Dep't of Sanitation v. Rudden

OATH Index No. 1566/18 (July 12, 2018)

Sanitation worker charged with failing to submit documentation for emergency leave, using an ethnic slur in a report, failing to report to the clinic, and refusing a drug test. ALJ found evidence sufficient to prove all of the complaints and recommended that the employee be terminated.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
KENNETH RUDDEN
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 Kenneth Rudden, a sanitation worker, is charged with failing to submit documentation for emergency leave, using an ethnic slur in a report, failing to report to the clinic, and refusing a drug test.

A trial on the charges was conducted before me on May 16 and 17 and June 13 and 21, 2018. Petitioner presented five witnesses and respondent testified on his own behalf.

For the reasons provided below, I find that the evidence was sufficient to sustain all of the complaints. I recommend that respondent be terminated.

ANALYSIS

Respondent has worked for the Department since 1989. The charges concern four violations which allegedly occurred in 2016 and 2017 while respondent was assigned to the Queens 14 garage located in Far Rockaway, Queens.

Failure to Document Emergency Leave (Complaint Number 139709)

Sanitation workers are generally required to call in one hour before their tour if they are unable to work. Employees who call and request leave due to an emergency are required to submit "verifiable proof of the emergency within 48 hours of the request." Dep't Code of Conduct No. 2015-03 § 1.5. Respondent is charged with calling in for emergency leave on Monday, August 8, 2016, and failing to document this request as required.

According to the telephone order book (Pet. Ex. 4), on August 8, 2016, at 2:53 a.m., respondent called and requested emergency leave for his shift which began at 4:00 a.m. He stated that his "car is down" and that he would "bring in proof." Superintendent Gallagher testified that as of August 25, 2016, respondent had failed to submit any documentation for the leave (Tr. 183). On that date, the superintendent therefore served respondent with a complaint for violation of the emergency leave rules (Tr. 184). According to Superintendent Gallagher, when served with the complaint respondent never mentioned that he had previously submitted documentation for the August 8 absence (Tr. 206) and denied having ever seen the auto repair invoice offered by respondent at trial (Tr. 204).

Superintendent Gallagher testified that, after a worker took emergency leave, it was his responsibility to submit documentation to his supervisor (Tr. 191).

At trial, respondent produced a copy of a receipt from an auto repair shop (Resp. Ex. B) indicating that, on August 8, 2016, he had a battery replaced for $137. Respondent contended that he submitted the original of the receipt to the supervisor's clerk soon after August 8. He indicated that the photocopy admitted into evidence was maintained in his own files.

I did not credit respondent's testimony that he submitted the auto repair bill soon after his August 8, 2016 absence. Had the bill been timely submitted, it should have been either given directly to Superintendent Gallagher or at least placed in respondent's file. Furthermore, if respondent had already submitted the bill at the time he was served with the complaint on August 25, 2016, it is unlikely that he would not have protested and told Superintendent Gallagher of this and submitted the copy that he stated he kept. The fact that Superintendent Gallagher never saw this bill until the trial and that respondent was evidently silent about the bill until that time strongly suggests that the bill was not timely submitted. *See Dep't of Sanitation v. Antrobus*, OATH Index No. 460/11 at 3 (Oct. 29, 2010) (worker's testimony that supervisors refused to accept documentation and production of documentation at trial not credited); *Dep't of Sanitation*

v. Raheb, OATH Index No. 1529/03 at 4-5 (Aug. 29, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-84-SA (Nov. 23, 2004) (worker's testimony of timely submission of documentation and belated production of documentation at trial not credited).

Complaint number 139709 should be sustained.

Use of Ethnic Slur (Complaint Number 139912)

On July 21, 2016, respondent was involved in an incident with another motorist. The motorist accused respondent of reckless driving. Respondent reported the incident the same day using an unusual occurrence report (Pet. Ex. 5a), indicating that the civilian "cut him off." On August 25, 2016, respondent was given a written warning (Pet. Ex. 6) that he should "make substantial and immediate improvement" to avoid future disciplinary action. At the bottom of the report, in a seven-line space for "comments," respondent wrote the following:

> It is obvious that safty [sic] did not check into this event. They did not contact me or ask what happened. The Rican that was driving was texting while waiting at a green light. I honk and flashed my lights. He went slow to annoy me so I went to left, he went left. I went right, he went right. I don't believe I "rubbed" his car. No dents. No paint.

