

Dep't of Environmental Protection v. Brennan

OATH Index No. 1451/19 (Sept. 12, 2019)

Petitioner alleged that Respondent, a sewage treatment worker, did not complete required checks at the treatment plant and that he neglected his duties by sleeping in his car. ALJ found that Petitioner did not establish that Respondent engaged in the charged misconduct and recommended dismissal of the charges.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
SHAWN BRENNAN
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

Petitioner brought this disciplinary proceeding under section 75 of the Civil Service Law, charging Respondent, a sewage treatment worker, with neglecting his duties and failing to be physically competent to perform the duties of his job in violation of Sections E12 and E29 of the Department's Uniform Code of Discipline (ALJ Ex. 1). Respondent denied committing misconduct.

At a one-day trial, conducted on June 13, 2019, petitioner relied on documentary evidence and testimony from K. Cataldo, manager of the Port Richmond and North River treatment plants, and C. Cotroneo, senior sewage treatment worker and Respondent's supervisor. Respondent testified on his own behalf.

For the reasons set forth below, the Department did not establish that Respondent committed the alleged misconduct and charges should be dismissed.

BACKGROUND

Respondent has been employed as a sewage treatment worker (“STW”) since 2011. He is currently assigned to the Port Richmond Treatment Plant in Staten Island, New York. His responsibilities include taking water samples for federal testing, taking readings from water samples, maintaining and repairing equipment. On May 7, 2018, Respondent was working the 11:00 p.m. to 7:00 a.m. shift (“overnight shift”) and the Department alleges that Respondent falsely reported that he performed the required 2:00 a.m. checks on his screen station log sheet. The Department also alleges that Respondent neglected his duties by sleeping in his car during his shift.

STWs are required to conduct station round checks in designated areas of the plant. These rounds include checks of the bar screens and the primary tanks which must be performed at 12:00 a.m., 2:00 a.m., and 6:00 a.m. during overnight shifts to make sure that the equipment is working properly. Mr. Cataldo described bar screens as hair combs or rakes that catch any large debris to keep it from damaging the equipment inside the plant. He emphasized the importance of making sure that the screens operate properly. He explained that if the screens become clogged with debris it could cause flooding. Three checks are necessary because plants are “dynamic” and conditions can change between the checks. STWs use log sheets to record that the checks have been performed. During the overnight shift, the workers are allotted a paid 20-minute lunch break. According to Mr. Cataldo, this break is not recorded on their timesheets because the workers are “on the clock.” There is a lunchroom in the main building at the plant. STWs are not required to report to the main building during the break but they are not permitted to leave the plant property (Tr. 21, 38, 39).

Mr. Cataldo performs off-hour inspections of overnight or “skeleton” crews.¹ He testified that he performs these inspections to insure that the workers are doing their jobs and “to keep the workers honest” (Tr. 12-13, 72). He said that he received reports that Respondent slept in his car while he was on the “on the job” at the Port Richmond plant. He emphasized that since workers do not “clock out” and remain on the clock while on break they cannot sleep during the meal breaks. Mr. Cataldo believed that this prohibition was in their contract. He also testified that he has issued disciplinary memos to STWs who were sleeping or resting in their cars.

¹ In addition to the STWs, the day shift includes first and second line supervisors, plant chiefs, electricians, machinists, and instrument technologists (Tr. 79-80).

Petitioner did not produce these documents at trial (Tr. 68, 72).

On May 7, 2018, Mr. Cataldo and Plant Chief B. Schroeder, performed an off-hour inspection. At 3:00 a.m. they walked through the plant premises to the storage tanks and saw a car parked with the engine running. When they approached the car, they observed Respondent with his eyes closed in the reclined driver's seat. Mr. Cataldo took a photo of Respondent then tapped on the window and Respondent looked at them (Pet. Ex. 2). Mr. Cataldo and Mr. Schroeder then continued with their inspection of the plant. Neither Mr. Cataldo nor Mr. Schroeder spoke to Respondent about this encounter and they did not ask Respondent if he had completed his 2:00 a.m. rounds. Neither Mr. Cataldo nor Mr. Schroeder informed Mr. Cotroneo of this incident; however, Mr. Cataldo asserted that Mr. Cotroneo should have spoken to Respondent about sleeping in his car. Mr. Cataldo also opined that Respondent should not have parked in that area of the plant and that Respondent should not have driven his car on plant premises. He cited a borough directive that prohibited use of personal vehicles for City business, although, it was not established that driving one's vehicle during a meal break was City business (Pet. Ex. 6; Tr. 49-50).

