Fire Dep't v. Armbruster

OATH Index No. 1350/12 (Aug. 24, 2012), *aff'd*, 149 A.D.3d 729 (2d Dep't 2017)

Firefighter tested positive for cocaine in a random drug test and failed to prove that he ingested it inadvertently, as he contended. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
DANIEL ARMBRUSTER
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This is an employee disciplinary proceeding referred by petitioner, the Fire Department ("Department"), pursuant to Section 15-113 of the Administrative Code, alleging that firefighter Daniel Armbruster tested positive for cocaine on January 19, 2009, in a randomly administered workplace substance use test in violation of the Department's Rules and Regulations for the Uniformed Force and the Department's Substance Abuse Policy, also known as Fire Department All Units Circular 202 (eff. date October 12, 2005) ("AUC 202").

At a hearing held before me on May 22, 2012, the parties stipulated to the accuracy and propriety of the random drug test (Tr. 27). Both parties entered documentary evidence into the record, and respondent testified on his own behalf as the sole witness. Following the hearing, the record was held open until July 2, 2012, for the submission of motions and written closing arguments, which were timely submitted by both parties.

Based upon the record of the proceeding, I find respondent guilty of the charged misconduct and recommend termination of his employment.

PRELIMINARY MATTER

At the outset of the hearing, respondent moved to dismiss this matter, citing the delay of three and a half years since the charges were served (Tr. 4). Respondent argued that he was

prejudiced by the delay in prosecution in two ways: first, that respondent had to put his life "on hold" (Tr. 6) and was "forced to perform light duty suffering excruciating pain" (Tr. 10-11); and second, that respondent's ability as a witness was impaired by the passage of time (Tr. 11).

Respondent's first claim, that his physical and mental pain and suffering was a form of prejudice, is without merit. "Prejudice" is defined as "damage or detriment to one's legal rights and claims." *Black's Law Dictionary* 1299 (9th ed. 2009). No legal rights before this tribunal were affected by respondent's discomfort and/or worry. Furthermore, respondent received full pay and medical benefits while working light duty during this time, none of which is prejudicial to him.

As to the second claim, even if the passage of time dulled respondent's recollection, a sanction would be improper in these circumstances. The settled common law rule is that "the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest." *Cortlandt Nursing Home v. Axelrod*, 66 N.Y.2d 169, 177 n.2 (1985). Although the common law rule may be overridden by statute, *Levey v. Catherwood*, 33 A.D.2d 1066, 1067 (3d Dep't 1970), the City Administrative Procedure Act, which provides that all parties "be afforded an opportunity for a hearing within a reasonable time," Charter §1046(c) (Lexis 2012), does not require more. The CAPA provision appears to require only that the hearing be held within a reasonable time of the commencement of the enforcement proceeding. This is the same construction the Court of Appeals gave nearly identical language in the State Administrative Procedure Act. *Cortlandt Nursing Home*, 66 N.Y.2d at 179 (under SAPA, agency is required "to commence a hearing with [a] reasonable time of the date of the commencement of the adjudicatory proceeding"). The Court of Appeals has held that, without more, the lapse of time in rendering administrative determinations does not constitute prejudice as a matter of law requiring dismissal of a complaint. *Louis Harris and Assocs., Inc. v. de Leon*, 84 N.Y.2d 698, 702 (1994). Therefore, delay prior to commencement of the adjudicatory proceeding has been called "'irrelevant.'" *Dep't of Buildings v. Gelb*, OATH Index No. 2155/96 at 16 (Mar. 3, 1997), *aff'd*, Sup. Ct. N.Y. Co. Index No. 107934/97, Dec. and Order (Dec. 11, 1998) (quoting P. Borchers & D. Markell, NYS Admin. Procedure and Practice at 54 (West 1995)).

For a sanction to be imposed, respondent must show substantial prejudice from the delay. *Comm'n on Human Rights v. Century 21 Laffey Assocs. of Bellerose*, OATH Index No. 956/03,

mem. dec. at 2 (Mar. 24, 2004) (citing *Cortlandt Nursing Home*, 66 N.Y.2d at 180 (respondent must prove the delay has significantly and irreparably handicapped his defense)). In this instance, the necessary evidence is respondent's testimony, and his memory is entirely within his own control. His apparent failure to capture essential details of his own recollection cannot be held against the Department. Indeed, where the only harm respondent demonstrates is the natural erosion of memory, we have found that even a delay of eleven years does not warrant dismissal. *Century 21 Laffey Assocs. of Bellerose*, OATH 956/03 at 3.

