Dep't of Sanitation v. Anonymous

OATH Index No. 1637/12 (June 19, 2012), *modified on penalty*, Comm'r Dec. (Aug. 15, 2012), *appended*

Sanitation worker tested positive for the presence of alcohol during randomly administered test and sought mitigation of penalty, offering evidence of his status as a recovering addict. ALJ recommends a 30-day suspension.

Commissioner adopted the penalty of 30-day suspension then, by stipulation, the parties also agreed to lifetime drug/alcohol testing.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
ANONYMOUS[1]
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the New York City Administrative Code. Petitioner alleges that respondent, a sanitation worker, tested positive for alcohol use during a substance use test randomly administered on November 7, 2011, in violation of section 5.7 of the Department's Substance Abuse Policy and Procedure ("PAP") 95-05 (Nov. 1, 1995).[2]

The hearing was conducted before me on May 23, 2012. The parties stipulated to respondent's guilt of the charge. Respondent testified on his own behalf and offered the testimony of three other Department officials in mitigation of the penalty.

[1] In accordance with title 49, sections 40.323(b) and 382.405 of the Code of Federal Regulations, respondent's name has been withheld from publication.
[2] The Department withdrew charges numbered 24237, 100516, 101167, and 101500.

Based upon the record of the proceeding, I find respondent guilty of the misconduct charged and recommend a 30-day suspension combined with monitoring and/or continued drug testing as the Department sees fit.

ANALYSIS

PAP 95-05, the Department's substance use policy, requires all employees who hold commercial drivers licenses to undergo random substance use testing, in accordance with the federal Omnibus Transportation Employee Testing Act of 1991. PAP 95-05 § 8.1. Section 3.0 of the policy states that "Employees are prohibited from having in their system alcohol, controlled substances or unauthorized prescription drugs." Section 5.7 of the policy provides that "The presence of prohibited substances in one's body as demonstrated by a positive substance use test is a violation of this rule." The parties stipulated that on November 7, 2011, respondent tested positive for alcohol (Tr. 7-8). Respondent does not contest the positive test result or any aspect of the testing procedures or methodology.

Petitioner proved that respondent violated the Department's substance use policy by testing positive for alcohol on November 7, 2011.

FINDING AND CONCLUSION

Respondent tested positive for the presence of alcohol on November 7, 2011, registering a blood alcohol content of .057.

RECOMMENDATION

In connection with my finding and conclusion, I obtained and reviewed an abstract of respondent's personnel record which was provided to me by the Department. Respondent was appointed to his position as a sanitation worker in 2005 (Tr. 78). In his most recent performance evaluation, for the period January through June 2011, he was rated satisfactory in all categories. His two prior evaluations, for January through December 2010 and for January through December 2009, received an "unsatisfactory" rating overall, though he scored "satisfactory" in all categories except the category related to time and attendance. Respondent's prior discipline includes a reprimand in 2007 for absence without authorization and a two-day penalty in 2010 for failure to provide sick leave documentation. Significantly, in 2008, he received a 41-day

suspension and two-year probation for two violations of the substance use policy within a two-month period.

Here, respondent has been found guilty of violating PAP 95-05 by testing positive for the presence of alcohol during work hours. Petitioner seeks his termination, citing the safety-sensitive nature of his position which requires him to operate a sanitation truck.

In mitigation, respondent testified about his past history of substance abuse, in particular, synthetic marijuana which triggered an admission to a psychiatric facility just before respondent's positive test. Respondent said he had been purchasing synthetic marijuana over the counter for a year and using it nightly to help him sleep. Eventually, the drug made him violent and suffer delusions. Although his memory of this time is vague, he recalled being told by family members about violent acts he had committed against his parents and girlfriend. In October 2011, he was admitted to a hospital psychiatric ward where he was physically restrained twice and recalled having hallucinations about being in a Coca-Cola commercial and thought he was President of the United States (Tr. 79-81; Resp. Ex. A). He was released after 16 days; he said he started using synthetic marijuana again shortly thereafter. He felt worse this time and again became violent. He recalls being ordered to the clinic for his alcohol test on November 7, being driven there by his girlfriend, and failing the breath test (Tr. 80-82). A few days later, his parents sent him to a residential rehabilitation center in Florida where he spent six days in detox and five weeks in rehabilitation (Tr. 84).

Mr. Chestnut, Director of the Employee Assistance Unit ("EAU"), said respondent's mother called and told him he had entered inpatient treatment. Mr. Chestnut researched the facility to determine their treatment approach and found it to be a legitimate, nationally certified program (Tr. 61-62). The facility reported that respondent was cooperative and making progress in the program. While in treatment, respondent participated in Alcoholics Anonymous, Narcotics Anonymous, and group therapy (Tr. 87). He completed the program on December 22, 2011 (Tr. 83-84; Resp. Ex. C).

