

Fire Dep't v. Arcello

OATH Index No. 109/13 (Nov. 29, 2012)

Firefighter found to have tested positive for cocaine. ALJ recommended termination from employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
ANTHONY ARCELLO
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Fire Department ("Department" or "FDNY"), pursuant to Administrative Code section 15-113. Petitioner alleges that firefighter Anthony Arcello tested positive for cocaine in a workplace random drug test in violation of the Department's Substance Abuse Policy (ALJ Ex. 1). Petitioner seeks respondent's termination. Respondent, understanding that separation from service is inevitable, asks that he be permitted to vest his pension and retire when he becomes eligible to do so.

At the hearing held before me on October 17, 2012, petitioner presented proof of the testing procedures and the positive test results. Respondent admitted ingesting cocaine and presented evidence of hardship as well as three character witnesses. The record closed on October 25, 2012.

The undisputed evidence is sufficient to prove the charges of drug use. For the reasons below, I recommend that respondent be terminated from his employment.

ANALYSIS

Respondent has been a firefighter in Ladder 113 in Brooklyn, New York since he started working for the FDNY in 1995 (Tr. 24-25). On Thursday, May 14, 2009, respondent appeared at

his firehouse at 9:00 a.m. and worked a 24-hour shift. On Friday, he left for several hours and returned to work at 5:14 p.m. (Tr. 92-93; Pet. Ex. 5).

It was undisputed that on May 15, 2009, at 8:41 p.m. respondent provided a urine sample that tested positive for cocaine metabolites at 6,160 nanograms per milliliter and that the testing procedures were proper (Pet. Exs. 1, 2, 3, 4). Moreover, there is no dispute that the positive test constitutes misconduct under the Rules and Regulations for the Uniformed Force and the All Units Circular Section 202 (“AUC 202”) (ALJ Ex. 2).

Respondent admitted that he ingested cocaine but stated that he could not recall what happened because he was drunk (Tr. 43). Respondent asserted that on either Monday or Tuesday, May 11, or 12, 2009, he drank excessively and unknowingly ingested cocaine. He was next scheduled to work on Thursday, and would not have been drinking that day (Tr. 70, 77-78, 82). Respondent also testified that he never appeared on the job under the influence of drugs or alcohol and that he was fit for duty on May 14, and 15, 2009 (Tr. 53, 82, 94-95).

Respondent’s testimony and the positive drug test support a finding that respondent tested positive for cocaine. Such use of illegal drugs is in violation of sections 25.1.3, 26.1.6,¹ and 25.1.1 of the Department Rules and section 4.1 of AUC 202 and the charges must be sustained.

FINDINGS AND CONCLUSIONS

1. Following a random drug test on May 15, 2009, respondent tested positive for cocaine.
2. Respondent’s use of cocaine was a violation of AUC 202 and the Rules and Regulations for the Uniformed Force.

RECOMMENDATION

The contested issue at the hearing revolved around penalty. Petitioner seeks a recommendation that, despite the lack of a prior disciplinary record, respondent be terminated from his employment as provided by the Department’s drug testing guidelines.

AUC 202 provides that the penalty for a first offense of testing positive for an illegal drug is termination (Resp. Ex. E: AUC 202 § 9.3). At the same time, the guidelines acknowledge that “there may be cases that do not fit precisely within [the guidelines]” and that the Department

¹ Petitioner charged respondent with AUC 202 section 25.1.5, which concerns on duty alcohol use. Section 26.1.6 prohibits illegal drug use.

“reserves the right to depart from these guidelines as the exacerbating or extenuating circumstances of each individual case require.”

Respondent acknowledged that he was aware of the Department’s “zero tolerance policy” towards drug use (Tr. 79-80) but argued that extenuating circumstances exist. He seeks a recommendation that he be allowed to vest his pension and retire when permitted under his retirement plan thereby receiving approximately \$39,000 annually plus health benefits (Tr. 133; Resp. Ex. E). Respondent’s proof focused on the mitigation of penalty based upon his clean record and a 17-year career, some personal setbacks including health issues, and the unfairness of termination, where such a penalty would take away his pension.

Respondent testified that he was born in Brooklyn, New York in 1964 and lives in Staten Island. He has two siblings and his parents are deceased. Prior to becoming a firefighter, respondent had various odd jobs. He is currently divorced and has four children ranging in ages from 14 to 23 years old. Prior to 2001, respondent started having problems with his wife and the state of his marriage was “horrible” (Tr. 22-26).

On September 11, 2001, respondent responded to the World Trade Center. He worked on “the pile” until the clean-up was completed. Respondent testified that it was the worst thing he had ever seen (Tr. 27-28). Respondent also attended many funerals for firefighters who perished on 9/11. During this time there was a lot of drinking by firefighters (Tr. 34).

