Dep't of Sanitation v. R. L.

OATH Index No. 806/16 (Mar. 16, 2016), *modified on penalty*, Comm'r Dec. (Apr. 19, 2016), **appended**

Sanitation worker who called in sick after the Department's drug and alcohol testing van appeared at his garage and did not report to the health care facility when ordered to do so charged with failing to undergo a substance use test. ALJ found the evidence sufficient to prove the charge and recommends that he be suspended for 30 days without pay. Commissioner imposes two years alcohol and drug testing and 30 day suspension with credit for pre-hearing suspension served. Respondent agreed to the penalty.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
R. L.[1]
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the New York City Administrative Code. Petitioner alleges that respondent, a sanitation worker, called in sick while the Department's mobile drug and alcohol testing van was on premises at his garage and failed to appear at the Department's Health Care Facility ("clinic") for drug testing when ordered to do so, in violation of section 2.5 of the Department's Code of Conduct (ALJ Ex. 1).

[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. 1853/15 at 1 n.1 (Aug. 7, 2015), *modified on penalty*, Comm'r Dec. (Oct. 6, 2015); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 1 n.1 (July 31, 2009).

At a two-day hearing conducted before me, petitioner presented the testimony of five witnesses and documentary evidence. Respondent presented documentary evidence, testified on his own behalf, and presented the testimony of one witness.

For the reasons set forth below, I find that the charge is sustained and recommend that respondent be suspended for 30 days without pay.

ANALYSIS

On the morning of December 26, 2014, respondent was randomly selected to be tested for drug and alcohol use. Respondent called in sick after the Department's Drug and Alcohol Testing ("DAT") Unit mobile testing van arrived at the Brooklyn North Four depot, where he was scheduled to work. When ordered to report to the Department's clinic that morning for testing, respondent informed Department personnel that he was medically unable to do so. Respondent did not report to the clinic, but instead visited his personal physician. Later that morning, he submitted a doctor's note to the clinic in support of his contention that he was too ill to report to the clinic. The Department's medical review officer ("MRO") determined that respondent's note did not substantiate that he was unable to travel to the clinic for testing. Respondent was then ordered to report to the clinic by 1:45 p.m. that same day, which he failed to do. The charges arise out of respondent's failure to report to the clinic (ALJ Ex. 1).

Sanitation workers who are required to have or use a commercial driver's license in performing their duties are subject to random drug and alcohol testing under applicable federal rules (Tr. 24). Kevin Sweeney, a supervisor in the Department's DAT Unit, oversaw administration of random substance use tests on December 26, 2014, at the Brooklyn North Four depot (Tr. 17-19).

According to Sweeney, the location and employees to be tested are randomly selected each day and the mobile testing van is dispatched to that location to perform the tests. Once at the location, the testing supervisor reviews the list of employees selected for testing with the district superintendent, who consults the operations board to determine the sanitation worker's status (Tr. 17). Employees who are on vacation, out due to a line of duty injury, scheduled for a regular day off, working a different shift, or are working at another location will not be tested that day. Employees who were out on sick leave before the date of the random testing and remain on sick leave will also not be tested that day (Tr. 30-32). An employee who is on the list

to be tested, but has not reported for work or called in by the start of his or her shift is considered absent without leave ("AWOL") and will not be tested that day. However, the AWOL employee will be ordered to report to the clinic on his or her first day back to work (Tr. 37, 39-40).

If an employee calls in sick on the day his or her name is on the list to be tested, the time that call is received is critical for determining whether the employee will be ordered to report to the clinic to undergo testing that day. If an employee calls in sick before the DAT van arrives at the location, he or she will not be ordered to go to the clinic. However, an employee who calls in sick after the DAT van arrives at the location will be ordered to report to the clinic for testing that same day (Tr. 33-36, 56).

On the morning of December 26, 2014, Sweeney accessed the Department's computer, which randomly selected certain employees at Brooklyn North Four for testing. He travelled in the DAT van to Brooklyn North Four, arriving at about 5:45 a.m. (Tr. 18-19). The driver parked the van in the garage where other vehicles were parked and it was visible to all who arrived at the facility (Sweeney: Tr. 28, 57; Karp: Tr. 68).