Respondent also alleged that the matter should be dismissed because the Department violated discovery by failing to provide the results of a confirmatory test until October 2010, more than a year and a half after it was performed (Tr. 4-5). Upon further inquiry, it became clear that respondent had made no discovery demand for the confirmatory test, having considered it the Department's obligation to provide it without a request (Tr. 16).

For a sanction to be imposed because of a failure to produce discovery, the failure must be willful or in bad faith, and the absence of the evidence must be prejudicial. *See Dep't of Environmental Protection v. Ginty*, OATH Index No. 1627/07 at 5-6 (Aug. 10, 2007) (declining to impose a sanction where "[t]here was no reason from the record here to conclude that the agency was deliberately hiding unfavorable information"); *Dep't of Correction v. Finch*, OATH Index No. 652/07 at 13 (Nov. 28, 2006) (declining to impose a sanction where the loss was not willful and respondent was not prejudiced). The Department's failure to produce the confirmatory test results could not have been willful or in bad faith when respondent never requested it. Moreover, respondent was not prejudiced, having received the relevant evidence two years before the hearing.

For the foregoing reasons, respondent's motion to dismiss was denied (Tr. 18).

ANALYSIS

AUC 202 is the Department's strict anti-drug use policy. Section 4.1 of the policy strictly prohibits the "[u]se, positive presence, . . . of any ***illegal drug*** as defined in Section 3.2 while on-duty or off-duty; or while in uniform; or while in any Department premises, property or vehicle(s)." AUC 202 § 4.1 (emphasis in original). Cocaine is a prohibited drug named in Section 3.2. AUC 202 § 3.2.2.

It is undisputed that, on January 19, 2009, respondent tested positive for cocaine in a randomly administered workplace drug test (Tr. 27; Pet. Ex. 1). Respondent does not contest the

positive test result or any aspect of the testing procedures or methodology. Instead, respondent alleges that he consumed the cocaine unknowingly while off duty during a ski trip.

Respondent testified that on or about January 13, 2009, he went to Lake Placid with members of his firehouse to ski (Tr. 40, 53). They had gone on similar trips in the past (Tr. 67). He was in Lake Placid from Wednesday through Friday but only skied for a half day on Wednesday because of neck pain (Tr. 41). On Thursday, he did not ski at all, but went drinking while his colleagues skied (Tr. 61). He said he drank with three women he met at a bar, starting around noon and continuing through the night (Tr. 41-42, 60), and he drank "until the pain went away," which he later attributed to both his neck and back (Tr. 42-43). Respondent said he did not recall parts of that day, nor exactly how much he drank. He awoke in his hotel room on Friday morning and was told by his friends that he had gone to a hotel with the women he met, returned "wasted" several hours later, and then continued to drink with them (Tr. 63, 65, 72). Respondent could not recall his friends saying anything that indicated they thought he had used cocaine, or that there was anything unusual about his behavior that night (Tr. 74).

Saturday morning, the group left Lake Placid and returned to New York City (Tr. 66). Respondent went to work Saturday night, Sunday night, and Monday morning (Tr. 68, 75). On Saturday and Sunday, respondent and his ladder company responded to at least 14 emergency calls. On Saturday, respondent was placed on house watch duty, which meant he was responsible for relaying emergencies to other firefighters (Tr. 89-91, 93, 95-97; Pet. Ex. 5).

Respondent was drug tested on Monday, between 11:31 a.m. and 1:21 p.m. (Tr. 41, 43, 98). The result was positive for cocaine at 275 nanograms per milliliter ("ng/ml"), which is above the cutoff of 150 ng/ml (Tr. 87; Pet. Ex. 1). Respondent said he believed he used the cocaine sometime on Thursday night (Tr. 68-69). Respondent could not deny that if he consumed the cocaine Thursday night, as he claimed, and tested positive on Monday, he must have had cocaine in his system when he reported for duty on Saturday and Sunday (Tr. 87).

Respondent admitted that he drank heavily on other occasions and stayed out until the early hours of the morning when partying with friends (Tr. 67), but he denied that he had ever used any sort of illicit drug, including cocaine, before this trip (Tr. 42). He stated without rebuttal that his prior Department drug tests, approximately five in total, had all been negative (Tr. 43).

