Dep't of Transportation v. Anonymous

OATH Index No. 147/15 (Dec. 8, 2014)

During a random test, respondent tested positive for alcohol at a level exceeding the threshold level established by federal regulations and agency policy. Respondent, who did not testify, failed to establish that the test was not random. Nor did he establish that the violation of federal regulations by the technician who administered the test warranted invalidation of the results of the confirmatory test. Further, respondent did not prove that acid reflux caused an enhanced reading of his blood alcohol level. ALJ recommends that respondent be terminated from his employment as a ship carpenter.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Transportation, pursuant to section 75 of the Civil Service Law. Petitioner alleged that during a random test conducted on June 4, 2014, respondent, a ship carpenter, tested positive for alcohol at a level exceeding the threshold set by federal regulations (ALJ Ex. 1).

At a hearing before me on November 3 and 5, 2014, petitioner presented the testimony of nurse practitioner Ursula Clancy, and Dr. Russell Kamer, both of whom are principals of Partners in Safety, Inc. ("PISI"), the contractor hired by the Department to perform random alcohol and drug testing. Petitioner also presented the testimony of Carlos Mulero, the PISI

[1] At the parties' request and pursuant to title 49 section 40.323 (b) of the Code of Federal Regulations, respondent's name has been withheld from publication. *See Dep't of Transportation v. Anonymous*, OATH Index No. 1754/07 at 2 n.1 (Aug. 23, 2007); *Dep't of Environmental Protection v. Anonymous*, OATH Index No. 977/05 at 1 n.1 (June 3, 2005), *rev'd*, Comm'r Dec. (July 27, 2005); *Dep't of Transportation v. Doe*, OATH Index No. 2035/04 at 1 n.1 (Nov. 26, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-64-SA (July 10, 2006).

technician who administered respondent's breathalyzer test, and two Department employees, Johanna De Niet and Patricia Breglio, as well as documentary evidence. Respondent, who did not testify, presented documentary evidence and the testimony of toxicologist Lyle Wayne Hayes, Ph.D, to challenge the actions taken by the testing technician, the accuracy of the intoxilyzer machine that rendered the positive result, and the actual test results.

For the following reasons, petitioner proved its charge that respondent tested positive for alcohol at a level exceeding federal regulations, and in violation of Department regulations.

I therefore recommend that respondent be terminated from his employment.

ANALYSIS

The charges allege that on June 4, 2014, respondent submitted to a random drug and alcohol test and tested positive for alcohol at a level at or exceeding the threshold established by federal regulations.

Federal law requires drug and alcohol testing of employees of mass transportation operations who perform safety sensitive functions. 49 C.F.R. §§ 655.4, 655.21, 655.31 (Lexis 2014). Random testing must be done of any "covered employee," defined as "a person . . . who performs or will perform a safety-sensitive function . . . ." 49 C.F.R. § 655.4. The Department's Drug and Alcohol Policy for employees of the Staten Island Ferry Division includes amongst its "covered employees," the title of "Ship Carpenter" (Pet. Ex. 1 at 13). Covered employees are prohibited from using alcohol while on duty or reporting for duty within four hours after using alcohol (Pet. Ex. 1 at 14).

Respondent is a ship carpenter who performs maintenance work on the Staten Island Ferry. There is no dispute that he had notice of the Department's Controlled Substance and Alcohol Abuse Policy. He signed for receipt of the policy in 2004, 2005, 2006, 2007, 2008 and 2009 (Tr. 16-17; Pet. Ex. 2).

