Dep't of Sanitation v. N.G.

OATH Index No. 1389/16 (May 12, 2016)

Evidence proved that respondent tested positive for use of amphetamine and methamphetamine. Where petitioner established chain of custody for urine sample despite error in collection process, request to cancel test denied. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
N. G.
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This disciplinary proceeding was commenced pursuant to section 16-106 of the Administrative Code by petitioner, the Department of Sanitation ("Department"). Respondent N.G.,[1] a sanitation worker, is charged with being under the influence of drugs or alcohol while on duty because he tested positive for amphetamine and methamphetamine (ALJ Ex. 1).

A hearing on the charge was conducted before me on March 10, 2016 and April 6, 2016. Petitioner relied on documentary evidence and testimony from a specimen collector, two supervisors, and a toxicologist. Respondent testified on his own behalf, and also offered the testimony of a supervisor, a sanitation worker, and photographs. For the reasons provided below, I find the evidence was sufficient to sustain the charge. A penalty of termination of employment is recommended.

[1] Respondent is subject to Department and federal regulations that require random drug testing. Pursuant to such federal regulations, respondent's name has been withheld from publication. *See* 49 CFR § 40.321(b), 40.323(a),(b), 382.405(g),(h) (Lexis 2016); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 1 n.1 (July 31, 2009).

ANALYSIS

Respondent was tested pursuant to the Department's Substance Abuse Policy and Procedure, PAP 2012-02, which requires an employee who holds a commercial driver's license to undergo random drug testing. It is uncontested that the urine sample attributed to respondent tested positive for amphetamine and methamphetamine (Pet. Exs. 1(a),(b),(c), 4). Respondent testified that he had no drugs in his system on the date in question (Tr. 429).

Respondent argued that the testing procedures were violated, that the chain of custody for his urine sample was broken, and accordingly, the test result should be discounted (Tr. 466-76). The relevant facts presented, up to the point when respondent provided a urine sample, were largely undisputed. Respondent's version of events will mostly be relied upon to form that portion of the narrative.

Respondent testified that upon reporting for work on December 9, 2015, he was informed that he had been selected for drug testing. Respondent, who began his employment with the Department in 2001, testified that he was familiar with the urine collection process. Respondent went to the garage area of his work facility, where the mobile testing van was parked, and reported to Supervisor Puleo, who is assigned to the Drug and Alcohol Testing Unit (Tr. 150, 416-18). Also present was Mr. Dalberiste, a drug and alcohol technician who was conducting the urine sample collection (Tr. 254-60, 420-21). Both Supervisor Puleo and Mr. Dalberiste testified that they had never previously met respondent (Tr. 190, 286).

Respondent informed Supervisor Puleo that he had ongoing stomach issues, and that he was currently suffering from diarrhea. Respondent then attempted to provide a urine sample, but could not. Respondent was given a bottle of water to drink. Sometime afterwards, respondent again attempted but failed to provide a urine sample. Respondent subsequently informed Supervisor Puleo that he needed to move his bowels. Respondent was then allowed to leave the area, use the bathroom, and report back to Supervisor Puleo. Upon his return, respondent again attempted to provide a urine sample, but felt he could not do so without moving his bowels, which could not be done in the van (Tr. 419-22).

According to respondent's testimony, he suggested that he be directly observed providing a urine sample. Upon Supervisor Puleo calling and discussing the matter with his superiors, it was agreed that respondent would be allowed to use a bathroom within the building facility, and that the urine specimen would be collected under the direct observation protocols (Tr. 17-21,

161-63, 421-23). Eventually, it was decided that a bathroom within the supervisor's locker room would be used to conduct the specimen collection. Supervisor Mercer, the executive officer of the work location, was asked to escort the group to the bathroom. Subsequently, the following five people walked over to the area near the supervisor's bathroom: respondent, Supervisor Mercer, Supervisor Puleo, Mr. Dalberiste, and sanitation worker Nuzzi, the union shop steward who was also respondent's work partner on the date in question (Tr. 163-64, 337, 341).

Before commencing the procedure, Mr. Dalberiste testified that he secured the bathroom by placing a bluing agent in the toilet and covering any faucets with latex gloves in order to prevent any tampering (Tr. 267-68). Thereafter, respondent entered a bathroom stall. At this point, Supervisor Mercer and Mr. Nuzzi were waiting outside the bathroom in a nearby area, and did not see anything that occurred in the bathroom (Tr. 164-66). Supervisor Puleo testified that he stood outside the bathroom door, where he could see the bathroom sink and Mr. Dalberiste, but not respondent because his view was mostly blocked by the stall partition (Tr. 209, 220). It is undisputed that respondent, while in the bathroom stall, was observed by Mr. Dalberiste urinating into a cup, and then gave that cup to Mr. Dalberiste (Tr. 270-71, 424). After this exchange, the parties presented conflicting testimony.

