Dep't of Sanitation v. Petosa

OATH Index No. 758/15 (Jan. 23, 2015), *adopted*, Comm'r Dec. (Apr. 29, 2015), **appended**

Sanitation worker was charged with being under the influence of drugs while on duty. Misconduct charge was not sustained where employee was given the drug test while seeking voluntary entry into a drug treatment program, after being assured by EAU that he would not be punished for a positive test result. ALJ recommends dismissal of the charge.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
DONALD PETOSA
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the Administrative Code. Petitioner charges sanitation worker Donald Petosa with being under the influence of drugs while on duty. Respondent does not deny the positive drug test; rather, he defends on the basis of his admitted drug problem and good faith attempt to obtain rehabilitation.

The hearing was conducted before me on December 2, 2014. The parties stipulated to the facts and no witnesses were called. Documents were received in evidence.

Based upon the record of the proceeding, I find that the misconduct charge should be dismissed.

ANALYSIS

The case rests upon the following facts which were stipulated by the parties. There were no witnesses called at the hearing.

Respondent is a sanitation worker charged with testing positive for marijuana on October 4, 2013. On October 3, 2013, respondent voluntarily entered Bridge Back to Life Center, a drug

and alcohol treatment facility (hereinafter "Back to Life") to address a substance problem with marijuana (Tr. 6). On October 4, Back to Life referred respondent for placement in the Department's Employee Assistance Unit ("EAU") program, for ongoing testing and monitoring.

Respondent's counselor at Back to Life, Meghan Gay, contacted Mr. Chestnut at EAU to facilitate respondent's placement, as is commonly done. When respondent arrived at EAU that day, he told Mr. Chestnut that he had tested positive the previous day and he likely had marijuana in his system. Mr. Chestnut told respondent that he had to be tested to determine when he could be returned to work and that it would not "be a problem" if he tested positive for marijuana, as a complaint would not be issued against him under the circumstances (Tr. 6-7). Mr. Chestnut believed that the results of respondent's urinalysis would become a baseline for his EAU treatment and would not be used to discipline him (Tr. 8).

Respondent was sent for testing and he submitted a urine specimen for toxicology; he tested positive for the presence of marijuana at a level of 20 nanograms per milliliter ("ng/ml"), 5 ng/ml above the cutoff (Tr. 5, 7). The reliability of the testing procedures is not disputed. The sample was collected with the appropriate chain of custody intact and the result was certified by the Department's medical review officer (Tr. 5). The Department immediately issued a complaint and imposed a 30-day pre-hearing suspension for the positive test.

Learning of this, Mr. Chestnut asked the Department's disciplinary advocate to withdraw the disciplinary complaint because he had encouraged respondent to take the test for purposes of treatment on the mistaken belief that respondent would not be punished for a positive test under the circumstances (Tr. 7). His request was denied.

Respondent has completed all of his contractual requirements with EAU, including the satisfactory completion of all random drug tests administered by EAU since October 2013, with no positives for drugs or alcohol (Tr. 8). EAU's random testing, which will continue to 2018, is in addition to the Department's random testing program.

A positive drug test is a violation of the Department's rules and regulations. Section 4.1 of Policy and Procedure 2012-02 prohibits employees while on duty or on medical leave or on city property, "from using, possessing, or having in their system controlled substances." The question is whether respondent's positive drug test constitutes misconduct. Under present circumstances, I find it does not.

Every rule violation does not constitute misconduct, as there are no strict liability offenses under section 16-106 of the Administrative Code. *See Dep't of Sanitation v. Torrence*, OATH Index No. 2515/10 at 5 (July 22, 2010) (strict liability runs contrary to the basic precept that a finding of misconduct requires some showing of fault on an employee's part); *Dep't of Sanitation v. Chaudhuri*, OATH Index No. 1674/08 at 6 (May 21, 2008) ("technical rule violations do not constitute misconduct absent a finding of fault"); *Dep't of Sanitation v. Katalenas*, OATH Index No. 1315/06 at 2 (June 13, 2006) ("A judgment error, lacking in willful intent and not so unreasonable as to be considered negligence, is not misconduct."). Thus, an employer must prove that either the employee acted willfully or intentionally, *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969) ("Misconduct and insubordination on the part of a civil service employee implies intentional and willful disobedience"), or carelessly or negligently, *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). *See also Ryan v. NYS Liquor Auth.*, 273 A.D. 576, 581 (3d Dep't 1948) ("A mere technical breach of the rules without wrongful intent" was not sufficient to warrant the discharge of an officer who had a good record of service).