When District Superintendent Adam Karp reported to work on December 26th at about 5:45 a.m., he observed the DAT van parked at the garage (Tr. 68-69). Karp and Sweeney reviewed the list of workers selected for testing, which included respondent, at about 5:50 to 5:55 a.m. (Tr. 29). Karp informed Sweeney that respondent had not arrived at the location as yet (Tr. 36). Shortly after their meeting, at about 6:00 a.m., the garage supervisor reported to Karp that respondent had called out sick. Karp notified the borough command of respondent's status and that he had been on the list to be tested. The borough command instructed Karp to order respondent to the clinic by 8:00 a.m. (Tr. 71-72). Karp updated Sweeney and told the garage supervisor to inform respondent that he had been ordered to report to the clinic for testing. He also instructed her to document the borough command's order in Brooklyn North Four's telephone order book (73-75, 105; Resp. Ex. A). The entry in the order book indicates that borough headquarters issued an order on December 26, 2014, that was transmitted by Chief Linley, received by Superintendent Karp, and conveyed to "Reyes." The time noted on the order book entry is 6:04 a.m. The notation states that respondent "called sick at 0600 for the 0600 shift [sic] was ordered to be at the DS Health Facility by 0800" (Tr. 48-51; Resp. Ex. A).

At approximately 6:05 a.m., Sweeney called the clinic and spoke to Anthony Ferrino, supervisor of clinic operations (Tr. 22, 117). He informed Ferrino that respondent called in sick and had been ordered to report to the clinic by 8:00 a.m. (Tr. 22, 42-43).

Ferrino telephoned respondent at around 6:30 a.m. and informed him that he had been ordered to report to the clinic for substance use testing. Ferrino gave respondent until 9:00 a.m. to report because that is the deadline for sanitation workers who call out sick to report to the clinic. Ferrino told respondent that if he failed to report to the clinic, he could be suspended for a refusal to undergo substance use testing. He further advised respondent that if he was unable to come to the clinic, he should get a doctor's note and immediately fax it to the clinic. Ferrino told respondent that if he submitted a note, the clinic's medical director would review it to assess whether respondent was unable to travel to the clinic. He advised respondent to keep his phone with him because the DAT Unit would be contacting him that morning (Tr. 117-20, 129-30).

Ferrino notified Daniella Marcune, director of the DAT Unit, that respondent had been ordered to the clinic for substance use testing after he called in sick. Marcune telephoned respondent at about 8:30 a.m. and he told her that he was having problems with his back, which were documented in his medical chart at the clinic, and would be going to his personal physician. Marcune informed respondent of the procedures he needed to follow if he planned to seek medical documentation of his inability to travel to the clinic. She explained to him that once she received the note, the clinic's Director and MRO, Dr. Norman Maron, would review it. According to Marcune, in the 18 years during which she has served as director of the drug testing unit, an MRO has never concluded that a doctor's note established an employee's diagnosis and inability to travel to the clinic for testing on a particular day. Therefore, she cautioned respondent that "there was a very good, strong possibility that Dr. Maron would not accept the note" (Tr. 199). She advised respondent to remain accessible by telephone so she could contact him to notify him of the MRO's decision. She also told respondent that if Dr. Maron decided the note was unacceptable, he should be prepared to come to the clinic at that point (198-200).

Between 9:00 and 9:30 a.m., respondent telephoned Marcune to inform her that he had an appointment with his personal physician that morning. At 11:46 a.m., he telephoned to tell her that he was faxing a note from his doctor. The doctor's note was written on a preprinted form prepared by the Department that includes fields to be completed by the employee's doctor (Tr. 257; Pet. Ex. 2). In the field captioned "PATIENT COMPLAINS OF," respondent's doctor

wrote "[b]ack pain." When asked whether he considered the visit a medical emergency, the doctor checked "no". In the field captioned "MEDICAL DIAGNOSIS (please include positive findings)," the doctor wrote "rt side sciatica/LS Disc Dx. Advise rest." In the field that asks for the date on which the patient can travel to the clinic, the doctor indicated December 31, 2014 (Pet. Ex. 2).

Marcune presented respondent's note to Dr. Maron, who advised her that it did not establish respondent's inability to travel to the clinic. Marcune telephoned respondent at 12:11 p.m., but he did not answer his telephone. She was able to reach him at 12:16 p.m., at which time she informed him that his doctor's note had not been accepted and that he was required to report to the clinic by 1:45 p.m. that day. She further informed respondent that if he failed to do so she would have to suspend him for a refusal to undergo substance use testing (Tr. 201-03; Pet Ex. 2). Marcune waited until 2:00 p.m. for respondent to report to the clinic. When he failed to appear, she drafted a complaint against him (Tr. 204, 210-11).