Mr. Dalberiste testified that he took the cup from respondent, waited for respondent to clean up and put his clothes on, and then went to the bathroom sink when respondent stepped out of the stall. At the sink, Mr. Dalberiste testified that he split the sample, as required, by pouring 30 milliliters of the urine into one vial, and 15 milliliters of the urine into a second vial, and closed the vials with their attached caps. Mr. Dalberiste testified he conducted this procedure in front of respondent. Then, Mr. Dalberiste returned with the vials back to the van, accompanied by respondent and Supervisor Puleo. Mr. Dalberiste stated he was always within "full view" of respondent (Tr. 271-74). Upon returning to the van, Mr. Dalberiste labelled the vials and had respondent sign the required forms, including the standard custody and control form ("CCF"). The vials were then placed in a sealed bag. According to Mr. Dalberiste, respondent never complained to him about any aspect of the collection procedure (Tr. 274-78).

Supervisor Puleo corroborated Mr. Dalberiste's testimony. In particular, he testified that he saw Mr. Dalberiste standing in front of the stall, with the stall door open, while respondent was inside the stall (Tr. 165-67). Thereafter, he saw Mr. Dalberiste holding a cup with fluids in it, waiting for respondent to exit the stall. He then saw Mr. Dalberiste split a urine sample into

two vials by the sink with respondent standing next to him. Afterwards, Supervisor Puleo stated that "[w]e all walked together back" to the van, where respondent entered the van with Mr. Dalberiste. Supervisor Puleo testified that when respondent exited the van, respondent showed "some kind of gratitude that we were able to accommodate him" and did not express any concern regarding the collection procedure (Tr. 170-74, 220-22).

Respondent testified that while he was in the stall, he urinated into the cup and gave it to Mr. Dalberiste, who "walked away with the cup." He then told Mr. Dalberiste "where are you going with the cup?" and that "it's supposed to remain in my eye contact, my eyesight." Mr. Dalberiste then instructed respondent to clean himself and flush the toilet. By the time respondent did so, Mr. Dalberiste had left the bathroom. When respondent washed his hands and exited the bathroom, respondent stated that he observed Mr. Dalberiste walking back towards the garage, and was "well down the hallway" (Tr. 424-26, 450).

After retrieving the rest of his belongings and speaking briefly to Mr. Nuzzi, respondent stated he walked back to the garage, and that Mr. Dalberiste was already inside the mobile testing van. Once he entered the van, respondent observed a urine sample in two vials, with a label on each one. Respondent was asked to sign and initial certain forms, including the labels on each vial, and the CCF. Respondent testified he told Mr. Dalberiste that he did not observe the splitting of the urine sample, and did not want to sign the labels. Mr. Dalberiste instructed respondent to sign the forms. Respondent initialed and signed the forms and labels presented because he was concerned that failure to do so would be counted as a refusal, which has the same effect as a positive test result (Tr. 426-31, 453-60).

Supervisor Mercer and Mr. Nuzzi mostly testified about what occurred after Mr. Dalberiste and respondent exited the bathroom. Supervisor Mercer testified that after escorting the group to the supervisor's bathroom, he waited in the locker room area, where he observed Supervisor Puleo standing by the bathroom door. After about 15 minutes, Supervisor Mercer saw Mr. Dalberiste come out of the bathroom. Mr. Dalberiste and Supervisor Puleo went and stood in the hallway outside the locker room, waiting for respondent. Supervisor Mercer heard water running inside the bathroom, and surmised respondent was washing his hands (Tr. 360-64). Respondent eventually came out "5 to 10 minutes" after Mr. Dalberiste had exited the bathroom (Tr. 379-80). At that time, everyone began walking back towards the garage. However, respondent stopped to talk to Mr. Nuzzi, while Mr. Dalberiste continued to the van.