The proof here is inconsistent with a finding of misconduct. Respondent's conduct was neither intentional nor negligent. The evidence shows that respondent voluntarily entered into a drug treatment program, frankly divulging his use of marijuana and seeking treatment. Upon transfer to the Department's EAU program, he was informed that he would, as a threshold matter, have to take a urine test to establish a baseline level of usage and to be returned to work. He knew he was likely to test positive and told the EAU representative as much. He was told he would not be punished for it. Thus, his reliance upon EAU's representation caused him to be suspended and charged with misconduct.

Respondent asserts the doctrine of waiver and condonation in his defense. Under this principle, an employer may not lead an employee into believing that his conduct will not be considered a rule violation and then reverse its policy and seek to have the employee disciplined. *See Fahey v. Kennedy*, 230 A.D. 156, 159 (3d Dep't 1930); *Law Dep't v. Coachman*, OATH Index No. 1370/00 at 8-9 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-13-SA (Apr. 11, 2001); *Dep't of Sanitation v. Kaplan*, OATH Index No. 035/15 at 3 (Sept. 18, 2014). For waiver and condonation to apply, respondent must show that the behavior alleged to be misconduct was a regular practice known to and accepted by those in authority. *See Kaplan*,

OATH 035/15 at 3-4 (dismissing charge that sanitation worker parked his car on sidewalk where facts showed supervisor regularly told workers to move their vehicles rather than issue complaints); *Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 362/13 at 5-7 (June 14, 2013) (charge that respondent violated order not to speak to certain employees dismissed where agency condoned such communications); *Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 10-11 (Jan. 8, 2010) (charge that correction officers wore gloves indoors, in violation of written directive, dismissed where agency condoned the practice); *Dep't of Correction v. Johnson*, OATH Index No. 514/02 at 13-14 (May 30, 2002), *modified on penalty*, Comm'r Dec. (July 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-39-SA (Apr. 11, 2003) (charges dismissed where employee was told or led to believe that he could not report to work pending processing of retirement application).

I find that waiver and condonation applies and the charge should be dismissed. The evidence indicates that taking a drug test upon entry to EAU's program was a required protocol. Reasonably, a positive test result would be expected for any individual entering drug treatment.

I would note that respondent voluntarily sought treatment for his substance problem and substance abuse is recognized as a disability under state and city law. *See* Mental Hyg. Law § 19.01 (Lexis 2014) (it is the policy of New York State to treat and rehabilitate alcoholics and substance abusers); Admin. Code § 8-102(16)(c) (Lexis 2014) (The term "disability" may be applied "to a person who (1) is recovering or has recovered and (2) currently is free of" alcoholism, drug addiction or other substance abuse); 9 NYCRR § 466.11(h)(1) (Lexis 2015) (The Law protects "an individual who is a recovered/recovering alcoholic or drug addict"). Respondent's actions are precisely the kind that an employer should want an affected employee to undertake and such action should be encouraged. The Department's own policy actively encourages employees to seek drug rehabilitation and treatment and to utilize the services of EAU. *See* Dep't of Sanitation Policy and Procedure No. 2012-02 § 2 (Mar. 20, 2012) ("the Department, within reason, will try to help employees confront, treat and recover from substance abuse problems. . . . The Department encourages each troubled employee to voluntarily seek assistance from the EAU."). Punishing respondent's reliance on EAU would eviscerate any effectiveness EAU could have with substance abusers who are interested in treatment.

FINDINGS AND CONCLUSIONS

1. Respondent tested positive for marijuana.

2. Petitioner failed to prove that respondent's positive drug test constituted misconduct, where the test was taken as a requirement of entering the Department's EAU program and respondent was assured the test would not be used against him.

RECOMMENDATION

I recommend dismissal of the charge.