At 3:30 a.m., Mr. Cataldo and Mr. Schroeder proceeded to the engineer's desk where STW log sheets are kept and reviewed Respondent's log sheet. They noted that the boxes indicating whether the 2:00 a.m. bar screen and primary tank checks were performed were not checked. Mr. Schroeder circled the blank boxes and wrote his name near each of the boxes in red ink. Mr. Schroeder also indicated in red ink, that Respondent had not filled in his name for the shift on the log sheet (Pet. Ex. 3). When they received the final log sheet at 7:00 a.m., the boxes for the 2:00 a.m. check were filled in (Pet. Ex. 4; Tr. 34-35). They did not ask Respondent if he performed his 2:00 a.m. rounds concluding that if the boxes on his log sheet were not checked earlier, his rounds were not conducted and that the later entries were false.

Mr. Cataldo acknowledged that some STWs leave the log sheets on the engineers table and check off the boxes later, opting not to take the log sheets with them on their rounds. However, he opined that completing the log sheet more than an hour after the check is "way too long" and that the boxes should be checked off within 30 minutes of the rounds (Tr. 41-42). Mr. Cataldo acknowledged that this 30-minute limit was not communicated to workers, "but they know" because log sheets are supposed to be current. However, he opined that it would be reasonable for the log sheet to be updated by 3:00 a.m. (Tr. 69).

Mr. Cotroneo testified that STWs do not usually take log sheets and clipboards with them on their rounds because some areas of the plant are “wet and dirty with sludge.” He elaborated that he preferred that the workers leave the log sheets on the desk because the water that they test has “bacteria and microorganisms” and if the sheets get wet and “[he] gets [his] hands wet, then [he] gets sick” (Tr. 93, 100). Many workers, instead, document their readings on a piece of paper that they carry or they will try to remember the readings and mark the log sheets later (Tr. 92). Mr. Cotroneo was not aware of any requirement that boxes on the log sheet have to be filled out within a certain amount of time after the reading. He stated that “as long as at the end of the shift everything is checked, everything is done; the paperwork is done, that’s it.” Mr. Cotroneo typically collects all of the log sheets an hour before the end of the shift so he would not know if a worker completed his round until the end of the shift. However, he checks in with workers when he sees them and asks about the status of their rounds. Mr. Cotroneo was working the overnight shift on May 7, but he was not able to confirm whether Respondent conducted the 2:00 a.m. checks because Mr. Cataldo and Mr. Schroeder took the log sheet (Tr. 95, 101).

Mr. Cotroneo provided detail about the overnight rounds relating that the 2:00 a.m. check was a visual or blanket check and did not require any samples or readings. He also said that Respondent had to take samples at 1:30 a.m. for submission to a federal agency (“federal sample”) and other times during the overnight shift. In order for Respondent to take the federal samples to the lab, he must walk by the screens for the 2:00 a.m. rounds. Mr. Cotroneo stated emphatically “I know [Respondent] saw the screens because he has to look at it to take the sample” (Tr. 103). He further asserted that “in performing that duty, [Respondent] would have had to check the primary tanks. He has to pass them; he has to pull debris from all the primary tanks. So he’s checking every tank as he’s looking at it” (Tr. 105).

Mr. Cotroneo asserted that unchecked boxes do not necessarily denote that Respondent did not complete his rounds. He stressed that he asks workers if they have done their rounds and they confirm to him that their rounds are completed before they complete the log sheets (Tr. 105). He said that he also knew that Respondent did his rounds on May 7 because Respondent’s clipboard was wet and the sample bottle used to take the federal samples was also wet. He also confirmed that Respondent conducted the 1:30 a.m. federal sample and completed the federal log sheet (Tr. 103, 107). Mr. Cotroneo said that he was aware that Mr. Cataldo and Mr. Schroeder were at the plant on May 7. However neither of them spoke to him to ask about the procedure

for checking samples or whether Respondent completed his rounds (Tr. 69, 99-100).

