Dep't of Sanitation v. E. V.

OATH Index No. 805/16 (Jan. 29, 2016), *modified on penalty*, Comm'r Dec. (Mar. 30, 2016), **appended**

Sanitation worker charged with refusing to undergo a drug test based upon his alleged failure to provide sufficient urine within the required three hours. ALJ found evidence sufficient to prove the charge and recommended that the employee be suspended for 30 days. Commissioner found recommended penalty to be insufficient; respondent is subjected to drug and alcohol testing for three years and suspended for thirty days with credit for pre-hearing suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
E. V.
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was commenced pursuant to section 16-106 of the Administrative Code by petitioner, the Department of Sanitation. Respondent E. V.,[1] a sanitation worker, is charged with refusing to undergo a drug test based upon his alleged failure to provide sufficient urine within the required three hours.

A hearing on the charges was conducted before me on December 16, 2015. Petitioner offered the testimony of a specimen collector, a supervisor, and two doctors to show that respondent failed to provide the required quantity of urine for a drug test and that this failure was not due to any existing medical condition. In his testimony, respondent insisted that he was

[1] Respondent holds a commercial driver's license and 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); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 1 n.1 (July 31, 2009).

physically unable to void the amount of urine required. He also submitted medical documentation indicating that he suffered from an inability to urinate due to his blood pressure medication.

For the reasons provided below, I find that the evidence was sufficient to sustain the refusal charge. I recommend that respondent be suspended for 30 days.

ANALYSIS

Respondent was tested pursuant to the Department's Substance Abuse Policy and Procedure, PAP 2012-02, which requires employees who are holders of commercial drivers' licenses to undergo random drug testing. Under section 3.24 of the policy, "the failure to produce an adequate amount of urine within 3 hours without acceptable medical documentation" is considered a refusal to submit to testing and a violation of the policy. Section 6.4 of the Department PAP provides that a refusal to test will be treated as a positive test, thereby making the employee subject to disciplinary charges.

The facts were largely undisputed. On June 4, 2015, respondent's social security number was randomly selected to be tested (Tr. 21). Both Mr. Yen, the lab technician, and respondent agreed that, between approximately 6:00 a.m. and 9:30 a.m., respondent made four attempts to produce the required 45 milliliters of urine. The technician testified that respondent appeared at around 6:05 a.m. and said he was not ready to provide a urine sample. This constituted the first attempt. The technician then gave respondent a 20 ounce bottle of water and, approximately an hour later, gave respondent a second 20 ounce bottle of water. At 8:22 a.m., respondent made a second attempt to urinate and produced only 20 milliliters, less than half of the 45 milliliters required. This urine was discarded as required by the federal rules. Respondent made a third attempt at 9:10 a.m. and this time provided only 15 milliliters of urine, which was also discarded (Tr. 44-47). Since it was now three hours after the first attempt, the technician told respondent that the test was over and notified a supervisor. The supervisor permitted respondent to make a fourth attempt, at 9:22 a.m., which produced only 2 milliliters of urine. The times of the four attempts, as well as the delivery of the two bottles of water, are noted on the custody and control form (Pet. Ex. 1).

After the unsuccessful fourth attempt, the supervisor directed respondent to go to the Department clinic for a determination as to whether there was a medical reason for respondent's

failure to produce sufficient urine within the drug testing guidelines.

Dr. Cohen testified that he examined respondent on June 4, 2015. He and his staff took respondent's blood pressure and he asked respondent a series of five questions, noting his answers on an evaluation form (Pet. Ex. 1B). Respondent indicated that he did not have an enlarged prostrate, kidney disease, or urinary tract infection. Respondent also indicated he was not under the care of a urologist or nephrologist and was not taking medication that would preclude him from voiding. Based upon his examination of respondent, and respondent's answers to the background questions, Dr. Cohen concluded that there was no medical reason for respondent's inability to produce the urine sample required (Tr. 57-59).