Supervisor Mercer testified that they did not walk back as a group, but instead Mr. Dalberiste and Supervisor Puleo walked ahead, he was in the middle, and Mr. Nuzzi and respondent walked behind him. Supervisor Mercer observed Mr. Dalberiste enter the testing van while respondent was still walking towards the area. On the date in question, respondent never expressed to Supervisor Mercer any concern regarding the collection procedure. A few days later, respondent did express concern, stating that he "didn't see the guy close anything" because he was "still in the stall." Supervisor Mercer advised respondent to speak to his union (Tr. 362-68, 371-72).

Lastly, Mr. Nuzzi testified, in relevant part, that he was in a nearby room across the hallway while respondent was in the supervisor's locker room bathroom. He eventually saw Mr. Dalberiste come out of the locker room by himself, speak to Supervisor Puleo in the hallway, and then he observed them walk back towards the garage. Eventually, respondent also exited the bathroom. Respondent told Mr. Nuzzi he had to return to the testing van, and Mr. Nuzzi observed respondent "grabbing his stuff to go back to the [van]." After the collection procedure finished, respondent and Mr. Nuzzi headed out on a sanitation truck to their assigned route for the day. Mr. Nuzzi testified that while in the truck, respondent complained that Mr. Dalberiste did not split his urine sample in his presence. Mr. Nuzzi advised respondent to call the union (Tr. 388-91).

Based on his own testimony, and the supporting testimony of Supervisor Mercer and Mr. Nuzzi, respondent claimed that the urine sample collection procedures were violated because he was not afforded the opportunity to see his urine sample split into the two vials, and was not allowed to continuously observe his sample from the time he gave the cup with his urine to Mr. Dalberiste to the time he returned to the van. As a result, respondent argued that the chain of custody was broken and the test result should be cancelled (Tr. 466-76).

As is the case here, whenever a laboratory report is relied upon as evidence "[t]he chain of custody must be established from seizure of the substance through laboratory analysis." *Dep't of Correction v. Irwin*, OATH Index No. 217/84 at 6 (Aug. 15, 1984). In such cases, petitioner bears the burden of demonstrating that "an uncontaminated specimen of respondent's urine was collected and tested" and that the specimen "has been held continuously secure from exchange, tampering, deterioration or other material change." *Dep't of Parks & Recreation v. Nappa*, OATH Index No. 306/00 at 2 (Jan. 25, 2000), *modified on findings, aff'd on penalty*, Comm'r Dec. (Feb. 9, 2000). Further, "[c]ontinuous security may be proven by reasonable assurances of

identity and unchanged condition." *Id*. (citing *Dep't of Correction v. Pizarro*, OATH Index No. 834/91 at 10 (May 22, 1991)).

The Department is also required to follow the Procedures for Transportation Workplace Drug and Alcohol Testing Programs published in part 40 of title 49 of the Code of Federal Regulations ("C.F.R.") by the Department of Transportation. *See* Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 917 (codified as amended in relevant part at 49 U.S.C. § 31306) (Lexis 2016); *see also* Department of Sanitation, Substance Abuse Policy and Procedure No. 212-02 § 1.0 (Mar. 20, 2012). The regulations provide for certain steps that a specimen collector must follow to "ensure security during the collection process." 49 C.F.R. § 40.43(d). For instance, such steps include: 1) testing one employee at a time; 2) ensuring that only the collector or the employee being tested handle the specimen before it is poured into the bottles and sealed with tamper-proof seals; and 3) maintaining personal control over each specimen and CCF throughout the collection process. 49 C.F.R. §§ 40.43(d)(1),(3),(5). Of relevance here, one of the regulations instructs a collector that, "[t]o the greatest extent you can, keep an employee's collection container within view of both you and the employee between the time the employee has urinated and the specimen is sealed." 49 C.F.R. § 40.43(d)(2). A specimen is sealed when tamper-resistant labels or seals are placed on the closed container or vials by the collector (Tr. 273). 49 C.F.R. § 40.71(b)(5). The labels must then be initialed by the employee. 49 C.F.R. § 40.71(b)(7).