Randomness of Respondent's Alcohol Test

Johanna De Niet is the director of the Department's drug and alcohol testing program. Patricia Breglio, the Department's director of employee relations, oversees the drug and alcohol testing program, occupational safety, and health and training for the agency (De Niet: Tr. 11-12; Breglio: Tr. 44-45). PISI is the entity contracted to provide the Department with drug and

alcohol testing of its employees (Tr. 130). Ms. De Niet testified that around 600 tests are done each year. Ursula Clancy, PISI's founder and president and a family nurse practitioner, described how employees are selected for testing. Employees' names are entered into a random software program that PISI uses. The program generates random batch numbers for random lists of names of employees to be tested, which PISI provides to the Department on a monthly basis. Testing is done at the Staten Island St. George Terminal. Respondent was on duty on June 4, 2014, when he was randomly selected for a test (De Niet: Tr. 12-18, 24-25; Breglio: Tr. 49, 51; Clancy: Tr. 135-36; Pet. Ex. 5). Ms. De Niet was not privy to respondent's randomly assigned number, and did not know offhand the number of tests that were conducted on June 4, or the number of times that respondent had previously been tested. But she indicated that that information was available in her records (Tr. 24-26).

Respondent did not testify, but his counsel argued that the Department failed to establish that respondent was randomly selected for testing because it did not produce documentation of the pool of employees that was selected by PISI for testing and establish how respondent, in particular, was selected (Tr. 249-50). A respondent may challenge the randomness of a drug or alcohol test, which the Department may overcome by providing sufficient proof that the respondent was indeed randomly selected. *Dep't of Transportation v. Sander,* OATH Index No. 1609/04 at 13 (July 29, 2004), *rev'd,* Comm'r Dec. (Sept. 15, 2004), *aff'd,* 23 A.D.3d 156 (1st Dep't 2005); *Dep't of Correction v. Oquendo,* OATH Index No. 119/97 at 2-6 (Oct. 17, 1996), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 99-54-SA (May 27, 1999); *Dep't of Correction v. Green,* OATH Index No. 1028/91 (Aug. 8, 1991); *Dep't of Correction v. Shaw,* OATH Index No. 989/91 (June 17, 1991), *aff'd,* 191 A.D.2d 284 (1st Dep't 1993). But it is respondent who bears the burden of showing that the test was not randomly administered. *See Dep't of Correction v. Hines,* OATH Index No. 537/94 at 15 (Oct. 4, 1994) (burden on respondent to "demonstrate that the delay turned what was initially a random search into an individually focused search based on factors other than the selection of respondent's social security number by computer").

In the cited cases, there was a lag between the respondent's selection and the actual test. In *Department of Correction v. Pettiford,* OATH Index No. 236/05 at 10-11 (Feb. 25, 2005), this tribunal recommended invalidation of a positive test result where there was a long, unexplained delay between selection and actual testing. We have found that under such circumstances, the

potential exists for an integrity officer to subjectively determine which of the selected officers in his facility should be notified and sent for testing based on factors that are not necessarily benign. *Hines*, OATH 537/94 at 14.

Here, petitioner offered testimony from its contractor as to the process involved in the random selection process via computer. On the other hand, respondent offered no testimony as to the circumstances surrounding his selection for testing, such as the proximity of the test in relation to his selection, or any perceived improper intent for the test. Nor was there any evidence to controvert the Department's testimony that the test was performed on the day that respondent was randomly selected for testing. *Hines*, OATH 537/94 at 15 ("the burden falls upon respondent in an individual case to show that a delay between his selection and testing was motivated by bad faith or other improper intent, and that in his actual testing, he was singled out for disparate treatment from others randomly selected with him for arbitrary or improper reasons"). Thus, I find counsel's assertion to be specious at best.

The Breathalyzer Test Performed on Respondent

PISI has about 15 breath alcohol technicians ("BATs") whom it has provided with training on the applicable federal regulations, as well as the Department's protocol, through the retention of an outside company (Tr. 131-34). Carlos Mulero is a certified medical assistant and a BAT who has been employed by PISI since May 2013. He works as a "mobile" technician, going to different sites to conduct drug and alcohol screenings of employees whose employer has contracted PISI for that purpose. Mr. Mulero received training on how to operate and calibrate different breathalyzer machines, including the Intoxilyzer 200, which is manufactured by CMI, Inc. He testified that the instructor also reviewed the Code of Federal Regulations as it pertains to drug and alcohol testing, and simulated different scenarios that could occur during testing (Tr. 72-75; Pet. Ex. 3). Mr. Mulero initially worked in PISI's White Plains office, where he gained significant hands-on experience on the Intoxilyzer 200 and 240 (Tr. 75-76). From October 2013, he began to conduct testing at the Department's Staten Island Ferry trailer located in the St. George Terminal. Between then and June 2014, he used the Intoxilyzer 200 about "100/200 times" (Tr. 77, 122).

