Fire Dep't v. Gala

OATH Index No. 2772/18 (Apr. 16, 2019)

Evidence established that respondent, an emergency medical technician ("EMT"), left a patient before other EMTs arrived to care for the patient; falsely claimed that he had been flagged down by a non-existent patient so that he could eat his meal instead of responding to a call to aid a patient who had a seizure; created a false patient care report for the nonexistent patient; failed to undergo substance use testing when ordered to do so; was absent without authorization; and tested positive for a controlled substance. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
ROBERT GALA
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Fire Department ("Department"), brought this employee disciplinary proceeding under section 75 of the Civil Service Law against respondent, emergency medical technician ("EMT") Robert Gala. Petitioner alleges that respondent left a patient in the care of people who were not medically trained, refused to undergo substance use testing as directed, was absent without official leave ("AWOL"), falsely reported that a patient had flagged down his ambulance and that he had attempted to treat the patient, created a false patient care report for the nonexistent patient, forged his partner's signature on a patient care report form for the non-existent patient, and tested positive for a controlled substance (ALJ Ex. 1).

At a two-day trial, petitioner relied upon documentary evidence and the testimony of seven witnesses. Respondent testified in his own behalf. The parties submitted post-trial memoranda, after which the record closed.

For the reasons below, I find that the charges have been sustained and recommend that respondent's employment be terminated.

PRELIMINARY MATTERS

Respondent requested that his name be withheld from publication to protect his privacy because this report and recommendation references respondent's medical information (Tr. 13; ALJ Ex. 4, Respondent's Post-trial Letter Brief ("Resp. Br.") at 4-5). Specifically, respondent contends that information about his admission to rehabilitation facilities, substance abuse treatment, and administration of opioid blockers is sensitive information that must be safeguarded as a matter of law (Resp. Br. at 5). Respondent relies on the Drug Abuse Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. § 290dd-2 (the "Act"), which he contends "protects the confidentiality of a substance abuse treatment patient's records and communications at facilities which receive federal assistance." *Id.* Respondent also cites the "media attention that this case has garnered" as a basis for protecting his "personal information and medical history" from disclosure. *Id.* Respondent's request is denied.

This tribunal's proceedings are presumptively open to the public and its decisions are issued without redaction in furtherance of the public interest. *See* 48 RCNY § 1-49 (Lexis 2016); *see also Mosallem v. Berenson*, 76 A.D. 3d 345, 348 (1st Dep't 2010) ("Under New York Law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records"); *Dep't of Correction v. Victor*, OATH Index No. 388/15, mem. dec. at 4 (Feb. 3, 2015), *aff'd*, Index No. 100890/15 (Sup. Ct. N.Y. Co. May 29, 2018) ("OATH's publication of its reports and recommendations without redaction furthers the public interest in transparency and open government"); *Dep't of Environmental Protection v. Capezza*, OATH Index No. 1536/14 at 4 n.1 (June 13, 2014), *adopted in part, rejected in part*, Comm'r Dec. (May 1, 2015), *aff'd in part, rev'd in part*, NYC Civ. Service Comm'n Case No. 2015-0610 (Nov. 4, 2015) (denying respondent's request to remove his name from a published decision). Indeed, section 1-49(d) of this tribunal's rules provides for publication of decisions without redaction unless the administrative law judge finds that "legally recognized grounds exist to omit information from a decision."

OATH has withheld names of respondents where there is discussion of sensitive medical information. *See, e.g., Dep't of Correction v. M.C.,* OATH Index No. 2343/15 at 1 n.1, 15-17 (Mar. 17, 2016) (respondent's name redacted because decision contained information about sensitive mental health issues); *Human Resources Admin. v. Anonymous*, OATH Index No. 2596/10 at 1 n.1, 9-10 (Jan. 13, 2011) (respondent's name removed from decision that included detailed discussion of his history of physical and mental illness); *Admin. for Children's Services v. J.M.*, OATH Index No. 3350/09 at 1 n.1, 5-6 (Apr. 5, 2010) (withholding respondent's name from a report that contained significant discussion of respondent's mental condition).

Redaction requests have been rejected, however, where the respondent placed his or her private health information in issue. *See Human Resources Admin. v. Charleman*, OATH Index No. 1653/16 at 2 (Aug. 5, 2016) (redaction request denied where respondent placed her mental health in issue as a defense and did not elaborate upon her condition or present documentary evidence to demonstrate a legally cognizable basis for redaction); *Capezza*, OATH 1536/14 at 4 n.1 (respondent's redaction request denied, in part, because he placed his condition in issue by testifying about it at the hearing); *Fire Dep't v. Palleschi*, OATH Index No. 192/11 at 6-7 (Dec. 20, 2010), *aff'd,* 102 A.D.3d 603 (1st Dep't 2013) (denying respondent's request to seal his counseling records because he placed his health in issue by way of defense).

Here, respondent articulated no basis for removing his name from the decision. Respondent's reliance on the Act is unavailing. The Act provides for confidentiality of "[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States." 42 USC § 290dd-2(a). The term "records" is defined as "any information, whether recorded or not, created by, received, or acquired by [a program that receives federal assistance] relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts." 42 C.F.R. § 2.11 (Lexis 2019). No such records were submitted in this case. Instead, respondent testified in very general terms about his treatment and rehabilitation, but submitted no medical or counseling records created by, received by, or acquired by any of the unidentified substance abuse treatment programs that respondent testified

he attended. Nor did he establish that these unidentified programs received federal assistance. Respondent's testimony that he attended those treatment programs, in and of itself, is not protected by the Act. *See Moore v. City of New York*, 2001 U.S. Dist. LEXIS 2191 (S.D.N.Y. 2001) (officer's statements disclosing his treatment at a drug and alcohol treatment program, made well after his completion of the program, was not received or acquired by the program in connection with the officer's treatment and therefore was not confidential under the provision). Accordingly, respondent's testimony does not fall within the ambit of the confidentiality afforded by the Act.