Respondent testified that he intended no harm by writing the word "Rican" and that he was "writing quick" and had only done so as a shorthand way of writing "Puerto Rican" (Tr. 766). He admitted that he "should have" written Puerto Rican instead (Tr. 767). At the same time, he pointed out that the other driver received a ticket for reckless driving (Tr. 766) and that he refrained from using a worse term such as "Spic" (Tr. 767).

Petitioner contends that respondent's use of the word "Rican" violated the Department's anti-discrimination rule, which provides as follows:

> Employees shall treat all other persons fairly and with respect, and shall not discriminate against any person in violation of rule, regulation or law. This includes, but is not limited to, all aspects of employment, terms and conditions of employment, any relationship with other government employees and the general public. Employees must become familiar with and comply with the City of New York's EEO Policy.

Dep't Code of Conduct § 3.14. Counsel for petitioner insisted at trial that the word "Rican" was an ethnic slur which clearly violated this rule.

Petitioner offered no corroboration that the use of the word "Rican," clearly a shortened version of Puerto Rican, was in and of itself an ethnic slur. However, I nonetheless find that, in the context of respondent's written report replying to the motorist's complaint, respondent's reference to the motorist's ethnicity was intended to be disparaging and therefore violated the anti-discrimination rule. Respondent gave no reason as to why the presumed ethnicity of this motorist was of any relevance to the incident. Respondent's testimony that he used the word "Rican" and chose not to use the racist slur "Spic" was further confirmation that the reason for pointing out the motorist's ethnicity was to impugn his character and undermine the credibility of the motorist's allegations.

Complaint number 139912 should be sustained.

Failure to Comply with Sick Leave Rules (Complaint Number 141288)

The charges allege that respondent failed to comply with sick leave rules requiring reporting to the clinic. Under Department leave rules, employees are placed in categories based upon their recent usage of sick leave. Employees who use the highest rates of sick leave are placed in category B or C. Category B employees who call in sick are required to either report to the clinic on the second day after reporting sick or provide medical documentation to demonstrate an inability to travel to the clinic. This documentation must be received by the clinic within five days. *See* Dep't Code of Conduct § 7.8 ("Employees on medical leave, or reporting sick must report to the DSNY Health Care Facility in accordance with the Department's Medical Leave Policy and Procedure, or when ordered by authorized personnel.") and § 7.9 ("Employees must submit medical documentation as required by the Department's Medical Leave Unit."); Dep't Policy and Admin. Procedure (PAP) 2007-04 § III(8) ("Category 'B' employees who cannot report to the DSNY Clinic on the second day of sick leave must submit a DS 398 (Medical Note) covering each day of medical leave."); Dep't PAP 2007-04 § V ("Documentation must be received by the DSNY clinic within five business days.").

Complaint number 141288 alleges that, on Wednesday, September 28, 2016, respondent called in sick while a category B worker. He also called in sick the following day and did not report to the clinic until September 30, 2016, at 6:20 a.m. (Farrell: Tr. 269, 273; Pet. Ex. 7a).

Department PAP 2007-04 III(8) expressly requires that category B employees who call in sick must report to the Department clinic on their second day of medical leave or supply medical

documentation to demonstrate their inability to report.

Respondent offered no testimony on this complaint.

The unrebutted proof supports a finding that, on September 28, 2016, respondent called in sick and failed to report to the clinic by September 29 or to supply documentation excusing his failure to report. Respondent did not produce a medical note for this date and there is no evidence that one was received by the clinic. Complaint number 141288 must be sustained.

Refusal to Submit to Drug Test

The final and most serious charge alleges that, on March 16, 2017, respondent was ordered to submit to a drug test and left the garage before he could be tested. Department rules provide that employees must submit to drug and alcohol tests when ordered. Dep't Code of Conduct rule 2.5; PAP 2012-02 § 4.13. A refusal to submit to a drug test is the equivalent of a positive drug test result. PAP 2012-02 § 6.4. As a defense, respondent asserted that the drug test order was not in compliance with Department procedural rules, which permit such orders only following an accident causing "significant equipment or property damage."