Dr. Maron stated that, on June 4, 2015, he reviewed respondent's file showing he had failed a drug test and assigned Dr. Cohen to conduct an examination (Tr. 144). Upon the completion of Dr. Cohen's exam, Dr. Maron, acting as the medical review officer, reviewed the custody and control form and the evaluation form and concluded that there was no medical justification for respondent's failure to provide the required quantity of urine, which constituted a refusal under the PAP (Tr. 148-49).

As a result of the failed drug test, respondent was suspended. At the time of the drug test, respondent was taking several medications for hypertension, including atenonol, Lisinopril, and chlorthalidone. Respondent consulted his own doctor and produced a note dated June 15, 2015, (Pet. Ex. 3A), in which his doctor, Dr. Ratana, noted that "one of the side effect[s] of chlorthalidone . . . is hypovolemia of the urine." Dr. Cohen indicated that hypovolemia meant a "low volume" (Tr. 81). The same note indicated that a drug screening was performed on June 11, 2015, and the results were "all negative for 10 drugs." In another medical note dated June 12, 2015, (Pet. Ex. 3B), a second doctor, Dr. Albian, wrote that respondent was "on diuretic and may need longer time to fill up bladder."

Respondent also submitted a Google printout, dated June 5, 2015, (Pet. Ex. 3C), indicating that a "side effect" of chlorthalidone is "urinating less than usual or not at all."

Both Department doctors found that the diagnosis of hypervolemia as a result of chlorthalidone was unconvincing. Dr. Cohen stated that chlorthalidone treats hypertension by drawing out sodium from the kidneys and increasing the urinary flow, reducing the blood pressure (Tr. 68). Dr. Cohen consulted a "PDR" database which indicated that 1 or 2 out of 2000 patients reported an inability to provide urine after using chlorthalidone (Tr. 82). Based upon

this information, Dr. Cohen found it "extremely unlikely" that chlorthalidone would prevent a patient from urinating (Tr. 85). Dr. Cohen also believed that there was a "low probability" that a man taking a diuretic would only be able to produce 20 milliliters of urine after drinking some 40 ounces, or approximately 1,100 milliliters, of water (Tr. 131).

Dr. Maron indicated that chlorthalidone was a diuretic which should increase, not decrease, voiding of urine. He further indicated that, over a ten-year period, the FDA Physicians' Desk Reference site reported three cases where use of chlorthalidone was linked to difficulty in urinating (Tr. 155-56). He stated that, if respondent in fact suffered from such a side effect, he "would have to be admitted to a hospital" (Tr. 155). Dr. Maron also noted that, despite several subsequent drug tests, respondent has never again had problems urinating the required quantity (Tr. 158). He agreed with Dr. Cohen that there was a "low probability" that taking chlorthalidone would prevent respondent from providing the required 45 milliliters of urine (Tr. 160).

The parties stipulated that, following the drug test, respondent was directed to report to the employees' assistance unit and sent for a weekly outside evaluation for evidence of drug or alcohol use. He tested negative for drugs and alcohol five consecutive times. At the end of the five-week evaluation, employees' assistance concluded that respondent does not need any further drug or alcohol treatment. Furthermore, respondent is subject to one year of random testing (Tr. 199).

Respondent testified that he worked from 1992 to 2000 as a City police officer. During this time, he was shot three times. He was terminated by the Police Department after a "dispute" with his former wife (Tr. 201-02), which resulted in a criminal conviction (Tr. 222). He joined the Department of Sanitation in 2004 after working briefly as a chef (Tr. 202). Respondent was diagnosed with hypertension in 1999 and placed on medication to control it (Tr. 203). In October 2012, he started to retain water in his ankles, and his doctor switched one of his medications to chlorthalidone (Tr. 204). Respondent stated that, in order to avoid needing to urinate during the day, he took the chlorthalidone every night after dinner (Tr. 205). The drug causes respondent to use the bathroom a couple of times at night and again in the morning before he leaves for work (Tr. 206).

