Fire Dep't v. Murray

OATH Index No. 2316/13 (Sept. 25, 2013)

Firefighter found to have been in possession of cocaine. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
BRIAN MURRAY
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Fire Department ("Department"), brought this disciplinary proceeding pursuant to section 15-113 of the Administrative Code against the respondent, firefighter Brian Murray. Petitioner alleges that the respondent possessed cocaine, which led to his arrest for criminal possession of a controlled substance; that he violated his oath of office; and that he engaged in conduct that brought reproach or reflected discredit on the Department (ALJ Ex. 1). Petitioner seeks termination of respondent's employment.

At a hearing conducted by this tribunal, petitioner relied upon documentary evidence and testimony from two Police Department detectives. Respondent presented documentary evidence, testified on his own behalf, and offered testimony from six other witnesses: a bartender from the bar he visited the night of his arrest, current and former Department firefighters, and employees from the Department's public certification unit, where respondent is presently assigned.

For the reasons below, I find that the Department has proved the charges by a preponderance of the credible evidence and recommend termination of respondent's employment.

PRELIMINARY MATTERS

At the hearing, counsel for respondent objected to the admission into evidence, in their entirety, of transcripts of the Department's interviews of Police Detectives Lopresti and Malpeso, which interviews were conducted by petitioner in February 2011. Counsel's principal objection was that the transcripts were derived from police reports and records that were sealed at the conclusion of the criminal proceeding against respondent, which was adjourned in August 2010, and dismissed in February 2011 (Tr. 21-24, 59-60, 70-71; Pet. Ex. 6). Counsel for respondent argued that the detectives were present at the hearing and could testify from their recollection. Further, counsel noted that the interviews were conducted a day before the records were sealed in the criminal proceedings and characterized the interviews as an end-run around the Criminal Procedure Law provisions regarding sealing of official records in criminal proceedings. I overruled these objections and admitted the transcripts into evidence (Tr. 24, 60).

Criminal Procedure Law section 160.50 provides, on termination of a criminal action or proceeding in the defendant's favor, the court shall enter an order directing that "(c) all official records and papers . . . relating to the arrest or prosecution . . . on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency. . . ." Crim. Pro. Law § 160.50(1)(c) (Lexis 2013). This tribunal has declined to preclude evidence prepared by agency investigators that contained references to or summaries of information culled from subsequently sealed police records where the investigators obtained that information prior to entry of a sealing order. *See Dep't of Correction v. Blanc*, OATH Index No. 2571/11, mem. dec. at 7-8 (Sept. 12, 2011) (After determining that agency reports "generated for the purpose of determining whether disciplinary charges should be brought are different from reports generated for the purpose of determining whether criminal charges should be brought," ALJ found that "for the most part, reports of [agency] investigators are not 'official records' subject to sealing.") In *Blanc*, the ALJ concluded that while she would undertake a case-by case review of the challenged evidence, she intended to "permit petitioner to introduce [agency] records, including those relating to respondent's arrest, so long as this information was obtained by investigators prior to entry of the sealing order." *Id*. at 8. *See also Dep't of Correction v. Toby C.*, OATH Index No. 1692/96 at 2 n. 2 (Sept. 19, 1997) (ALJ rejected respondent's argument that all evidence derived from a police investigation should be deemed sealed and permitted the submission of reports prepared by

agency investigators in the course of their official investigation, which reports "contained summaries of, made reference to and/or included information from subsequently sealed police records" where the information was obtained prior to the sealing order being entered).

Here, the Department, which is not a law enforcement or prosecutorial entity, conducted the interviews. The detectives stated that they reviewed their paperwork before the interview to refresh their memory, but the transcripts do not include excerpts from documents that were part of the criminal proceeding. In addition, respondent's counsel represented that the interviews were conducted prior to the sealing order in the criminal proceedings. The interviews here fall within the purview of material gathered by the Department in the course of preparing a disciplinary case and were not prepared by or for a criminal investigation or prosecution. Therefore, the interview transcripts are not official records subject to seal under the Criminal Procedure Law.

In any event, assuming for the sake of argument that the interviews were conducted and the transcripts generated in violation of a sealing order, such evidence need not be suppressed in this proceeding. *See Charles Q. v. Constantine,* 85 N.Y.2d 571, 575 (1995) (no basis for excluding from a disciplinary hearing evidence obtained through an erroneous unsealing order and mere reception of the erroneously unsealed evidence in a disciplinary hearing does not warrant annulment of the administrative determination).