Respondent admitted that he had previously tested positive for alcohol and, in 2005, had entered into a last chance agreement under which he agreed he could be randomly tested for alcohol and, if he again tested positive, he could be terminated. According to respondent, he has been sober and has not consumed any alcohol since 2007 (Tr. 713-14).

On March 16, 2017, respondent, along with the rest of the Queens 14 garage crew, were working a 12-hour shift from 8:00 p.m. to 8:00 a.m. due to an on-going snow condition. During this shift, respondent was assigned to drive a front-end loader and fill salt spreaders with salt, while Mr. Murphy, another worker, was assigned to drive one of the salt spreaders. Supervisor Demmerle, who was assigned as the night superintendent, testified that, at around 5:00 a.m., Mr. Murphy came into the office and reported that a front-end loader driven by respondent "hit" his salt spreader. He asked the supervisor to look over the salt spreader for damage (Tr. 290-92). Supervisor Rizzo, who was also in the office, recalled that Mr. Murphy stated that "his spreader was damaged while getting salt" (Tr. 464).

Both supervisors left the office and examined the salt spreader. Supervisor Demmerle saw that the rear fender was "hunched over" with a protective steel bar "bent" (Tr. 295). When he looked more closely, he saw that one of the welds alongside the battery box of the spreader

was broken, leaving a steel bar "listing" (Tr. 296). Supervisor Rizzo also saw that the fender was "bent down" (Tr. 465) and that a weld holding a protective bar around the battery box was broken (Tr. 467). Supervisor Rizzo recalled he could put his hand on the bar and move it (Tr. 468). Supervisor Rizzo indicated that the air tank bleeder was attached to the bar and, if the bar fell, it might bleed the tank and cause the brakes to fail. He also believed that the metal could hit the driver or someone on the street (Tr. 469).

Following the inspection, Supervisors Demmerle and Rizzo immediately took the spreader out of service. Both supervisors indicated that the damage could not be repaired by the garage staff but would need to be fixed by metal repair technicians ("MRT") workers with welding equipment (Demmerle: Tr. 298-99; Rizzo: Tr. 469-70; Napier: Tr. 562). Supervisor Demmerle noted in the equipment database (Pet. Ex. 2a) that at 4:43 a.m. the spreader was taken down because it "needs MRT by battery protector box."

Supervisor Demmerle telephoned Deputy Chief King at Department headquarters about the accident. According to Supervisor Demmerle, he told Chief King that he viewed the damage to the spreader as significant due to the safety risks involved if the steel bar came loose (Tr. 385). Chief King instructed the supervisor to take photographs (Pet. Ex. 3) of the damage and send them to him via e-mail, which the supervisor did (Tr. 303-04, 386). Supervisor Demmerle ordered respondent to leave the loader and wait inside the garage (Tr. 310-11).

Superintendent Gallagher testified that, soon after he arrived at the garage at 5:45 a.m., Supervisor Rizzo told him that one of the salt spreaders had been damaged, taken out of service, and would have to await repair by outside welders (Tr. 24). Supervisor Rizzo told him that a front end loader, operated by respondent, had "hit" or "crashed into" the side of the spreader, inflicting body damage (Tr. 25, 28).

Superintendent Gallagher stated that, at 6:25 a.m., Chief King called him and said that respondent must be ordered to be drug tested at the Department clinic (Tr. 31). Superintendent Gallagher sent Supervisor Demmerle to notify respondent that he would need to report to the clinic for a drug test (Tr. 32).

Supervisor Demmerle found respondent in the lunch room watching television. He told respondent that he was being ordered to take a drug test and would have to come with Supervisor Demmerle. Respondent said "no problem" and said he would just have to use the bathroom and put some things in his locker (Tr. 314). Supervisor Demmerle waited outside the bathroom door

for 10 to 15 minutes. When respondent did not appear, he went into the bathroom to look for him but could not see him (Tr. 315-16). Both Supervisor Demmerle and Supervisor Rizzo searched for respondent throughout the garage and could not find him (Demmerle: Tr. 316-18; Rizzo: Tr. 475-77). Superintendent Gallagher noticed that respondent's car was no longer in the spot where he usually parked (Tr. 36-37, 126). The supervisors assumed that respondent had used the other exit to the bathroom and left the garage.

