

# ***Dep't of Sanitation v. Anonymous***

OATH Index No. 765/11 (Dec. 1, 2010)

Petitioner failed to prove that it followed proper drug testing procedures. Thus, respondent's inability to produce sufficient urine for testing was not misconduct. Dismissal of charge recommended.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF SANITATION**  
*Petitioner*  
*- against -*  
**ANONYMOUS<sup>1</sup>**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**KEVIN F. CASEY**, *Administrative Law Judge*

The Department of Sanitation brought this proceeding pursuant to section 16-106 of the New York City Administrative Code. Petitioner alleged that respondent, a sanitation worker, refused to submit to a drug test on March 9, 2010, in violation of section 5.8 of the Department's Substance Abuse Policy and Procedure (PAP) 95-05 (ALJ Ex. 1).

At a hearing on October 5, 2010, petitioner relied on documentary evidence and testimony from the specimen collector and a medical review officer. Respondent testified on his own behalf. For the reasons below, I find that petitioner failed to meet its burden of proof and recommend dismissal of the charge.

### **ANALYSIS**

Federal law requires the Department to conduct random substance abuse testing for every employee, such as respondent, who holds a commercial driver's license. PAP 95-05 § 2.0. Under the Department's policy, inability to furnish a sufficient urine sample within three hours

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<sup>1</sup> 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. Doe*, OATH Index No. 2035/04 (Nov. 26, 2004).

constitutes a refusal to submit to testing where “a Medical Review Officer (MRO) conducted a medical inquiry and concludes that there exists no medical reason why the sample could not be provided.” PAP 95-05 § 5.8.

The Department randomly selected respondent for drug testing on March 9, 2010. During the testing process, respondent vomited and failed to provide a sufficient urine sample. The next day, respondent visited his doctor who performed diagnostic testing. According to a note provided by the doctor, test results revealed that respondent had a urinary tract infection and an enlarged prostate that contributed to “urinary outlet obstruction” and urine retention (Pet. Ex. 3). Petitioner’s MRO reviewed the medical evidence and considered it insufficient to excuse respondent’s failure to submit a sufficient sample.

At the hearing, respondent challenged the MRO’s medical findings and questioned whether the Department provided respondent with the required amounts of water during the drug-testing procedure. Petitioner’s evidence supported the MRO’s medical findings. However, petitioner failed to prove that the specimen collector followed required drug-testing procedures. Specifically, federal regulations mandate that the specimen collector was to urge respondent to “drink up to 40 ounces of fluid” but respondent was only given half that amount in the time required. 49 C.F.R. § 40.193.

Randy Rivera, a specimen collector employed by a private testing service, testified about respondent’s attempts to provide a urine sample (Tr. 10). According to Mr. Rivera, respondent first attempted to provide a urine sample at 6:19 a.m. (Tr. 22, 33; Pet. Ex. 1). When respondent could not produce any urine, Mr. Rivera gave him a 20-ounce bottle of water (Tr. 22, 59-60).

At 9:24 a.m., respondent made a second attempt to provide a urine sample (Tr. 23, 34-35, 46). Although respondent produced some urine, it was less than the 45 milliliters required for testing (Tr. 23, 63; Pet. Ex. 1). At the hearing, Mr. Rivera could not recall how much less than the required amount respondent provided (Tr. 42).<sup>2</sup>

Mr. Rivera gave respondent a second 20-ounce bottle of water (Tr. 22, 34-35, 46, 48). Within a minute, at approximately 9:25 a.m., Mr. Rivera saw respondent vomit twice (Tr. 47, 50, 52, 54-55, 57-59).

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<sup>2</sup> The parties used milliliters and cubic centimeters interchangeably. As petitioner’s medical expert explained, one milliliter equals one cubic centimeter (Tr. 71, 75). For convenience all references will be to milliliters.

Normally, employees have three hours to produce a urine sample, but a supervisor of the Department's drug and alcohol testing program has the discretion to allow additional time, up to 15 minutes (Tr. 42, 57). Respondent received additional time and he made a third attempt to submit a sample at 9:49 a.m., but he was unable to produce any urine and Mr. Rivera concluded the test (Tr. 24-26, 42, 48, 59).