Respondent stated that by 2002, his marriage was failing and he was often arguing with his wife. At one point his wife called the police and had him arrested. The charges were dropped but they continued to have problems. At the suggestion of other firefighters, respondent sought counseling and was admitted to Veritas Villa for 28 days (Tr. 28-31). His primary substance problem was with alcohol and this was what he was treated for (Tr. 32-33). On his intake questionnaire, respondent stated that he started drinking when he was 18, that he drinks beer about four times a week, and that the most recent use was on March 20, 2002. He also stated that the first time he used cocaine and marijuana was at age 20. Under “usual frequency” respondent stated that he snorts two lines of cocaine once a year and that the last time he used it had been six months ago. He further stated that he smokes one joint of marijuana a week and last smoked on March 20, 2002 (Tr. 60-66; Resp. Ex. B).

After respondent was discharged from Veritas Villa, he attended AA meetings. He also returned to work and subsequently divorced his wife. His financial situation was not good as he

was supporting his children and was sleeping at various friends' homes. He later got a place of his own and eventually borrowed money to purchase the family house from his wife so that he could be the primary caretaker of his children. Respondent testified that this period was personally and financially difficult and that in 2005 or 2006 he went to FDNY's counseling unit to deal with the stress. Respondent also asserted that he was not using drugs at this time but that he started drinking again (Tr. 34-38, 42). Since his positive drug test, respondent has been seeing a social worker who is treating him (Tr. 44; Resp. Ex. D).

Respondent also testified that he suffered a variety of line-of-duty injuries during his career involving his back, knee, and shoulder. Moreover, he had a hole in his intestine in 2006 and a lung abscess in 2007 that required medical attention (Tr. 25, 38; Resp. Ex. C).

Captain Frontera, Lieutenant Kreuzer, and Lieutenant Schenck testified about respondent's abilities as a firefighter, that respondent always appeared for work fit for duty, and that they believed it would be unfair to deny him his pension over one positive drug test (Tr. 99-102, 110-13, 120-23). Respondent's hearing was also attended by a number of firefighters who wished to show support for him.

The parties agreed that under current Department rules and policy, should respondent be terminated for misconduct, his eligibility for pension benefits would end because he was not "a member of city service" at the time of his retirement, although he would still be entitled to repayment of any past pension deductions from his salary. *Eberle v. LaGuardia*, 285 N.Y. 247, 254 (1941); Admin. Code § 13-151 (Lexis 2012) (City employee may retire provided "he or she shall be a member at such time"); Admin. Code § 13-349 (Lexis 2012) (City firefighters who meet service requirements may retire provided that their employment has not been terminated).

Respondent presented an e-mail (Resp. Ex. E) from Mr. Connolly, the deputy director of FDNY's pension bureau. The email indicates that if respondent completed his 20 years of service and retired on October 16, 2015, he would receive a one-half pay annual pension of approximately \$46,000 and would be eligible for an additional supplement of \$12,000 (Tr. 52). If respondent was terminated now and his pension permitted to vest as of November 1, 2012, he would receive a reduced annual pension of \$39,121 starting on October 16, 2015, 20 years after he entered City service.² Respondent also offered actuarial tables from the New York State jury instructions (Resp. Ex. I) to show that based on his life expectancy, respondent would receive a

² Respondent has an outstanding loan that would reduce his pension to \$35,454 per year if unpaid (Resp. Ex. E).

total pension benefit worth approximately \$1,040,624.45 if he retired on October 16, 2015, after having vested on November 1, 2012 (Tr. 50). Respondent testified that the loss of his pension would leave him destitute and without health care for him and his family (Tr. 53).

Petitioner's attorney argued that, given the Department's zero tolerance policy for any use of illegal substances, the only possible penalty for respondent is termination without a vested pension. The Department has adhered to this position in a number of recent drug cases in which OATH recommendations of termination or suspension with retention of pension rights have been rejected. *See, e.g., Fire Dep't v. Rawald*, OATH Index No. 1552/12 (July 30, 2012), *modified on penalty*, Comm'r Dec. (Oct. 11, 2012) (ALJ recommended firefighter be allowed to vest his pension and retire when permitted under his retirement plan); *Fire Dep't v. Sicignano*, OATH Index No. 801/11 (June 30, 2011), *modified on penalty*, Comm'r Dec. (May 31, 2012) (ALJ recommended disability retirement where firefighter sustained a permanent line-of-duty injury following a positive drug test); *Fire Dep't v. Zoda*, OATH Index No. 995/10 (Mar. 18, 2010), *modified on penalty*, Comm'r Dec. (Mar. 30, 2010) (ALJ recommended firefighter be allowed to vest his pension and retire when permitted under his retirement plan); *Fire Dep't v. Maresca*, OATH Index No. 2564/08 (Nov. 19, 2008), *modified on penalty*, Comm'r Dec. (Feb. 11, 2009), *aff'd sub nom. Maresca v. Scoppetta*, No. 13478/09 (Sup. Ct. Kings Co. Nov. 30, 2009) (ALJ recommended retirement due in part to firefighter's permanent disabilities from service on 9/11); *Fire Dep't v. Schroeder*, OATH Index No. 1261/07 (Sept. 28, 2007), *modified on penalty*, Comm'r Dec. (Nov. 19, 2008), *annulled and remanded*, 77 A.D.3d 840 (2d Dep't 2010) (ALJ recommended disability retirement due to firefighter's post-traumatic stress disorder and respiratory disabilities due to 9/11); *Fire Dep't v. Kelly*, OATH Index No. 804/06 (June 9, 2006), *modified on penalty*, Comm'r Dec. (Jan. 2, 2007), *aff'd sub nom. Kelly v. Scoppetta*, 56 A.D.3d 475 (2d Dep't 2008) (ALJ recommended either a 10-day suspension or disability retirement due to firefighter's post-traumatic stress disorder).