Dr. Maron testified that respondent's doctor's note did not preclude him from coming to the clinic for testing because it did not adequately document his inability to travel to the clinic on December 26, 2014 (Tr. 235, 269-70). An inability to travel to the clinic for substance use testing would have been substantiated had the doctor's note indicated that respondent was being sent to the hospital for evaluation and treatment. The note only advised that respondent rest and did not indicate that respondent, who went to his doctor complaining of back pain, was given any medication, transported by ambulance, or required hospitalization (Tr. 269).

Respondent, who has worked for the Department since 2000, testified that he sustained several back and neck injuries on the job over the course of his career (Tr. 286-87). He suffers from chronic back pain, which is documented with the Department (Pet. Ex. 2, Progress Notes). Respondent described it as persistent pain in his back radiating down to his leg. Sometimes the pain is so severe that he is unable to walk and has to crawl on the floor to perform daily functions such as using the bathroom (Tr. 287-89).

On the morning of December 26, 2014, respondent was unable to move when he woke up and had to crawl on the floor to get to the telephone. He called the Department at about 6:00 a.m. to report that he was sick and spoke with a supervisor, who told him that he had to come in because the DAT van was at the garage. Respondent told the supervisor that he could not make it in (Tr. 289-90). At about 6:20 a.m., Ferrino called respondent and ordered him to report to the

clinic for testing. Respondent notified Ferrino that he was unable to report because of back pain. Ferrino then told respondent that he would need a doctor's note (Tr. 290-91).

Respondent made an appointment to see his doctor at 10:30 a.m. Although his doctor's office is located about 200 feet from his house, it took some time for respondent to get there as he had to lean against walls to make the journey. Respondent informed the doctor that his employer wanted him to travel to the clinic, which is located in Manhattan. According to respondent, his doctor told him that he looked as though he was in severe pain and that he should not travel in that condition. He said the doctor suggested that he rest. He told his doctor that he needed a note, which the doctor provided. Respondent went home to bed after he faxed the note to the clinic (Tr. 292-93; Pet Ex. 2).

Respondent, who lives in Glendale, New York, and typically drives to work in Brooklyn, testified that it would have been dangerous for him to drive a vehicle on December 26 because he was experiencing spasms that would have made it difficult to concentrate (Tr. 296). Moreover, travel by public transportation from his home to Beaver Street in Manhattan, where the clinic is located, would have required him to take a bus and a train and would have entailed him walking several blocks and climbing stairs. He said that on a good day, the typical travel time from his home to the clinic is about an hour and 20 minutes (Tr. 297).

At about 12:16 p.m., after Marcune advised him that the MRO had concluded that his doctor's note did not substantiate his inability to travel to the clinic, respondent told her that he was in too much pain to make it down to the clinic. She informed him that he would be suspended (Tr. 293-94).

Respondent was suspended and, as part of his reinstatement, underwent substance use testing. He was also sent to the Department's Employee Assistance Unit ("EAU") (Tr. 294). Martin Chestnut, who has been employed by the EAU for over 30 years and has served as its Director since 2004, testified that the unit assists employees with personal problems, including issues arising from a positive substance use test or refusal to test (Tr. 222-23). On January 8, 2015, Chestnut met with respondent, who was referred to EAU by the Department Advocate relating to a complaint of refusal to undergo testing. According to Chestnut, during their initial meeting to assess which services were appropriate, respondent did not appear to have a substance abuse problem (Tr. 224). Chestnut testified, however, that he was legally obligated to send respondent to an outpatient treatment program for their evaluation over the course of four

sessions. At the end of the evaluation, it was determined that respondent did not seem to have a problem and Chestnut discharged him. Chestnut was required to order a follow-up one-year testing regimen conducted by the Department's testing unit (Tr. 224-26). According to Chestnut, respondent cooperated with the program and left in good standing (Tr. 229).

Respondent conceded that the facts are largely undisputed (Tr. 303). However, he challenged the validity of petitioner's order that respondent report to the clinic and petitioner's rejection of his doctor's note as insufficient to establish his inability to travel.