Garage practice was for a supervisor to put out the attendance sheet 15 minutes before the end of the shift so that the workers could sign out (Gallagher: Tr. 143-45). Respondent did not sign out for the end of the shift at 7:00 a.m. (Gallagher: Tr. 69; Pet. Ex. 1g).

Upon being told that respondent had left the garage after being ordered to submit to the drug test, Chief King ordered respondent suspended (Gallagher: Tr. 37; King: Tr. 530-31). In determining that the damage to the loader was "significant," Chief King relied upon the description given by Supervisor Demmerle and the photographs taken, which he concluded showed that the spreader was "severely damaged" and would likely be out of service "for an extended period of time" (Tr. 529).

The spreader was repaired by Mr. Maggio, the garage mechanic, and Mr. Charles, a welder who was dispatched from a Brooklyn repair facility. According to work orders maintained by the Department (Pet. Ex. 9), Mr. Maggio and Mr. Charles attributed nine hours of their work day to repairing the vehicle, although some of this time was evidently spent, in the case of Mr. Charles, on travel to and from the garage. The work orders indicate that the total "labor charge" for fixing the spreader was $929.36.

Both Mr. Maggio and Mr. Charles testified at the trial. Mr. Maggio described the damage done to the spreader as "extensive," stating that both the protective bar and the battery box could fall off. If this occurred, the battery box might ignite into flames or it might be run over by the spreader, causing further damage (Tr. 630-31). Mr. Charles testified that he needed to heat the bar, straighten it, and also drill holes and create welds to secure it to the body of the spreader (Tr. 654). He viewed the amount of damage to the truck as somewhere in the middle in terms of the types of repairs he was asked to perform (Tr. 657-58).

Per the equipment database, the spreader was placed back into service at 5:17 p.m. the evening of March 16.

In April 2018, a belated collision report (Pet. Ex. 1c) was created, indicating that there was damage to the "rear fender" and "broken welding on battery box." When respondent was given a copy of the report on April 28, 2018, he wrote at the bottom that the drawing showing a vehicle side-swiping another vehicle was "not correct." He further wrote, "if anything, the FEL's front wheels touched up against side of spreader while loading it." He concluded, "I don't really think I did this, but if I did, it was a incident not an accident" (Pet. Ex. 1c).

Both petitioner and respondent provided photographs (Pet. Ex. 3; Resp. Ex. A) of the damaged spreader. The damage was described similarly by all of the eyewitnesses. Superintendent Gallagher stated that he saw that the "body" beneath the calcium chloride tank was bent, a weld holding the battery box to the body of the spreader was broken, and the rear fender and a ladder at the rear of the spreader were bent (Tr. 39-40). He believed that there was a danger of the batteries falling out if the truck was not repaired (Tr. 40-41). Both Supervisor Demmerle and Supervisor Rizzo perceived the damage was "significant" (Demmerle: Tr. 302; Rizzo: Tr. 468) in that it created a danger that the steel bar could come loose on the street, creating a traffic hazard, or could cause a malfunction to the brake line (Demmerle: Tr. 298; Rizzo: Tr. 469). They also believed that repairing the broken weld would put the spreader out of service for a day or more (Demmerle: Tr. 301; Rizzo: Tr. 469-70).

Respondent and Mr. Murphy both denied that respondent could have damaged the spreader. Respondent testified that, as the operator of the FEL, he loaded some 25 to 30 vehicles with salt that night (Tr. 718). He had no recollection of coming in contact with a spreader operated by Mr. Murphy, and insisted that he always kept the FEL about a foot away from the vehicles he was loading (Tr. 717-18). He admitted that Supervisor Demmerle directed him to leave the FEL and wait upstairs, but insisted he had no idea why this was done (Tr. 717-18).

Mr. Murphy denied that he ever witnessed respondent's FEL come in contact with the spreader or that he ever told the supervisors that respondent's FEL had caused the damage. He testified that he inspected the spreader at the beginning of the tour and saw no damage (Tr. 700). It was only later, at around 3:30 a.m., that he noticed that the steel bar was bent (Tr. 682-84). Mr. Murphy surmised that the damage occurred while he stopped to use the bathroom or go into a store (Tr. 682). At this point, he returned to the garage and reported the damage to Supervisor Rizzo, telling him that he did not know how the damage occurred (Tr. 686). At around 4:30 a.m., Mr. Murphy took several photos of the damage with his phone (Resp. Ex. A), which he

later sent to respondent and respondent then printed out. Mr. Murphy insisted that he took these photos in order to "cover" himself in case he received a complaint (Tr. 688).