At first, Mr. Rivera testified that respondent vomited "clear water" during his third attempt to produce urine (Tr. 26). Later, Mr. Rivera clarified his testimony and stated that respondent vomited shortly after the second attempt (Tr. 58-59). Mr. Rivera did not lose sight of respondent from the moment he received the second bottle of water until he vomited (Tr. 26, 48-50). Though Mr. Rivera performs over 100 tests per week, he specifically remembered this test because of respondent's illness (Tr. 13, 25-26). It was the first time that Mr. Rivera had ever seen someone react that way (Tr. 50).

On March 12, 2010, respondent submitted a letter from his doctor to the Department (Pet. Ex. 3). The doctor noted that he saw respondent on an emergency basis on March 10, 2010, the day after the random test. According to the doctor, respondent said that he could not urinate with a steady flow and he complained of severe lower abdominal pain discomfort (Pet. Ex. 3). The doctor began treating respondent with antibiotics and recommended diagnostic testing, including renal and pelvic ultrasound, with emphasis on the prostate and bladder. In the doctor's opinion, "diagnostic results demonstrated a urinary tract infection along with an enlarged prostate" which was "contributory to urinary outlet obstruction" and "urinary retention" (Pet. Ex. 3). The doctor advised respondent to continue antibiotic treatment, recommended a follow-up visit with a urologist, and cleared respondent for return to work (Pet. Ex. 3).

Dr. Remy Obas, Director of the Department's Medical Division, reviewed the letter submitted by respondent's doctor (Tr. 68, 77, 161). Dr. Obas, who has been a physician for 45 years and an MRO for 16 years, is board certified as a general surgeon (Tr. 68, 78-79). According to Dr. Obas, the note from respondent's doctor was insufficient because it lacked specificity and there were no underlying, objective test results attached (Tr. 88-89, 141). As for the note's reference to "abdominal pain and discomfort," Dr. Obas said that had "nothing to do with urine" (Tr. 85). Dr. Obas also testified that men rarely have urinary tract infections and such a condition would cause more frequent, rather than less, urination (Tr. 85-87, 138, 148, 170). He also noted that respondent's doctor did not mention dehydration (Tr. 88).

Referring to unspecified federal regulations, Dr. Obas testified that there were only two acceptable reasons for inability to provide a sufficient sample: (1) a psychological inability to urinate in the presence of others, or (2) physical conditions, such as kidney disease which prevents the kidneys from producing urine, or a urinary obstruction that completely prevents the passage of urine (Tr. 81-83). According to Dr. Obas, “if you have urinary obstruction ... you should be in the hospital and catheterized” (Tr. 82).

Respondent, who has been a sanitation worker for 15 years, testified that, on the day of the random test, he left his home at about 5:30 a.m. and arrived at work at about 5:55 a.m. (186-88, 202). He did not have breakfast or coffee before work (Tr. 187, 203). Normally, he stopped for coffee along his work route later in the morning (Tr. 203).

After signing in on March 9, 2010, respondent learned that he was selected for random drug testing (Tr. 189). He tried to provide a urine sample at about 6:19 a.m., without success (Tr. 188-89). Mr. Rivera gave respondent a 20-ounce bottle of water and told him to come back when he was ready to produce urine (Tr. 190, 205). Respondent gradually drank the bottle of water, never left the area, and stayed in sight of the drug-testing unit’s supervisor (Tr. 190, 206). Although respondent felt some abdominal pain, he considered himself well enough to work (Tr. 191).

Near the end of the three-hour time limit end, respondent tried to produce a urine specimen (Tr. 192). He produced some urine but Mr. Rivera told him that the sample was insufficient and that he had to try again (Tr. 192, 206). Mr. Rivera discarded respondent’s insufficient sample (Tr. 193). Respondent estimated that he received a second bottle of water at about 9:15 or 9:20 a.m. (Tr. 193). He took a few sips and vomited water (Tr. 193-94, 208).

Respondent received an additional 10 to 15 minutes to submit a sample, but he could not urinate (Tr. 194, 208). Told that his test was “deemed a refusal,” respondent learned that he had five days to prove why he was unable to produce a sample (Tr. 195). Nervous and upset at the stigma of failing a drug test, respondent went back to his garage and signed out for the day (Tr. 209-10).