Two recent appellate decisions, however, have overturned agency decisions terminating a City firefighter and a City police officer because the loss of the employees' pension rights "shocked" the courts as unfair. In *McDougall v. Scoppetta*, 76 A.D.3d 338 (2d Dep't 2010), the Commissioner terminated a firefighter who tested positive for cocaine thereby depriving him of his pension. Relying on *Pell v. Board of Education*, 34 N.Y.2d 222 (1974), the Second Department held that stripping away the firefighter's pension was "shocking to our sense of

fairness” due in part to the firefighter’s 25 years of excellent service and the hardship it would cause to him and to his family. The Court reversed the Commissioner’s decision of termination and held that the firefighter should be allowed to retire and pay a fine of \$80,000, as recommended at a step 1 disciplinary conference.

In *Vecchio v. Kelly*, 94 A.D.3d 545 (1st Dep’t 2012), a police officer was found to have improperly coerced a rape victim to submit to nude photos and was terminated by the Police Commissioner. In reversing a finding on other misconduct, the First Department noted that despite the “repellant behavior” the officer had served for “approximately two decades,” had good evaluations and 12 medals for excellent police work, and that he and his family, including three foster children, would suffer “extreme hardship” if he lost his job and his pension. The Court remanded the case noting that, if the Commissioner adhered to the penalty of termination, the officer should be permitted “to apply for a vested interest retirement.” 94 A.D.3d at 546.

Following *McDougall* and *Vecchio*, the New York state legislature enacted legislation that protects the pension rights of firefighters and police officers with 20 years or more of service, even if terminated pursuant to misconduct. Pursuant to Administrative Code sections 13-256.1 and 13-361.1, for a firefighter or police officer with 20 years of service, “the discharge or dismissal from employment of such person shall not preclude such person from receiving any rights or benefits to which he or she shall otherwise be entitled.” This provision is of no benefit to respondent, who had less than 15 years of service at the time of his positive drug test and only 17 years at the time of the hearing.

There is no question that respondent’s use of illegal drugs constitutes a serious violation of the Department’s rules. Despite respondent’s admirable work record, termination is the most appropriate penalty for a firefighter proved to have used cocaine, absent extraordinary mitigation which does not exist here. The only other penalty available in the law, a 10-day suspension, is inadequate for such egregious misconduct. *See* Admin. Code § 15-113 (Lexis 2012); *see also Rawald*, OATH No. 1552/12 at 8.

Thus, the only issue is whether respondent should be allowed to obtain his reduced pension in the future. As noted by his attorney, there is no evidence that respondent was impaired while on duty. Moreover, the record supports a finding that respondent had a long and admirable career as a firefighter prior to his positive drug test, that he has experienced personal, health, and professional difficulties, and that the loss of his pension will create hardship for him

and his family. However, there is nothing remarkable to distinguish this case from the FDNY Commissioner's most recent decision in *Rawald*, OATH No. 1552/12. Firefighter Rawald, like respondent, had 17 years of service, was a respected firefighter, was a first responder on 9/11, had various line-of-duty injuries and related health issues, and credibly testified that his family would experience hardship by the loss of his pension.

Moreover, some notable extenuating circumstances discussed in *McDougall* and *Vecchio* are not present here. In both cases the employees were well past the time that they could have retired. The reviewing Courts also observed that the employees' drug use was an isolated incident in otherwise exemplary careers. Here, respondent admitted in 2002 that, starting at age 20, he used cocaine once a year and marijuana once a week. This means that respondent started using drugs before becoming a firefighter. More importantly, he continued to use them regularly after he became a firefighter in 1995, even though use of illegal drugs is prohibited and might have imperiled the safety of the public and fellow firefighters. Respondent's self-serving testimony that he ceased using drugs after he sought alcohol counseling in 2002 was not credible. Respondent admitted that he had an uncontrolled alcohol problem and that he used cocaine prior to his 2009 drug test while under the influence. Respondent's suggestion that this was an accidental, unknowing, one-time use of drugs seems highly unlikely. AUC 202 allows firefighters with a "dependence upon or problems with alcohol or drugs" to seek counseling prior and thereby avoid discipline (Resp. Ex. E: AUC 202 § 2.1.4). Respondent knew he had a long-time alcohol problem that led to drug use, and he failed to seek help to overcome this difficulty as allowed by the Department. On this record, I am unable to conclude that depriving respondent of a reduced pension is shocking to the conscience under *McDougall* or *Vecchio*.

According, I recommend that respondent be terminated from his employment.

Alessandra F. Zorgniotti
Administrative Law Judge

November 29, 2012

SUBMITTED TO:

SALVATORE CASSANO

Commissioner

APPEARANCES:

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