Mr. Mulero testified that the Intoxilyzer 200 is calibrated to .045, using a gas standard. According to the manufacturer's manual, a displayed value within ± 0.005 of the calibration

indicates that the machine's operation is within limits and acceptable (Tr. 80-81, 84; Resp. Ex. A at 32). The machine automatically goes into calibration mode when a test produces a result in excess of 0.02. When that happens, Mr. Mulero does a calibration check which is printed out (Mulero: Tr. 81; Clancy: Tr. 142).

To get an accurate breathalyzer reading of blood alcohol level, a donor must take a deep breath and exhale slowly and continuously into the machine (Mulero: Tr. 78-79; Clancy: Tr. 137-38, 150). That is because blood alcohol is diffused from the alveoli sacs in the lungs and evaporated into the breath (Tr. 80-81, 104-05; Resp. Ex. A at 7).

On June 4, 2014, respondent reported to the trailer at the St. George Terminal for a random alcohol test. Mr. Mulero introduced himself and requested respondent's identification in order to enter information on the Department's unique four-step alcohol testing form (Tr. 77-78; Pet. Ex. 4). After he and respondent had completed Steps 1 and 2 of the form, respectively, Mr. Mulero instructed respondent on how he should breathe and exhale into the machine, then proceeded to conduct a breathalyzer test on respondent using the Intoxilyzer 200 (Tr. 78-79). The printout from the Intoxilyzer 200 showed that on the morning of respondent's test, the machine was reset at 10:00 a.m. (Pet. Ex. 4). A blank check of the machine's fuel cell displayed a reading of .000 at 10:01 a.m. According to the machine's operating manual submitted by respondent, this meant that the fuel cell was clear of alcohol (Tr. 87-88; Resp. Ex. A at 31).

Mr. Mulero testified that respondent appeared "flushed and pale" when he reported for the test but he did not demonstrate outward manifestations of being impaired. He did not smell alcohol on respondent's breath, respondent's eyes were not bloodshot, his speech was not slurred, and he did not walk with an unsteady gait (Tr. 92-93). At 10:02 a.m., respondent's test produced a reading of .069 (Pet. Ex. 4). The machine therefore went into calibration mode. Mr. Mulero notified respondent of the test results which he also promptly reported to his own supervisor, Nancy Wasner. Pursuant to federal regulations, Ms. Wasner called Ms. De Niet, the Department's designated employer representative ("DER").[2] Mr. Mulero stated that upon being advised of the results, respondent appeared upset, confused, and nervous, and inquired into the consequences of the positive test on his job. Mr. Mulero informed respondent that a

[2] The DER is "[a]n employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. The DER also receives test results and other communications for the employer . . . ." 49 C.F.R. § 40.3; *see also* Pet. Ex. 7.

confirmatory test would be done after 15 minutes had elapsed from the first test so that anything present in his mouth that could have caused a positive reading would dissipate (Mulero: Tr. 81-83, 93-94, 112; Clancy: Tr. 139-40, 148, 150) *See* 49 C.F.R. §§ 40.247, 40.251.

Under the federal regulations, the BAT is required to observe the employee during the 15-minute waiting period. The BAT must also instruct the employee that he cannot eat, drink, put anything in the mouth, or belch, and inform him that the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed. 49 C.F.R. § 40.251(a)(2). If the employee falls ill or there are any concerns about the employee during the 15-minute waiting period, the BAT is required to inform his office and a decision will be made as to whether the confirmatory test should be done (Tr. 143-44).