After work the next day, March 10, respondent went to his doctor for an emergency visit (Tr. 196, 213). Respondent told his doctor that he could not urinate and the he had stomach pain as well as a burning sensation (Tr. 196, 213). He provided his doctor with blood and urine

samples (Tr. 196, 214). The doctor prescribed antibiotics and made a sonogram appointment for later that day (Tr. 196-97).

On March 12, respondent picked up the note from his doctor's office (Tr. 198). The doctor told respondent that the test results indicated that he had a urinary tract infection and an enlarged prostate, which could cause him to retain urine (Tr. 198-99). If the infection did not clear up with antibiotics, respondent would need to make an appointment with a urologist (Tr. 198). Two years earlier, respondent had a similar urinary tract infection that cleared up with antibiotics (Tr. 199-200).

In summation, counsel argued that respondent's medical evidence was sufficient to explain his inability to provide a sample (Tr. 222). Counsel also argued that the testing procedures were flawed because respondent only received one 20-ounce bottle of water and he should have received two within three hours (Tr. 223). Petitioner stressed that Mr. Rivera and Dr. Obas were both very experienced and knowledgeable (Tr. 225, 227). Noting that respondent was given 20 ounces of water after the first failed attempt and approximately three hours and five minutes elapsed before he was asked to make a second attempt, petitioner maintained that appropriate rules and regulations were followed (Tr. 226-27).

Despite counsel's robust cross-examination, his attempt to challenge Dr. Obas's qualifications and findings was unsuccessful. Dr. Obas is an experienced physician and MRO. He credibly testified that the note from respondent's doctor, without more, was insufficient to show that respondent had a medical reason for his inability to provide a sufficient sample. The note referred to testing, including ultrasound, and "diagnostic results," but respondent did not offer any expert testimony and he did not provide any objectively verifiable test results that Dr. Obas, or this tribunal, could review.

There were some weaknesses in Dr. Obas's testimony. For example, he insisted that there were only two limited circumstances when a person would be physically unable to produce a sufficient urine sample: kidney disease or a urinary obstruction so severe that it required hospitalization (Tr. 82-83). Remarkably, Dr. Obas seemed unwilling to accept that a temporary physical condition, such as abdominal pain or a urinary tract infection, could interfere with the ability to produce urine (Tr. 82, 85). Pressed on this point, Dr. Obas referred generally to "data from the federal government" and "federal guidelines" (Tr. 80-82, 129). Respondent offered no evidence to show that Dr. Obas's interpretation of federal guidelines was incorrect.

Notably, Dr. Obas made no findings regarding the actual collection procedures in this case. When asked what it would mean if someone vomited “as soon as they started to put water in their mouth,” Dr. Obas described it as a “symptom of serious disease” and recommended that such a person should be taken to the hospital “right away” (Tr. 126-27). There was no indication that Dr. Obas was aware that respondent had vomited. When questioned on this point, Dr. Obas stated, “I have nothing to do with the testing procedures” (Tr. 127).

Dr. Obas also assumed that respondent had received 1200 milliliters of water, which is equivalent to two 20-ounce bottles (Tr. 74-75). Asked whether one 20-ounce bottle of water was enough to comply with federal regulations, Dr. Obas testified, “I don’t know the procedures. You know, myself. I’m just at the end of the experiment” (Tr. 72). In his written comments on the MRO Verification Worksheet, Dr. Obas also assumed that the collector followed normal hydration procedures. Dr. Obas wrote, “medical note failed to justify inability to give 45 cc of urine after hydration, and no prior documented complaints of urinary problems” (Pet. Ex. 2).

Federal regulations plainly specify what is to occur when an employee fails to provide a sufficient urine sample. In relevant part, the regulations mandate that the specimen collector “must”:

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever comes first. It is not a refusal if the employee declines to drink ...

(4) If the employee has not provided a sufficient sample within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection ...

