, Dr. Obas maintained that it had no impact on his determination. He articulated that certain medical conditions could indeed preclude an employee from producing a sample. They included 1) kidney failure – he noted, however, that there is a presumption of normalcy if a worker reports regularly for work; 2) complete obstruction which would manifest itself by severe pain and would require hospitalization; 3) shy bladder, which must be documented before the test is administered; and 4) dehydration (Tr. 83-86, 152). Since none of these conditions was present in respondent, Dr. Obas dismissed the other conditions raised by him and/or his physicians as having no impact on respondent's ability to produce an adequate urine sample. Furthermore, Dr. Obas testified that a normal person should be able to produce the amount of urine required for the sample within the time allotted by the federal regulations even in the absence of liquid consumption because the body is largely composed of water. Dr. Obas also stated that urinating is voluntary thereby suggesting that respondent purposely withheld his urine (Tr. 87-88, 161-66).

The issue therefore is whether respondent refused a drug test as Dr. Obas indicated on the MRO Verification Work-Sheet that he issued in respondent's name. Rule 4.7 of the PAP clearly provides that an employee's refusal to test includes circumstances where the employee "fails to provide a sample within the time period set by Federal Regulations and a Medical Review Officer concludes that there exists no medical reason to substantiate the employee's inability to provide a sample." There is no dispute that respondent failed to provide an adequate sample within the time set by federal regulations. Further, Dr. Obas questioned the integrity of both the initial and supplemental reports from respondent's urologist and concluded that no medical reason existed to substantiate respondent's inability to produce a sample within the required time.

While I am not entirely convinced by Dr. Obas' rationale for his rejection of Dr. Polepalle's reports (especially the supplemental one which indicated that a sonogram had been performed on respondent), respondent presented no expert testimony to controvert the profundity of his explanations. Instead, respondent sought to impugn Dr. Obas' qualifications and the training that he had received to become the Department's MRO. I found nothing in Dr. Obas' articulated resumé that justified respondent's attempt to denigrate his educational background.

On the other hand, respondent's claim that he had been experiencing problems with passing urine following his hospitalization for kidney stones six months prior to the random test was not supported by medical evidence that delayed or incomplete bladder emptying was a natural consequence of kidney stones in the absence of blockage.

Finally, even though respondent became visibly emotional at the hearing, I was not convinced that he had actually provided a urine sample which Mr. Prevete ordered thrown out because it was insufficient to satisfy the federal requirements. Respondent had a full and fair opportunity to cross-examine Mr. Prevete but never once raised the occasion of his urine being discarded. But even if true, he still admitted that the sample was inadequate.

Accordingly, I find that when he was randomly selected for drug testing on October 29, 2009, respondent failed to provide a urine sample within the time set by federal regulations, and the Department's medical review officer concluded that there was no medical reason for such failure, in violation of the Department's Substance Abuse Policy and Procedure. *See Dep't of Sanitation v. Field*, OATH Index No. 1977/08 (July 24, 2008) (PAP 95.05 violated where MRO was unconvinced by medical note).

FINDINGS AND CONCLUSIONS

1. The Department established that when randomly selected for drug testing on October 29, 2009, respondent failed to provide a sample within the time set by federal regulations.

2. The Department's Medical Review Officer also concluded that no medical reason existed to substantiate respondent's failure to provide a sample.

3. Accordingly, respondent's failure to provide a sample within the time allotted by the federal regulations, plus the Medical Review Office's rejection of respondent's proferred medical

documentation constitute a refusal to test under Sections 4.7 and 5.8 of the Department's policy.

RECOMMENDATION

In order to recommend an appropriate penalty, I requested and received a copy of respondent's disciplinary extract, which indicates that respondent became a sanitation worker in 2005. In April 2010, respondent received a reprimand for failing to submit medical documentation to the Department's Medical Leave Unit. For the subject charge, respondent was suspended pre-hearing from November 6 through November 19, 2009. At trial, petitioner's counsel stated that for violation of the Department's Substance Abuse Policy and Procedure, the Department is obligated to seek respondent's termination. However, it would not object to a lesser penalty.