ANALYSIS

Respondent, a New York City firefighter since 1998, was arrested on November 24, 2009, while he was off duty, for possession of cocaine (Pet. Ex. 6; Tr. 163). At the hearing, police detectives testified to having observed a drug transaction in the vehicle in which respondent was a passenger and to recovering a packet of cocaine from respondent during his arrest. Respondent denied having possessed drugs on the night of his arrest and noted that drug tests administered shortly after his arrest were negative for the presence of drugs. Resolution of these charges rests on which version of the events surrounding respondent's arrest is credited.

On the evening of November 20, 2009, at about 8:00 p.m., New York City Police Detectives Malpeso and Lopresti were conducting surveillance in Great Kills, Staten Island, an area described as a known drug location (Tr. 33, 72). The detectives were officers in the Police

Department's Staten Island narcotics unit and Great Kills had been designated as a target area for surveillance during a tactical meeting earlier that day (Tr. 72).

Detective Lopresti testified that he and two other police officers were in an unmarked vehicle conducting surveillance in what they had identified as a drug-prone location when he observed respondent and a companion, Richard Barry, exit a bar on Giffords Lane (Tr. 61, 72). Detective Lopresti was driving the police vehicle (Tr. 63). At the time of the arrest, Detective Lopresti had been a police officer for twelve years, and a detective for three of those years (Tr. 55). Respondent and Mr. Barry exhibited behavior the detective deemed suspicious based on his training and experience, such as walking rapidly and getting on and off the phone (Tr. 61, 76-77).

According to Detective Lopresti, he observed respondent and his companion walk to the end of the block and wait until a car pulled up to them at the corner. The two men entered the back seat of the car, which then made a series of left turns, going around the block, until it arrived back near the location where they had entered the vehicle (Tr. 62-64). Detective Lopresti testified that traveling around the block in such a manner, which the detectives referred to as a "loop de loop," is common in drug transactions (Tr. 80). Detective Lopresti, who was driving the unmarked police vehicle, followed the car and, while at a traffic light, he positioned his vehicle to the right side of the one in which respondent was traveling and peered into the car (Tr. 64-65, 74). The detective testified that his vehicle was close to the one in which respondent was travelling so that he was able to see inside the car, where he observed a hand-to-hand drug transaction between passengers in the front and rear seats (Tr. 64, 80, 81-82). The detective could not recall which of the passengers were involved in the transaction (Tr. 64).

During an interview conducted by petitioner in February 2011, which interview took place closer in time to respondent's arrest that the detective's testimony, Detective Lopresti provided a more detailed account of the events leading to the arrest. He stated he observed a narcotics transaction between an occupant of the car, respondent, and Mr. Barry, in which small zip-lock bags of a white powdery substance were exchanged for money (Pet. Ex. 3 at 10). In his interview, Detective Lopresti stated that the vehicle in which respondent was riding had stopped at a red light when he pulled up next to the car and saw the transaction. The car then made a series of left turns before ending up at the location where they had picked up respondent and his companion (Pet. Ex. 3 at 11).

According to Detective Lopresti, after respondent and Mr. Barry exited the car, his partners, Detective Malpeso and Sergeant Reyes, jumped out of the police vehicle in pursuit of respondent and Mr. Barry while Detective Lopresti followed the car respondent had just exited (Tr. 65). Detective Lopresti stopped the car after pursuing it for several blocks and recovered cocaine and pills from the occupants of that vehicle (Tr. 65). In his February 2011 interview, Detective Lopresti stated that he recovered two zip-lock bags of cocaine with heart stamps on the packaging from the occupants of the vehicle. He further stated that he later determined that the stamp on the drug packages recovered in the car matched that on the zip-lock package Detective Malpeso found on respondent at his arrest (Tr. 71; Pet. Ex. 3 at 12-13).

As the designated arresting officer that evening, Detective Lopresti vouchered the drugs that were recovered during the arrest, including those recovered from respondent by Detective Malpeso. Detective Lopresti testified to field-testing the drugs and to the chain of custody of the items recovered from respondent (Tr. 66-67).