Respondent further argued that media interest in this matter is a basis for making the decision anonymous. Respondent offered no support for this contention, which is unpersuasive in light of the public interest in transparency and open government.

Lastly, it was respondent who placed his medical condition in issue as a defense to the charges that he engaged in misconduct. Having asserted his addiction as a defense to the charges, and having failed to establish a legally cognizable basis for removing respondent's name from the decision, respondent's request is denied. *Dep't of Correction v. Rolando,* OATH Index No. 2417/17 at 6-7 (Jan. 12, 2018), *adopted*, Comm'r Dec. (Feb. 27, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0221 (July 5, 2018) (request for redaction of respondent's name denied where respondent asserted as a defense to misconduct charges that he suffered from alcoholism); *Human Resources Admin. v. Holman,* OATH Index No. 223/17 at 3 (Dec. 22, 2016), *aff'd*, NYC Civ. Serv. Comm'n Index No. 2017-0161 (May 12, 2017) (request to redact respondent's name from decision denied where respondent offered his medical condition as a defense to disciplinary charges).

Similarly, respondent's request to close the courtroom during his testimony was denied (Tr. 116-18; ALJ Ex. 2). *See* 48 RCNY § 1-49(a) ("Other than settlement conferences, all proceedings are open to the public, unless the administrative law judge finds that a legally cognizable ground exists for closure of all or a portion of the proceeding, or unless closure is required by law."); *Herald Co. v. Weisenberg,* 59 N.Y.2d 378, 381-82 (1983) (noting "the strong public policy in this State of public access to judicial and administrative proceedings," the Court of Appeals held that and administrative law judge erred in closing to the public and the press an unemployment insurance board hearing absent inquiry into whether compelling reasons existed

for closure). Inasmuch as there is a presumption that this tribunal's proceedings are open to the public, respondent bears the burden of demonstrating compelling circumstances to justify excluding the public from the proceedings, which he failed to do. *See Herald Co.*, 59 N.Y.2d at 381; *Maxim, Inc. v. Feifer*, 145 A.D.3d 516, 517 (1st Dept 2016). Accordingly, respondent's request to close the proceedings during respondent's testimony was denied.

ANALYSIS

Respondent has been a Department EMT for over five years (Tr. 214). He is charged with leaving a patient in the care of people who were not medically trained, refusing to cooperate in substance use testing as directed, being AWOL, falsely reporting that a patient had flagged down his ambulance and that he had attempted to treat the patient, forging his partner's signature on a patient care report form, and testing positive for a controlled substance while on duty (ALJ Ex. 1). With the exception of the allegation that he left a patient unattended, respondent does not dispute the charges, but contends that his actions were due to his addiction to opioids (Resp. Br. at 2, 3-4).

May 27, 2016 – Patient Abandonment

The charges arise out of an incident on May 27, 2016 at a sports complex at Aviator Field in Brooklyn, New York. The complex consists of multiple ice skating rinks and facilities for other sports activities (Tr. 218-19). It is alleged that respondent left a patient unattended at the location (ALJ Ex. 1).

EMT Huertas has been employed by the Department for eight years. She and her partner were assigned to respond to a call at the sports complex on May 27, 2016, to treat a child with an ankle injury (Tr. 195-97). The call had come in as a non-critical injury request from an ambulance that was already on the scene (Tr. 206).

Huertas saw another ambulance leaving Aviator Field as her unit entered the area. About two minutes after her ambulance crossed paths with the other ambulance, her unit arrived at the sports complex. Huertas testified that when she and her partner arrived at the location, they found the patient in a wheelchair on the ice rink with an ice pack wrapped around his ankle (Tr. 198). Staff members from the sports complex were with the patient (Tr. 202-03). Huertas and

her partner transported the patient to a hospital that was 30 minutes away from the location at the request of school staff members who were there with the patient (Tr. 207).

Huertas' captain ordered her to write a statement about the incident later that day (Tr. 199-200). In her statement, Huertas wrote that when she and her partner arrived on the scene "to back up" respondent's ambulance, they found a minor patient in a wheelchair on the ice rink with an ice pack on his ankle accompanied by the facility's staff. The staff told Huertas that the ice pack had been applied by respondent's unit, which had left before Heurtas arrived (Pet. Ex. 16).

Captain Barwick has been an EMT since 1991 and a captain since 2016 (Tr. 42-43). On May 27, 2016, Barwick, who was then a lieutenant, was working at the officer's desk in the Fire Department Operations Center in Brooklyn when Lieutenant Matos from station 43 called in an unusual occurrence. Matos reported that respondent and his partner had abandoned a patient at a skating rink in Brooklyn. Matos indicated that respondent and his partner had responded to the location for an injured person, were notified that there was a second injured person at the location, started treating the second patient, but left before another ambulance (also referred to as a "unit") arrived to continue caring for the second patient (Tr. 51-54).

A unit history is a printout of information from the computer-aided dispatch terminal in the ambulance, which captures the EMTs' actions during their tour, including assignments to which the unit responded (Tr. 58; Pet. Ex. 7). The unit history for unit 33C2, the ambulance respondent and his partner operated at the time of the incident, shows that respondent's ambulance was assigned to the location at 11:36 a.m. for an injury that was categorized as "priority five" (Tr. 65; Pet. Ex. 7). Barwick testified that the person who took the call for assistance labeled the call involving a head injury to a patient as a level five priority injury on a scale from one to nine, with one being the highest priority injury. In terms of the seriousness of a priority five injury, Barwick described it as a "basic life support" assignment, compared to more serious injuries, starting at priority three, where an "advanced life support" unit would be dispatched (Tr. 65-66).

The Department's records show that at 11:56 a.m., twenty minutes after respondent's unit had been assigned to the location, a second ambulance was assigned to assist respondent's

ambulance (Tr. 59-61, 68-69; Pet. Ex. 9). That second ambulance, unit 43A2, was operated by Huertas and her partner (Tr. 59-61, 66-69; Pet. Ex. 8).