Respondent was returned to work full duty on December 27, 2011 (Resp. Ex. B) and has worked without incident ever since. He has received frequent drug testing since his return and all tests have been negative (Tr. 86). Superintendent Cutrupi, who currently supervises respondent, characterized him as an excellent worker who has never given him any cause to

doubt his ability to do the job safely (Tr. 13-14). Superintendent Cutrupi rated respondent's post-treatment performance as excellent and recommended against his termination (Tr. 15).

Respondent testified that he no longer uses drugs or drinks alcohol and feels better than he has in years (Tr. 87-88). Consistent with that testimony, Mr. Chestnut testified about the positive change he observed in respondent after his in-patient drug treatment. Although there can be no assurances of future sobriety, Mr. Chestnut, who was qualified as an expert in drug abuse counseling, thought respondent's prognosis was good (Tr. 66).

Respondent currently lives with his girlfriend (Tr. 87). He testified that he loves his job and, though he had never appreciated it before, realizes it enables him to make a good living as he looks forward to marriage and having a family. He does not envision ever using drugs or alcohol again, especially considering how good he currently feels sober. Respondent stated that he would abide by any set of conditions to maintain his employment with the Department (Tr. 88-89).

The Department has adopted a rigorous substance abuse program, outlined in PAP 95-05, to ensure that it can meet its obligations to provide a workforce is not driving heavy trucks while under the influence of drugs or alcohol. *See Dep't of Sanitation v. Anonymous*, OATH Index No. 1921/10 at 4-5 (July 7, 2010), *modified on penalty*, Comm'r Dec. (July 30, 2010). Under the policy, for first or second offenses, the Department commonly enters into agreements that impose a yearlong regime of random alcohol testing and a course of alcohol treatment, if recommended by an alcohol counselor, a penalty that is not available under the Administrative Code. To its credit, the Department's program seeks to address the needs of employees who acknowledge they have a problem and wish to keep their jobs. Thus, the Department's policy is not one of zero tolerance, and employees have been able to retain their jobs once enrolled in an appropriate program.

The Department argues that it has provided respondent with two opportunities to recover from his alcohol dependence and he has failed. A third chance, it contends, is more risk than it can reasonably assume, even though the Department acknowledges that respondent is a good worker and his recent alcohol treatment has apparently helped him (Tr. 98-99). The position is understandable.

I should note, though, that in this case, although respondent was found guilty of two prior instances of alcohol use, he had not had the chance to complete two periods of treatment at the time of his positive test on November 7, 2011. His two prior violations of the substance abuse policy occurred less than three months apart, and respondent was given one penalty and ordered to one round of treatment and one probationary period in satisfaction of both. The Department's policy is to provide employees "at least one opportunity to participate in a treatment program" "[i]n addition to the first voluntary referral." PAP 95-05 § 10.1. Thus it appears that the Department's policy is to offer at least two chances at rehabilitation: one mandatory and one voluntary. Respondent's first round of treatment was ordered by the Department, but his recent course was entirely voluntary. Although the treatment followed a positive alcohol test administered at work, it was not ordered by the Department; rather was instigated by respondent and his family out of concern for his wellbeing (Tr. 83). Consistent with the Department's allowance of more than one transgression, Mr. Chestnut said it was not unusual that respondent needed more than one course of drug treatment, nor was it predictive of future failure to maintain sobriety, stating it was "pretty much the norm" (Tr. 75).

Because respondent's prior offenses occurred close in time and he was given only one opportunity for rehabilitative services, he stands more in the shoes of employees with one prior substance offense than those with two. Employees charged with their second violation are generally offered a second chance at rehabilitation, even where there is extensive prior discipline. *See Dep't of Sanitation v. Richins*, OATH Index No. 167/01 at 23 (Oct. 15, 2001) (an employee with substantial disciplinary history was sanctioned with a 32 day suspension, loss of 10 vacation days, and a fine for his second substance use violation together with other charges); *see also Dep't of Sanitation v. McLain*, OATH Index No. 233/11 at 5 (Oct. 26, 2010) (15-day suspension and "last chance agreement" after second substance abuse violation); *Dep't of Sanitation v. Johnson*, OATH Index No. 746/05 (Oct. 5, 2005), *modified on penalty*, Comm'r Dec. (Dec. 4, 2005) (30-day suspension after second alcohol use violation and, by later agreement, one year of probation); *Transit Auth. v. Monteverde*, OATH Index No. 1198/94 at 7-9 (Dec. 5, 1994) (60-day penalty for second offense of being unfit for duty due to alcohol intoxication, even though respondent had been uncooperative to follow-up monitoring or treatment on his prior offense).