Detective Malpeso, the officer who stopped and searched respondent, gave an account of the events leading up to his search of respondent that is consistent with that of Detective Lopresti. Detective Malpeso observed respondent and Mr. Barry engage in behavior he deemed suspicious and saw them enter a car that made several quick left turns, which he described as a "loop de loop," before arriving back at its starting location. He then saw them exit the car (Tr. 18-19). Detective Malpeso testified that while the officers were observing the vehicle in which respondent was riding, he heard Detective Lopresti say "hand-to-hand," which signaled observation of a drug transaction (Tr. 48, 51-52). However, Detective Malpeso admitted that he did not witness the transaction (Tr. 36, 52).

According to Detective Malpeso, after exiting the unmarked police vehicle, he observed respondent making furtive movements towards his pants pocket and holding his hand in a closed fist as if trying to conceal something (Tr. 20, 37-38). Detective Malpeso identified himself as a police officer and positioned respondent against the side of a building so that respondent was facing the wall with his hands raised to his shoulders (Tr. 39-41). Detective Malpeso recovered one zip-lock bag of drugs with a heart stamp on the package from respondent's pocket (Tr. 20, 24-26; Pet. Ex. 1 at 10). Sargent Reyes stopped Mr. Barry and Detective Malpeso assisted Sargent Reyes in searching him. They recovered several packages of drugs from Mr. Barry (Tr. 25, 29). During an interview that the Department conducted in February 2011, Detective

Malpeso stated that the packaging of the drugs recovered from Mr. Barry was different from that recovered from respondent (Tr. 25; Pet. Ex. 1 at 10).

In the same February 2011 Department interview, Detective Malpeso said that he first approached respondent from behind and that he saw something in respondent's fist. When he identified himself as a police officer, respondent tried to put the object in his pants pocket, but part of it remained visible outside of the pocket (Pet. Ex 1 at 9-10).

The detectives testified that respondent's arrest stood out as one of a very small number of drug-related arrests of a firefighter they have made in the course of their careers. Detective Lopresti testified to having been involved in only one or two such arrests out of the 500 drug arrests he has made in his career (Tr. 58), while Detective Malpeso was only involved in two in a career of over 200 drug arrests (Tr. 17). Thus, it is likely that the detectives' recollection of the circumstances of respondent's arrest was enhanced because they rarely have occasion to arrest a firefighter.

The detectives acknowledge that the events leading to the arrest occurred at around 8:00 p.m., when it was dark outside (Tr. 18, 36, 79). Respondent suggests that Detective Lopresti's testimony that he observed a hand-to-hand drug transaction at 8:00 p.m. in November should not be credited. However, Detective Lopresti testified to having positioned the vehicle he was driving so that he was close enough to see into the car in which respondent was seated (Tr. 79-82). It is plausible that even at that hour, the position of the vehicles relative to each other and lighting conditions could have made it possible to see what was transpiring inside the car in which respondent was travelling. In any event, Detective Malpeso, who arrested respondent, credibly testified to finding a package of what was later determined to be cocaine on respondent.

Respondent's version of the events related to his arrest depict him as a victim of happenstance. He testified that after working a 24-hour shift at 6:00 p.m. on November 24, 2009, he went to a bar near his home after ordering food from a nearby restaurant (Tr. 164-66). According to respondent, his tour of duty that day had been a long one, towards the end of which his ladder company had responded to an accident in which a child had been seriously injured after being struck by an SUV (Tr. 165). Respondent, who had had three potent alcoholic drinks before his food was delivered, asked the bartender for permission to leave his car parked in the bar's parking lot because he did not want to drive after drinking (Tr. 167-68). According to respondent, he then went across the street to get a taxi to take him to his then-fiancée's home and

the taxi dispatcher told him it would be 30 minutes before one was available (Tr. 169). While in the bar waiting for the taxi, respondent encountered Mr. Barry, whom he described as a social acquaintance he had met six years earlier through his fiancée (Tr. 168-69, 209).

Respondent testified that Mr. Barry told him that respondent's fiancée's nephew was driving Mr. Barry to another bar and offered respondent a ride (Tr. 169). Respondent called his fiancée as he left the bar to let her know that he was getting a ride and walked down the street with Mr. Barry to meet the car at the corner of Margaret Street and Giffords Lane. Respondent stated that he entered the car and sat directly behind the front seat passenger, with whom he engaged in conversation for much of the ride. He testified that Mr. Barry and the driver had a separate conversation to which he did not pay attention. Respondent denied handing anything to anyone in the front seat or seeing Mr. Barry do so (Tr. 171-72, 175, 177-78).