On June 4, 2015, respondent arrived for work and was ordered to report to the drug testing wagon for a test. He told the technician that he could not urinate yet and asked for a

bottle of water, which was provided. An hour later, a supervisor gave respondent another bottle of water, which he drank (Tr. 207-09). Respondent admitted that his second attempt was "below the line" (Tr. 210), as were his third and fourth attempts (Tr. 211). Respondent insisted that, each time he urinated, he tried to empty his bladder (Tr. 210-12).

Respondent stated that he told Dr. Cohen about his medications and, after a brief examination, his supervisor announced that he was suspended (Tr. 214). Respondent insisted that he "did not do drugs" and was unwilling to plead guilty to failing the drug test (Tr. 217). He stated that, during the drug test, he provided all the urine he could and therefore committed no misconduct (Tr. 217-18). Respondent explained that he was able to urinate for subsequent drug tests because he was able to have more time and to drink more water (Tr. 219).

Here respondent admitted to having been unable to produce the required 45 milliliters of urine within the three-hour time span mandated by federal regulations and the Department's PAP. Respondent contended that this failure was inadvertent and provided medical documentation that he suffered from hypovolemia, a side effect of his blood pressure medication. Respondent also presented medical documentation that chlorthalidone is a diuretic and therefore he may need more time to fill up his bladder (Pet. Ex. 3B). Although diuretics are known for increasing urinary frequency (Tr. 128), respondent claimed that his doctor recommended he take chlorthalidone at night, in order to avoid urinating during his route at work (Tr. 206). He also submitted proof that, one week after the alleged refusal, he tested negative for drugs and, in the following weeks completed a five-week drug evaluation program and tested negative for illegal drugs five consecutive times.

Under the federal guidelines, respondent's medical proof as to his alleged inability to provide a sufficient urine sample did not establish that a medical condition precluded him from providing a sufficient amount of urine. Under the federal rules, an employee's medical documentation must come from a licensed physician and recommend the MRO determine that either: (1) "a medical condition has, or with *a high degree of probability* could have, precluded the employee from providing a sufficient amount of urine (45 mL)"; or (2) that "there is not an adequate basis for determining that a medical condition has, or with *a high degree of probability* could have, precluded the employee from providing a sufficient amount of urine. 49 C.F.R. § 40.193(d)(1) and (2) (emphasis added). Petitioner's witnesses, Dr. Cohen and Dr. Maron, credibly testified that, based upon their research and knowledge of the relevant medical studies,

the incidence of hypovolemia in connection with the drug chlorthalidone is rare, occurring in only two out of 2,000 patients (Tr. 82), and has only been reported three times by the FDA in a ten-year period (Tr. 155-56). Both doctors therefore concluded that respondent's contention that he suffered from hypovolemia as a result of the drug was highly unlikely and, under the federal guidelines requiring a finding of "high probability," could not support a finding that his failure to provide sufficient urine had a medical basis. *See Dep't of Sanitation v. E.L.*, Comm'r Dec. at 24 (Mar. 15, 2012), *rejecting*, OATH Index No. 2107/11 (Nov. 30, 2011) ("the referral physician will have to explain why prostate cancer or an enlarged prostate in one particular employee would preclude that employee from providing a sufficient amount of urine specimen, yet does not in the vast majority of men with the same conditions."). Respondent offered no expert evidence to challenge these conclusions.

It is true that respondent's evidence as to the subsequent negative drug tests offers some support for his contention that he did not deliberately refuse to take the drug test in order to conceal drug use. In *Department of Sanitation v. C.L.*, NYC Civ. Serv. Comm'n Item No. CD 11-89-R at 6 (Nov. 29, 2011), the Civil Service Commission reversed a finding of a drug refusal based upon a worker's failure to provide 45 milliliters of urine in three hours. The Commission held that the equivocal proof as to whether the employee was directed to drink the required 40 ounces of water, combined with the employee's "determined contemporaneous efforts to submit to alternative means of testing [,] . . . contradicts the inference made by the MRO, that [the employee] was 'deemed' as producing a positive sample when in fact he did not."