At 10:05 a.m., Mr. Mulero did a calibration check which reflected a .046 value, within the acceptable range as per the operating manual (Tr. 95). He maintained that during the 15-minute wait period after the first positive test, he observed respondent for the entire time save "four or five seconds" during which he watched the screen of the Intoxilyzer machine while it was performing the calibration check (Tr. 102). Respondent continued to appear flushed and "looked like he was going to pass out," so Mr. Mulero permitted respondent to splash water on his face and rinse out his mouth. He saw respondent spit out water, but could not tell if respondent ingested any of it (Tr. 112-13). Ms. Clancy opined that permitting respondent to rinse his mouth with water during the wait period might have been a violation of the federal regulations, but was not grounds for invalidation of the test results (Tr. 145-47).

Before the confirmatory test was done on respondent, Mr. Mulero repeated the previous sequence on the machine in preparation for the test. The printout from the Intoxilyzer 200 showed that the machine was reset at 10:18 a.m. A blank check of the fuel cell, which is required by the federal regulations, displayed a reading of .000 at 10:19 a.m. 49 C.F.R. § 40.253(a). Mr. Mulero used a fresh mouthpiece for respondent's confirmatory test which was done at 10:20 a.m., 18 minutes after the first test. The test produced a reading of .051. That triggered the machine's calibration mode once again. Mr. Mulero then performed another calibration check which reflected a .049 value. This was also within the acceptable range as per the operating manual (Tr. 83-85, 88; Pet. Ex. 4). However, at his supervisor's request, he ran another calibration check at 10:51 a.m. and reset the machine to .047 (Tr. 98; Resp. Ex. B). Mr. Mulero testified that he generally calibrates the machine once per week even though the

manufacturer suggests that it should be done once per month or after every 20 tests (Tr. 88-89, 95). Both Mr. Mulero and Ms. Clancy insisted that in order for the Intoxylizer 200 to register a positive result, alcohol must be present in the donor's system (Mulero: Tr. 123; Clancy: Tr. 151).

After respondent's second positive reading, Mr. Mulero called Ms. De Niet to update her, and faxed the alcohol testing form to her. He then completed Step 3 of the Department's alcohol testing form, which called for the BAT to enter, among other things, the test number, testing device and serial number, the activation time of the machine, the reading time, and the result. Mr. Mulero entered the information regarding the confirmatory test but left the "Remarks" section blank, making no mention that he had permitted respondent to rinse out his mouth with water. Respondent signed the Step 4 portion of the form which is required if the test result is 0.02 or higher (Tr. 85-87, 116, 121; Pet. Ex. 4).

An employee in a safety-sensitive job whose alcohol test result is 0.04 or higher must be immediately removed from his/her safety-sensitive functions. 49 C.F.R. § 40.23(c); *see also* Pet. Ex. 7. Thus, after respondent's second positive test, he was removed from duty and instructed to report to the advocate's office. His request to be re-tested because his alcohol level reading on the second test had decreased from the first was denied (De Niet: Tr. 20-21; Breglio: Tr. 52).

Respondent's counsel contended that the BAT made serious errors during the 15-minute waiting period. First, he argued that by permitting respondent to rinse his mouth with water, the BAT should have reset the clock. Second, he claimed that failing to record the mouth-rinsing on the Department's alcohol testing form is grounds for invalidating the test.

Dr. Russell Kamer, a graduate of Columbia University College of Physicians and Surgeons, is the medical review officer and medical director of PISI, in which he also has a substantial ownership interest (Tr. 159-61, 173). His medical experience includes: a residency at Long Island Jewish Medical Center followed by a fellowship in primary care internal medicine at the same medical center; an instructor of medicine at Albert Einstein College of Medicine; associate professor of clinical medicine at New York Medical College; medical director at Westchester County Medical Center; chief of the drug testing crew at the National Collegiate Athletic Association; and doping control medical officer at the 1996 Atlanta Olympic Games (Tr. 160-61; Pet. Ex. 6). At the Department's request, and with no objection from respondent, I deemed Dr. Kamer to be an expert witness.

