Dep't of Sanitation v. Anonymous

OATH Index No.1853/15 (Aug. 7, 2015), *modified on penalty*, Comm'r Dec. (Oct. 6, 2015), **appended**

Where respondent admitted violating Department's substance abuse policy, termination of employment is recommended but Department is urged to consider an alternative lesser penalty based upon significant mitigating evidence presented.

Commissioner agreed with specific findings in the report and imposed a 30-day suspension and lifetime drug/alcohol follow-up testing for the duration of respondent's employment with the Department.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation pursuant to 16-106 of the New York City Administrative Code. Petitioner alleges that on January 13, 2014, respondent refused to submit to a drug test, in violation of section 2.5 of the Department's Code of Conduct (ALJ Ex. 1).

At trial on June 18, 2015, respondent admitted his guilt and offered mitigatory evidence. Respondent testified and also offered the testimony of two additional witnesses: Martin Chestnut, Director of the Employee Assistance Unit ("EAU"), and Frederick Russo, a supervisor at respondent's garage.

[1] In accordance with title 49, section 40.323(b) of the Code of Federal Regulations, respondent's name has been redacted from publication.

For the reasons below, the charge is sustained. Considering the options available under the Administrative Code, I recommend termination of respondent's employment. However, based upon the mitigating evidence presented at trial, I urge the Department to consider an alternative penalty involving a period of suspension, substance abuse testing for the duration of respondent's employment with the Department, compliance with EAU treatment referrals, and any other conditions the Department feels are appropriate.

ANALYSIS

It is undisputed that on January 13, 2014, respondent's name was selected for random testing. Respondent reported to the mobile testing van as ordered but then left the testing van and went to EAU to speak to a counselor (Tr. 5, 46; Pet. Exs. 1, 2). This constituted a failure to submit to an ordered substance abuse test, as required by section 2.5 of the Code of Conduct. The charge, therefore, is sustained.

FINDING AND CONCLUSION

On January 13, 2014, respondent failed to submit to a substance use test when ordered, in violation of the Department's Code of Conduct.

RECOMMENDATION

For the proven charge, the available penalties under the Administrative Code are a pay fine, suspension up to 30 days, or termination of employment. Petitioner asserts that termination of respondent's employment is necessary to protect the public safety and is appropriate under the Department's substance abuse policy because respondent previously tested positive for drugs in 2003 and 2004.

Respondent admits that he had problems with drugs in 2003 and 2004 and that he left the drug testing site on January 13, 2014, because he was afraid he would test positive for marijuana. However, he highlights the ten-year gap between his second positive drug test in 2004 and his refusal to test in 2014, and asserts that he has no interest in taking drugs and wants to keep his job. He urges that a penalty involving probation and mandatory testing is more appropriate than

termination of his employment. In support, he presented the testimony of Mr. Chestnut, head of EAU.

As set forth below, I found respondent's testimony to be thoughtful and persuasive. I was also moved by Mr. Chestnut's testimony that, considering the ten-year gap, he would be comfortable if respondent continued to work for the Department under the auspices of the EAU, subject to mandatory testing and treatment as required. Accordingly, I believe that an alternative penalty encompassing this arrangement, as well as a suspension for a period of time, is appropriate.

Respondent's personnel record, which I requested after trial, shows that he was hired in September 2000. He accepted a 36-day penalty for positive drug tests in 2003 and 2004. Other than these violations, his disciplinary record is relatively minor: a one-day penalty in 2002 for violations of the sick leave policy and the rule requiring prompt notification of arrest; a three-day penalty in 2004 for a sick leave violation; a reprimand in 2008 for a sick leave violation; and a three-day penalty in 2009 for an unauthorized absence.

Thus, the issue here is whether respondent should be terminated from employment based upon his third violation of the Department's substance abuse policy, or whether an alternative penalty is more appropriate considering the ten-year hiatus between his second and third violations as well as other evidence in the record.

The Department's substance abuse policy is embodied in Policy and Procedure 2012-02 ("PAP 2012-02"). This policy provides for a graduated penalty schedule for employees who test positive for illicit drugs or who refuse to test, encompassing referrals to EAU and compliance with EAU rehabilitation recommendations. Generally, the Department will not seek termination for first time offenders but will offer such employees the opportunity to participate in a treatment program recommended by EAU, along with unannounced, directly observed drug and/or alcohol testing for up to five years. PAP 2012-02 § 7.1 (Mar. 20, 2012). For the second violation of the policy, the Department will either seek termination or offer a last chance agreement, requiring compliance with EAU rehabilitation recommendations, testing for up to five years, and resignation based upon a positive test, refusal to test, or non-compliance with EAU programs. Further, after the testing period ends, the employee will be required to make follow-up appointments with EAU on a semi-annual basis for the rest of his or her career. *Id.* § 7.4. For

"the third or subsequent violations" of the policy, the Department will seek termination. *Id.* § 7.5.