Mr. Cotroneo said that the workers usually take their break in the middle of the shift at 3:00 a.m. and they usually get together and have coffee. On May 7, Respondent told Mr. Cotroneo that he was going to his car to eat instead of joining the others for coffee during their break (Tr. 92). Mr. Cotroneo told him that was okay as long as Respondent had his radio with him because it is mandatory that all STWs keep their radios with them. According to Mr. Cotroneo, Respondent has taken breaks in his car before and has always been back in time to resume his duties (Tr. 98). Mr. Cotroneo further testified that the only restrictions concerning breaks were that the workers have to stay on plant property during their breaks and have to have their radios with them. He was also not aware of any rule prohibiting workers from taking their breaks in their cars (Tr. 99).

Respondent confirmed that on May 7, he took his break at 3:00 a.m. He told Mr. Cotroneo that he was going to be in his car during the break. He said that he preferred not to have a heavy meal in the “middle of the night” so he usually keeps light snacks in his car for the meal break. Respondent testified that there is no standard protocol for breaks during the overnight shift and that “everybody kind of does their own thing.” He noted that sometimes workers go outside to the picnic tables or the smokers might go to the smoking areas. This has been the accepted practice as long as the workers have their radios with them and can be reached if necessary. Respondent said that he takes his meal break in his car once a week and that Mr. Cotroneo was aware of this (Tr. 113- 16, 130).

On May 7, Respondent went to the lab at 2:55 a.m. to wash his hands and then went out to his car. He drove to an area behind the new storage tanks because it was quiet and it did not smell as bad as other areas of the plant. He testified that at 3:10 a.m. Mr. Cataldo and Mr. Schroeder knocked on his car window and asked if he was okay. They did not say anything else to him (Tr. 113-15). Respondent was never advised that employees were prohibited from taking breaks in their cars (Tr. 116). Respondent was not asked during direct or cross examination whether he was sleeping in his car.

Respondent explained that at the beginning of the shift, STWs tend to carry clipboards because they take readings from equipment gauges and must record those numbers. STWs wear latex gloves during their rounds but as the shift progresses the plant “gets wet, dirty and greasy” so the workers might keep a piece of paper in their pockets to record the readings instead of

taking the clipboards and log sheets. He added that workers do not usually carry their clipboards if they are performing visual checks of equipment. For the 2:00 a.m. checks, “there’s only two little boxes to check, so you wait until the end of the shift” to check the boxes. Respondent stated that management “gets mad” if the log sheets get wet or dirty because other workers have to touch or refer to the sheets. Under those conditions, the supervisors would prefer that the workers not carry their log sheets (Tr. 118).

Respondent explained that the bar screen check is a visual check and is performed in the area where he takes the federal sample. In order to take the federal sample, Respondent lowered a bottle by rope 50 feet into a tank of untreated water. He testified that the untreated water is “greasy and very dirty.” After retrieving the sample, Respondent was required to take it to the lab where he dries off the bottle, removes his gloves and completes information on the federal log sheet. He emphasized that the sample is taken from the bar screen area and is required to be taken at 1:30 a.m. (Tr. 120). He testified that he performed his check of bar screens when he took the federal sample but he admitted that he did not fill out the 2:00 a.m. box.

The check of the primary tanks is also a visual check. Although he did not check the required boxes on the log sheet, Respondent maintained that he completed that check during his 2:00 a.m. rounds. He explained that the primary tanks are located on the way to the laboratory and that he had to walk by the tanks to get to the lab. He testified that “there’s nothing else to look at” so he checked “as [he was] walking by” (Tr. 121). Respondent said that there was no particular reason that he did not check the 2:00 a.m. boxes. He said he believed that he had to check the boxes by the end of the shift (Tr. 117, 118, 135).

Respondent also noted that the log sheet instructs that “stated times are guidelines. Complete tasks as close to times as possible” (Pet. Ex. 3). He testified that a worker could conduct the 2:00 a.m. checks at the appointed time and then check the box later because checking the box was not the task referenced in the guideline. He maintained that his tasks were completed at 2:00 a.m. (Tr. 125). Respondent contended that if the box is not checked, it only means that he did not check the box and maintained that Mr. Cataldo and Mr. Schroeder did not ask him if he had completed the 2:00 a.m. checks (Tr. 122, 137).