Respondent admitted that, at around 6:25 a.m., Supervisor Demmerle came up to the lunch room and told respondent that he needed to get his jacket and accompany the supervisor to the clinic. Respondent stated that, upon hearing this, he told Supervisor Demmerle that traveling to the clinic was "not happening" and that he was "going home" (Tr. 721). According to respondent, he needed to go home in order to drive his seven-year-old son to his school some three to four blocks away (Tr. 722). Respondent insisted that Supervisor Demmerle turned away from him before respondent had a chance to mention the issue with his son (Tr. 723).

Based upon respondent's testimony, it is undisputed that, after being ordered to accompany Supervisor Demmerle to take a drug test, he left the garage. Resolution of the disputed facts surrounding the damage to the salt spreader and what respondent stated when ordered to take a drug test depends upon a credibility determination between petitioner's witnesses and those of respondent. To evaluate credibility, this tribunal has looked to "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

The testimony of Supervisors Demmerle and Rizzo as to being notified of the damage to the salt spreader by Mr. Murphy at approximately 5:00 a.m. was highly credible. Neither witness had any apparent reason to testify falsely about this issue. Their accounts were corroborated by the reports they both wrote that night as well as by the testimony of Superintendent Gallagher, who stated that Supervisor Rizzo reported that the salt spreader was damaged by some kind of contact with a FEL, and by Chief King, who was told the same thing. Supervisor Demmerle's testimony that, after being ordered to take a drug test, respondent said little except that he needed to use the bathroom was also credible.

The testimony of respondent and Mr. Murphy, on the other hand, was replete with inconsistencies and implausibilities. Mr. Murphy's account of discovering the damage to the spreader while in the field and not reporting it until he returned to the garage was highly incredible. When asked how he noticed the bent bar, he stated, "I can't remember exactly" and "I really don't know how I noticed, how it got brought to my attention" (Tr. 682). His theory

that the damage was somehow done on the street while he was using a bathroom or in a store seemed unlikely, since the damage was well above the height of most vehicle bumpers and was caused by downward pressure on the steel bar. Mr. Murphy's version was contrary to the testimony of two supervisors who both heard Mr. Murphy state that the damage was caused by contact with a FEL.

Mr. Murphy's testimony that he declined to report the damage at once and waited for an hour until he returned to the garage was also inconsistent with his supposed concern about being disciplined for the damage. Although Mr. Murphy indicated that he returned to the garage due to the damage, he nonetheless minimized the damage as "not that significant" and not raising any safety concerns (Tr. 702-03). It also seemed unusual that Mr. Murphy, who was aware that respondent was removed from the FEL after the incident, did not make any statement to the supervisors at the time as to when he noticed the damage and whether respondent could be responsible. The photographs taken by Mr. Murphy and then delivered to respondent also suggested some discussions between the two about proving that respondent did not cause the damage to the spreader. Finally, Mr. Murphy's demeanor on the witness stand was subdued and anxious, further undermining faith in his overall truthfulness.

Respondent's testimony that he was unaware of any contact between his FEL and the salt spreader was contradicted by the statement he wrote on the accident report, admitting, "if anything, the FEL's front wheels touched up against side of spreader while loading it." The supervisors agreed that pressure from the large front wheels of the FEL pushing downward on the spreader could have bent the steel bar and broken loose the weld affixing the bar to the body.

Likewise, respondent's contention that, when given the drug test order, he immediately told Supervisor Demmerle that he was refusing to obey the order was less credible than Supervisor Demmerle's testimony. Had respondent verbally defied the drug test order, misconduct arguably worse than simply leaving the garage, it seems likely that Supervisor Demmerle would have recalled it and included respondent's remark in his reports to Superintendent Gallagher.