In most instances, this tribunal has recommended termination of employment where a worker has violated the substance abuse policy for a third time. *See, e.g., Dep't of Sanitation v. Betancourt*, OATH Index No. 1463/07 (May 7, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-103-SA (Nov. 5, 2007); *Dep't of Sanitation v. Anderson*, OATH Index No. 1135/06 (Sept. 22, 2006); *Dep't of Sanitation v. King*, OATH Index No. 1836/04 (Aug. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-03-SA (Apr. 15, 2005). However, in some cases, based upon significant mitigatory circumstances, this tribunal has recommended lesser or alternative penalties. *See, e.g., Dep't of Sanitation v. Anonymous*, OATH Index No. 1821/15 (June 3, 2015) (urging an alternative lesser penalty where first two positive tests occurred close together and respondent was drug-free for more than seven years after second positive test); *Dep't of Sanitation v. Anonymous*, OATH Index No. 1637/12 (June 19, 2012), *modified on penalty*, Comm'r Dec. (Aug. 15, 2012) (ALJ recommended a thirty-day suspension, which Commissioner adopted subject to parties' agreement to lifetime drug and alcohol testing, where the employee violated the substance abuse policy a third time but where the two prior violations occurred close in time, three years prior to the third violation).

Here, respondent is 57 years old and has worked in the same district in Manhattan for his entire career (Tr. 45). It was undisputed that in 2002 he went to EAU voluntarily for help with a substance abuse problem (Tr. 13). EAU recommended an outpatient substance abuse program. Respondent did not complete the program and dropped out after three months (Tr. 23, 61). Respondent acknowledged having a drug problem at the time, when he and his wife "really were at odds" with each other (Tr. 59). He candidly admitted that he had just started to work for the Department, after twenty years parking cars, and that he did not appreciate his responsibilities as a sanitation worker (Tr. 60). Similarly, he admitted "walking away" from this program, and attributed his relapse in 2003 to his failure to complete the program (Tr. 61). When respondent tested positive for a controlled substance in 2003, EAU sent him to an outpatient four-month program, which he completed (Tr. 13, 24). Respondent then tested positive in May 2004, after which he signed a two-year last chance agreement and agreed to comply with any EAU referrals for treatment.

Mr. Chestnut who has been affiliated with EAU for thirty years, the last thirteen of which he has been director (Tr. 11), testified that it was not unusual for an employee to test positive on two different drug tests within a short time. He explained, "when we first see a client who is struggling with a substance abuse problem, it takes some time to get that straightened out . . . for them to reach abstinence" (Tr. 15).

Here, after the May 2004 positive test, respondent entered a 28-day inpatient program, followed by three months of outpatient aftercare. He completed both components of the program and was subject to follow-up testing by the Department for at least two years (Tr. 26). Respondent did not return to EAU until 2014, meaning he did not test positive or refuse to submit to any drug test in the interim (Tr. 15, 16).

Asked about why he relapsed in 2014, respondent acknowledged, "I brought this on myself" (Tr. 56). He testified that in 2014, he was having "marital issues" with his wife (Tr. 52). His father had died in late 2013 and he felt he did not grieve properly. He started drinking "a little bit" and having more problems with his wife, which precipitated his drug use (Tr. 53). On January 13, 2014, he left the testing site and went to EAU because he was concerned that he would test positive for marijuana (Tr. 50). He was immediately suspended and was not able to return to EAU until about ten days later, following an appearance at the Department Advocate's Office (Tr. 48). EAU then placed him in the Inter-Care outpatient substance abuse program, which he attended until his completion date on June 13, 2014 (Tr. 49; Resp. Ex. A). The program consisted of group counseling about three nights a week, in conjunction with weekly drug testing (Tr. 50). A letter from the senior clinician at Inter-Care attests that respondent "was in full compliance with attendance and abstinence policies," including submitting to alcohol and drug screening on a weekly basis and testing negative (Resp. Ex. A). Since completing Inter-Care, respondent has been randomly tested, without a problem (Tr. 19, 51).

Mr. Chestnut testified that ten years is "a pretty good chunk of time" for respondent to remain drug-free and that he believes that respondent "would be a good risk to remain at Sanitation" (Tr. 22). He would be comfortable if respondent remained employed at the Department under the auspices of EAU, subject to testing and compliance with drug treatment recommendations (Tr. 22). Credibly, he acknowledged that while he could assess risk, he could not offer any guarantees regarding whether respondent would test positive for drugs in the future (Tr. 30).

I found it notable that Mr. Chestnut, a professional with a long history in substance abuse treatment, concluded that it would be appropriate if respondent remained employed by the Department under the auspices of EAU. In so doing, Mr. Chestnut relied heavily upon the ten-year gap between respondent's last positive test in 2004 and his drug test refusal in 2014. I found his testimony more persuasive than petitioner's argument that respondent's continued retention would pose an unreasonable risk to the Department.