Because unknowing ingestion of illegal drugs is an affirmative defense, it is respondent's burden to prove by preponderance of the evidence. *Jackson v. Safir*, 261 A.D.2d 348 (1st Dep't 1999); *Fire Dep't v. Milano*, OATH Index No. 2029/05 at 2 (July 3, 2006), *adopted*, Comm'r Dec. (July 27, 2006). To do so, respondent must do more than raise the possibility that his positive test was the result of unknowing ingestion, he must persuade the factfinder that his theory is plausible and supported by evidence. *Green v. Sielaff*, 198 A.D.2d 113 (1st Dep't 1993); *see also Goldin v. Kelly*, 77 A.D.3d 475, 476 (1st Dep't 2010); *Harmon v. NYC Police Dep't*, 188 A.D.2d 429 (1st Dep't 1992) (hearing officer rejected employee explanation of innocent ingestion that had the "ring of total implausibility"). Respondent must prove as fact that while very drunk and blacking out, he consumed cocaine given to him by women he met in Lake Placid but did not know and could not identify at trial. Yet, respondent offered no evidence beyond his own self-serving supposition that it happened.

I found his testimony utterly lacking in credibility. As an initial matter, his testimony was heavily weighted by his significant interest in the outcome. Second, his testimony was characterized by a lack of knowledge, because his essential contention is that he does not recall what happened, did not recall taking cocaine, and could not say where, when, or how it happened. Respondent's theory that three women – who he could not name – provided him with cocaine while he was very drunk was both far-fetched and similar to theories that this tribunal has rejected in the past as totally speculative. *See, e.g., Milano,* OATH 2029/05 at 2 (firefighter's assertion that a stranger must have placed cocaine in his drink in the bar of the Las Vegas hotel where he was getting married was rejected); *Dep't of Correction v. Cosby*, OATH Index No. 890/91 at 14-16 (March 29, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-107 (Sept. 24, 1992) (correction officer's theory that his positive test for cocaine was the result of innocently drinking a soda a friend had laced with cocaine, allegedly to be used under doctor's advice as a laxative, was rejected as "preposterous").

Finally, respondent failed to offer corroborating witnesses, which further reduced the credibility of his defense. Specifically, he could have offered the testimony of his friends who witnessed both his condition and his activities on that night. Their notable absence from the hearing permits the inference that they would not have corroborated respondent's testimony. *See Taxi & Limousine Comm'n v. Petrone*, OATH Index No. 640/08 at 3 (Oct. 22, 2007) (citing *Dep't of Correction v. Irwin*, OATH Index No. 217/84 at 9-10 (Apr. 15, 1984)).

This tribunal has consistently held that drug use is a voluntary act of misconduct unless respondent meets his burden of proving otherwise. *Fire Dep't v. Sicignano*, OATH Index No. 801/11 at 15 (June 30, 2011). Respondent failed to prove his affirmative defense; thus, the charge is sustained.

As evidence of the implausibility of respondent's claim of innocent ingestion while on vacation, petitioner offered evidence it claimed would prove that respondent could not have ingested cocaine on the date he claimed because it would not have been detectable in his system more than three days later. Specifically, petitioner's counsel offered as Petitioner's Exhibit 6, an excerpt from *The Medical Review Officer's Manual* (Medical Review Officer Certification Council, 1999), which states that cocaine metabolite "can be detected in urine for up to three days after a single dose [of cocaine] and does not significantly accumulate in the body" (Pet. Ex. 6 at 80). Petitioner sought to bolster this conclusion with an affidavit sworn by the Department's Chief Medical Review Officer, Kerry Kelly, M.D., who described *The Medical Review Officer's Manual* as a medical reference book relied upon by the Department for information about testing for controlled substances (Pet. Ex. 7). Respondent objected, citing his inability to challenge the evidence by cross-examination. Although the constitutional right of confrontation is inapplicable to civil administrative proceedings (N.Y. Const. art. I, § 6; *Gordon v. Brown*, 84 N.Y.2d 574, 578 (1994) (constitutional right to confrontation is limited to criminal proceedings and does not apply to administrative proceedings)), as a matter of due process, we do recognize "a limited right to cross-examine adverse witnesses in administrative proceedings." *Gordon*, 84 N.Y.2d at 578; *Dep't of Buildings v. Stallone Testing Laboratories, Inc.*, OATH Index No. 362/10 at 6 (Aug. 26, 2009). "In assessing whether due process requires the production of particular witnesses for cross-examination, a hearing officer should consider the nature of the evidence, the potential utility of trial confrontation in the fact-finding process, and the burden of producing the witness." *Gordon*, 84 N.Y.2d at 578. I find that cross examination was not required here, as its utility was severely limited by the fact that the scientific conclusions offered are minimally relevant to respondent's defense, as more fully discussed below.