Dr. Kamer admitted that his expertise was sought following Mr. Mulero's testimony that he had permitted respondent to rinse his mouth with water during the 15-minute wait period preceding the confirmatory test (Tr. 178). He acknowledged that under federal regulations the employee must be instructed not to put anything in the mouth or belch during that time, and added that this requirement safeguards the employee from inadvertently ingesting alcohol-containing substances. But he posited that rinsing the mouth with water during the wait period would not affect the blood alcohol level concentration of the donor. Nor would the ingestion of water during the same time have any effect (Tr. 163-64, 179, 183-84).

Federal regulations itemize problems that require an alcohol test to be cancelled, as well as those which may cause a test to be cancelled if left uncorrected. 49 C.F.R. §§ 40.267, 40.269; *see* Pet. Ex. 7. In addition, the regulations discuss the effect of procedural problems that are insufficient to cancel an alcohol test, and specify that:

> No person concerned with the testing process may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test.

49 C.F.R. § 40.275(b). Dr. Kamer agreed that none of the regulations identified rinsing the mouth with or the ingestion of water as grounds for invalidation of a test (Tr. 168, 170). When asked about Mr. Mulero's omission of that incident on the alcohol testing form, Dr. Kamer assessed that such an omission was not a fatal flaw which would require invalidation of the test (Tr. 180, 185-86).

I find no support in the federal regulations for counsel's position that the BAT should have reset the clock after permitting respondent to rinse out his mouth during the 15-minute wait period. Nor do I find it grounds for invalidation of the confirmatory test. The regulations provide for the confirmation test to be conducted at the end of the waiting period, even if the instructions have not been followed. 49 C.F.R. § 40.251(a)(2)(iv). There is no doubt that the federal regulations were not strictly complied with in this case. But while they prohibit the employee from drinking during the wait period, among other things, they articulate that the reason for the waiting period is to prevent an accumulation of mouth alcohol from leading to an artificially high reading. 49 C.F.R. § 40.251(a)(2)(ii). There was nothing to suggest that rinsing his mouth negatively affected respondent's confirmatory test. If anything, it would appear that it

was more likely than not to favor the outcome by dispelling mouth alcohol, if present during the first test. Given Dr. Kamer's assurance that neither rinsing the mouth nor ingesting water would impact respondent's blood alcohol concentration, I find that respondent's confirmatory test was not adversely affected, and therefore, the BAT's oversight is insufficient grounds to invalidate the test.

Respondent's Defenses

Like Mr. Mulero and Ms. Clancy, Dr. Kamer maintained that for a person to test positive for alcohol, he/she needed to have ingested the substance within four hours of reporting for work. The four-hour timeframe is intended to permit any small amount of alcohol that was imbibed to dissipate. With respect to the consequences of a donor belching during a breathalyzer test, Dr. Kamer explained that air from the stomach as opposed to the lung would seep into the machine and would give a positive result, which is not necessarily reflective of the blood alcohol concentration (Tr. 170-72, 175-76). At respondent's counsel's inquiry, Dr. Kamer also explained how regurgitation occurs but indicated that it was highly unlikely that regurgitation would cause a positive test if there was no alcohol in a donor's stomach in the first place (Tr. 193-95).

Respondent called Dr. Lyle Hayes as his expert witness. Dr. Hayes has a Ph.D in Biochemistry/Biophysics from Oregon State University. Since 2009, he has been self-employed as a consultant in forensic toxicology for which he is certified by New York State Department of Health. In addition, for more than 13 years, Dr. Hayes worked as a laboratory director in the areas of forensic toxicology and clinical chemistry, analyzing hair and urine samples for drugs. That included supervision of the lab that conducted alcohol and drug testing on school bus drivers employed by the Department of Transportation. He is also widely published (Tr. 196-200; Resp. Ex. D). Dr. Hayes raised two defenses for respondent. First, he testified that respondent suffers from gastric esophageal reflux disorder ("GERD"), which could cause a false positive test. Second, he claimed that the Intoxilyzer 200 malfunctioned and as a result, the confirmatory test results should be cancelled.