Barwick testified that EMTs must complete a pre-hospital care summary report, also referred to as a patient care report ("PCR") every time they establish contact with a patient (Tr. 61-62, 69; Pet. Ex. 10). The PCR from respondent's unit indicates that on arriving at the sports complex they encountered a patient, who was a minor, with a cut above the eyebrow. The PCR indicates that the patient was stable, as the assessment showed normal breathing, lung sounds, and color. The patient is described as "alert and ambulatory," with vital signs that Barwick testified were stable according to the applicable guidelines (Tr. 69-72; Pet. Ex. 10). The PCR from Huertas' ambulance shows that Huertas and her partner treated a patient who complained of ankle pain after falling while ice skating (Tr. 62, 73; Pet. Ex. 11).

The Department's protocols require that EMTs maintain continuity of care for patients. Barwick testified that the training he received from the Department included instruction on the Department's EMS Operating Guide Procedures, ("OGP"), which contains guidelines for how EMTs are to conduct themselves on and off duty (Tr. 44-46). He was also trained on emergency patient care protocols set forth in the General Operating Guide Procedures of the Regional Emergency Medical Advisory Committee of New York City ("REMSCO"). The OGP guidelines and procedures are modelled on the REMSCO protocols (Tr. 46-47; Pet. Ex. 6).[1] OGP 106-02, § 4.1.10, provides that when an ambulance is flagged down while transporting a [2]stable patient, the EMTs are to stop, assess the situation, and render assistance. The provision goes on to note that "[o]ne member **must** stay with the original patient while the other member assesses the situation and, if necessary, administers care to the flagdown patient until additional assistance arrives" (emphasis in original) (Pet. Ex. 1).

According to Barwick, when an EMT crew is taking care of two patients at the same time, the REMSCO guidelines provide that so long as the initial patient is stable, the EMTs must stay and treat the second patient. When an EMT starts treating a patient who is stable and subsequently encounters a second patient at the same location who is also stable, they must

[1] Petitioner submitted into evidence REMSCO Prehospital Treatment Protocols General Operating Procedures, effective September 1, 2017 (Pet. Ex. 6). The effective date of these guidelines post-date the incident that is the subject of this charge. Petitioner offered no explanation for the discrepancy and the exhibit was not considered in this matter

notify dispatch that there is a second patient. They must also notify dispatch if they will require back up to handle the second patient and must begin to treat that patient (Tr. 74). If each EMT treats one of the patients at the scene, the EMT treating the second patient is not allowed to leave that patient until a second ambulance arrives, unless the original patient is in critical condition (Tr. 74). However, if there is a second EMT unit on the scene, the EMTs in the first ambulance can leave the patient in the care of the second unit (Tr. 74-75).

Barwick testified that when an EMT treats two patients, it is important for an EMT to wait for a second unit to arrive before taking one of the patients to the hospital. This is because once an EMT starts to care for a patient, he or she is supposed to continue that care until the patient is released to another ambulance. In the alternative, the EMT should transport the patient, unless the patient refuses medical care (Tr. 77). In addition, EMTs must generate a PCR anytime they make contact with a patient, including when they examine the patient (Tr. 78).

Respondent did not deny that he left the second patient at the location, but maintained that his actions do not constitute misconduct. Respondent contends that he acted within his discretion when he determined that it was more prudent to transport the first patient, who had a laceration to the head, to the hospital rather than wait with the second patient until the second ambulance arrived (Tr. 229; Resp. Br. at 2-3).

Respondent testified that on May 27, 2016, his partner served as the driver of the ambulance while he was the technician. As the technician, respondent was primarily responsible for patient care. When they arrived at the sports complex in response to a call about a patient with a laceration above the eyebrow, they were approached by a staff member who escorted them to the ice rink at the facility (Tr. 218-20). However, when they arrived at the rink, the patient was not there. A second staff member told respondent and his partner that she had bandaged the patient (Tr. 220). That staff member was carrying a bag containing medical supplies, which respondent referred to as a "medical bag" or a "tech bag" (Tr. 267). They located the patient in the food court, where respondent examined the wound and determined that the patient had to be transported to the hospital for stitches. The patient was on a school trip and the chaperones contacted the patient's parents, who requested that the patient be transported to Coney Island Hospital (Tr. 220-21).

As respondent and his partner escorted the patient, who was able to walk, to their ambulance, a member of the facility's staff approached them and said there might be a second patient in another skating rink. After the staff member verified that there was indeed a second person in need of medical care, respondent told his partner to call another ambulance and to stay with the first patient while he went to check on the second one (Tr. 221-23). Respondent found the second patient laying on the ice in a different skating rink. As he began to walk onto the ice, he saw the same staff member with the medical bag he had encountered earlier. The staff member was kneeling next to the patient and had a medical bag next to her. Because the patient only spoke Spanish, the staff member translated for respondent so that he could speak with the patient. The patient had an injured ankle so respondent removed the skates and examined the ankle. After finding no obvious signs of a break, he picked up the patient, carried the patient off the ice, and placed the patient on a bench. Respondent then placed ice on the patient's ankle and wrapped the ankle (Tr. 223-24). Respondent tended to the second patient for about five minutes (Tr. 224).

Respondent's partner, who had stayed with the first patient, came to where respondent was treating the second patient and told him that another ambulance would be on the scene in a few minutes. The staff member who had the medical bag said she would remain with the second patient. The patient's chaperone informed them that if the child had to be transported to the hospital, the family lived near one that was in the opposite direction from the hospital to which respondent and his partner were going to transport their first patient. Respondent and his partner told the people caring for the second patient that a second ambulance was coming to transport the patient to the hospital and left to take their first patient to their ambulance (Tr. 224-25).