The inference of intentional refusal based upon a failure to provide sufficient urine, created by the federal rules, is also somewhat inconsistent with the principle that all misconduct "implies intentional and willful disobedience." *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969) (nurse was not insubordinate when she was physically unable to show up for work due to illness, and thus, her failure to do so did not justify her discharge). A long line of cases hold that civil service employees cannot be held to a strict liability standard in disciplinary proceedings. *See Dep't of Sanitation v. Abele*, OATH Index No. 2519/10 at 3-4 (Aug. 6, 2010); *Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 9 (Mar. 9, 2007); *Dep't of Sanitation v. Richards*, OATH Index No. 529/06 at 3 (Feb. 3, 2006).

Nonetheless, there is little legal support for respondent's efforts to invalidate a properly

administered drug test resulting in a failure to provide sufficient urine which is unexplained by timely documentation establishing a probable medical cause. In *Department of Sanitation v. E.L.*, OATH Index No. 2107/11 (Nov. 30, 2011), *rejected*, Comm'r Dec. (Mar. 15, 2012), an employee with a diagnosis of a bladder obstruction and prostate cancer who failed to provide sufficient urine was charged with a refusal. Judge Miller found that the drug test irregularities and the medical proof that the bladder and prostate condition could have caused an inability to urinate precluded a finding that the employee intentionally refused the test and recommended dismissal of the charges. The Commissioner rejected this finding, concluding that the testing irregularities were non-prejudicial and that the primary medical proof was untimely.

In the instant case, the medical documentation offered by respondent did not demonstrate that he was diagnosed or treated for a urinary obstruction or difficulty in urinating prior to or subsequent to the June 4 drug test. He did not indicate on the evaluation form any condition which might prevent him from urinating. In addition, as noted by petitioner, respondent exhibited no difficulty providing sufficient urine according to the guidelines in five subsequent drug tests. Despite his doctors' putative diagnosis of hypovolemia caused by chlorthalidone, respondent's primary doctor did not modify respondent's prescription and continued respondent on the same drug. All of this evidence undermines respondent's claim that the failure to void a sufficient urine specimen on June 4 was due to a medical condition.

In sum, the credible evidence here indicates that respondent failed to provide a sufficient urine specimen within the mandated three-hour time period. I find that the charge that respondent refused a drug test must be sustained in that he failed to provide a sufficient amount of urine.

FINDING AND CONCLUSION

Complaint 129047 should be sustained in that, on June 4, 2015, respondent failed a mandated drug test in that he failed to provide a sufficient amount of urine in violation of PAP 2012-02 section 4.13.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history in order to make an appropriate penalty recommendation. He has worked as a sanitation worker since 2004 and has been disciplined four times. In 2008, he received a

reprimand for unauthorized absences. In 2011, he received a six-day pay fine for taking unauthorized emergency leave, insubordination, and a sick leave violation. In 2012, he was suspended for nine days for failing to report to the clinic as required, absence without authority, and unauthorized emergency leave. In 2013, he was suspended for 20 days for unauthorized emergency leave, being out of residence while on sick leave, and failing to report to the clinic. This escalating pattern of time and leave violations provides reason to aggravate the penalty here.

Petitioner is requesting that respondent be terminated for his imputed refusal to provide a urine specimen. In his closing, counsel contended that termination was essential to preserve the "integrity of the plea negotiation," ensuring that workers who refuse to plead guilty and force the agency to hold a hearing will receive higher penalties than workers who cooperate and settle (Tr. 244). There is some merit to the argument of petitioner's counsel that a worker who admits misconduct and agrees to a penalty should be treated more leniently than a worker who denies misconduct and goes to trial. However, in this case, respondent has already received the penalties mandated for any positive drug test: a 30-day suspension, counseling and evaluation, and regular drug testing. PAP 2012-02 § 7.1 and 7.2.