ANALYSIS

In this disciplinary proceeding, Petitioner “has the burden of proving its case by a fair preponderance of the credible evidence . . .” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 08-33-SA (May 30, 2008) (citation omitted). Preponderance has been defined as “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.” Prince, Richardson on Evidence § 3-206 (Lexis 2008); *see also Dep’t of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 11-47-A (July 12, 2011).

Failing to Conduct Station Round Checks

Petitioner alleged that Respondent neglected his duties by failing to perform his 2:00 a.m. station rounds. At trial, Petitioner relied on circumstantial evidence in the form of Respondent’s incomplete log sheet observed by Mr. Cataldo at approximately 3:10 a.m. to establish this charge. Circumstantial evidence is defined as “direct evidence of a collateral fact, that is, of a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred.” Prince, Richardson on Evidence § 4-301; *see also People v. Vitalis*, 67 A.D.2d 498, 503 (2d Dep’t 1979); *Dep’t of Sanitation v. Ivy*, OATH Index No. 2376/00 at 17 (May 3, 2001), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 02-07-SA (Mar. 22, 2002) (quoting *Dep’t of Transportation v. Mascia*, OATH Index No. 403/85 at 7 (May 30, 1986)). Such an inference must be based on and reasonably taken from proven collateral facts. *See Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Huggins*, OATH Index Nos. 587/14 & 1545/14 at 7 (June 23, 2014) (quoting *Ivy*, OATH 2376/00 at 18). Circumstantial evidence, if reliable and credible, may be sufficient to establish misconduct. *See Ivy*, OATH 2376/00 at 17; *Dep’t of Sanitation v. Guastafeste*, OATH Index No. 658/00 at 16-17 (May 1, 2000), *aff’d*, 282 A.D.2d 398 (1st Dep’t 2001).

In a circumstantial case, petitioner need not disprove all other possible explanations, but must “show that the inference drawn is the only one that is fair and reasonable.” *Guastafeste*, OATH 658/00 at 17 (quoting *Mascia*, OATH 403/85 at 12). But “[i]f the probabilities are evenly balanced, no inference as to the fact in dispute may be drawn,” as it would be speculative. *See Dep’t of Education v. Fleischmann*, OATH Index No. 1528/05 at 10 (July 26, 2006); *see also*

Ivy, OATH 2376/00 at 18; *Police Dep't v. Leonick*, OATH Index No. 1342/90 (Oct. 2, 1990) (charge that police officer stole money from a colleague not sustained where it was equally probable that his colleague lost or misplaced the money).

This circumstantial evidence that Respondent did not perform his 2:00 a.m. checks was rebutted by the testimony of Respondent and Mr. Cotroneo. Respondent testified emphatically that he conducted the 2:00 a.m. checks but he did not immediately check the boxes on the log sheet after doing so. He credibly explained that it was a common practice for STWs to conduct the visual checks at the designated times and to fill out the log sheet at the end of their shifts. The practice was corroborated by Mr. Cotroneo, Petitioner's witness. In this instance, the unchecked boxes were not proof that Respondent did not complete the 2:00 a.m. checks, but are rather consistent with Respondent's testimony that he intended to complete the log sheets later in his shift. Mr. Cotroneo testified that he believed Respondent performed the 2:00 a.m. checks. Although Mr. Cotroneo's conclusion was based on circumstantial evidence, i.e., that he observed that both Respondent's clipboard and the bottle for the 2:00 a.m. federal sample were wet, this evidence was more reliable and credible than the mere fact that boxes were left unchecked.

Petitioner asserted that Respondent committed misconduct by failing to complete his log sheet within a "reasonable" amount of time after he conducted the required rounds. There was no proof offered of any rule to this effect. Furthermore, Respondent's credible and corroborated testimony established a defense of condonation and waiver by demonstrating that his behavior was a regular practice known to and accepted by his supervisor. *See Dep't of Correction v. Heredia*, OATH Index No. 1070/91 at 12 (Aug. 23, 1991). The principle underlying condonation and waiver is that an agency may not lead an employee into believing that his/her conduct will not be considered in violation of a rule and then reverse its policy and seek to have the employee disciplined. *See Fahey v. Kennedy*, 230 A.D. 156, 159 (3d Dep't 1930); *Dep't of Environmental Protection v. Critchlow*, OATH Index No. 709/07 at 12 (Mar. 5, 2007); *Dep't of Environmental Protection v. Taylor*, OATH Index No. 925/04 at 14 (June 22, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-04-SA (Jan. 9, 2006); *Law Dep't v. Coachman*, OATH Index No. 1370/00 at 8 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-13-SA (Apr. 11, 2001); *Dep't of Parks and Recreation v. Wilson*, OATH Index No. 398/91 at 3-4 (May 3, 1991).