Respondent also objected that both exhibits were hearsay statements, which in this proceeding goes primarily to weight, rather than admissibility. *Police Dep't v. Ayala*, OATH Index No. 401/88 at 5 (Aug. 11, 1989), *aff'd sub nom. Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't), *lv. to app. den.* 78 N.Y.2d 851 (1991); *see also Dep't of Education v. Hendricks*, OATH

Index No. 153/12 at 8 (Nov. 14, 2011) (hearsay is admissible in an administrative proceeding and may be the sole basis for a finding of fact); Charter § 1046(c)(1) (Lexis 2012) (for a city agency authorized to conduct a hearing, "[a]dherence to formal rules of evidence is not required."). In short, I found the treatise and affidavit both admissible and conclude that, together, they represent some evidence that cocaine remains in the system for only three days after it is consumed.

Respondent was given an opportunity post-trial to submit evidence to contradict petitioner's claim about the detectability of cocaine metabolite. Respondent submitted an excerpt from *Principles of Forensic Toxicology* (Barry Levine, editor, 3rd ed. 2010) for its statement that cocaine metabolite "may be detectable from two to four days after cocaine use depending on the dose, frequency of use, urinary pH, and clearance" (Resp. Ex. L at 261). Moreover, the treatise states that "cocaine and metabolite concentrations measured in urine cannot be correlated with the time of drug use or the degree of impairment" (Resp. Ex. L at 261), which means that one cannot infer from the relatively low concentration of cocaine metabolites in respondent's urine at the time of testing when he ingested the cocaine. Respondent also submitted a letter written by Donald B. Hoffman, Ph.D., in which he opines that *Principles of Forensic Toxicology* is an authoritative treatise and states that, based upon this text, "it is not possible to conclude that Mr. Armbruster would of necessity had to have had cocaine enter his system only within three days prior to when the urine sample was collected." (Resp. Ex. M at 2).[1] Both were admitted as evidence post-trial, along with Dr. Hoffman's curriculum vitae (Resp. Ex. K).

I found neither petitioner's nor respondent's submissions particularly weighty hearsay evidence. *See Fire Dep't v. Gill*, OATH Index No. 1871/10 at 8 (July 9, 2010) (reviewing *The Medical Review Officer's Manual* and noting that the brief explanation cited is not a comprehensive review of the medical literature). Though respondent's evidence rebuts petitioner's in one respect – confirming the possibility that cocaine metabolite may be detected in urine for as long as four days – the evidence is not proof of any fact upon which respondent's defense rests. The mere possibility that the cocaine was ingested on a Thursday does little to buttress respondent's theory of involuntary ingestion.

[1] Respondent submitted this proposed exhibit as Respondent's Exhibit J. Since another exhibit was marked Respondent's Exhibit J at the hearing, the tribunal marked this exhibit as Respondent's Exhibit M.

Respondent bears the burden of proving his defense and his own evidence did no more than raise the possibility that he could have consumed cocaine more than three days before testing positive. Neither the affidavit nor the treatise proves that respondent ingested the cocaine on any particular date, nor how he came to ingest it. More importantly, the conduct that he described – becoming so drunk in the company of strangers that he had never before met that he could take an elicit drug such as cocaine and have no recollection of it – is hardly testimony that supports a strong case of mitigation. In my view, such conduct is only slightly less reckless than taking the cocaine knowingly and intentionally.

Respondent had the burden to prove his defense and offered only his own self-interested and uncorroborated testimony. Having failed to meet his burden of proving that he took cocaine involuntarily, the charge is sustained.

FINDING AND CONCLUSION

The Department proved by a preponderance of the evidence that respondent tested positive for the use of cocaine in violation of AUC 202 section 4.1; violated his oath of office in violation of AUC 202 section 25.1.1; and engaged in conduct reflecting discredit upon the Department in violation of AUC 202 section 25.1.3.

RECOMMENDATION

Upon making the above findings, I requested an abstract of respondent's record of work performance. Respondent has been a firefighter since 2003, though only five of those years were served on full duty prior to the instant charges. After his positive drug test in 2009, he was placed on light duty. He has a clean record of conduct. Three quarterly performance evaluations conducted in 2004, the only ones provided to the tribunal, were "satisfactory."

Petitioner seeks respondent's termination, citing the Department's zero-tolerance policy. Respondent seeks to mitigate on the basis of injuries he sustained while working as a firefighter, including some that occurred after his positive drug test while working for the Department on light duty. I did not find such mitigation.