According to respondent, about one minute into the ride, the driver, who may have already been on the telephone when respondent entered the car, or whose phone may have rung after they entered the car, told his passengers that he would not be able to take them to their destination because he had to take care of a problem with a water heater (Tr. 172-76, 214-17). The driver made four right turns and dropped respondent and Mr. Barry near the corner near where he had picked them up (Tr. 172-76).[1] Respondent estimated that the entire ride lasted about two minutes (Tr. 217-18). Respondent testified that after he exited the car someone slammed him against a wall near a window and emptied his pockets. Startled, respondent asked what was happening, identified himself as a firefighter, and asked to get out of there (Tr. 180, 182-84, 218-20). Respondent testified that the officer told him "don't make me an accomplice" as he searched respondent (Tr. 184).

Respondent maintained that the officer who conducted the search became frustrated and upset when he did not find anything on respondent (Tr. 184-85). He stated that he then heard a crinkling sound, like a cigarette pack or cellophane, from behind his left shoulder, as the officer said: "I got you now," or words to that effect (Tr. 185-86, 222). Respondent testified that the officer had a cigarette packet in his hand, but that they were not respondent's cigarettes because the officer had already put those on the window sill with respondent's other property (Tr. 186).

[1] Respondent's account of the brief ride differs from that of the detectives in that they testified that the vehicle in which respondent was riding made a series of quick left turns around the block, described as a "loop de loop" by the detectives. Although respondent recalls the turns as right turns and the detectives testified that the turns were to the left, and although the detectives' did not identify the same street names on which the car turned, it is undisputed that the vehicle made a series of quick turns and arrived back at the location from which it started.

During the officer's search of respondent, Mr. Barry was positioned against the same wall to respondent's left (Tr. 185; Resp. Exs. A, B). Respondent stated, however, that he did not see Mr. Barry's arrest because he was too involved in his own (Tr. 187).

The essence of respondent's defense is that he was in the wrong place at the wrong time. He claims that after having several drinks he decided to park his car in the bar's parking lot (Tr. 168). He accepted a ride from an acquaintance and became caught up in an arrest of all the people who were in the car. To bolster his claim that he was an innocent passenger in the vehicle, respondent offered the testimony of Mr. Dunn, a bartender, was working at the bar the evening of November 24, 2009. Mr. Dunn, who was a Department firefighter for 22 years, acknowledged that he knows the respondent from the bar and that he knew respondent's father because both had worked as firefighters in the same borough for over five years (Tr. 124, 126, 135-36). Mr. Dunn appeared to minimize the extent of his relationship with respondent and his family, but conceded that a relationship preceded the charges in this matter (Tr. 135-36). Mr. Dunn recalled seeing respondent at the bar on the evening in question. According to Mr. Dunn, after consuming several drinks of whiskey, respondent told him that he planned to take a cab home. Respondent asked for permission to leave his car in the bar parking lot overnight. Mr. Dunn stated that respondent then took the food he had ordered and left the bar alone (Tr. 126-31; 133-34). Mr. Dunn's testimony was clearly offered to show that respondent was in the vehicle with Mr. Barry and the other persons because he needed a ride, not to buy drugs.

Although Mr. Dunn's testimony supports respondent's assertion that he left his car in the bar parking lot on the night the detectives observed him getting into the vehicle with Mr. Barry, it does not refute the charge of possession of a controlled substance. Just as respondent could have decided to leave his car parked in the lot out of concern about driving under the influence of alcohol, it is plausible that he left the car in the parking lot so he could go with Mr. Barry to buy drugs or so his driving would not be impaired by consumption of illegal drugs.

Mr. Barry, who was arrested with the respondent on November 24, 2009, signed an affidavit at respondent's behest, which petitioner offered into evidence (Pet. Ex. 7). In that affidavit, Mr. Barry stated that he accompanied respondent before and at the time of respondent's arrest. Mr. Barry admitted that he purchased drugs on that date, which led to his conviction for possession of a controlled substance. According to Mr. Barry, respondent "was never in possession of any drug" at the time of their arrest, nor did respondent tell Mr. Barry that he

possessed drugs. Mr. Barry's affidavit states that he had never seen respondent in possession of drugs at any time. It is worth noting what is absent from Mr. Barry's affidavit: Mr. Barry, who was arrested with respondent and was to the left of the respondent at the time of the arrest, the same left side on which respondent testified the detective was positioned, did not indicate that he observed any of the conduct respondent attributed to Detective Malpeso, such as planting evidence or stating, "I got you now." Nor did Mr. Barry take responsibility for the drugs that were attributed to respondent, which would lend some support to respondent's contention that the officer obtained the drugs elsewhere and planted them on him.