Respondent acknowledged that the Department's protocols require that EMTs remain within arm's reach of their patient at all times (Tr. 228). However, he maintained that between the two patients, the one with the head laceration had the more serious injury. He explained that because that patient suffered a head injury, the extent of the injuries could not be determined until after the patient underwent testing at the hospital (Tr. 226). He and his partner decided to leave the patient with the ankle injury before the second ambulance arrived and transport the patient with the head laceration to the hospital because they felt that patient was a higher risk, the second patient was stable, and they knew another ambulance would arrive in a few minutes (Tr.

227). According to respondent, as his ambulance left the complex, the second ambulance arrived (Tr. 228). Respondent maintained that the patients were to be transported to different hospitals and that it was not possible to do so because those hospitals were in opposite directions (Tr. 228).

Respondent's actions in leaving the second patient before the second ambulance arrived constitute misconduct.

First, respondent's contention that he left the second patient because the first patient's injuries were more serious and took precedence is unsupported by the evidence and undermines respondent's credibility. The PCR for the patient with the head laceration described the injury as "non-critical" (Pet. Ex. 10). Although respondent could have upgraded the call so that it was given a higher priority, he testified that did not think it was necessary to do so. Nor did he feel it necessary to rush the patient to the hospital (Tr. 268-69; Pet. Ex. 10). Moreover, respondent's contemporaneous written account of the incident, dated May 27, 2016, makes no reference whatsoever to the seriousness of the first patient's injuries as justification for leaving the second patient before the second ambulance arrived (Pet. Ex. 17). Instead, respondent wrote that the second patient was "left on scene with [the facility's] EMS awaiting secondary ambulance crew" (Pet. Ex. 17). In sum, there is no contemporaneous evidence that respondent saw an urgent need to transport the first patient to the hospital. It would appear that respondent invented this as an after-the-fact justification of his decision to leave the patient before the second ambulance arrived, rather than his actual assessment of the situation.

Furthermore, respondent's claim that the second patient was left in the care of the sports complex's EMS is unsupported by the record. Respondent acknowledged that he never determined if the person he encountered at the facility with the medical bag was certified as a medical services provider. Instead, he assumed that she had an EMT or paramedic certification because he saw the medical bag. Therefore, he testified, he felt comfortable leaving the second patient, a minor, in her care (Tr. 265, 267-69). However, it is not reasonable to presume that merely because someone has access to a medical bag he or she is a certified emergency medical care provider.

Respondent sought to minimize the amount of time the patient was left unattended, noting that petitioner's evidence indicated that respondent left the scene about 20 seconds before

the second ambulance arrived (Resp. Br. at 2; Pet. Exs. 10, 11). The PCR for the first patient and unit history for respondent's ambulance show that respondent left the location with the first patient at 12:08:42 p.m., while the unit history and the PCR and for the second patient indicate that the second ambulance was "on scene" at 12:09:02 p.m., approximately 20 seconds later (Tr. 83-85; Pet Exs. 7, 8, 10, 11). However, Barwick credibly testified that "on scene" means the time that the EMTs in the unit indicate that they are at the assigned location. He explained that the EMTs may still have to walk some distance to get to the patient after arriving at the location (Tr. 99).

It is more likely that respondent left the patient unattended by Department EMTs for more than 20 seconds. This is consistent with Huertas' testimony that she arrived at the sports complex about two minutes after crossing paths with respondent's ambulance (Tr. 202-03). Moreover, Barwick testified that whether the elapsed time is 20 seconds or two minutes, it was improper for respondent to leave the patient before the second ambulance arrived because of the risk that the patient's condition might worsen (Tr. 100).

Respondent seemed to contend that it was impossible for his unit to transport both patients because they were to be taken to different hospitals in opposite directions from each other (Tr. 275; Resp. Br. at 3). However, the issue is not whether both patients could have been transported in the same ambulance, but whether respondent should have remained with a patient he had treated until the second ambulance arrived to assume control over the care of that patient. Under the circumstances here, respondent was required to maintain continuity of patient care by doing so.

Finally, there are aspects of respondent's account of the incident that raise questions about its reliability. For example, respondent testified that he carried the second patient off the ice to a bench for treatment (Tr. 224). Yet when the second ambulance arrived, the patient was seated in a wheelchair on the ice (Tr. 197-98, 204; Pet. Exs. 11, 16). There is no explanation as to the circumstances under which the patient might have been moved. It is highly unlikely that if respondent had removed the injured patient from the ice rink and placed him on a bench, someone would then place the patient in a wheelchair and back on the ice rink. As discussed below, respondent admitted that he was under the influence of opiates during the time that he served as an EMT. Respondent could not recall whether he was under the influence of opiates

when he responded to the sports complex on May 27, 2016 (Tr. 240). This makes his account of his actions on that day less reliable.

In sum, petitioner established that respondent left a minor patient to whom he had rendered medical assistance in the care of staff members at the sports complex before a second ambulance arrived to continue to care for that patient. This charge is sustained.

October 17, 2016 – False Flag and PCR

On October 17, 2016, respondent was working as the driver of the ambulance, while his partner, Braun, served as the technician (Tr. 138-39). At about 8:38 p.m. that day, Braun and respondent were assigned to respond to a high priority call regarding a patient having a seizure. Braun was alone in the ambulance when the call came in because respondent was in a restaurant picking up a takeout order of food (Tr. 140-43, 169). When respondent entered the vehicle a minute or two after the call came over the radio, Braun told him about the call. Respondent stated that he did not want to take the call because he wanted to eat his food. Braun told respondent, who she described as "intimidating," that they should take the call because it was nearby and would be a quick call (Tr. 143, 170). However, he ignored her suggestion and, instead of taking the call, respondent drove the ambulance for several blocks then stopped. He then went on the radio and stated that the ambulance had been flagged down by a male patient with an unknown injury (Tr. 145-46).

According to Braun, no such patient had stopped the ambulance to seek assistance and neither she nor respondent rendered aid to anyone when they stopped. The call ended when respondent indicated that the nonexistent patient had refused medical treatment and refused to sign any documentation (Tr. 151). Respondent asked Braun, whose credentials were logged into the electronic device on which the PCRs are created, to write a PCR for the nonexistent patient. However, when she refused, he asked for her credentials and wrote up the PCR himself (Tr. 140-47). Braun assumed that respondent would sign his own name on the PCR, but later learned that he had signed her name without her permission (Tr. 148-49, 151, 165).