However, the federal regulations do not provide for the automatic cancellation of a test for failure by a specimen collector to strictly follow this rule. The regulations do enumerate specific circumstances where a test must be cancelled, but none are applicable here. 49 C.F.R. §§ 40.199, 201, 203. Another section of the regulations enumerates various procedural problems that do not result in the cancellation of a test. 49 C.F.R. § 40.209(b). Under that section, the federal rules state that "[n]o person concerned with the testing process may declare a test cancelled based on an error that does not have a *significant* adverse effect on the right of the employee to have a *fair and accurate test*." 49 C.F.R. § 40.209(b) (emphasis added). Therefore, even when errors occur, a test will not be cancelled unless such errors cast significant doubt on the fairness and accuracy of the test, or fall under the specific provisions requiring cancellation of the test. *Dep't of Sanitation v. E.L.*, Comm'r Dec. at 20-21 (Mar. 15, 2012), *rejecting* OATH Index No. 2107/11 (Nov. 20, 2011) (finding that a drug test may be cancelled "only in very

narrowly defined… circumstances" and that "non-adverse errors that do not affect the respondent's right to a fair and accurate test…would not result in cancellation of his drug test"); *Nappa*, OATH 306/00 at 5-8 (finding that even if urine sample was left unattended in bathroom while another unknown person was in a toilet stall, it was unlikely the sample was contaminated or switched. Test result found reliable despite alleged lapse in procedure because it was far more likely that "it was respondent's specimen that was collected, sealed and tested by the laboratory"); *Dep't of Correction v. Quarles*, OATH Index No. 873/94 at 4-5 (May 24, 1994) (finding that even if a supervisor briefly held a cup containing respondent's urine sample, no evidence provided that the supervisor switched or contaminated the sample, or had a motive to do so); *see also, Davis v. Shelby County Sheriff's Dep't*, 278 S.W.3d 256, 265-68 (2009) (where respondent alleged various procedural irregularities, including that he did not observe his specimen handled after he gave it to the collector, positive drug test result was properly admitted into evidence. Employer established chain of custody for the urine sample, and respondent failed to provide credible evidence that the sample was not his).

Accordingly, at issue here is whether petitioner established the chain of custody for respondent's urine specimen, and whether respondent was allowed to observe his sample continuously during the collection process, and if not, whether respondent's test result should be cancelled. As an initial matter, I reject respondent's argument that a collector's failure to allow respondent to continuously monitor his specimen requires, by itself, a finding that petitioner failed to establish the chain of custody. A petitioner may establish chain of custody using all credible evidence. While a respondent's affirmation that he observed his sample throughout the collection process helps to establish chain of custody, it does not follow that if respondent does not so affirm, a respondent's drug test result must be deemed unreliable.

Here, petitioner established with reasonable assurance a proper chain of custody for respondent's urine sample. Respondent and Mr. Dalberiste both testified that respondent urinated into a cup under direct observation, and gave the cup to Mr. Dalberiste (Tr. 270-71, 424). Supervisor Puleo and Mr. Dalberiste both testified that Mr. Dalberiste split the urine from the cup into two vials by the sink, closed the vials with attached caps, and took the vials back to the mobile testing unit (Tr. 170-72, 271-74). Supervisor Mercer also testified that he saw Mr. Dalberiste exit the bathroom and walk back to the mobile testing unit, accompanied by Supervisor Puleo (Tr. 360-64).

Mr. Dalberiste testified that once inside the mobile testing unit he placed labels on the vials, that respondent initialed the labels and the CCF, that he placed the vials and appropriate forms in a specimen bag, and that he placed the specimen bag in a FedEx bag for transport (Tr. 274-78; Pet. Exs. 2(b),(c)). Respondent testified that upon entering the mobile testing unit, he did see Mr. Dalberiste doing the paperwork and "putting the label on" the vials (Tr. 427-28). Respondent admitted to signing the labels, and of not "really" reading the CCF when he signed it (Tr. 456-58). Significantly, respondent did not rebut the testimony that Mr. Dalberiste split the urine sample into two vials and then took the vials back to the mobile testing van, but instead argued that he did not observe Mr. Dalberiste do so.

In all, the preponderance of the evidence established that respondent's urine sample was under the control of Mr. Dalberiste from the time of collection until the time it was placed in a transport bag, even if respondent did not observe his sample continuously throughout the collection process. Respondent did not specifically argue, nor did he provide any facts, to reasonably conclude that his sample was exchanged, contaminated or compromised in any fashion, or that anyone else besides Mr. Dalberiste handled his sample during the collection process. Accordingly, even accepting that respondent did not see the sample at all times, petitioner established the chain of custody for respondent's urine sample.