GERD

In preparation for this hearing, Dr. Hayes reviewed respondent's alcohol testing form (Pet. Ex. 4), as well as a medical report prepared by the medical offices of Sottile & Megna, on June 18, 2014, following an examination of respondent on June 11, 2014 (Tr. 201; Resp. Ex. E). Dr. Hayes appeared to have paid such little attention to the medical report that he consistently misidentified respondent's doctor. First, in an evaluation of the report, he identified "Menga Scottie, M.D., P.C," as the gastroenterologist who conducted tests on respondent when, in fact, the report was electronically signed by Dr. Mancino, and indicated that respondent's referring physician was Dr. Lucinda Ripoli (Resp. Ex. F). In addition, during his testimony, Dr. Hayes repeatedly referred to respondent's doctor as "Dr. Scottie."

In any event, besides an overall indication of GERD, respondent was diagnosed with: erosive esophagitis, erosive gastritis, severe gastritis, Barrett's esophagus, and multiple gastric ulcers (Resp. Ex. E at 2). Dr. Hayes acknowledged that he is neither an expert in gastroenterology nor a practicing physician and conceded that he has never conducted scientific studies on the effects of alcohol ingestion and acid reflux, or the effects of alcohol ingestion vis-à-vis breathalyzer instruments (Tr. 229-30). Yet, he ventured to offer a medical explanation of respondent's condition, testifying that Barrett's esophagus is an erosive condition which results from a history of gastric reflux, or the reverse flow of stomach acid into the esophagus (Tr. 204). Based on the diagnosis made by respondent's doctor, the results of respondent's blood alcohol test, and "scientific literature," Dr. Hayes wrote an evaluation on June 25, 2014, in which he stated that respondent's acid reflux is exacerbated by his hiatal hernia, which could lead to a false elevation of blood alcohol as measured by breath alcohol (Tr. 202-03; Resp. Ex. F). He further testified that substances introduced into a donor's mouth during the wait period before a confirmatory test result in a reading of mouth alcohol, not blood alcohol. Mouth alcohol is not absorbed into the bloodstream and therefore, contrary to blood alcohol, is not a yardstick for the measurement of impairment (Tr. 204-05, 208). Dr. Hayes relied primarily on a 2006 article by A.W. Jones, Ph.D., DSc., on "Gastric Reflux, Regurgitation, and The Potential Impact of Mouth-Alcohol on The Results of Breath-Alcohol Testing" (Resp. Ex. G). In relevant part, the article reflected that:

> Any alcohol residing in the mouth after a recent drinking is much less of a problem than alcohol that enters the mouth because of gastric reflux . . . . Whether a burp or a belch can falsify the result

> of an evidential breath-alcohol test can only be evaluated by means of carefully designed experiments.

(Resp. Ex. G at 6, ¶ 4). Dr. Hayes echoed similar sentiments and noted that it is an extremely difficult area in which to conduct research (Tr. 207-08). While admitting that he had never personally undertaken any scientific studies on the effects of alcohol ingestion vis-a-vis breathalyzer instruments, Dr. Hayes nevertheless insisted that alcohol in the stomach is likely to falsely elevate the results of a breathalyzer test (Tr. 212, 230). Yet later on, after much equivocating, he acknowledged that studies have been inconclusive as to whether or not GERD has any effect on breathalyzer results (Tr. 234-36).

Respondent also relied on a non-binding decision from the Supreme Court of Illinois which is worthy of discussion because it upheld the trial court's decision to suppress the results of a blood alcohol test ("BAC") as unreliable, where the defendant, who was charged with driving while under the influence of alcohol and driving with a blood alcohol concentration of 0.08 or more, asserted a defense of GERD. *People v. Bonutti,* 212 Ill. 2d 182 (Ill. 2004). In that case, the defendant's physician testified that the defendant had suffered from and been treated for GERD for approximately nine years. The defendant testified that within six hours of the BAC, he had taken Prilosec which, according to his physician, neutralizes stomach acid and the burning sensation associated with a reflux episode. The police officer who administered the BAC test confirmed that defendant had requested and been denied water before the test. At the time, regulations promulgated by the Illinois Department of State Police in accordance with the Illinois Vehicle Code required the testing process to be restarted if the subject regurgitated or vomited during the observation period before a breathalyzer test was administered. *Id.* at 189.