I do not find that respondent's imputed refusal to cooperate with the testing warrants termination. This penalty would be incongruent with past Department cases involving similar facts. In *Department of Sanitation v. E. P.*, OATH Index No. 1552/14 (May 6, 2014), *modified on penal*ty, Comm'r Dec. (Oct. 3, 2014), a sanitation worker who failed to provide sufficient urine within the required three hours was suspended for 30 days with credit for a prior pre-trial suspension. In *Department of Sanitation v. E.L.*, OATH Index No. 2107/11 (Nov. 30, 2011), *rejected*, Comm'r Dec. (Mar. 15, 2012), the Commissioner ordered that a 22-year worker who failed to provide sufficient urine yet denied committing misconduct be given the same penalty as employees who settled after an initial positive drug test – a one-year ACD and follow-up testing, along with reimbursement for his pretrial suspension. It is true that respondent's tenure of 11 years is shorter than the worker in *E.L.*. Likewise, respondent's past disciplinary record is somewhat worse, since the worker in *E.L.* apparently had only one prior disciplinary penalty for failing a previous alcohol test. However, one underlying rationale of *E.L.*—that workers who fail a drug test due to not providing sufficient urine should not be terminated—is applicable here.

Despite respondent's less than perfect record, I conclude that terminating respondent for the failure to supply sufficient urine is unwarranted. The totality of the reasons for respondent's failure to void sufficient urine was largely unexplained. While it is possible that he had taken illegal drugs and was deliberately trying to avoid being tested, as suggested by petitioner, it also seems possible that he was physically unable to void more urine for other reasons which his doctors have not been able to identify. And even assuming respondent had taken illegal drugs, it is unduly harsh to terminate him when most workers who test positive for illegal drugs are not dismissed for a first offense. In fact, multiple workers who verbally refused to cooperate with mandated drug tests have received penalties short of termination. *Dep't of Sanitation v. Bacigalupo*, OATH Index No. 2091/07 (Jan. 25, 2008) (worker suspended for 60 days for punching co-worker and telling supervisors he refused to submit to drug test); *Dep't of Sanitation v. Buccellato*, OATH Index No. 1835/04 (Jan. 26, 2005) (worker suspended for 30 days for refusing to submit to drug test due to illness); *Dep't of Sanitation v. Hinds*, OATH Index No. 204/01 (Dec. 21, 2000), *modified on penalty*, Comm'r Dec. (Jan. 18, 2001), *ALJ's penalty recommendation reinstated*, NYC Civ. Serv. Comm'n Item No. CD 02-55-M (June 17, 2002) (on appeal, worker suspended for 30 days pursuant to OATH recommendation for refusing order to submit to a drug test based upon reasonable suspicion of drug use). The inference of actual drug use was stronger in these cases than in respondent's case.

Given these circumstances, I recommend that the appropriate penalty in this case would be a 30-day suspension, the maximum penalty short of termination permitted under Administratave Code section 16-106. Respondent should also be on notice that any further serious violations may result in his termination.

John B. Spooner
Administrative Law Judge

January 29, 2016

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

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

ACTION OF THE COMMISSIONER

March 30, 2016

In the Matter of
NEW YORK CITY DEPARTMENT OF SANITATION

Petitioner
- against- OATH Index No. 805/16

E.V.
Respondent

Kathryn Garcia, Commissioner

DECISION

A copy of the January 29, 2016 Report and Recommendation (the Report) submitted by OATH Administrative Law Judge (ALJ) John B. Spooner 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 E.V. violated DSNY Policy and Procedure ("PAP") 2012-02. However, I find the proposed penalty of a 30 day suspension without pay to be inappropriate.