Specifically, respondent contended that he should not have been ordered to report to the clinic for testing on December 26 because he was AWOL, not sick, by the time he called into the garage. Respondent maintained that the Department's rules require that a sanitation worker be present for roll call at the start of his or her shift. Respondent also contended that the Department requires an employee who is calling in sick to call the garage one hour before the start of his or her shift. He asserted that because he was not present at the garage for roll call at 6:00 a.m., the start of his shift, and because he called in at 6:00 a.m., he was "technically" AWOL. Therefore, respondent maintained, he should have been ordered to report to the clinic on his first day back to work (Tr. 305-07). Respondent is mistaken.

The evidence, including respondent's testimony and the supervisor's telephone order book entry, establishes that respondent called in sick at 6:00 a.m. (Tr. 289; Resp. Ex. A). Respondent initiated the call to his supervisor and informed her that he was unable to make it to work because he was sick. Having reported that he was sick just as his shift was scheduled to start, respondent's assertion that he should, in retrospect, have been classified as AWOL is a transparent attempt to avoid the repercussions of his failure to report to the clinic as ordered. *See Dep't of Sanitation v. Morrison*, OATH Index No. 894/09 at 9 (Feb. 25, 2009) (rejecting sanitation worker's argument that since he called in sick at 6:00 a.m. he should be classified as AWOL and not have to report to the clinic for testing until his first day back at work, finding it "disingenuous for respondent to argue that he should have been classified as absent without leave now that it suits his purpose, when on the day in question he himself maintained that he was calling in sick."). Accordingly, respondent's contention that he should not have been ordered to report to the clinic fails.

Similarly, respondent's argument that he was too ill to report to the clinic for testing on December 26, 2014, and that the Department's MRO improperly found his doctor's note to be

inadequate must be rejected. While respondent credibly testified that he experienced intense pain the morning of December 26, I am unpersuaded that it prevented him from traveling to the clinic as ordered.

First, respondent testified that although he awoke in severe pain, his condition improved somewhat as the day progressed. Indeed, he stated "As the day went it got a little bit better but not very much" (Tr. 289). His doctor's appointment was at 10:30 a.m., four and a half hours after he awoke in pain. An additional hour and 45 minutes elapsed before he was informed of the MRO's decision. Thus, more than six hours had elapsed by the time respondent was told that the MRO rejected his note. The passage of time and respondent's testimony that he felt a bit better as the day progressed strongly suggest that he should have been able to travel to the clinic by the time he was notified that his note was unacceptable.

Second, once he was told that he was required to report to the clinic by 1:45 p.m., an hour and a half after he was notified that his doctor's note had not been accepted, respondent did not attempt to travel to the clinic. At 8:30 a.m., Marcune warned respondent that based on her experience as Director of the DAT Unit, it was almost certain that the MRO would not accept his doctor's note to excuse him from reporting to the clinic for substance use testing. Therefore, respondent should have been prepared for the likelihood that he would have to report to the clinic. Yet, he made no arrangements to get there. Although respondent described the challenges he would have faced had he taken public transportation, the fact remains that he made no effort whatsoever to use alternate means of transportation, such as using a taxi or car service or asking someone to drive him. Instead, he went home to bed. *See Dep't of Sanitation v. Field*, OATH Index No. 1977/08 at 8 (July 24, 2008) (sanitation worker who was incapable of driving himself to the clinic for testing could have used alternate means to get to there); *Dep't of Sanitation v. Guarneri*, OATH Index No. 382/04 at 15 (Apr. 28, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD04-84-SA (Nov. 23, 2004) (sanitation worker who was able to travel to his doctor's office, but made no attempts to explore or obtain alternate transportation to get to the clinic failed to substantiate inability to travel to the Department's clinic on dates encompassed by his doctor's notes).

With respect to respondent's doctor's note, Dr. Maron credibly and knowledgeably testified about his review of that note and the basis for his conclusion that it did not establish respondent's inability to travel to the clinic for testing. His testimony that the note lacked

positive findings which would support a conclusion that respondent was unable to travel is persuasive. Moreover, while the note establishes that respondent complained of back pain and was diagnosed with right side sciatica, it also indicates that his doctor did not consider respondent's situation to be an emergency and the recommended course of treatment was rest. Respondent's physician noted that he could travel to the clinic on December 31, 2014, but provided no explanation for that conclusion.