Based upon the credible evidence, I find that, just before 5:00 a.m., while respondent was operating a FEL to fill up a salt spreader being driven by Mr. Murray, the wheels of the FEL came into contact with the bar along the side of the spreader and pushed it down, breaking a weld at the front of the bar and bending it down so that the rear of the bar was lower than the

front. After being given an order to accompany Supervisor Demmerle to take a drug test, respondent stated he needed to use the bathroom and then left the garage without signing out and without notifying his supervisors that he was going.

The question remains as to whether the incident involving the damage to the salt spreader warranted a drug test under Department rules. The Department substance abuse directive states that, following certain events such as a vehicle accident, employees involved are to be tested for illegal drugs. One of the events requiring tested is where "[n]o citation was issued but the accident caused bodily injury or significant equipment or property damage as determined by the on-scene supervisor, unless the supervisor reasonably believes that the driver bears no responsibility for the injury or property damage." Dep't PAP 2012-02 § 9.3 (4).

In this case, three supervisors examined the damage to the salt spreader in person and one, Deputy Chief King, examined the damage as shown by photographs. All four concurred that the damage was "significant" in that the broken weld created a safety risk that the bar could come loose and injure a pedestrian or the vehicle operator or might further damage the vehicle and make it unsafe to drive. They also felt that the damage was significant because the salt spreader had to be taken out of service during a snow emergency, with no clear time frame as to when it could be safely operated again. Deputy Chief King, who made the final decision to order respondent to be drug tested, spoke with the supervisors on the scene and examined photographs of the damage before rendering his decision. This established that the assessment of whether the damage to the salt spreader was significant enough to warrant a drug test was fair and reasonable, made after collecting the facts surrounding the incident and then performing an analysis as to whether the facts demonstrated significant damage.

Respondent's counsel contended that the damage was not "significant" primarily because the salt spreader was able to be repaired and returned to service by the start of the evening shift. This was accomplished by the efforts of both a garage mechanic and a welder from outside the garage, who worked for a total of 19 hours to repair the salt spreader.

The final decision maker as to the drug test was Chief King, who based the decision to order a drug test on the severity of the damage to the spreader, as shown by the photos and as described by Supervisor Demmerle (Tr. 529, 546), as well as upon the "severe impact" which would have been necessary to cause the bar to come loose and bend and the very good condition of the spreader, which was only a year old, prior to the damage (Tr. 542, 546). In his testimony,

Chief King conceded that he was uncertain that he would have ordered a drug test if the bar could have been immediately repaired and the spreader returned to the field (Tr. 540-42). The testimony of the three supervisors who considered the damage to the truck, particularly the highly credible testimony of Chief King, established that there was a fair and reasoned assessment of a number of factors in determining whether the operator of the FEL should be drug-tested. There was no indication that Chief King, who made the ultimate decision, had any familiarity with respondent or even knew him by name.

Based upon these circumstances, I find that the damage caused to the salt spreader constituted "significant" equipment damage "as determined by the on-scene supervisor," in full compliance with the Department directive. Respondent's refusal was therefore a clear violation of the rule.

Insofar as respondent sought to excuse his refusal by asserting a need for emergency child care leave, I did not credit his testimony that a need for emergency leave existed. The fact that he never requested emergency leave of any of the supervisors at the garage is strong evidence that he was not leaving the garage due to an emergency. Further, according to respondent, his child was seven years old at the time and lived only three to four blocks from the school in Queens. Respondent offered no explanation as to why, given the proximity of the school, anyone was required to drive the child to school or, assuming for some reason that a ride was needed, why someone else was not available to drive the child.

Petitioner's evidence established that the drug test order was justified and that respondent's refusal to submit to the test violated Department rules. This complaint must be sustained.

FINDINGS AND CONCLUSIONS

1. Complaint number 139709 should be sustained in that, on August 8, 2016, respondent was granted emergency leave due to his car being down and failed to provide documentation as required by Department Code of Conduct § 1.5.

2. Complaint numbers 139912 should be sustained in that, in a report written on August 25, 2016, respondent referred to a motorist who complained about his conduct as a "Rican," in violation of Department Code of Conduct § 3.14.

3. Complaint number 141288 should be sustained in that, on September 30, 2016, while a category B employee, respondent reported sick and failed to report to the clinic on his second day of sick leave, as required by Department Code of Conduct §§ 7.8 and 7.9.