Respondent presented no credible evidence to support his suggestion that Detective Malpeso planted cocaine on him. Moreover, he offered no motive for the detective to engage in such profound misconduct, other than inquiry into whether the detective received of overtime pay incident to the arrest or had a similar financial incentive, which Detective Malpeso denied (Tr. 41-43, 48).

In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of witness' testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998).

Respondent's credibility is undermined by his unconvincing testimony that he was the victim of coincidences and misconduct. To credit respondent's version would require believing that a series of very unfortunate events, including serious police misconduct, occurred on the night of the arrest. One would have to believe that: (1) respondent innocently accepted a ride in a vehicle in which the other occupants, who were social acquaintances and his fiancée's nephew, were in possession of drugs; (2) about a minute into the ride, the driver learned he had a problem that prevented him from taking respondent to his destination; (3) after circling around the block, the driver returned respondent to the location where he had been picked up; (4) respondent encountered a police officer who, having failed to find evidence of a drug transaction, planted cocaine on respondent.

Moreover, respondent has every reason to present a version of the events that would exculpate him: the Department is seeking to terminate him for possessing drugs. I did not credit respondent's suggestion that Detective Malpeso planted cocaine on him. I found the detective to

be credible in his testimony of the events surrounding respondent's arrest, including his recovery of a packet of cocaine from respondent's pocket. His credibility is enhanced by his recollection of the arrest as one of only two in his career that involved a fire fighter. In addition, Detective Malpeso testified he felt "horrible" about testifying in this matter because he has a photograph of his son with a firefighter on his desk (Tr. 30). The detective testified not because of some bias or interest in the outcome of this disciplinary proceeding, but because he was called as a witness in this matter.

The parties stipulated to the facts contained in the affidavit of Amy Yuen, a Criminalist at the Police Department Crime Laboratory, as well as those in a transcript of an interview of Ms. Yuen conducted by the Department on January 26, 2011 (Tr. 84; Pet. Exs. 4, 5). In her affidavit, Ms. Yuen indicated that on November 30, 2009, she performed a substance analysis on evidence recovered from the respondent. Ms. Yuen summarized the procedures she employed in receiving and analyzing the evidence. The transcript of the interview is consistent with Ms. Yuen's affidavit. According to Ms. Yuen, she received the evidence in a sealed security envelope and a narcotics envelope and verified that the information on the voucher matched that on the envelopes. Ms. Yuen described the evidence she received as "a clear Ziploc bag with hearts on one side containing solid material" (Pet. Ex. 5 at 8-10). Ms. Yuen indicated that after her analysis she concluded that the substance tested contained cocaine (Pet. Ex. 5).

The Department's stringent policy regarding the possession or use of illegal drugs is reflected in the Department's All Units Circular 202, dated October 12, 2005 ("AUC 202") (ALJ Ex. 3). Section 4.1 of that policy "strictly prohibits" the "[u]se, positive presence, possession, attempted possession, sale, transport or delivery 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)" (emphasis in original). Section 3.2 of AUC 202 defines illegal drugs to include cocaine.

Respondent sought to make much of the results of a mandatory drug test the Department administered shortly after his arrest and the drug test that respondent underwent, at his own expense, a few days after his arrest, both of which were negative for the presence of illegal drugs (Tr. 192-94; Resp. Ex. C). However, the Department charged respondent with possession, not use, of illegal drugs; a negative drug test is not dispositive of the charge of drug possession.

A negative test may merely indicate that respondent did not have an opportunity to consume the cocaine before he was tested. *See Dep't of Correction v. Rodriguez,* OATH Index No. 761/91 at 27 (June 28, 1991), *modified on penalty,* Comm'r Dec. (Sept. 12, 1991) ("Although the evidence failed to establish that respondent used drugs in this instance, there was no way to be certain that that was not his intent and that he was simply caught before he was able to do so"); *Fire Dep't v. Sammis*, OATH Index No. 502/90 at 18 (Feb. 27, 1990) ("[n]o basis exists to conclude that respondent was purchasing the drugs for someone else and thus it is reasonable to conclude that, at some point, he would have consumed the drugs that he purchased"). Indeed, respondent's arrest came minutes after Detective Lopresti observed a drug transaction, so it is highly unlikely that he would have had a chance to consume drugs. Therefore, respondent's negative drug test results do not rebut the charge of possession of cocaine.