Respondent also argued that the test results should be voided because he was not allowed to monitor his sample continuously throughout the collection process, in violation of the federal regulations. Petitioner, however, presented testimony to the contrary. A credibility determination is required where, as here, the parties have presented conflicting testimony on relevant facts. In making a credibility determination, this tribunal may consider such factors as witness demeanor; consistency of the witness's testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies,* OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Mr. Dalberiste credibly testified as to the events in the bathroom, specifically, that he split respondent's urine specimen into two vials in respondent's presence (Tr. 271-74). Mr. Dalberiste testified that collecting a urine specimen under direct observation using a bathroom outside the testing van was an unusual circumstance that he had not previously encountered, and

it seemed to stand out in his mind (Tr. 298, 305, 314). While Mr. Dalberiste was less clear with the remainder of his testimony, such as not remembering that the bathroom was inside a locker room, and not accurately describing the bathroom layout, these inconsistencies were not germane to whether he collected a urine sample from respondent that he sealed and sent to the laboratory for testing (Tr. 304, 319-25). Also, it is not surprising that he did not clearly remember a bathroom area he had only visited once, on the date in question (Tr. 330-31).

Further, the key facts were corroborated by Supervisor Puleo. Supervisor Puleo credibly testified that, while standing by the bathroom door, he observed Mr. Dalberiste stand by the sink and split the urine sample into two vials in respondent's presence (Tr. 165, 222). Supervisor Mercer confirmed Supervisor Puleo was standing by the bathroom door (Tr. 360). A photograph taken by the door of the bathroom demonstrates Supervisor Puleo would have had a clear view of the sink area (Resp. Ex. B). Supervisor Puleo confirmed that Mr. Dalberiste returned to the van with respondent's urine specimen (Tr. 172-73).

Relevant portions of respondent's testimony, on the other hand, were not credible because they did not comport to common sense. For instance, respondent testified that he immediately protested when Mr. Dalberiste walked away with the cup of urine while he was still in the bathroom stall, specifically stating that "it's supposed to remain in my eye contact, my eyesight" (Tr. 424-25). Yet no one in or near the bathroom area heard respondent make such statements. Also, respondent made no such contemporaneous complaint to any supervisors, despite having multiple opportunities to do so. Respondent made no such complaint despite stating that Supervisors Puleo and Mercer were standing nearby when he exited the bathroom (Tr. 426, 450-51). Respondent made no such complaint to Mr. Nuzzi, who was by an office holding some of respondent's clothes (Tr. 453). After respondent retrieved the rest of his clothes from Mr. Nuzzi, but before returning to the van, respondent stated that he again saw Supervisors Puleo and Mercer in the hallway, but still did not make any complaints to them regarding the collection procedure (Tr. 453-54).

Respondent did testify that once he returned to the van, he protested to Mr. Dalberiste that his urine sample was not split in his presence, yet he signed the CCF attesting that "each specimen bottle used was sealed…in my presence" (Pet. Ex. 1(b)). Respondent stated he lodged a similar complaint with Supervisor Puleo after he exited the van (Tr. 427-31). These alleged complaints always occurred when no other witnesses were present to corroborate respondent's

testimony and both Supervisor Puleo and Mr. Dalberiste credibly denied respondent ever complained about the collection procedure on the date in question (Tr. 174, 277-78). Also, while Mr. Nuzzi testified that later on that day respondent complained that he did not observe the splitting of his urine sample, and while Supervisor Mercer testified respondent made a similar complaint a few days later, such belated statements by respondent did not rebut the credible testimony that respondent did observe his sample split while in the bathroom (Tr. 388-91).

Further, respondent has a compelling motive to embellish his testimony. Respondent freely testified that he had two previous positive drug tests charged against him, and believed that a third positive drug test would likely result in the termination of his employment (Tr. 428-29). In all, the most likely version of events is that respondent saw Mr. Dalberiste split the sample into two vials by the bathroom sink, that the vials were closed with their attached caps, and that Mr. Dalberiste exited the bathroom while respondent stayed and washed his hands.

At the same time, the evidence also established that Mr. Dalberiste returned to the van ahead of respondent, during which time respondent was unable to observe his urine sample. While there is some variation in the sequence of events, Supervisor Mercer, Mr. Nuzzi and respondent all testified that Mr. Dalberiste exited the bathroom and returned to the garage area ahead of respondent (Tr. 380, 388-90, 425-26). Supervisor Mercer, a witness with no particular interest in the outcome of this proceeding, was a compelling and credible witness on this issue (Tr. 350, 359). Supervisor Puleo was not questioned extensively on this point, and testified generally that after the sample was split in the bathroom "we all walked back to the [van] together" (Tr. 222). Supervisor Puleo's testimony did not address whether Mr. Dalberiste walked ahead of respondent, or if the urine sample was kept in respondent's sight at all times as they returned to the van.