Respondent's chronic back pain is documented in progress notes made during his many visits to the clinic (Tr. 135-36, 148; Pet. Ex. 2). These notes demonstrate that on numerous occasions unrelated to random substance use testing, respondent was able to travel to the clinic while experiencing back pain. For example, in 2014 respondent was seen at the clinic over ten times with complaints relating to back pain, including on December 22, 2014, four days before his name was selected for random testing (Tr. 161-165, 301; Pet. Ex. 2). That respondent was able to travel to the clinic on days he was required to do so because he was calling out sick due to back pain suggests that he may have embellished his testimony about his inability to travel to the clinic to undergo substance use testing.

Having been ordered to report to the clinic for substance use testing, under the principle of "obey now, grieve later," respondent was obligated to report to the clinic and challenge the order through formal grievance procedures. *See Morrison*, OATH 894/09 at 10 ("it is well settled that once a directive has been given, an employee must abide by the principle of 'obey now, grieve later.' This means an employee is required to obey the order when it is given and subsequently challenge it through formal grievance procedures . . . "); *see also Dep't of Sanitation v. Centeno*, OATH Index No. 857/11 at 14 (June 6, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-92-SA (Nov. 30, 2011); *Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855, 856 (1984). Exceptions to "obey now, grieve later" are recognized where the orders clearly exceed the supervisor's authority, are unlawful, or would threaten the health and safety of any person if followed. *See Law Dep't v. Lawrence,* OATH Index No. 1312/10 at 10 (Mar. 30, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-36-A (May 11, 2011).

The essence of respondent's contention that he was too ill to report to the clinic as ordered is that to comply with the order would have endangered his health and safety. To establish this exception, respondent must demonstrate, by a preponderance of the evidence, that the health threat was not only "imminent and serious" but also that his assessment of the risk was

reasonable and was the actual reason for his conduct. *Dep't of Sanitation v. Alston,* OATH Index No. 473/15 at 8 (Dec. 4, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0060 (Dec. 15, 2015); *Dep't of Probation v. James,* OATH Index No. 535/90 at 9-10 (Feb. 6, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-112 (Dec. 13, 1990); *Dep't of Parks and Recreation v. Kotch*, OATH Index No. 101/87 at 6 (Mar. 20, 1987). Respondent failed to demonstrate that he was too ill to report to the clinic. Thus, respondent did not establish that the health threat was imminent or serious. Furthermore, respondent's assessment of the risk seems to be at odds with his prior experience when required to report to the clinic with complaints of back pain. Finally, the fact that respondent claimed he was unable to travel to the clinic on the day he was ordered to report there for a substance use test calls into question the actual reason for his conduct.

In sum, petitioner established that respondent failed to report to the Department's clinic for substance use testing as ordered, in violation of section 2.5 of the Department's Code of Conduct, which requires that employees submit to drug and alcohol tests when ordered to do so.

FINDINGS AND CONCLUSIONS

Petitioner established that respondent failed to report for substance use testing on December 26, 2014, as ordered, in violation of section 2.5 of the Code of Conduct.

RECOMMENDATION

After making the above findings, I requested and received a copy of respondent's personnel record. Respondent was appointed in March 2000 and has been disciplined five times. In 2003, he received a reprimand for failing to submit a medical note to the Department's Medical Leave Unit. In 2004, he received a one-day suspension for failing to timely notify his work location of his absence. In 2005, he received a reprimand failing to drive carefully. In 2013, he received a reprimand for failing to comply with medical leave procedures, time and leave violations, and failing to act courteously. Finally, in 2014**,** he received a one-day suspension for failing to report to the clinic and failing to submit medical documentation to the Medical Leave Unit. This disciplinary history, while minor, raises red flags regarding respondent's compliance with the Department's time and leave requirements and rules.

Under section 16-106 of the Administrative Code, the Commissioner may impose various penalties on employees who violate Department rules, including suspension without pay for a period not to exceed 30 days or termination of employment.

Here, petitioner seeks termination of respondent's employment. In contrast, respondent's counsel urged that should the charge be sustained, the appropriate penalty is time served, noting that respondent has already been suspended, evaluated and counseled in a drug program, and has undergone regular substance use testing, penalties that are mandated by the Department's rules (Tr. 317).

In his closing, petitioner's counsel contended that to preserve the "integrity of the plea bargaining system," termination is appropriate in light of respondent's refusal to plead guilty and his decision to risk a trial (Tr. 317-19). Counsel noted that the Department has "a liberal policy of trying to get employees to cooperate under a plea" in similar cases and it makes little sense for respondent to get the same penalty after putting the Department to its proof that would have been imposed had he pled guilty (Tr. 317-19). The determination as to appropriate penalty, however, rests upon consideration of the circumstances of the particular case.