The undisputed facts establish that on November 24, 2009, respondent finished a lengthy and stressful tour of duty, towards the end of which his ladder company responded to an accident in which a child was gravely injured. Respondent went to a neighborhood bar and had several drinks. He then met an acquaintance, Mr. Barry, and got into a car with him and two other people, including his then-fiancée's nephew. After taking a two-minute ride in the car, which circled the block, respondent exited the car and was arrested for drug possession, as was Mr. Barry and the other occupants of the car. Mr. Barry acknowledged having purchased drugs on the date in question and was convicted of drug possession. The police also found illegal drugs in the vehicle driven by the nephew of respondent's then-fiancée.

The contested issue is whether respondent possessed drugs. The most reasonable inference to be drawn from the undisputed facts, coupled with the testimony of the arresting officers, is that respondent was indeed in possession of cocaine at the time of his arrest. The most plausible scenario is that the driver and/or front seat passenger of the vehicle sold drugs and respondent obtained drugs from them. It is significant that the packaging of the drugs recovered from respondent matched that on the drugs recovered from the occupants of the vehicle, but not that recovered from Mr. Barry. In all likelihood, Mr. Barry facilitated the transaction between respondent and the occupants of the vehicle.

The officer who searched respondent during the arrest testified to his discovery of drugs in respondent's pocket and those drugs were vouchered and tested. At the end of the day,

respondent did not really dispute that the officer recovered the drugs during the arrest, but suggested that the officer planted the drugs on him. Yet, he offered no motive for such egregious misconduct, nor did he provide any evidence, such as a statement from Mr. Barry, who was arrested next to him, that would support his suggestion that an officer planted the drugs on him during the arrest. Moreover, the packaging of the drugs recovered from respondent matched that of drugs recovered in the vehicle, not the packages recovered from Mr. Barry, which suggests that Mr. Barry was not the source of the drugs found on respondent.

Accordingly, petitioner has established, by a preponderance of the credible evidence, that respondent was in possession of drugs on November 24, 2009.

FINDINGS AND CONCLUSIONS

1. On November 24, 2009, respondent possessed cocaine when he was arrested. Possession of an illegal drug is a violation of section 25.1.5 of the Department Rules and section 4.1 of AUC 202.

2. Respondent's possession of cocaine is conduct unbecoming and of a nature to bring discredit to the Department, and contravenes his oath of office, in violation of sections 25.1.1 and 25.1.3 of the Department Rules.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed respondent's personnel record. Respondent has been a firefighter since August 1998. In November 2009, respondent was suspended for thirty days after his arrest. No other disciplinary action is reflected in his personnel history. Respondent has received a merit award for responding to the World Trade Center on September 11, 2011 ("September 11") and one for rescuing victims of a building fire in 2008 (Tr. 157-58). Despite respondent's unblemished record, the Department, in keeping with its zero-tolerance policy for drug use and possession, seeks termination of respondent's employment.

Absent extraordinary circumstances in mitigation, this tribunal has consistently recommended termination from employment for violation of its prohibitions on illegal drugs. *See Fire Dep't v. Arcello*, OATH Index No. 109/13 (Nov. 29, 2012) (ALJ recommended termination from employment, despite unblemished disciplinary record and 17-year tenure,