Mr. Dalberiste testified that he walked back to the van with respondent and Supervisor Puleo but was not sure if another supervisor and sanitation worker followed them back to the van (Tr. 273-74). Supervisor Mercer credibly testified that the group began walking back to the van together, but that respondent stopped to talk to Mr. Nuzzi while Mr. Dalberiste continued walking (Tr. 362-64). No one seems to have alerted Mr. Dalberiste that respondent was no longer walking with him, which may explain some of the conflicting testimony in this matter. In sum, the credible evidence established that while respondent did partially see Mr. Dalberiste in

the hallway returning to the garage area, he was not able to continuously observe his urine sample as it was transported back to the van.

Nonetheless, as discussed, petitioner established a proper chain of custody for the urine sample. Respondent offered no credible evidence to show that his sample was in any way compromised. Therefore, the urine sample collected from respondent was the sample that tested positive for amphetamine and methamphetamine (Pet. Exs. 1(a),(b),(c), 4). I find that respondent's inability to continuously monitor his urine sample was restricted to the time from when Mr. Dalberiste exited the bathroom and returned to the van to the time when respondent followed and entered the van, and that this limited error in procedure did not significantly affect respondent's right to a fair and accurate test. Consequently, respondent's request to cancel the test should be denied.

FINDINGS AND CONCLUSIONS

1. Petitioner established that respondent tested positive for the use of amphetamine and methamphetamine.

2. Petitioner established a proper chain of custody for respondent's urine sample, and that the failure to allow respondent to continuously monitor his sample during the collection process did not significantly affect respondent's right to a fair and accurate test.

RECOMMENDATION

In connection with the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Department. Respondent was appointed to his position as a sanitation worker on August 27, 2001. Respondent has a significant disciplinary history. In 2006, respondent pled guilty to a violation of the Department's Substance Abuse Policy, which resulted in a one year "Adjournment in Contemplation of Dismissal," which he successfully completed. In 2012, respondent pled guilty to various disciplinary charges, including a second violation of the Substance Abuse Policy, and two charges of using threatening or obscene language to a superior, the public or a fellow employee. For these violations, respondent accepted a 22 day suspension without pay, plus a "last chance" agreement, which he successfully completed after 24 months without any further

substance abuse violations. Respondent received a rating of "unsatisfactory" on his 2013 and 2015 performance evaluations, and received a "satisfactory" rating on his 2011, 2012 and 2014 performance evaluations.

The evidence established that respondent's urine sample tested positive for amphetamine and methamphetamine (Pet. Exs. 1(a),(b),(c), 4). The Department requested that respondent's employment be terminated. Respondent has been the recipient of the Department's remedial approach to drug use on the job. After respondent's first positive drug test, he faced no substantive penalty if he committed no further violations for a year. Then, respondent again violated the Substance Abuse Policy, whereupon he was given a "last chance" agreement and another opportunity. Unfortunately, respondent has now violated the Substance Abuse Policy for a third time.

As respondent himself alluded to during the trial, in almost every case in which an employee was found guilty of violating the Department's Substance Abuse Policy for a third time, a penalty of termination of employment was recommended. *See Anonymous*, OATH 3381/09; *Dep't of Sanitation v. Field,* OATH Index No. 1977/08 (July 24 2008); *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. 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).

The employee bears the burden of showing that a lesser penalty is warranted. *Dep't of Correction v. Potter*, OATH Index No. 969/96 at 6 (Apr. 29, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 97-40-A (June 4, 1997) (mitigating factors may, in a few isolated cases, warrant a penalty of less than termination for illegal drug use, even though the overriding policy generally mandates dismissal for such misconduct). However, respondent did not specifically argue for a penalty of less than termination should the positive drug test result be counted against him. A review of the record reveals that respondent is married and expecting his first child, that he graduated from high school and has certificates in auto body work, and that respondent is a long-time employee (Tr. 433-34). Respondent also testified that his second violation of the Substance Abuse Policy was the result of failing to provide sufficient urine for testing, not because he had used drugs (Tr. 428). Such facts, as compared with the seriousness of a repeat positive drug test, the Department's need to ensure public safety, and established precedent, do

not provide the type of extraordinary extenuating circumstances which might merit a recommendation short of termination for a third positive drug test.

Accordingly, a penalty of termination of employment is recommended.

Noel R. Garcia
Administrative Law Judge

May 12, 2016

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

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