Consistent with this approach, and considering the Department's interest in not providing an incentive for employees to refuse to undergo drug testing, this tribunal has recommended penalties short of termination for violations of the substance use testing procedures. In *Dep't of Sanitation v. E. V.*, OATH Index No. 805/16 at 8 (Jan. 29, 2016), the tribunal recommended a 30-day suspension for a sanitation worker who failed to provide sufficient urine for a mandated drug test. The employee had been disciplined four times during an 11-year tenure, including a 20-day suspension for time and leave violations, which aggravated the penalty. In determining the appropriate recommended penalty, we considered that prior to the trial the employee had served a 30-day suspension and had undergone counseling, evaluation, and regular drug testing. Similarly, in *Dep't of Sanitation v. Buccellato*, OATH Index No. 1835/04 (Jan. 26, 2005), the tribunal recommended a 30-day suspension for a sanitation worker who reported to the clinic but did not produce a urine sample for testing. During his 11-year tenure, the employee had been previously disciplined for failure to comply with the Department's sick leave provisions and failure to maintain a driver's license. Considered as mitigation of the penalty was uncontroverted evidence that the employee was ill on date of the test and had no prior record of substance abuse. The tribunal determined that under the "totality of the circumstances,"

termination was not warranted. *Buccellato*, OATH 1835/04 at 9. *See also Dep't of Sanitation v. Hinds*, OATH Index No. 204/01 (Dec. 21, 2000), *modified on penalty*, Comm'r Decision (Jan. 18, 2001), *ALJ's penalty recommendation reinstated*, NYC Civ. Serv. Comm'n Item No. CD02-55-M (June 17, 2002) (30-day suspension recommended for refusal to submit to testing; employee had a 14-year tenure, a minor disciplinary record, and no record of substance abuse).

Here, respondent is a 16-year employee whose disciplinary record is minor and does not include substance use infractions. Moreover, I credit his contention that he was ill on the day of the drug test, even though I do not believe that he was too ill to travel to the clinic. In addition, respondent served a pre-hearing suspension and successfully completed a substance use treatment program and a regular drug testing regimen. Under the totality of the circumstances, I recommend that respondent be suspended for 30 days without pay, and that he receive credit for the number of days that he was suspended, pre-hearing, in this matter.

Astrid B. Gloade
Administrative Law Judge

March 16, 2016

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

CARLTON LAING, ESQ.
Attorney for Petitioner

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

ACTION OF THE COMMISSIONER

April 19, 2016

In the Matter of

NEW YORK CITY DEPARTMENT OF SANITATION
Petitioner
- against - OATH Index No. 806/16

R.L.
Respondent

Kathryn Garcia, Commissioner

DECISION

A copy of the **March 16, 2016** Report and Recommendation (the Report) submitted by OATH Administrative Law Judge (ALJ) Astrid B. Gloade 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 **R.L.** violated DSNY Policy and Procedure ("PAP") 2012-02. However, I find the proposed penalty of a 30 day suspension without pay to be inappropriate.

Here this employee was found guilty of a refusal to submit to a substance use test when ordered. This Department provides one of the most vital of City services. To provide this service, the Department assigns sanitation workers to operate heavy duty sanitation vehicles in busy and sometimes narrow city streets. To carry out these duties safely, the Department requires its employees to report to work unimpaired by drugs or alcohol that could affect their ability to safely operate the equipment they are assigned. And while the Department does not seek to regulate the social mores of its employees, it also cannot escape the fact that nationwide, substance abuse has proven to be a factor in many accidents, physical altercations, and job performance problems that endanger the employee, co-workers, and the public, as well as in the erosion of productivity.

Prior to this proceeding, no sufficient medical reason was presented to substantiate R.L.'s inability to travel to the testing facility. Further, at trial, he failed to present any medical evidence and produced no experts to support his contention that illness precluded his ability to travel. 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 Gloade's recommendation is modified. Based on the severity of the misconduct and a review of R.L.'s prior disciplinary record, it is my decision that the appropriate penalty for the proven misconduct is a two (2) 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: April 19, 2016

I acknowledge this Agreement constitutes a settlement of the matter of ***Dept of Sanitation v. R. L.,*** OATH Index No. 806/ 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 **two (2) 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 tills 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.