Tynia D. Richard
Administrative Law Judge

January 23, 2015

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

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

ACTION OF THE COMMISSIONER
April 29, 2015

NEW YORK CITY DEPARTMENT OF SANITATION
Against

DONALD PETOSA
Respondent

I have received and carefully reviewed the January 23, 2015 Report and Recommendation of Administrative Law Judge (ALJ) Tynia D. Richards (the Report) concerning charges brought against the Respondent, Sanitation Worker (SW) Donald Petosa, for violating the Department of Sanitation (The Department) Substance Abuse Policy and Procedure (PAP) 2012.02. Upon review of the record and exhibits presented at the formal hearing concluded at the Office of Administrative Trials and Hearing on December 2, 2014, I adopt the finding of the Report that SW Petosa should not be punished for the misconduct alleged in this matter.

The parties both averred that there were no facts in dispute and as a result agreed to stipulate the facts on the record without calling any witness (Tr. 4). In addition, the parties stipulated into evidence Chain of Custody and Drug Test Results (Pet. Ex. 1) and a Suspension Status Report (Res. Ex. A). Except for documents entered into the record, the Stipulated Facts were presented orally, rather than in writing. As a result, the record is ambiguous with respect to certain factual issues. (In the future, when the Department stipulates to facts, it will do so in writing.) Having reviewed the respondent's personnel records along with the record and exhibits in this case, this decision will clarify those facts. I will also reference the federal law that mandates that the Department test Sanitation Workers returning to safety sensitive duties.

SW Petosa was charged with testing positive for marijuana on October 4, 2013. Department records indicate that he voluntarily entered a drug and alcohol treatment facility, Bridge Back to Life Center, on August 28, 2013, Department records further indicate that SW Petosa left this facility on October 2, 2013. On October 4, 2013, the Department administered Return To Duty substance use tests to SW Petosa when he sought to return to work after treatment, and his urine sample tested positive for marijuana. Accordingly, the Department issued a complaint, and SW Petosa was suspended for a period of 10 days, October 15, 2013 to October 24, 2013. See attached Suspension Notification document.

Federal Law, 49 U.S.C. Section 31306(b)(1)(A), directs the Secretary of the Department of Transportation (DOT) to promulgate regulations mandating employers to conduct pre-employment, reasonable suspicion, random and post-accident testing for controlled substances of drivers of commercial vehicles. Pursuant to these regulations, 49 C.F.R. Part 382, 49 C.F.R. Part 40, the Department maintains a drug-testing program for employees such as the Respondent, who, as a condition of employment, hold commercial driver's licenses and operate commercial vehicles including sanitation trucks.

While these regulations encourage those affected to seek treatment for abuse of alcohol and controlled substances, an employee is still subject to a drug and alcohol test when seeking to return to full duty work. “Prior to the employee participating in a safety sensitive function, the employee shall undergo a return to duty controlled substance test with a verified negative test result for controlled substances use.” 49 C.F.R. Section 382.121 (b)(4)(ii). Further these federal regulations mandate the manner in which the Return To Duty testing is performed. 49 CFR Part 40 and 49 C.F.R., Section 382.309.

Pursuant to federal regulations designed to ensure public safety, SW Petosa submitted to a test after completing the in-patient program at a drug and alcohol treatment facility and prior to returning to full duty. The Department administered the required Return To Duty substance use tests after SW Petosa completed his prescribed course of drug treatment program.

The federal regulations state:

> No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled

> substances. No employer having knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions. 49 C.F.R. Section 382.215.

Although SW Petosa was given a Return To Duty Test in accordance with federal regulations, I adopt the Report's recommendation that the underlying disciplinary charge be dismissed. This record clearly reveals his efforts to seek treatment for a substance use problem. The underlying facts point to an employee recognizing that he is struggling to overcome a problem and voluntarily seeking assistance. A review of his disciplinary history reveals that SW Petosa has received 39 disciplinary complaints during his tenure. To his credit, he has not received any disciplinary complaints since this October 2013 event. Given this and the unique circumstances surrounding the October 4, 2013 test, particularly Martin Chestnut's statements to SW Petosa that the Department would not use the result of the test to issue a complaint, the charge against SW Petosa shall be dismissed. SW Petosa shall be reimbursed for any pre-trial suspension period related to this matter. The related disciplinary charge will not appear in SW Petosa's personnel record and will not be counted as a violation of DSNY's Substance Use Policy.

Kathryn Garcia, Commissioner
Department of Sanitation
April 29, 2015