Respondent testified that he sustained two line-of-duty injuries over the years: on October 17, 2007, during an elevator malfunction (Tr. 37; Pet. Ex. C), and on November 10, 2007, during

a ceiling collapse (Tr. 39; Pet. Exs. A, B). After the 2009 incident, he was out for three weeks with back pain and numbness in his hands but returned to full duty (Tr. 39).

Respondent testified that following his positive drug test in January 2009, he began drinking excessively due to the stress of worrying about his job and the back pain he experienced from the previous line-of-duty injury (Tr. 44). He said he successfully completed an in-patient alcoholism rehabilitation program, which he attended voluntarily, and had two months of Department counseling (Tr. 45). He did not offer documentary proof of his stay in the rehab program. After his positive drug test, he was given a light duty assignment performing security at Department headquarters, where he works to the present day (Tr. 45-46). Shortly after he began this assignment, he tripped and fell while moving furniture around the office (Tr. 130). A subsequent MRI and CAT scan revealed damage to his cervical spine (Tr. 46; Resp. Exs. D, E, F). After waiting a year to see if the injury would improve with physical therapy and rest, respondent had surgery in November 2010 (Tr. 47; Resp. Exs. G, H). He took three months of medical leave to recover and returned to his light duty post in February 2011 (Tr. 48). Through Department accident reports from 2007 and 2009, MRI and CAT scan reports from August 2009, and doctor's letters from 2010 and 2012, respondent offered documentary evidence of his back injury (Resp. Exs. C-H). None of his medical records indicate that any doctor's visits predate his positive drug test. Respondent also submitted the 2011 finding by the Department's Medical Board that he is unfit to work as a firefighter, which indicates the Department's intent to file an application to determine his eligibility for disability retirement (Resp. Ex. J).

In spite of the significant back pain respondent claimed to experience since 2007, at the time of his drug test in 2009, he was working full duty and was fully functioning as a firefighter. He described his pain at that time as "not that bad" (Tr. 55-56, 129). It was not so substantial as to keep him from going on a ski trip. Respondent offered no basis for believing that his drug use resulted from his injuries. The mere fact that respondent has injuries is not a mitigating factor in his misconduct, inasmuch as the injuries and misconduct are unrelated. Nor does respondent present a compelling argument that he should be allowed to receive a disability retirement, if found eligible, rather than be terminated due to his drug use. He has spent only five years as a full time firefighter.

With only five years with the Department prior to his positive drug test, respondent's tenure is no mitigating factor at all. *Compare Dep't of Correction v. Tillery,* OATH Index No.

467/12 (Dec. 30, 2011) (noting that officer's four-year tenure is "short" and "diminishes potential mitigation") *and Dep't of Sanitation v. Cerulli*, OATH Index No. 2272/01 at 13 (Jan. 28, 2002) (12-year unblemished record was insufficient mitigation), *with Gill*, OATH 1871/10 at 3 (firefighter's 30-year tenure was one of many factors that contributed to "exceptional circumstances" justifying mitigation).

AUC 202 provides that the penalty for a positive drug test is termination on the first offense. AUC 202 at § 8.3. Importantly, the Department emphasizes that its zero-tolerance policy is rooted in public safety concerns, because "[t]he lives of citizens and co-workers are dependent upon the fitness, stamina and alertness of firefighters and fire officers. Drugs and alcohol alter alertness, judgment, physical agility and the ability to fulfill one's work responsibilities." AUC 202 at § 2.1. Respondent has not allayed these concerns here, nor has he shown mitigating circumstances that would justify a recommendation less than termination for his positive drug test. *Compare Milano*, OATH 2029/05 (termination recommended for firefighter who tested positive for cocaine where there were no exceptional mitigating circumstances), *with Gill*, OATH 1871/10 (due to respondent's 30 year tenure and support from captains, commanders, and a battalion Chief, as well as pending legislation that would protect a vested 20 year service pension, ALJ recommended respondent be permitted to retire). Indeed, respondent's refusal to acknowledge knowing ingestion of the cocaine may be viewed is an aggravating factor in selecting a penalty. *See Fire Dep't v. McDougall*, OATH Index No. 862/08 at 5 (May 22, 2008), *adopted*, Comm'r Dec. (June 23, 2008), *modified on penalty sub nom. McDougall v. Scopetta*, 76 A.D.3d 338 (2d Dep't 2010), *app. withdrawn*, 17 N.Y.3d 902 (2011).

In accordance with the foregoing, I recommend respondent's termination from employment with the Department.

Tynia D. Richard
Administrative Law Judge

August 24, 2012

SUBMITTED TO:

SALVATORE CASSANO

Commissioner

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