The PCR that respondent created identifies the nonexistent patient by name and date of birth, and indicates that the patient said that he fell on a crack in the sidewalk and had abrasions

to his elbows and knees. It further indicates that the patient was examined, but was uncooperative and refused care (Tr. 164-65; Pet. Ex. 15).

After respondent filled out the PCR, he drove the ambulance to the station. During the drive to the station, the ambulance emitted an "on scene" status, which signaled to dispatch that respondent and Braun were on the scene of an incident with a patient. This meant that they could not be assigned to another job (Tr. 148-50). When they arrived back at the station, respondent used the radio to indicate that they were available to receive calls then changed their status to indicate that they were taking a break to use the facilities (Tr. 150-51, 152). Respondent then ate his food (Tr. 152).

Respondent did not dispute petitioner's evidence regarding the allegation that on October 17, 2016, he falsely claimed that his ambulance had been flagged down to avoid having to respond to a call and created a false PCR for the non-existent patient. He maintained that he did not remember the incident because he "wasn't in the right state of mind mentally and physically" due to a "bad addiction to opiates," which he had been using for some time before the incident (Tr. 233). He acknowledged that he could have signaled a false flag and that there was no basis for him to say that Braun lied when she testified about the incident (Tr. 233, 270).

Respondent testified that when he was about 16 or 17, he started using oxycodone after being introduced to the drug by friends (Tr. 234). At that time, he was working as a pharmacy technician and stole the drug from his employer (Tr. 234, 248). Respondent maintained that he only stole from the pharmacy once or twice, taking about four pills (Tr. 249-50). When he was about 17, respondent left his job at the pharmacy to take a job in the construction industry (Tr. 248-50). Respondent started using about half a pill on weekends, but his use increased when he found himself with more free time after his construction job ended and before he started working for the Department (Tr. 249).

Respondent continued to use opiates, which he obtained from drug dealers, until he was 19. By that time, he was using 10 to 15 pills per day and his drug habit cost about $1,400 per week. Respondent testified that he stole money, including from his parents, to support his habit. Although he had hidden his addiction from his parents, he told them about it when he could no longer afford to obtain drugs. Respondent entered a 30-day treatment facility located in upstate New York that his parents found for him, but stayed there for only six hours (Tr. 235-36, 252).

When respondent was between 18 and 19 years old, he took a certification course to become an EMT (Tr. 215-16, 253). He used oxycodone while taking the course (Tr. 253). After respondent was certified as an EMT, he applied for a job with the Department. At that time, he was taking three or four oxycodone pills per day. Although he underwent a physical examination and was asked to complete paperwork regarding his drug use as part of the application process, respondent did not disclose to the Department's medical staff that he was addicted to opiates (Tr. 255-56).

Respondent stopped using oxycodone when the Department offered him a place in its training academy. He knew that he would have to undergo drug screening so he stopped using oxycodone for a week or two before the test because he knew that if he "failed the urine test [he] would not have a job" (Tr. 236-37, 256).

After respondent was admitted to the academy, he resumed using oxycodone, taking four or five pills per day. Respondent was in the academy from July through September or October 2013, when he graduated (Tr. 236-37, 258).

Respondent was assigned to Station 43 in Coney Island after his graduation (Tr. 258). Two or three weeks after respondent started working in the field, he told his parents that he was still using oxycodone. At their urging, he contacted the Department's counseling unit. Respondent was placed on sick leave and was admitted to a 28-day in-patient treatment program. However, he checked himself out two weeks into the program and started using drugs again. Realizing that he could not manage his drug use on his own, respondent, with assistance from the Department, returned to the same treatment program a few weeks after he had checked himself out (Tr. 237-38).

This time, respondent remained at the program for 12 of the 28 days. He testified that he believed he could manage his addiction with the use of an opiate blocker that is administered in monthly injections (Tr. 238). He started seeing a physician who administered the opiate blocker and remained clean for two years (Tr. 239).

Respondent testified that perhaps if he had completed the treatment program, he would have acquired more tools for managing his addiction. He acknowledged that he should have been attending support group meetings and have had people on whom he could call when he was

tempted to use drugs. Because he lacked such support, he started using drugs again about two years after he left the treatment program (Tr. 239-40).

Respondent testified that he was using oxycodone about five or six times per day in October 2016 and that he did not remember whether he had created a false flagdown and PCR (Tr. 240, 270). He argued that his actions were a result of his addiction to oxycodone, his addiction is a disability, and "the charges should be dismissed because it would be discriminatory to terminate [respondent] because of his opioid addition" (Rep. Br. at 3-4).

Respondent relies on principles articulated in *McEniry v. Landry*, 84 N.Y.2d 554, 560 (1994), where the Court of Appeals held that where an employee established that his excessive absences were caused by his addiction to alcohol, that he had completed a program of rehabilitation, and that he had successfully returned to work without relapse, he should not be terminated for pre-rehabilitation alcohol-related absenteeism. Notably, the Court cautioned that its holding was not "intended to create a safe haven for individuals who resort to recovery programs as a pretext for avoiding otherwise legitimate disciplinary action, nor do we imply that in every case where an alcoholic is purportedly rehabilitated all disciplinary action is prohibited. The review is individualized." *Id.* at 560-61. When that individualized review reveals no "direct, causal connection" between an employee's disability and a "deliberate and calculated act" of misconduct, *McEniry* offers no defense to imposition of appropriate discipline, including termination of employment. *Murolo v. Safir*, 246 A.D.2d 653, 655 (2d Dep't 1998), *aff'g, Fire Dep't v. Murolo*, OATH Index No. 560/95 (Feb. 24, 1995).