Here, both Respondent and his supervisor, Mr. Cotroneo, testified that it was a common and accepted (and even preferred) practice for STWs to complete the log sheets entries for station rounds at the end of their shifts. The reasonable explanation for this practice was to minimize the workers' exposure to untreated water and sludge that might get on the logs if they were taken on their respective rounds.

Petitioner failed to produce sufficient evidence to support a finding that Respondent did not perform the required 2:00 a.m. station round checks. This charge should be dismissed.

Sleeping During Authorized Break

In charge 2, Petitioner alleges that Respondent was not in a physical condition to be competent to be able to perform his assigned duties because he was sleeping in his car during his 20-minute meal break. Petitioner did not produce any evidence to establish that Respondent was not competent to perform his job because he allegedly slept or rested for any portion of his break. In fact, Mr. Cataldo testified that after a knock on the car window, Respondent immediately acknowledged his presence. Mr. Cataldo did not indicate that he had any trouble rousing Respondent or that Respondent seemed groggy or disoriented during their brief encounter. There was thus no testimony that Respondent was not able to perform his duties when he returned from his break.

This tribunal has found misconduct in instances where employees were found to be sleeping when they were not on a break and were required to be working. See *Dep't of Health & Mental Hygiene v. Elder*, OATH Index No. 628/19 (Mar. 13, 2019) (charges sustained where special officer was seen twice at a perimeter security post with his eyes closed, apparently sleep); *Dep't of Environmental Protection v. Usury*, OATH Index No. 2569/18 (July 25, 2018) (DEP employee found to have neglected his duties when he was found sleeping on multiple occasions and playing cards while on the job); *Health & Hospitals Corp. (Harlem Hosp. Ctr.) v. Henry*, OATH Index No. 2196/13 (Dec. 9, 2013) (suspension recommended for special officer who was either sleeping on post or in a position that would be perceived as sleeping); *Dep't of Sanitation v. Parks*, OATH Index No. 178/05 (Mar. 9, 2005) (suspension recommended for sanitation worker found sleeping on duty and absent from his assigned work location); *Dep't of Homeless Services v. McDuffie*, OATH Index No. 416/03 (Apr. 14, 2003) (charges sustained against assistant superintendent of family shelter who fell asleep while in charge of the facility during

his shift). This is not the case here.

Petitioner's witness acknowledged that Respondent was on a meal break but testified that sleeping was not allowed while Respondent was "on the clock." He elaborated that since STWs do not "clock out" they are on the clock and certain activities such as sleeping or resting can be prohibited. However, it must be noted that having a paid meal break is not the same as being on the clock where a worker would be required to perform the duties of his job. In fact, meal breaks require that workers be completely relieved from work duties during their meal break. New York State Dep't of Labor, Meals and Rest Periods FAQ, <https://www.labor.ny.gov/legal/counsel/pdf/meal-and-rest-periods-frequently-asked-questions.pdf> (last visited Sept. 11, 2019).

It was not disputed that STWs are not required to perform work during their meal breaks even though they are paid during this break time. Credible testimony established that STWs were only required to keep their radios with them and stay on the plant premises during the meal break. Petitioner has produced no evidence to establish that resting or even dozing off briefly during the meal break is prohibited or rendered Respondent incompetent to perform his job. This charge should also be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner did not establish that Respondent neglected his duties by failing to conduct the required 2:00 a.m. station round checks.
2. Petitioner did not establish that Respondent was not in a physical condition to be medically qualified and competent to be able to perform and not to neglect his assigned duties because he slept in his car during his 20-minute meal break.

These findings of fact are final pursuant to section 1046(e) of the New York City Charter. Charter § 1046(e).

RECOMMENDATION

I recommend that the charges against Respondent be dismissed.

Joycelyn McGeachy-Kuls
Administrative Law Judge

September 12, 2019

SUBMITTED TO:

VINCENT SAPIENZA, P.E.
Commissioner

APPEARANCES:

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