49 C.F.R. § 40.193(b) (Lexis 2010).

Those regulations were not followed here. Mr. Rivera did not provide respondent with 40 ounces of fluid in the first three hours after the first unsuccessful attempt. Instead, according to petitioner’s evidence, respondent received one 20-ounce bottle of water and he did not receive a second bottle of water until more than three hours later (Tr. 23, 47, 52, 54-55, 57-59). The custody and control form, completed by Mr. Rivera at the time of the incident, removes any doubt about the sequence of the testing. On that contemporaneous record, Mr. Rivera wrote that he gave respondent 20 ounces of water after the first attempt, at 6:19 a.m. (Pet. Ex.1). The second attempt took place at 9:24 a.m. (Pet. Ex. 1). That document is more reliable than

respondent's estimate at the hearing that the second test occurred at approximately 9:15 or 9:20 a.m. (Tr. 193).

There is also no serious dispute that respondent did not receive a second bottle of water until after the second attempt (Tr. 23, 47, 52, 55). In response to counsel's specific questioning, Mr. Rivera conceded that respondent only received "one 20-ounce bottle of water" from 6:19 a.m. to 9:24 a.m. (Tr. 35). Respondent was not allowed to receive more than two bottles of water and Mr. Rivera had a vivid recollection of respondent's reaction to that second bottle of water following his second attempt to provide a urine sample (Tr. 20, 25-26, 46).

Thus, based upon petitioner's reliable evidence, it appears that respondent received half the required amount of water and it was not "distributed reasonably" over the course of three hours. Because the record is clear that respondent did not receive 40 ounces of liquid within three hours, this case is distinguishable from *Dep't of Sanitation v. Buccellato*, OATH Index No. 1835/04 (Jan. 26, 2005), where a challenge to testing procedures failed, in part, because the employee received adequate hydration. Although the amounts are not specified in *Buccellato*, it appears that the employee received at least two bottles of water from 2:00 p.m. to 3:00 p.m. *Id.* at 3-4.

Here, however, there was a clear violation of the testing procedures. Moreover, those errors were not some minor technicality. Respondent received far below the required amount of water.

A failed test may be deemed a refusal and result in loss of employment. A failed test also carries a stigma and damages a person's reputation. Dr. Obas testified that a person typically produces more than 45 milliliters of urine per hour, without ingesting any fluids, but that estimate is an average (Tr. 71, 124). In apparent recognition of the serious consequences of a failed test, federal regulations provide greater protection. As Dr. Obas explained, federal regulations are carefully calibrated and modified (Tr. 71-72, 74-75). Adhering to those regulations insures testing that is accurate and safe.

Over and over, petitioner's witnesses stressed the importance of federal regulations (Tr. 63, 67, 68, 70, 71, 80-81, 83, 129, 163, 177). Dr. Obas rejected respondent's medical note, in part, because the diagnosis did not qualify as one of few acceptable excuses recognized by the federal government (Tr. 80-81). Likewise, Dr. Obas justified his failure to follow-up with respondent's doctor on the ground that federal regulations did not require such a step (Tr. 154).

Mr. Rivera also strictly interpreted the federal regulations. Respondent produced a partial sample during his second attempt; Mr. Rivera discarded it because it was not 45 milliliters required by federal procedures (Tr. 63). Mr. Rivera could not recall whether the insufficient sample was closer to 5 or 40 milliliters (Tr. 64). But it did not matter, Mr. Rivera insisted, because federal procedures required a minimum sample of 45 milliliters (Tr. 63). If strict compliance with federal regulations compels rejection of an employee's medical evidence, or refusal to accept a partial sample, basic fairness and due process demand substantial compliance with those regulations for the hydration process.

Here, the testing procedure dramatically departed from relevant regulations. In the three hours after the first unsuccessful attempt, respondent received only one 20-ounce bottle of water; which is half of the required 40 ounces. After three hours and a second failed attempt, respondent received another 15 to 20 minutes to provide a sample. There was no suggestion or evidence that respondent's vomiting was self-induced. He was under constant supervision, in close quarters, from his failed second attempt until he became ill moments later (Tr. 48)

Though well intentioned, the extended time did more harm than good. After respondent received a second 20-ounce bottle of water, he had a relatively short time to drink the water, allow his body to process it, and produce a sufficient urine sample. Because respondent was already nervous about the initial test failures and pressed for time, it is hardly surprising that he became ill.