where firefighter found to have tested positive for cocaine); *Fire Dep't v. Armbruster,* OATH Index No. 1350/12 (Aug. 24, 2012) (termination recommended for a firefighter who tested positive for cocaine in a random drug test and failed to prove that he ingested it inadvertently); *Fire Dep't v. Lyon,* OATH Index No. 2124/08 (July 28, 2008) *(*termination recommended for respondent who admitted his use of cocaine); *Fire Dep't v. Peltonen,* OATH Index No. 2101/08 (Oct. 9, 2008), *aff'd*, 2009 NY Slip Op 52001U, 25 Misc.3d 1208A (Sup. Ct. Kings Co. 2009) (termination of firefighter who tested positive for cocaine use recommended; firefighter suffered from post-traumatic stress disorder (PTSD) related to September 11); *see also Fire Dep't v. Benson,* OATH Index No. 1638/06 (Sept. 5, 2006); *Fire Dep't v. Milano,* OATH Index No. 2029/05 (July 3, 2006); *Fire Dep't v. Kirk,* OATH Index No. 441/06 (April 26, 2006), *aff'd,* 47 A.D.3d 406 (1st Dep't 2008); *Fire Dep't v. O'Sullivan,* OATH Index No. 1914/05 (Sept. 29, 2005); *Fire Dep't v. St. Cloud,* OATH Index No. 128/05 (Apr. 7, 2005); *Fire Dep't v. Reinhard,* OATH Index No. 647/05 (Oct. 21, 2004), *aff'd sub nom. Reinhard v. City of New York*, 34 A.D.3d 376 (1st Dep't 2006), *motion for lv to app den.*, 8 N.Y.3d 808 (2007).

Respondent was found to have been in possession of cocaine, but did not test positive for cocaine. The Department's policy, however, draws no distinction between use and possession of illegal drugs: AUC 202 expressly prohibits both possession and use of drugs and states that violation may result in termination (ALJ Ex. 3 at §§ 4.1, 8.4).

Thus, the penalty of termination from employment for possession of illegal drugs has been recommended by this tribunal. For example, in *Fire Department v. Sammis,* this tribunal recommended termination for a firefighter found to have been in possession of heroin, but who tested negative for drug use. The ALJ, finding that the respondent's off-duty drug use constituted serious misconduct, concluded that the Department "has a legitimate interest in removing respondent from his position even though he is only charged with possession and not use of drugs." *Sammis*, OATH 502/90 at 18. The ALJ reasoned that "[t]he Department may logically infer that individuals who use drugs off-duty may also use drugs while they are on duty. In addition, off-duty drug use can impair a firefighter's functioning when he returns to work." *Id. See also Fire Dep't v. Palma*, OATH Index No. 1579/95 (Oct. 30, 1995) (possession of cocaine on four separate occasions is misconduct that warrants termination of employment where there was nothing on record to support a lesser penalty).

Moreover, this tribunal has held that possession of drugs by employees of other agencies, whether on or off-duty, warrants termination under circumstances where drug possession is antithetical to the employees' responsibilities. Such circumstances include holding positions where safety is a paramount concern or those that involve responsibility for law enforcement and protecting the public. *See Rodriguez*, OATH 761/91 at 27 (penalty less than termination of correction officer for drug possession "would diminish public confidence in the Department's ability to carry out its mission and would require it to retain an employee who posed an unacceptable risk to the future safety and security of its operations.") *See also Triborough Bridge and Tunnel Auth. v. Redman*, OATH Index No. 703/96 (Apr. 9, 1996) (bridge and tunnel officer's off-duty purchase and possession of cocaine was criminal in nature and was so antithetical to his duties and obligations as a peace officer that termination of his employment is warranted); *Dep't of Correction v. Boston*, OATH Index No. 970/96 (May 3, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD00-96-SA (Nov. 14, 2000) (termination recommended for a correction officer with a clean disciplinary record who was arrested after he was observed by police purchasing cocaine and refused to provide urine sample); *Dep't of Correction v. Castelli*, OATH Index No. 540/91 (Feb. 20, 1991) (termination recommended for a correction officer with minor disciplinary record who was found to have possessed cocaine); *Dep't of Correction v. Freeman*, OATH Index No. 171/86 (Aug. 19, 1986) (same). Therefore, the prohibition on possession of drugs is one that is premised on the danger to the public and one's colleagues such conduct creates.

Respondent steadfastly denied being in possession of cocaine, although the credible evidence is to the contrary. Consistent with his position, respondent did not explain the circumstances giving rise to his possession of the drugs that might be considered in mitigation. Respondent did offer, however, evidence of his commendable service to the Department before and after his arrest. Significantly, respondent testified to having rescued victims from a fire and to having restrained a violent person during an altercation while he was assigned to the Department's certification of fitness unit after his arrest (Tr. 152-53, 157-58).

Respondent presented a number of witnesses to testify as to his character, including current and retired firefighters. These witnesses paint a picture of respondent as an excellent employee. Mr. Frontera stated that he is retired from the Fire Department, but that before his

retirement he had been captain of the ladder company to which respondent was assigned. According to Mr. Frontera, respondent was a hard worker who presented no disciplinary problems and was always fit for duty (Tr. 98-99). He described the respondent as "a pleasure to work with" (Tr. 98). Mr. Frontera said that he socialized with respondent outside their firehouse, but they did not generally frequent the same places (Tr. 103).