Under section 16-106 of the New York City Administrative Code, the Commissioner is empowered to impose penalties on employees who violate Department rules. The penalties include forfeiting or withholding pay for up to thirty days; suspension for up to thirty days; or dismissal from the Department.

The circumstances of this case are peculiar because of the immediate follow-up steps taken by respondent. Generally, a refusal to submit to a random drug test absent any medically-justifiable reason may lead to the inference that a sample would prove positive for the presence of drugs. *See* PAP 95-05 § 5.8. But here, respondent made an immediate effort to debunk, on the very day of the random test, any inference that had he provided a urine sample, it would have proved positive for the presence of drugs in his system. The Quest Diagnostics report was not accompanied by a chain of custody form and there is no indication that respondent's counsel sought to obtain one, which would have confirmed that the necessary steps were taken to avoid corruption of the sample and validated that the results provided were unquestionably based on respondent's sample. Nonetheless, besides raising his concern over the absence of the chain of custody form, petitioner's counsel did not challenge the authenticity of the report.

In sum, while respondent's failure to void during the Department-administered drug test constitutes refusal under the Department's policy, the results of the independent drug test of respondent's urine sample taken on the same day as the random test precludes the inference of a

prohibited substance in respondent's system. For that reason, I find termination to be inappropriate.

I note that the articulated intent of PAP 95-05 is "to protect the health and safety of the public and Department employees and to ensure that employees troubled by drugs and alcohol abuse problems get the help they need." Thus, the refusal to submit to drug testing is not taken lightly by this tribunal. However, given these peculiar facts and circumstances, I recommend that respondent be suspended for 25 days without pay, with the caveat that he take any medically necessary steps to avoid future instances of delayed voiding that could result in his termination. *See Dep't of Sanitation v. Buccatello,* OATH Index No. 1835/04 (Jan. 26, 2005) (30 days recommended where respondent, an eleven-year employee with no prior record of substance abuse did not provide a urine sample on the day that he was selected to do so, but the evidence indicated that even though he showed up for the test, he was not feeling well). I further recommend that respondent receive credit for the number of days that he was suspended, pre-hearing, in this matter.

Ingrid M. Addison
Administrative Law Judge

November 8, 2010

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

DANIEL HAGEVIK, ESQ.
Attorney for Petitioner

KIRSCHNER & COHEN
Attorneys for Respondents
BY: ALLEN COHEN, ESQ.

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

C.L.
Appellant:
-against- :
NYC DEPT. OF SANITATION
Respondent:

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

DATE: 11/29/11

ITEM NO.
CD 11-89-R

PRESENT:
NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON. COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL, COMMISSIONER

ALINA A. GARCIA
DIRECTOR/ GENERAL COUNSEL

AMANDA M. WISMANS
ATTORNEY FOR THE COMMISSION

ALLEN COHEN, ESQ.
REPRESENTIVE FOR APPELLANT

DANIEL HAGEVIK, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT NOT PRESENT

STATEMENT

On Thursday, May 12th 2011 the City Civil Service Commission heard oral argument in the appeal of C.L., Sanitation Worker, NYC Department of Sanitation ("DOS"), from a determination by the DOS, finding him guilty of charges of incompetency or misconduct and imposing a penalty of 25 DAYS SUSPENSION following an administrative hearing conducted pursuant to Civil Service Law Section 75.

NEW YORK CITY CIVIL SERVICE COMMISSION

C.L.

C.L. appeals from a determination of the New York City Department of Sanitation ("DOS") finding him guilty of violating Section 5.8 of its Substance Abuse Police and Procedure 95-05 by refusing to submit to a substance abuse test on October 29, 2009, and imposing a penalty of a twenty-five (25) day suspension without pay following disciplinary proceedings conducted pursuant to Civil Service Law Section 75. The Commission conducted a hearing on May 12, 2011.