A similarly flawed procedure led to the rejection of test results in *Amalgamated Transit Union Division Local 757 (AFL-CIO) v. Tri-County Metropolitan Transportation District of Oregon*, 222 Ore. App. 293 (Or. Ct. App. 2008). There, a specimen collector gave an employee 36 ounces of water and two opportunities to produce a sample. Two hours and fifty-five minutes after the first attempt, the collector terminated the test. *Id.* at 299. The appellate court upheld an arbitrator's finding that collection procedure was defective because, among other things, the collector did not give the employee the full three hours and 40 ounces of fluid. Noting that the MRO's only role was to evaluate the medical documentation provided by the employee's treating physician, the court concluded, "in light of the procedural errors, the lack of medical explanation was immaterial." *Id.* at 311.

Respondent's test was worse than the flawed test in *Amalgamated Transit Union Division Local 757*. There, the employee received 36 ounces of fluid in two hours and fifty-five minutes,



which is nearly 40 ounces of fluid in nearly three hours. In contrast, respondent received far less than 40 ounces of fluid in three hours.

The federal regulation interpreted in *Amalgamated Transit Union Division Local 757*, required specimen collectors to “direct the individual to drink up to 40 ounces of fluid distributed reasonably through a period of up to three hours.” 49 C.F.R. § 40.25(f)(10)(iv)(A)(2) (2000) (emphasis added). Federal regulations now require collectors to “urge” individuals to drink up to 40 ounces of fluid. 49 C.F.R. § 40.193 Substitution of “urge” for “direct” does not make a difference here. To “urge” goes beyond merely making some available; it is defined as “to press upon the attention; present or speak of earnestly and repeatedly; plead, allege or advocate strongly.” *Webster’s New World Dictionary* (3<sup>rd</sup> Coll. Ed. 1988). Respondent was never urged to drink 40 ounces of water within three hours.

Petitioner had the burden of proving that respondent committed misconduct. It failed to do so. Because regulations were not followed, the testing procedure in this case was flawed. Respondent was not urged to drink up to 40 ounces of fluid, reasonably distributed, over the course of three hours. Instead, he received 20 ounces of fluid and, after three hours, he received a second bottle of water and given 15 to 20 minutes to produce a urine sample. There was a direct connection between the flawed testing and respondent’s inability to provide a sufficient sample. Thus, respondent’s inability to provide a sufficient sample should not be deemed a test refusal or misconduct.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner’s evidence established that it failed to follow required federal regulations and that the random drug test of respondent was conducted improperly.
2. Respondent’s inability to produce a sufficient urine sample was directly attributable to errors in the testing process.

### **THEREFORE:**

I recommend dismissal of the charge.<sup>3</sup>

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<sup>3</sup> Petitioner stated that, if it proved the charge, respondent should be terminated from his employment (Tr. 230). Even if petitioner had proved the charge, I would not have recommended such a harsh penalty. Respondent has worked for the Department for more than 15 years. He has a minor disciplinary record, consisting of a reprimand in

Kevin F. Casey  
Administrative Law Judge

December 1, 2010

SUBMITTED TO:

**JOHN J. DOHERTY**  
*Commissioner*

APPEARANCES:

**DANIEL HAGEVIK, ESQ.**  
*Attorney for Petitioner*

**KIRSCHNER & COHEN**  
*Attorneys for Respondent*  
**BY: ALLEN COHEN, ESQ.**

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2007 and a one-day pay fine in 2009. His most recent evaluations describe his work as satisfactory and he has a good attendance record. In light of respondent's lack of a significant disciplinary history, respondent's lengthy record of service to the Department, the flawed test collection procedure, and respondent's apparent illness on the day of testing, termination would be inappropriate. *See Dep't of Sanitation v. C.L.*, OATH Index No. 760/11 at 8-9 (Nov. 8, 2010) *adopted* Comm'r Dec. (Nov. 10, 2010) (25-day suspension without pay recommended for drug test refusal where employee presented medical evidence to show that he had not ingested prohibited substances and the Department's representative had no objection to a penalty less than termination); *Dep't of Sanitation v. Buccellato*, OATH No. 1835/04 at 8-9 *adopted* Comm'r Dec. (Feb. 3, 2005) (30-day suspension recommended for drug test refusal by an 11-year employee, with minor disciplinary record, where uncontroverted evidence showed that he did not feel well on the day of testing).