

Dep't of Sanitation v. Anonymous

OATH Index No. 1821/15 (June 3, 2015), *modified on penalty*, Comm'r Dec. (July 8, 2015),
appended

Respondent admitted violating Department's substance abuse policy. Termination of employment recommended. The Department urged to consider an alternative lesser penalty based on mitigating evidence presented.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
ANONYMOUS¹
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Sanitation, brought this proceeding, under section 16-106 of the New York City Administrative Code, alleging that respondent, a sanitation worker, tested positive for cocaine use on October 21, 2014, in violation of section 2.1 of the Department's Code of Conduct (ALJ Ex. 1). The parties agreed to hold three additional charges, related to time and leave issues, in abeyance pending resolution of this charge (Tr. 4).

At trial on April 28, 2015, petitioner relied on documentary evidence. Respondent testified, admitted that he tested positive for drug use, and offered mitigating evidence, including documentary evidence and testimony from three other witnesses.

For the reasons below, I find that petitioner proved the charge and recommend termination of respondent's employment. Based on mitigating evidence presented at trial, the Department is urged to consider an alternative lesser penalty.

¹ In accordance with 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. Doe*, OATH Index No. 2035/04 at 1 n.1 (Nov. 26, 2004).

ANALYSIS

Respondent stipulated that, as a result of a random drug test on October 21, 2014, he tested positive for cocaine use, in violation of the Department's Code of Conduct (Tr. 5-7, 44-45; Pet. Ex. 1). The charge should be sustained.

FINDING AND CONCLUSION

Respondent tested positive for illegal drug use on October 21, 2014, in violation of the Department's Code of Conduct.

RECOMMENDATION

At trial, the parties agreed to admit respondent's personnel record (ALJ Ex. 2; Tr. 4-5). The Department hired respondent in April 2004. In July 2006 and January 2007, he tested positive for cocaine use, which resulted in a 44-day penalty, consisting of a 25-day pay fine and 19 days of suspension without pay. Following his second positive test, respondent signed a "last chance agreement" on February 28, 2007, which remained in effect for two years. He also received an eight-day pay fine in 2006 and a five-day suspension in 2013 for violating time and leave rules and other, unspecified misconduct. Petitioner now seeks termination of respondent's employment (Tr. 70). Respondent seeks a lesser penalty and expressed a willingness to accept drug and alcohol testing for the remainder of his career (Tr. 65).

For the proven charge, the available penalties under the Administrative Code are a pay fine or suspension up to 30 days or termination of employment. Admin. Code § 16-106(a) (Lexis 2015). Under the Department's substance abuse policy, first-time offenders are given an opportunity to seek rehabilitation. PAP 2012-02 § 7.1 (Mar. 12, 2012). "For a second or subsequent violation of this policy," the Department may seek termination of employment or offer a last chance agreement. *Id.* § 7.4.

Where employees violate the Department's substance abuse policy for a third time, this tribunal usually recommends termination of employment. *See, e.g., Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 4 (July 31, 2009); *see also Dep't of Sanitation v. Betancourt*, OATH Index No. 1463/07 (May 7, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-103-SA (Nov. 5, 2007); *Dep't of Sanitation v. King*, 1836/04 at 5 (Aug. 27, 2004), *aff'd*,

NYC Civ. Serv. Comm'n Item No. CD 05-03-SA (Apr. 15, 2005); *Dep't of Sanitation v. Richins*, OATH Index No. 167/01 at 27 (Oct. 15, 2001). The Department has occasionally agreed to impose lesser penalties. See *Dep't of Sanitation v. Anonymous*, OATH Index No. 1637/12 (June 19, 2012), *modified on penalty*, Comm'r Dec. (Aug. 15, 2012) (where sanitation worker tested positive for alcohol use three years after receiving a 41-day suspension for violating substance abuse policy twice within two months, 30-day suspension imposed and parties agreed to drug and alcohol testing for the remainder of employee's career); *Dep't of Sanitation v. Johnson*, OATH Index No. 746/05 (Oct. 5, 2005), *modified on penalty*, Comm'r Dec. (Dec. 4, 2005) (where sanitation worker with a lengthy disciplinary record admitted to synthetic marijuana use and tested positive for alcohol use four years after entering a last chance agreement, 60-day suspension imposed and parties agreed to one year probation along with drug and alcohol testing for remainder of employee's career).