Under *McEniry*, an employee bears the burden of establishing that he "suffers from a disability and the disability caused the behavior" for which he is being disciplined. *McEniry*, 84 N.Y.2d at 558. Although respondent testified as to his frequent drug use and multiple failed attempts at rehabilitation, he offered no supporting evidence to establish that he is addicted to opiates.

Noting that drug use is not the same as addiction under federal or state law, this tribunal has determined that "to be considered disabled, respondent must demonstrate that his past drug use was beyond his control" or involuntary. *Fire Dep't v. Rivera*, OATH Index No. 3416/09 at 5 (July 30, 2010), *superseding* (July 28, 2010), *adopted*, Comm'r Dec. (Sept. 24, 2010); *Fire Dep't v. Kelly*, OATH Index No. 804/06 at 10-12 (June 9, 2006), *modified on penalty*, Comm'r Dec.

(Jan. 2, 2007), *aff'd sub. nom Kelly v. Scoppetta*, 56 A.D.3d 475 (2d Dep't 2008); *Fire Dep't v. Kirk*, OATH Index No. 441/06 at 7-8 (Apr. 26, 2006), *aff'd sub. nom Kirk v. City of New York*, 47 A.D.3d 406 (1st Dep't 2008).

In *Rivera*, Administrative Law Judge Julio Rodriguez found that an EMT who tested positive for cocaine while on duty failed to establish that he was addicted to cocaine. That EMT testified that he had used the drug on and off for over 20 years, during 14 of which he worked as an EMT; he did so four to five times per week, although never while at work; he used it when he had money to do so; and he would stop using drugs for periods of up to 10 months before relapsing. *Rivera*, OATH 3416/09 at 2. In addition, the EMT submitted two summary information sheets reflecting his admissions to a substance abuse treatment program before he tested positive. Administrative Law Judge Rodriguez found that the evidence established that the EMT's use of cocaine was voluntary, as he "had the capacity to choose when and where to use cocaine" and "to limit his drug use to his budget." *Id.* at 7.

Here, like *Rivera*, the evidence that respondent was addicted to opiates is sparse. Other than respondent's self-serving testimony regarding the extent and nature of his drug use, he offered no evidence to establish that he is addicted to oxycodone. It is curious that respondent testified that he attended multiple in-patient treatment programs, yet, unlike the respondent in *Rivera*, he produced no documentary proof of a diagnosis of addiction or treatment. In addition, respondent was able to stop and start his use of oxycodone in order to evade detection, such as when he wanted to get into the academy. Respondent asks this tribunal to accept his testimony, unsupported by any other evidence, that he is addicted to opiates; however, respondent is simply not credible.

Moreover, even if respondent proved that he is addicted to opiates and therefore suffers from a disability, he failed to establish that there is a causal link between his misconduct and his disability, as required under the *McEniry* standard.

Murolo provides guidance in this regard. In that case, a firefighter admitted that he transmitted a false alarm to his engine company and, while everyone was responding to the alarm, he entered the firehouse, used a bolt cutter to cut locks at the house, and stole money and other items. *Murolo*, OATH 560/95 at 2. The firefighter, who went to counseling after he was arrested for his actions, attributed his conduct to his alcoholism and intoxication at the time of

the incident. *Id.* at 3. Noting that the *McEniry* decision "cannot reasonably be held to mean that [a disability] provides an absolute defense for misconduct involving fraud, deceit, or the commission of illegal acts," Administrative Law Judge Faye Lewis concluded that the firefighter could be penalized for his conduct. *Id.* at 8. The Appellate Division, Second Department "confirmed" the Department's termination of the firefighter's employment, finding that "the protection afforded to disabled employees . . . was not intended to prohibit [employers] from imposing appropriate disciplinary measures, including the penalty of dismissal, against a firefighter who has committed serious and intentional acts of misconduct." *Murolo*, 246 A.D.2d at 655; *see also Dep't of Correction v. Rolando,* OATH Index No. 2417/17 at 12 (Jan. 12, 2018), *adopted*, Comm'r Dec. (Feb. 27, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0221 (July 5, 2018) (respondent's "deliberate and deceitful misconduct," which included drinking alcohol while on duty and making false entries into the agency's logbook, held not to fall within the ambit of *McEniry*).

In the instant case, respondent falsely claimed that his ambulance had been flagged down by a patient in order to avoid having to respond to a call about a patient having a seizure. He did so because he wanted to eat a meal that he had purchased just before the call came in. In furtherance of his lie, respondent created a detailed, false patient care report and forged his partner's signature. Respondent offered no evidence to establish a causal link between his drug use and these intentional acts of misconduct, other than generalized testimony that he used drugs while he was an EMT. The evidence establishes that it was respondent's desire to eat a meal rather than respond to a high priority call about a patient having a seizure that caused him to engage in such elaborate deception. There is no contention that respondent was under the influence of opiates when he did so. Nor was his state of mind so addled by opiates that he was incapable of making the calculated, self-interested decision to ignore a patient call so he could eat his meal and fabricate evidence to cover it up.

Accordingly, petitioner's undisputed evidence establishes that respondent engaged in the charged misconduct.

August 21, 2017 – Failure to Take Drug Test

Dr. Ortiz was Deputy Chief Medical Officer in the Department's Bureau of Health Services ("BHS") during the relevant period. She testified that BHS is responsible for the health and safety of the Department's employees and conducts annual physical exams to ensure that they are fit for duty (Tr. 121-22).

On August 21, 2017, Dr. Ortiz met with respondent, who had to be evaluated for his fitness to return to duty. Dr. Ortiz informed respondent that he had to undergo drug screening that day as part of the evaluation and directed him to report to the location where the screening was to be conducted (Tr. 123-25).