Mr. Kreuzer, a Fire Department lieutenant who worked with respondent until respondent was reassigned in the wake of his arrest, testified that he found the respondent to be dependable and reliable. According to Mr. Kreuzer, respondent had no disciplinary issues (Tr. 107-9). Mr. Kreuzer stated that he would want respondent back in his unit if respondent returns to the field (Tr. 110-11). Mr. Kreuzer testified that he attended Department functions with the respondent, but acknowledged that they did not socialize outside of those functions (Tr. 112).

Ms. Araya, Mr. Carfagna, and Mr. Ertrachter work with respondent in the Fire Department's certificate of fitness unit. Mr. Ertrachter testified that he has a highly favorable impression of the respondent based on his performance as a greeter in the unit (Tr. 115, 117-20). Mr. Carfagna testified that respondent has gone above and beyond the requirements of the position and described him as an asset to the unit (Tr. 140-42). Similarly, Ms. Araya characterized respondent as someone who made important contributions to the efficient functioning of the unit (Tr. 88-90). These witnesses acknowledged, however, that they did not know respondent until after his arrest and that they did not socialize with him outside the workplace (Tr. 91, 103, 112, 122, 144).

The overall impression is that respondent is a diligent, reliable worker who has acted heroically when it was necessary for him to do so. Yet, respondent's admirable work record alone does not warrant a recommendation short of termination in light of respondent having engaged in illegal activity and his failure to offer any explanation, other than a disingenuous story of bad luck and police misconduct. In that regard, this case is unlike those in which this tribunal has found that extraordinary, compelling mitigating circumstances merited a penalty short of immediate termination. Penalties short of immediate termination have typically been recommended for violations of the Department's drug policy where the respondent suffered from PTSD and physical ailments related to service on September 11 and his or her pension vesting date or disability-related separation from service was imminent. *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 that firefighter be permitted to vest his pension and retire where firefighter admitted his drug use and there were mitigating factors, including respondent's involvement in three tragic disasters in 2001, respiratory illness related to the events of September 11, other on-the job injuries, and PTSD); *Fire Dep't v. Sicignano*, OATH Index No. 801/11 (June 30, 2011), *modified on penalty*, Comm'r Dec. (May 31, 2012), (ALJ recommended that firefighter with an exemplary service record, who suffered from PTSD relating to his service on and after September 11, 2001, be permitted to apply for disability benefits related to a line-of-duty injury sustained after the positive drug test rather than be immediately terminated from employment); *Fire Dep't v. Zoda*, OATH Index No. 995/10 (Mar. 18, 2010), *adopted in part*, Comm'r Dec. (Mar. 30, 2010) **(**ALJ recommended that firefighter who was arrested for cocaine possession and tested positive for drugs be given the opportunity to apply for retirement; firefighter suffered from ailments related to PTSD relating to his service after September 11); *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*, Index No. 13478/09 (Sup. Ct. Kings Co. Nov. 30, 2009), *aff'd, Maresca v. City of New York*, 856 F. Supp. 2d 474 (E.D.N.Y. 2012), *aff'd, Maresca v. City of New York*, 2013 U.S. App. LEXIS 5165 (2d Cir. 2013). (ALJ recommended that firefighter, who was arrested for cocaine possession and tested positive for its use, be allowed to retire due to disability that was related to his service on September 11). Respondent has offered no such compelling mitigating circumstances.

On this record, I have no doubt that respondent has been a creditable member of the Department. However, his possession of cocaine is at odds with his duties as a firefighter. The Department's zero-tolerance policy for drug possession and use reflects its profound concern about the significant risk of injury and death to the public and other firefighters that can occur if a firefighter is under the influence of an illegal drug in the course of performing his or her duties. Therefore, despite respondent's unblemished record, a penalty of termination is appropriate for his possession of cocaine.

Accordingly, I recommend that, for the misconduct found here, respondent's employment be terminated.

Astrid B. Gloade
Administrative Law Judge

September 25, 2013

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

APPEARANCES:

SIHEEM ROSEBOROUGH, ESQ.
Attorney for the Petitioner

ROBERT GALLO, ESQ.
Attorney for the Respondent