Here, petitioner argues that respondent poses too much of a risk to himself, his co-workers, and the public (Tr. 67). Petitioner stressed that it must balance competing interests, the desire to help workers rehabilitate and the need to minimize the risk posed by workers operating heavy machinery on crowded city streets (Tr. 68). Emphasizing that the present substance abuse policy has been in place for many years and respondent has had the benefit of a second and third chance, petitioner asserted that respondent poses too much of a risk (Tr. 68-69). Noting that respondent tested positive for drug rather than alcohol use, petitioner also referred to reasoning set forth by the Commissioner in a recent case where a sanitation worker violated the Department's substance abuse policy for a fifth time by testing positive for marijuana use (Tr. 70). See *Dep't of Sanitation v. J.C.*, OATH Index No. 1555/14 (May 30, 2014), *modified on penalty*, Comm'r Dec. (June 25, 2014) ("nationwide, substance abuse has proven to be a factor in many accidents, physical altercations, and job performance problems that endanger the employee, co-workers, and the public").

Respondent's counsel stressed that the first two positive test results occurred close together "in rapid fashion" and that respondent was drug-free for more than seven years before this more recent positive drug test (Tr. 62). Observing that there are limited situations where sanitation workers have received more than three chances, counsel emphasized that respondent has successfully entered treatment and been returned to full duty (Tr. 66).

In support of his request for leniency, respondent credibly testified about his history of drug use and treatment. Following his first positive drug test in 2006, respondent entered a 30-day in-patient treatment program (Tr. 44). In 2007, he returned to in-patient treatment for another 30 days following his second positive drug test (Tr. 45). After completion of the in-patient treatment, he submitted to drug testing for two years and regularly attended counseling sessions for several years (Tr. 46). Respondent was drug free for about seven years (Tr. 46).

In October 2014, respondent was caring for his elderly grandmother and going through a break-up with his girlfriend (Tr. 46). He became depressed and used cocaine (Tr. 46-47). After his positive drug test, respondent was suspended and he began intensive outpatient treatment (Tr. 47). Respondent presently attends group and individual counseling, submits to frequent drug testing, and goes to AA or NA meetings three or four times a week (Tr. 49-50). According to respondent, he had received similar counseling in 2007 but it was “not as intense as it is today” (Tr. 49).

Upon returning from suspension, he was on light duty (Tr. 59). Because of his progress with drug treatment, respondent was returned to full duty about a month before trial (Tr. 58). Respondent credibly testified that he “greatly appreciated” the assistance provided by the Department and he is better equipped to handle the problems that led to his previous drug use (Tr. 52). A letter from respondent’s drug-treatment program, dated April 17, 2015, confirmed that he has been receiving treatment since December 2014, he has repeatedly tested negative for drug and alcohol use, he regularly attends group and individual therapy sessions, and he shows a “positive attitude and commitment to change” (Resp. Ex. A).

A Supervisor, a Superintendent, and a Deputy Chief, who were familiar with respondent’s history, testified about his job performance. Supervisor James O’Connor described respondent as a “very good worker” who was “always right there, very willing” to do more than expected, especially during snow removal operations (Tr. 10). Superintendent Joseph Coccozza testified that respondent was an “excellent,” “hard worker” (Tr. 20-21).

Despite the positive drug tests, Supervisor O’Connor and Superintendent Coccozza considered respondent an asset to the Department (Tr. 10-11, 21). Supervisor O’Connor said that he would be comfortable supervising respondent and he believed that respondent has made sincere efforts to prevent a relapse of his drug use (Tr. 11, 16). Superintendent Coccozza

acknowledged the risk posed by sanitation workers who tested positive for drug use and he recommended continued monitoring to minimize that risk (Tr. 26-27).

Deputy Chief Daniel Stine has known respondent since September 2014 and worked “closely with him every day” (Tr. 34, 41). Based on his own observations and conversations with his staff, Deputy Chief Stine testified that, “we all have the same opinion,” that respondent is an excellent worker who is “always willing to go the extra mile” (Tr. 35-36, 41). Deputy Chief Stine has spoken with respondent “numerous times” following the failed drug test in October 2014 (Tr. 37). He believed that respondent was sincere in his efforts at rehabilitation and there was an excellent chance that respondent would remain drug-free (Tr. 16, 37). Deputy Chief Stine testified that he would be comfortable if respondent continued to be a sanitation worker (Tr. 36-37, 42).