The Department sought Termination for this PAP 2012-02 violation since an employee who chooses to put the Department to its proof should not get a better deal than someone who admits his/her drug use and has to agree to evaluation for rehabilitation. And most important, the employee who settles this type of charge is obligated to at least one (1) year of follow-up testing (which increases that employee's risk of termination if he/she should come up positive).

Prior to this proceeding, no medical reason could be found for the respondent's inability to produce sufficient urine for testing. Further, at trial, he failed to present sufficient medical evidence and produced no experts to support his contention that a medical condition precluded his ability to produce a sufficient amount of urine. Moreover, if this 30-day recommendation is followed, it would set a dangerous precedent that dilutes the Department’s more than reasonable substance use policy.

Therefore, the recommendation of ALJ Spooner’s recommendation is modified. Based on the severity of the misconduct and a review of E.V.’s prior disciplinary record, it is my decision that the appropriate penalty for the proven misconduct is a three (3) year period of alcohol/drug testing and a 30-day suspension with credit for time served on the pre-trial suspension related to this matter.

Kathryn Garcia, Commissioner
NEW YORK CITY DEPARTMENT OF SANITATION

STIPULATED PLEA

DATED: March 22, 2016

EMPLOYEE NAME: SW _____

Index Numbers: 129047, 122261, 122752, 123343, 130374, 131630

DATED: March 22, 2016

I acknowledge receipt of a copy of the complaint (s) hearing the above listed Index Numbers, I agree to the following:

I acknowledge this Agreement constitutes a settlement of the matter of *Dept of Sanitation v. E. V.*, OATH Index No. 805/16, filed at the New York City Office of Administrative Trials and Hearings (OATH).

I agree to a suspension for **30 Work Days.**

I acknowledge that a subsequent positive drug test, or a subsequent positive breathalyzer, or refusal to test including not providing a urine sample within a three hour period, shall constitute a violation of this Agreement. I understand that I shall be subject to drug and alcohol testing at any time, for any reason, and at any location where I am ordered. I understand that when ordered to undergo substance use testing, employees are required to report immediately to the designated testing site. I understand that a failure to report when ordered for any toxicology testing shall be considered a ***Refusal To Test*** and a violation of this Agreement. This includes, but is not limited to, a failure to report to the testing site at the specified time and/or a failure to provide acceptable and verifiable medical documentation to support an inability to travel to the testing site.

I hereby waive my right to any appeal or hearing or right to be heard for the purpose of contesting this agreement, or any subsequent positive laboratory or breathalyzer findings or the circumstances surrounding a charge of refusing to test. My attorney has explained the consequences of this plea or agreement and I fully understand its conditions and agree to all of its terms without the benefit of a conference and/ or hearing.

This agreement will stay in effect for a period of three (3) years from the date of the Commissioner's approval at which time this matter will be re-conferenced for final action. This agreement may be extended unilaterally at the discretion of the Advocate for any time that the employee is carried LWOP. This agreement together with the Plea to the Docket is the total agreement and no oral representations have been made which modify the terms of this agreement, as any modifications must be in writing.

I agree to participate in a rehabilitation program as determined by the Employee Assistance Unit (EAU) and will sign the appropriate forms permitting EAU to inform the undersigned my participation and progress in the program. I agree to comply with all rules and regulations of EAU or any EAU approved program. I agree to remain involved with EAU until EAU

determines that such participation is no longer necessary. I understand that failure to remain involved with EAU or an EAU approved program will be a violation of this agreement and I will be terminated.

Nothing contained in this agreement may be deemed a practice or precedent by the Department of Sanitation and this agreement may not be used or offered into evidence by me or any party in any litigation, mediation, alternative dispute resolution, or any other forum, for any purpose whatsoever except to enforce the terms of this agreement.

EV
Attorney Representative
Department Advocate
Commissioner