When raised by the Department, respondent's counsel acknowledged that subsequent to *Bonutti,* the Illinois legislature amended the regulations to exclude regurgitation as a condition for the suppression of breathalyzer test results. *See Illinois v. O'Krongley,* 2014 Ill. App. Unpub. LEXIS 1115 (Ill. App. Ct. 1st Dist. May 29, 2014) (Appellate court affirmed the lower court's conviction of defendant whose counsel unsuccessfully relied on *Bonutti* at trial. The court discussed the amended regulations and defendant's likelihood of success had counsel sought suppression of defendant's breathalyzer results pre-trial.); *People v. Lindmark,* 381 Ill. App.3d 638, 660 (Apr. 3, 2008) (noting the amendment to the applicable regulations, the appellate court affirmed the trial court's denial of defendant's motion to suppress the results of the breathalyzer

test where defendant claimed to suffer from acid reflux and challenged officer's actions during observation period).

Other jurisdictions have also been reluctant to overturn or invalidate breathalyzer test results based on the condition of GERD or a minor deviation in testing procedures. *See Poplinski v. Commissioner of Public Safety*, 2008 Minn. App. Unpub. LEXIS 1367 (Minn. Ct. App. Nov. 25, 2008) (revocation of appellant's driver's license affirmed even though he argued that his GERD condition may have caused him to burp during the observation period); *New Jersey v. Swala*, 2007 N.J. Super. Unpub. LEXIS 2130 (N.J. App. Div. May 23, 2007) (appellate court found ample evidence in the record supported defendant's conviction although defendant argued his GERD condition rendered the test results unreliable).

In spite of Dr. Hayes's efforts, I am not convinced that respondent's condition of GERD, which was diagnosed well after the date of his test, played any role, let alone a significant one, in his positive results for alcohol. His own expert testified that studies done on the impact of GERD on breathalyzer tests have been inconclusive. Moreover, there was no testimony from respondent as to how he felt on the day of the test and/or his condition during the wait period, and I am not prepared to engage in speculation. Rather, I was persuaded by Dr. Kamer's medical opinion that ingestion of water, or regurgitation for that matter, would result in no appreciable change in the test results.

Intoxilyzer 200

In so far as respondent's breathalyzer tests were concerned, Dr. Hayes opined that the difference in the results of tests performed 18 minutes apart raised questions as to the actual value or the accuracy of the measurement. He surmised that blood alcohol should not change so significantly in such a short space of time and suggested that the reading was more reflective of mouth alcohol which is expected to dissipate over time (Tr. 214-15). Dr. Hayes conceded that he had never personally worked with the Intoxilyzer 200. Nor did he know why Mr. Mulero performed a calibration check of the machine after respondent's confirmatory test. Nevertheless, he speculated that the calibration check and subsequent correction of the machine to .047 were motivated by problems with breath alcohol measurements, concluded that the calibration check was a failure, and opined that the results of the confirmatory test should be cancelled (Tr. 224, 226-27, 230, 240; Resp. Ex. B).

Under federal regulations, a confirmation test must be cancelled if a fatal flaw occurs. Among the fatal flaws listed under the regulations is the malfunctioning of the testing device, in this case, the Intoxilyzer 200. Such malfunctioning would be evident where the next external calibration check of the machine "produces a result that differs by more than the tolerance stated in the QAP [Quality Assurance Plan] from the known value of the test standard." 49 C.F.R. § 40.267(c)(5). When that occurs, every test result of 0.02 or above since the last valid external calibration check must be cancelled. *Id.* Thus, if indeed Mr. Mulero's calibration check and subsequent resetting of the machine to .047 after respondent's confirmatory test were based on a malfunction of the machine, then the previous calibration check at 10:05 a.m. which reflected a reading of .046 would control. Respondent's confirmatory test which resulted in a reading of .051 would then have to be invalidated, since it was more than 0.02 above .046.