Rothmund, an investigator in the Department's Bureau of Investigations and Trials ("BITS"), testified that he was assigned to conduct a urine test on respondent on August 21, 2017 (Tr. 186). He prepared the equipment and paperwork necessary to conduct the test and went to get respondent, who he had been told was already present at BITS. However, he could not locate respondent in the BITS offices. Respondent subsequently telephoned the BITS office, and the call was transferred to Rothmund (Tr. 107-08). During their telephone call, which was recorded, respondent stated that he left BITS before undergoing the test because he had a family emergency. Rothmund directed respondent to report to BITS the next day and to bring documentation of his family emergency (Tr. 187-89; Pet. Ex. 5). However, respondent did not report to BITS the following day and did not submit documentation to establish his claimed family emergency (Tr. 189, 192).

Respondent testified that in August 2017, when he was directed to go to BITS for a urinalysis, he was using oxycodone several times per day. Realizing that if he underwent the drug screening the result would be positive, which would jeopardize his job, respondent called a friend at the Department, who told him to leave and contact the Department's counseling unit. Respondent left before getting tested and went into a drug treatment program the following day, on August 22, 2017. However, he did not complete the treatment program (Tr. 240-41, 270-71).

Respondent made a deliberate attempt to avoid the test, which he knew would be positive for opiates and expose him to discipline. In sum, petitioner established that on August 21, 2017, respondent failed to cooperate with a drug test when ordered to do so, left the testing site without authorization, and failed to submit documentation regarding his departure when ordered to do so.

October 17, 2017 – Positive Drug Test

It is undisputed that respondent underwent a urine drug screen on October 17, 2017, which was positive for oxycodone at a level of 58,730 nanograms per milliliter and oxymorphone at a level of 63,006 nanograms per milliliter, well above the federally mandated cutoff of 100 nanograms per milliliter for each substance (Tr. 128, 132-33; Pet. Ex. 12; Resp. Br. at 3). Dr. Ortiz determined that respondent did not have a prescription for the medications by checking a New York State prescribers' database that physicians can access to determine whether a patient has a prescription for a controlled substance and whether that prescription was filled within a certain period (Tr. 128-29).

Respondent testified that after he left the treatment program that he had entered in August 2017, he continued to use drugs (Tr. 241). From September to October 2017, he was assigned to the Department's counseling unit, which required that he attend counseling sessions and group meetings with other Department employees who were experiencing issues with addiction (Tr. 242). Respondent testified that while in the counseling unit, he was "buying himself more time," because he continued to use drugs, but was not working in the field and was not being tested (Tr. 242). In October 2017, suspecting that respondent was still using drugs, the counseling unit staff took him to an outside testing facility for a drug screening test (Tr. 242-43). On October 16, 2017, when the results came back positive for the presence of drugs, counselors told respondent he could not remain in the unit and would have to go to an in-patient treatment program or be referred to headquarters to return to work (Tr. 242-44).

Respondent opted to return to work and on October 17, 2017, Dr. Ortiz referred him for drug screening as part of the evaluation for fitness to return to duty (Tr. 244). Respondent told Dr. Ortiz that he was abusing drugs and had unsuccessfully sought treatment several times, that he did not want to lose his job, and that he wanted to get better (Tr., 244). According to respondent, Dr. Ortiz contacted the head of the counseling unit to arrange for him to be admitted into another treatment program. Because respondent had been ordered to go to BITS to take the drug screening test that same day, respondent underwent the test, which was positive (Tr. 244-45).

Respondent entered the drug treatment program on October 18, 2017, and stayed there for 28 days. He maintains that since leaving the program, he has not used oxycodone or any other opiate. Respondent testified that he attends support group meetings three times per week, tries to go to a weekly meeting at the counseling unit, and has received a monthly dose of an opiate blocker since November 2017 (Tr. 246-47).

The undisputed evidence establishes that a workplace drug screening test administered to respondent on October 17, 2017, was positive for oxycodone and oxymorphone at levels that exceeded the federally mandated cutoff levels.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the evidence that on May 27, 2016, respondent left a minor patient in the care of non-Department personnel before a second ambulance summoned to the scene arrived, as charged in Case # 116/17D.

2. Petitioner established by a preponderance of the evidence that on October 17, 2016, respondent falsely reported that his ambulance had been flagged down by a patient, created a patient care report for the non-existent patient, and forged his partner's signature on the patient care report, as charged in Case # 81/18D.

3. Petitioner established by a preponderance of the evidence that on August 21, 2017, after he was ordered to report for substance use testing, respondent left the testing location without authorization before undergoing the test and failed to submit documentation regarding his departure from the testing location when ordered to do so, as charged in Case # 116/17D.

4. Petitioner established by a preponderance of the evidence that a workplace drug screening test administered to respondent on October 17, 2017, was positive for the presence of oxycodone in the amount of 58,730 nanograms per milliliter and oxymorphone in the amount of 63,006 nanograms per milliliter, as charged in Case # 191/17D.

RECOMMENDATION

Having made these findings, I requested and reviewed respondent's personnel record. Respondent was appointed as an EMT in June 2013 and has no formal discipline. His performance evaluations for 2014 and 2016, the only years that were provided by the Department, reflect an overall rating of "good" for 2014 and "conditional" for 2016. In the 2014

evaluation, the justification for the overall rating was that although respondent had a strong grasp of prehospital care, he had been placed on a driving restriction because of poor operation of Department vehicles and needed to improve his attendance. The justification given for the overall rating of "conditional" for the 2016 evaluation was respondent's poor attendance, poor performance in several tasks, and poor adherence to time-keeping procedures. The Department seeks termination of respondent's employment.

In contrast, respondent requests that charges be dismissed or that a penalty short of termination be imposed because his misconduct was a result of his drug addiction (Tr. 278-79; Resp. Br. at 2-3). Respondent testified that for two out of the five years that he worked out in the field as an EMT, he was abusing oxycodone (Tr. 260). He maintains that he "never intentionally set out to hurt anybody or not perform the duties that [he] was supposed to be performing" and that he "had a sickness" (Tr. 247). Respondent contends that his "history of addiction renders him disabled under city, state, and federal law" and that discrimination based on one's disability is unlawful (Resp. Br. at 3-4). According to respondent, because he has successfully completed rehabilitation, is taking opiate blockers, and regularly attends support group meetings, it would be discriminatory to terminate him from employment for conduct he engaged in because of his addiction (Resp. Br. at 4). However, for reasons discussed above, respondent is mistaken.