4. Complaint number 144702 should be sustained in that, on March 16, 2017, respondent was ordered to accompany a supervisor for a drug test and disobeyed the order by leaving the garage, in violation of Department Code of Conduct § 2.5.

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. Respondent was appointed as a sanitation worker in 1989. He has been disciplined 25 times for violations including testing positive for alcohol following an accident, testing positive for cocaine, being out of residence while on sick leave, being absent without leave, making false statements, failing to document emergency leave, disobeying orders, failing to provide medical documentation for sick leave, and disobeying traffic laws. Most of the penalties were reprimands or for fewer than seven days. However, in 1998, he received a 44-day penalty after testing positive for cocaine in a random drug test in 1997 and twice testing positive for alcohol in follow-up tests in 1997 and 1998. He tested positive for alcohol again in 2005 following an accident. He then tested positive for alcohol yet again some six months later and was given a penalty of 28 days and a last chance agreement.

Respondent's evaluations have been mixed. Although his 2012-2013, 2014-2015, 2015-2016 evaluations were "satisfactory," his 2013-2014 evaluation was "conditional" as to attendance while his 2016-2017 evaluation was "unsatisfactory" for attendance.

Department rules provide latitude in disciplining workers who test positive for controlled substances. The rules provide that, after a first violation, most workers will be suspended for up to 30 days, be obliged to sign a cooperation agreement requiring attendance in a counseling program, and be required to submit to regular drug tests for from one to five years. Dep't PAP 2012-02 § 7.2. For a second violation, the worker may be terminated or may be suspended for 30 days and offered a last chance agreement, consisting of further counseling and unannounced drug testing for one to five years, and an agreement to resign upon another positive drug test and

a refusal to comply with counseling recommendations. PAP 2012-02 § 7.4. For a third violation, the worker must resign or be terminated. PAP 2012-02 § 7.5.

Petitioner's counsel requested that respondent be terminated for the misconduct charged here. In fact, most sanitation workers who have refused to submit to drug testing have been terminated. *Dep't of Sanitation v. Anonymous*, OATH Index No. 0056/16 (Jan. 4, 2016); *Dep't of Sanitation v. Field*, OATH Index No. 1977/08 (July 24, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-62-SA (Dec. 12, 2008); *Dep't of Sanitation v. Blucher*, OATH Index No. 1306/06 (July 31, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-41-SA (Apr. 17, 2007); *Dep't of Sanitation v. Gallimore*, OATH Index No. 1144/98 (July 14, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-004-SA (Jan. 24, 2000).

Those few workers who have not been terminated for refusing to take drug tests presented mitigating circumstances. In *Department of Sanitation v. R. L.*, OATH Index No. 806/16 (Mar. 16, 2016), *modified on penalty*, Comm'r Dec. (Apr. 19, 2016), a sanitation worker 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. Judge Gloade recommended a 30-day suspension, noting that the worker was, indeed, ill on the date of the test order, had no prior violations of the substance abuse rules, and had completed a substance abuse treatment program.[1] Other workers who submitted to drug tests but failed to produce sufficient urine for valid testing were also given suspension penalties rather than being terminated. *Dep't of Sanitation v. E. V.*, OATH Index No. 805/16 at 8 (Jan. 29, 2016), *modified on penalty*, Comm'r Dec. (Mar. 30, 2016); *Dep't of Sanitation v. Buccellato*, OATH Index No. 1835/04 (Jan. 26, 2005).

I can find no significant mitigating factors in respondent's employment history or in the circumstances of the incident to warrant a penalty of less than termination here. While respondent has been employed by the Department for some 29 years, his sorry disciplinary record and lackluster evaluations suggest that his service has been less than distinguished. Respondent has been found guilty of several past substance abuse violations involving both cocaine and alcohol. He also has a history of sick leave and emergency leave violations. It was also likely that his decision to flee the garage in March 2017 rather than submit to the drug test was due to a fear that the test would be positive. He also seems to have enlisted Mr. Murphy to

[1] The worker later agreed to accept two years of alcohol and drug testing, in addition to the 30-day suspension.

provide testimony inaccurately suggesting that the damage to the spreader was caused in the field.

Accordingly, the most appropriate penalty in this case is termination, and I so recommend.

John B. Spooner
Administrative Law Judge

July 12, 2018

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

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