Appellant, a Sanitation Worker, was charged with complaint index No. J-147727, alleging that on October 29, 2009, Appellant was selected for random CDL testing procedure and after attempting twice and failing to void, was transported to the clinic for evaluation and given five days to present medical documentation to support his failure to provide a sufficient sample. Upon receipt of his medical note the DOS Medical Review Officer ("MRO"), Dr. Remy Obas, deemed him positive for failure to void. The Administrative Law Judge ("ALJ") found Appellant guilty of the charges and recommended a penalty of 25 days' suspension without pay. DOS accepted the ALJ's findings and imposed the recommended penalty.

Appellant's Position

Appellant was represented by counsel, who argued that Dr. Obas's determination that Appellant's medical note was insufficient was based merely on his unsupported assertion that he did not believe the Appellant's doctor and that he failed to give any reasons for his decision to discount the urologist's opinion that Appellant could not fully void. Additionally, Dr. Obas

indicated notwithstanding the evidence presented by Appellant that he would have needed to present the results of a sonogram to demonstrate bladder capacity.

On October 29, 2009 Appellant was selected for random drug testing. Ultimately, Appellant failed to provide a sufficient urine sample within three hours as mandated by federal law. Dr. Obas's report notes that Appellant was provided with 20 oz. of water shortly after the test began at 6:32 AM, and an additional 20 oz. at 9:00 AM upon failing to provide a specimen. Appellant disputes that he ever received an additional 20 oz. of water. At the conclusion of testing at 9:32 AM, Dr. Obas determined that Appellant had failed to provide an adequate sample for testing. Appellant was escorted to the medical unit where his requests for blood and hair testing were denied. Appellant then signed a form in which he acknowledged that he had 5 working days (deadline of November 6, 2009) from which to provide evidence from a licensed physician that he had a medical condition that prevented him from providing sufficient urine for the test.

That same day Appellant obtained a report from Dr. Sapan Polepalle, a board certified urologist, indicating that he had infrequent urination and some terminal dripping. The report noted that Appellant had a history of kidney stones and pancreatitis. On the same day, Appellant also went to his children's pediatrician, who took a urine sample which later tested negative for all drugs in a lab reported dated November 2, 2009. On November 12, 2009, Dr. Polepalle supplemented his report by confirming that Appellant had an enlarged prostate and evidence of incomplete bladder emptying. In addition, Appellant submitted evidence that he had a colonoscopy two days prior to the drug test in a report dated November 17, 2009 as further proof of his inability to void a sufficient sample.

Counsel argued that in deciding not to give due weight to Appellant's expert's submissions and opinions, Dr. Obas deprived the Appellant of his ability to avoid a negative inference from his failure to void and wrongly caused the Appellant to be "deemed" as producing a positive sample when in fact he did not.

DOS's Position

DOS argued that the testing process is dictated by federal regulations and that as the federally certified MRO, Dr. Obas is the only person who can determine whether the Appellant's submission is sufficient to overcome the inference that Appellant was physically able to produce the required sample.

DOS conceded that many of Appellant's submissions were not reviewed by Dr. Obas until the hearing below and therefore could not have impacted his ultimate decision to deem Appellant's sample positive due to his unsubstantiated inability to produce the requisite sample.

DOS further argued that Dr. Obas listed a number of reasons that would have prevented Appellant from producing the sample and that Appellant's expert had failed to cite any of those reasons.

DOS counsel argued that Appellant's failure to produce a sufficient sample within the prescribed three hours provided a valid basis for deeming him positive.

Analysis

The Commission has considered the record below and the arguments presented at the hearing. On that basis it is undisputed that the results of Appellant's privately administered drug

test are not admissible for consideration by a MRO. 49 CFR[5] § 40.151 is clear in stating that a MRO is prohibited from considering any evidence from tests of urine samples or other bodily fluids that are not administered under this part. Based on this restriction, Appellant's private exam results could not be consulted by Dr. Obas in support of a finding that Appellant had indeed tested negative for all drugs.