Respondent acknowledges a long battle with drug abuse since he was a teenager and concedes that he has failed in the past to maintain sobriety. However, a number of things have changed since his recent course of inpatient treatment, which concededly was more rigorous that the outpatient program he previously attended (Tr. 74). Respondent shows insight into both the magnitude of his problem and the value of continued employment, which he admits he formerly lacked. He has renewed supportive relationships with his parents and girlfriend and feels good about himself (Tr. 88-89). His demeanor was frank and honest before this tribunal. Respondent did not attempt to make light of his mistake or deflect responsibility for his actions. To the contrary, he appeared deeply chastened. Respondent's most recent work evaluation was completely satisfactory, and his performance has improved over his evaluations for 2010 and 2009.

Superintendent Cutrupi's testimony regarding respondent's excellence as a worker and his desire to see respondent keep his job carried some weight. It is not a small matter that the superintendent who supervises him and is personally responsible for the fitness and safety of all of his staff, recommends respondent's continuing employment. Similarly, Mr. Chestnut's evaluation of respondent's exceptional progress and good prognosis must also be given weight, given his 26 years of experience working for the Department in employee substance abuse matters (Tr. 55).

The Department has a legitimate concern for the safety of its employees and the general public. To address that concern, respondent suggests conditions, not provided under the Administrative Code, that the Department might impose with his agreement, such as periodic alcohol testing, as a safeguard against any possible recidivism. The Department may also consider ordering respondent to participate in some period of counseling or active membership in a program such as Alcoholics Anonymous or Narcotics Anonymous. Respondent has stated he would agree to any set of terms that would permit him to keep his job.

Under the circumstances, affording him another chance is reasonable. While it is true that respondent's misconduct warrants a serious penalty given his two prior instances of substance use, I disagree that termination is the only appropriate penalty in this case. Under section 16-106 of the Administrative Code, short of termination, respondent may serve a maximum 30-day suspension for a finding of misconduct. I find that penalty appropriate for the misconduct proven here. The Department may also impose a period of continued monitoring

and substance testing, counseling, or other conditions to be agreed upon by the employee. I am sure that respondent already knows that, if a last chance is accorded him this time, any further findings of substance use are likely to lead to termination of his employment.

Tynia D. Richard
Administrative Law Judge

June 19, 2012

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

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Attorney for Petitioner

KIRSCHNER & COHEN, P.C.
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SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

Approved
John J. Doherty
7/30/12

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Commissioner's Decision (August 15, 2012)

A copy of the June 19, 2012 Report and Recommendation submitted by OATH Administrative Law Judge (ALJ) Tynia D. Richard was forwarded to this office following a disciplinary proceeding pursuant to Section 16-1 06 of the Administrative Code of the City of New York ("Section .l6-106"), which governs the discipline of uniformed employees of the Department of Sanitation.

After reviewing the evidence, hearing transcript and report and recommendation, I agree with the specific findings that the Department has met its burden of demonstrating that ***Anonymous*** violated DSNY Policy and Procedure ("PAP") 95-05. However, I find the proposed penalty of a 30 day suspension without pay to be inappropriate.

The Department sought **Termination** for this 95-05 violation since this was his **third** violation of the agency's substance abuse policy. This situation is mirrors that presented in a prior OATH decision, ***Dep't of Sanitation v. Johnson,*** OATH Index No. 746/05 (Oct. 5, 2005) *modified on penalty,* Comm'r Dec. (Dec. 4, 2005). ***Anonymous*** had no other alternative but to present his claims of rehabilitation to OATH**.** Although the mitigation presented on behalf of ***Anonymous*** was effective and sympathetic, this agency has to guard against efforts to make our current "three strikes" too elastic depending on arbitrary factors. For example, the ALJ here made a distinction on how close together ***Anonymous***'s two prior positive test results were and opined that, because they were only three months apart, those results were more like only one violation. This ignores that fact ***Anonymous*** already had been afforded the opportunities to take full advantage of rehabilitative benefits featured in a ***Last Chance Agreement.*** This reasoning *also* opens up the door for every employee who comes up positive again within that or a lesser time frame to assert the same argument in asking to be treated differently than all other sanitation workers who have been fired after three strikes.

The penalty recommendation here of a mere 30 days would expose this agency and the public to the serious risk of having an employee driving a sanitation truck that has an alcohol problem and is in denial as to its seriousness.

Therefore, after discussion between the parties, the recommendation of ALJ Richard is modified and agreed to by the parties that the appropriate penalty for the proven misconduct is a 30-day suspension and Lifetime drug/alcohol follow-up testing for the duration of his employment with the Department.

John J. Doherty, *Commissioner*
NEW YORK CITY DEPARTMENT OF SANITATION