Here, there is no evidence that the machine malfunctioned. The QAP for the machine articulates that "the tolerance for an acceptable calibration verification is the chosen concentration ±0.005 BrAC as displayed by the instrument" (Resp. Ex. C). Unlike Dr. Hayes, I could find no tension between the QAP, by which the Department must be guided pursuant to federal regulations, and the external calibration check that followed respondent's confirmatory test. The machine used to test respondent was set at a gas standard of .045. Thus, a calibration check that produces a reading of .049, as this machine did after the confirmatory test, falls within the QAP's stated tolerance level, that is, anything within the range of .040 and .050. Based on those calculations, Mr. Mulero was not required to reset the calibration. He did so at his supervisor's instructions, not because the machine malfunctioned as Dr. Hayes speculated. Thus, I find no reason for the invalidation of the confirmatory test result which was in excess of the standard set by the federal regulations.

FINDING AND CONCLUSION

1. The Department proved that during a random drug and alcohol test, respondent tested positive for alcohol at a level exceeding the threshold established by federal regulations.

RECOMMENDATION

Respondent's personnel abstract, which I requested after making my finding, shows that he joined the Department as a laborer in 1997, and was appointed to the title of "Ship Carpenter"

in 2007. He has no prior discipline. His most recent evaluation was for calendar year 2009. He received a rating of "good" for completing all emergency repairs, erecting scaffolds to standards, and completion of assignments. In addition, respondent received a "good" overall rating and the supervisor's plans included giving respondent more responsibility.

The Department has a zero-tolerance policy in that it seeks the termination of employees in safety-sensitive positions who receive a verified positive drug or alcohol test result (Tr. 48-50; Pet. Ex. 1 at 21). Ms. Breglio testified that removal of a worker who tests positive for drugs or alcohol is not only required by federal law, but it is necessary to protect the safety of the thousands of Staten Island ferry riders. In fact, the Department developed a zero-tolerance policy for drugs and alcohol after a ferry crash in 2003 which resulted in the death and permanent disability of passengers, among other consequences (Breglio: Tr. 52-53, 60; De Niet: Tr. 40-41). In accordance therewith, the Department seeks to terminate respondent who was placed on a 30-day pre-hearing suspension.

Respondent's counsel attempted to introduce the collective bargaining agreement of a union to which respondent does not belong. This was in an effort to establish disparate treatment of the Department's employees in safety-sensitive positions versus the treatment of other employees who are also engaged in safety-sensitive functions under that other agreement, in that they are not subject to zero-tolerance treatment for positive drug or alcohol tests. I found counsel's attempt to be inappropriate. Any challenge to the Department's policy as it relates to other collective bargaining agreements is not properly before this tribunal. *See Dep't of Correction v. Smith*, OATH Index No. 496/95 at 6 (Jan. 3, 1995) (OATH should not venture to interpret the CBA of the parties which should be done through the impartial arbitration procedures set forth in the CBA). Besides, the Department has a rational basis for its zero-tolerance policy given the type of destruction caused by the ferry accident in 2003. Moreover, the nature of respondent's job as a carpenter who works directly on the vessels dictates that he be subject to the Department's zero tolerance for drug and alcohol use.

Accordingly, I find termination to be fitting, and I so recommend. *See Dep't of Transportation v. Anonymous*, OATH Index No. 2276/08 (June 2, 2008) (termination recommended for respondent who held safety-sensitive position and twice tested positive for cocaine); *Dep't of Transportation v. Anonymous*, OATH Index No. 677/08 (Mar. 4, 2008) (ALJ recommended termination where traffic device maintainer, a safety-sensitive position, tested

positive for alcohol and illegal drug use during random test); *Dep't of Transportation v. Doe*, OATH Index No. 2035/04 (Nov. 26, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-64-SA (July 10, 2006) (in light of Department's zero-tolerance policy, termination where engineer tested positive for marijuana during random drug test).

Ingrid M. Addison
Administrative Law Judge

December 8, 2014

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner

APPEARANCES:

IFEAMAKA IGBOKWE, ESQ.
Attorney for Petitioner

GREENBERG BURZICHELLI GREENBERG P.C.
Attorneys for Respondent
BY: ROBERT BURZICHELLI, ESQ.