Appellant's other medical proof was both untimely and insufficient. 49 CFR section 40.191(a)(5) notes that failure to provide enough urine is deemed a refusal. Under section 40.193(d)(2)(e) the burden of producing medical evidence as to why Appellant was unable to produce a sufficient sample rests with the Appellant and must be introduced within five days after he has failed the test. Pursuant to section 40.193, Appellant's physician must introduce evidence that Appellant has a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. This medical condition includes an ascertainable physiological condition or a medically documented preexisting psychological disorder. It does not include unsupported assertions of "situational Anxiety" or dehydration. In the instant case, while Dr. Polepalle's initial report was introduced within the period designated by statute, his supplemental report and proof of colonoscopy were untimely. Even had they have been introduced by the November 6 deadline, there remains doubt as to whether these reports constituted objective evidence that Appellant was unable to urinate sufficiently as to produce adequate samples for testing. Dr. Obas maintained his position that even if a party is dehydrated, a person has enough water in his or her body to produce a 45 ml. sample, even before consuming the 40 oz. of water provided by the test collector.

[5] Code of Federal Regulations

In his initial report, Dr. Polepalle noted that Appellant suffered from pancreatitis, a condition involving the inflammation of the pancreas, a gland located behind the stomach. In response, Dr. Obas asserted that pancreatitis is related to the digestion of food and has nothing to do with urination. Dr. Obas also questioned the validity of the report's finding that Appellant experienced 55 cc of post voiding retention in the bladder, noting that a measure of post voiding retention could only be obtained via a sonogram. In addition Dr. Obas testified below that Appellant's reports do not show that incomplete bladder emptying was a natural consequence of kidney stones and that absent total obstruction (which from Dr. Polepalle's own report was not the case) prostrate issues would not prevent voiding.

It should be noted that Appellant was able to produce a sample, albeit insufficient, and that the DOS discarded that sample. Further, it is undisputed that Appellant requested that the medical unit perform contemporaneous blood and hair follicle testing when he failed to produce an adequate urine sample, and that this request was denied. While Dr. Obas may not have been permitted to consider Appellant's November 2, 2009 negative blood test as a matter of law, Appellant's requests on October 29, 2009, and his willingness to provide alterative evidence of lack of drug use provides strong circumstantial evidence that Appellant was not refusing to submit to a random drug test.

Additionally, the question of whether Appellant received 40 oz. of water was at issue in the hearing below and was not explained at the hearing before the CSC. Appellant denied being given more than 20 oz. of fluid by the MRO (185 Tr. 7-14), although he was unclear about the circumstances surrounding why only one bottle was given, only indicating "they are obligated to give it, but I had eaten breakfast that day." (185 Tr. 13-14) The ALJ found that since Appellant failed to produce urine within the three-hour time limit, he did not meet his burden of proof

regarding medical inability and therefore was guilty of refusal. However, the ALJ did not address the issue of whether the test was administered correctly. In Dept. of Sanitation v. Anonymous, (Oath Index 765/11), the tribunal noted that where the collection procedure was defective because among other things the collector did not give the employee the full three hours or 40 oz. of fluid, the test results would be rejected. The tribunal further noted that even though the text of 49 CFR sec. 40.193 requires collectors to "urge" and does not "direct" individuals to drink up to 40 oz. of fluid, urging goes beyond merely making the fluid available. It is unclear from the record whether this was done in the instant case.

Decision

We therefore find that the record indicates the DOS may have failed to fulfill its obligation, as provided by section 40.193 of the CFR, to urge the Appellant to consume the 40 oz. of fluid and since this failure could have had a direct impact on Appellant's ability to provide a sufficient sample, we find this possible flaw in the administration of the testing negates a mandatory "deemed positive" result based on a refusal to provide a sufficient sample. Further, the unusual circumstances in this case, notably, Appellant's determined contemporaneous efforts to submit to alternative means of testing, i.e. of his blood and hair follicle, as well as his extraordinary steps to get himself tested that very day, regardless of the outcome of those tests, contradicts the inference made by the MRO, that Appellant was "deemed" as producing a positive sample when in fact he did not.

The Commission hereby reverses the determination of DOS and finds that the results are voided. Appellant is to be reimbursed for the twenty-five (25) days suspension within thirty (30) days from this determination.

Nancy G. Chaffetz, Commissioner
Chair

Rudy Washington, Commissioner
Vice-Chair

Charles D. McFaul, Commissioner

Date 11/29/1l