A penalty of termination is appropriate. Respondent engaged in serious misconduct when he falsely claimed that his ambulance had been flagged down to avoid having to respond to a call about a patient having a seizure. He also created a fraudulent PCR that identifies the patient by name, date of birth, and weight; indicates that the patient was examined at the scene; and includes a narrative section with details about a physical examination that never occurred (Tr. 165, Pet Ex. 15). That respondent went to such great lengths as to falsify Department records to avoid performing his duties and to conceal his misconduct is intolerable. EMTs are on the frontlines of providing emergency medical care and the Department must be able to trust that they accurately record their treatment of patients while in the field. Recognizing that medical care providers' failure to honestly and diligently perform their duties can have dire consequences for the patients who are entrusted to their care, this tribunal has recommended termination for such misconduct. *See Fire Dep't v. Taylor,* OATH Index Nos. 621/05, 622/05 at 17 (Jan. 21, 2005), *modified on penalty*, Comm'r Decisions (Mar. 22, 2005), *aff'd*, NYC Civ. Serv. Comm'n

Item No. CD06-68-SA (July 10, 2006) (termination of employment of EMTs who failed to complete an ambulance call report, failed to carry the patient to the ambulance at her request, and falsified patient's refusal to be carried to the ambulance); *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Yao,* OATH Index No. 473/11 (Dec. 29, 2010) (termination recommended for dietician with an unblemished disciplinary record for falsifying a patient's record, which could jeopardize patient welfare). Respondent's failure to stay with the minor patient, although a less serious form of misconduct than lying and falsifying documents to avoid having to respond to an urgent call for medical assistance, is further indication that respondent does not appreciate the gravity of the responsibilities that are entrusted to him as an EMT.

Respondent's failure to undergo drug testing when ordered to do so and testing positive for oxycodone and oxymorphone in a workplace drug test are independent bases for termination of his employment. *See Dep't of Environmental Protection v. Usry,* OATH Index No. 2569/18 at 8 (July 25, 2018) ("refusal to submit to an alcohol/drug test is a serious form of misconduct which often results in termination of employment, as it is considered to warrant the same penalty accorded to one who tests positive"); *Fire Dep't v. Rolling,* OATH Index No. 1615/11 (Sept. 23, 2011), *adopted*, Comm'r Dec. (Oct. 31, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-26-A (May 22, 2012) (EMT terminated after testing positive for marijuana in a workplace drug test); *Fire Dep't v. Rivera*, OATH Index No. 3416/09 at 10 (July 30, 2010), *superseding* (July 28, 2010), *adopted*, Comm'r Dec. (Sept. 24, 2010) (EMT terminated where he tested positive for cocaine); *Fire Dep't v. Brown,* OATH Index No. 659/07 at 12 (May 24, 2007) (termination of employment recommended for fire fighter who refused to submit to drug test when ordered to do so); *Fire Dep't v. Milano*, OATH Index No. 2029/05 at 5 (July 3, 2006) (firefighter terminated where he tested positive for cocaine); *Fire Dep't v. Persico,* OATH Index No. 2207/04 at 4 (July 25, 2005) (EMT who tested positive for a controlled substance terminated despite absence of any significant disciplinary record); *Fire Dep't v. O'Sullivan*, OATH Index No. 1914/05 at 12 (Sept. 29, 2005) (firefighter terminated where he tested positive for cocaine).

Respondent noted that a positive drug test has resulted in a penalty short of termination, citing *Sicignano v. Cassano,* 43 Misc. 3d 1220(A), 2014 NY Slip Op 50730(U) (Sup. Ct. Kings Co. 2014) (Tr. 277-78). However, *Sicignano* involved a penalty of termination and its facts are markedly different from those here. In *Sicignano*, this tribunal recommended termination of

employment for a firefighter who tested positive for cocaine use, but also recommended that the firefighter be permitted to seek a disability retirement. That firefighter, who had been returned to full duty after his positive drug test and was then injured in the line of duty, established that he suffered from severe PTSD as a result of responding to the September 11, 2001 attack, which caused him to abuse alcohol and cocaine. He also had no prior discipline over a lengthy tenure. On appeal of the Commissioner's termination of respondent's employment, the Court held that a loss of pension benefits under the "unique and extenuating circumstances of the proceeding" would shock the conscience and annulled the Commissioner's decision. *Id*. at 2014 NY Slip Op 50730(U) at 8. Here, respondent presented no compelling, unique, or extenuating circumstances that would merit a recommendation other than termination of his employment. The other cases referenced by respondent appear to involve misconduct other than a positive drug test. *Vecchio v. Kelly*, 94 A.D.3d 545 (1st Dep't 2012) (taking and possessing photographs of an arrestee and a rape victim); *Sequist v. County of Putnam*, 40 A.D.3d 1003 (2nd Dep't 2007) (unidentified misconduct).

Respondent acknowledged that he "screwed up multiple times when it came to [his] addiction," but maintained that he turned his life around after he completed a treatment program in October 2017 (Tr. 262-64). He insisted that he loves his job and does not want to lose it, and asked for a second chance to prove himself capable of doing it (Tr. 247). However, it is difficult to reconcile respondent's professed love for his job with the serious misconduct established here, particularly his failure to respond to the call involving a person having a seizure and his falsification of a Department record. Moreover, respondent testified that he performed those duties under the influence of controlled substances with a seeming lack of regard for the multiple lives that he placed at risk by doing so. Lastly, respondent's evaluations reveal that he was, at best, a mediocre employee.

Accordingly, I recommend that respondent's employment be terminated.

Astrid B. Gloade
Administrative Law Judge

April 16, 2019

SUBMITTED TO:

DANIEL A. NIGRO
Commissioner

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