In light of respondent’s previous 38-day penalty for similar misconduct, another 30-day suspension, as provided by the Administrative Code, would be inadequate to address the Department’s legitimate safety concerns. The only other penalty recommendation available is termination of employment. However, the Department could offer respondent the opportunity to voluntarily resolve this matter with alternative penalties, including drug and alcohol testing for the remainder of his career. Such a resolution would minimize the risk of a relapse and protect the safety of respondent, his co-workers, and the public. At the same time, such a penalty would recognize respondent’s rehabilitative progress and allow him to make a positive contribution to the Department.

Petitioner noted that none of respondent’s witnesses could guarantee that he would never relapse (Tr. 67). But that is an impossible standard to meet because no witness could credibly offer such a guarantee. Anyone who suffers from addiction is at risk of relapse. Regular testing of respondent, for the remainder of his entire career if necessary, would greatly reduce that risk.

The Department personnel who testified for respondent—a supervisor, a superintendent, and a deputy chief—know full well the hazards sanitation workers face every day. Based on their testimony and demeanor, I was convinced that none of them would have vouched for respondent if they believed he posed a risk to himself or others. Each one of them testified that respondent should be given another chance. Their testimony, based on firsthand knowledge of respondent’s day-to-day work and his efforts at turning his life around, should be given considerable weight.

I was particularly impressed by Deputy Chief Stine's testimony. It is unusual for a high-ranking Department official to testify on behalf of a sanitation worker who has repeatedly tested positive for drug use. And Deputy Chief Stine did not offer generic platitudes about respondent's character. Instead, he took the time to talk with respondent repeatedly about substance abuse and treatment before rendering an informed opinion about his prospects for success. Though he has only known respondent for about seven months, Deputy Chief Stine has 16 years of experience in the Department. He testified that he had seen other sanitation workers, with similar records, "completely change" themselves and he also made clear that he was speaking for himself and his staff when he stated that respondent was "very consistent" and an excellent worker (Tr. 34-35, 40).

Deputy Chief Stine offered a thoughtful assessment based on his experience and his daily interactions with respondent for an extended period. His assessment was consistent with respondent's sincere testimony and the correspondence from the drug treatment program.

Accordingly, I recommend termination of respondent's employment but urge the Department to consider less drastic alternatives.

Kevin F. Casey
Administrative Law Judge

June 3, 2015

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

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Attorneys for Respondent

BY: ALLEN COHEN, ESQ.

ACTION OF THE COMMISSIONER

July 8, 2015

In the Matter of
NEW YORK CITY DEPARTMENT OF SANITATION
Petitioner

- against- OATH Index No, 1821/15

Anonymous
Respondent

Kathryn Garcia, Commissioner

DECISION

A copy of the June 3, 2015 Report and Recommendation (the Report) submitted by OATH Administrative Law Judge (ALJ) Kevin F. Casey was forwarded to this office following a disciplinary proceeding pursuant to Section 16-106 of the Administrative Code of the City of New York, which governs the discipline of uniformed employees of the Department of Sanitation.

After reviewing the evidence, hearing transcript and report and recommendation, I agree with the specific findings that the Department has met its burden of demonstrating that *Anonymous* violated DSNY Code of Conduct Rule 2.1. While the Report recommends termination of employment, the Report also urges the Department to consider less drastic alternatives. In the specific circumstances of this matter, I find the penalty of termination to be inappropriate.

My decision not to terminate is not an easy one and is the result of several factors including the testimony on his behalf by several superior Officers attesting to SW *Anonymous*' character and his work performance. With the exception of his past violations of the Department's substance use policy, a review of his disciplinary, sick and his attendance record show only minor infractions during his tenure. I also note that, prior to the October 2014 drug test, SW *Anonymous* last had a positive drug test in 2007.

Therefore, the penalty recommended in the Report is modified. Based on the severity of the misconduct, it is my decision that the appropriate penalty for the proven misconduct is a 30-day suspension and lifetime drug/alcohol follow-up testing for the duration of his employment with the

Department.

Kathryn Garcia, Commissioner

New York City Department of Sanitation