I also found respondent to be sincere in asserting that he has no desire to take drugs in the future and wants to continue working. Respondent stressed that he likes his job and wants to keep working. In five years he will reach his twenty-year mark, which will make him eligible to collect his pension if he retires (Tr. 56). Respondent acknowledged that drug addiction is a lifetime struggle (Tr. 58) and admitted that he was not currently attending any type of drug treatment program, although in the past he had periodically attended meetings of Narcotics Anonymous (Tr. 52). He indicated that his marriage was "very consuming," that he picks up garbage all day and is very tired at night, and that he also helps take care of his elderly mother (Tr. 51). Yet respondent also testified that he has no desire to smoke marijuana, "[d]efinitely not" (Tr. 52). He explained further:

> after this last incident . . . I've been kind of scared straight. I don't want anything else to do with any other kind of drugs or whatever because I've invested 15 years of my life . . . I've learned my lesson to [not] put my job in jeopardy and the . . . drug thing is not fun anymore, it's work

(Tr. 52).

Further, when asked if he would return to drug use if there was other stress or adversity in his life, respondent gave a long and thoughtful answer indicating he was still struggling with many issues but he was invested in keeping his job and would abide by any testing or treatment requirements the Department imposed:

> . . . I'm still struggling with my marriage trying to resolve some of the issues behind . . . the drugs … and it's, it's a constant day to day struggle. And you know, I've invested 15 years of my life in this job and you know how you take things for granted, you think it's going to be there, you know, you don't worry about it, and that was one of the things that I was doing. I was just getting complacent but I mean this time that I've, you know, sitting here, brought me here to this, this point in my life has made me reflect

> and look back and realize that I mean I got too much to lose. Consequences are too high and I don't like the way I feel . . . So . . . if I could get another shot at it, you won't regret it . . . I will not be back down here . . . anymore. I will take and comply [with] whatever the Department tells me to comply with . . . .

(Tr. 56). I found respondent sincere and credible.

Petitioner has noted that in this case, respondent did not present character testimony of a Chief or Deputy Chief on his behalf. Rather, respondent presented the testimony of his garage supervisor, Mr. Russo, as well as letters from two other supervisors and the District Superintendent, all of whom indicated that respondent was a responsible and conscientious worker (Resp. Exs. B2-B4). Petitioner urges that the absence of such testimony distinguishes this case from other cases in which a non-termination alternative penalty has been recommended for a third violation of the drug testing policy. *See, e.g., Dep't of Sanitation v. Anonymous,* OATH Index No. 1821/15 at 6 (June 3, 2015) (noting that a Deputy Chief testified on the employee's behalf).

Although Mr. Russo is not a high-level supervisor, I disagree with petitioner's conclusion that here, respondent failed to present sufficient mitigating circumstances to justify a non-termination penalty. Mr. Russo has first-hand experience observing respondent's conduct on a daily basis. Moreover, Mr. Chestnut, who has extensive experience with employees who have substance abuse problems, is especially well-suited to evaluate the risk posed by each employee. He presented a compelling case for respondent's continued employment under the auspices of EAU. His conclusions, drawn upon his decades of experience with EAU, that the ten-year gap between respondent's 2004 drug test failure and his 2014 failure to test was significant, and that he would be comfortable if respondent remained employed by the Department under the auspices of EAU, were worthy of considerable weight.

The Department was persuaded by the circumstances in *Anonymous*, OATH 1637/12, to adopt a penalty involving suspension and lifetime drug/alcohol testing. The circumstances here are no less compelling. In *Anonymous,* there was a three-year gap between the current violation and the employee's last violation of the substance abuse policy; here, a full ten years elapsed since respondent's last violation of the policy. In *Anonymous,* as he did here, Mr. Chestnut testified based upon his observation of and assessment of the employee that he believed the

employee's prognosis to be good. In *Anonymous*, Judge Richard found the employee to be "deeply chastened" and to accept responsibility for his actions. *Id.* at 6. Here, similarly, I found respondent to be contrite about his drug use and sincere in his desire to stay off drugs and comply with testing, EAU treatment requirements, and any other conditions of employment that might be imposed.

Thus, although I recommend termination of respondent's employment, based on the options available under the Administrative Code, I urge the imposition of a less drastic penalty involving drug and alcohol testing for the remainder of respondent's career, compliance with EAU directives, and a period of suspension.

Faye Lewis
Administrative Law Judge

August 7, 2015

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

KIRSCHNER & COHEN, P.C.
Representative for Respondent
BY: ALLEN COHEN, ESQ.

Commissioner's Decision (Oct. 6, 2015)

DECISION

A copy of the August 7, 2015 Report and Recommendation (the Report) submitted by OATH Administrative Law Judge (ALJ) Faye Lewis 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 a less drastic penalty. 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. It is the result of several factors including the testimony by the Department's *Employee Assistance Unit* on behalf of SW Anonymous concerning his treatment after this latest violation, along with the testimony by his garage supervisor 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 this 15-year employee's disciplinary, sick and attendance record reveals only minor infractions during his tenure with the Department. I also note that there is a 10-ycar gap between SW Anonymous' last positive drug test (May 2004) and this January 2014 failure to submit a substance use test.

Accordingly, 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

Dated: Oct. 6, 2015