Dep't of Sanitation v. J.S.

OATH Index No. 1530/19 (July 15, 2019)

Petitioner established that sanitation worker violated its substance abuse policy with the use of prohibited drugs. Termination of employment recommended. But because the records support that respondent's problems were spawned from a line of duty injury, ALJ suggests that as an alternative to termination, the Department should consider placing respondent on a leave of absence pursuant to Section 72 of the Civil Service Law, for him to be fully rehabilitated.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
J. S.[1]
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

The Department of Sanitation ("Department" or "petitioner") brought this proceeding under section 16-106 of the Administrative Code and charged respondent sanitation worker J.S. with possessing and being under the influence of drugs or alcohol while on duty, with failing to become familiar with the Department's policy on substance abuse, and with being absent without leave ("AWOL"), in violation of Department rules (ALJ Ex. 1).

At a trial before me on June 11, 2019, petitioner presented the testimony of respondent's supervisor, Raymond Maglione III, and the Department's deputy medical director, Dr. Pascale Kerlegrand, as well as documentary evidence. Respondent, who was represented by counsel, did not testify and presented no evidence to refute the charges.

[1] Respondent's job requires him to have a commercial driver's license (Tr. 88). Accordingly, even though he did not request it, in an exercise of caution, his name is being withheld from publication in accordance with title 49, sections 40.323(b) and 382.405 of the Code of Federal Regulations. 49 C.F.R. §§ 40.323, 382.405 (Lexis 2019).

For the following reasons, I find that petitioner proved that respondent violated its substance abuse policy. Petitioner put forth no evidence regarding its AWOL charge which should be dismissed. For violation of petitioner's substance abuse policy, I recommend that respondent be terminated from his employment. However, respondent's problems appeared to have started following a line of duty injury during the period 2015 to 2016. Therefore, as an alternative to termination, petitioner should consider placing him on a leave of absence pursuant to Section 72 of the Civil Service Law, for him to be fully rehabilitated.

ANALYSIS

The Department charged respondent with violating rules 2.1, 2.4 and 2.6 of its Code of Conduct. Rule 2.1 prohibits employees from being under the influence of "alcohol, drugs, intoxicants, or controlled substances while at work or on Department premises or property." Rule 2.4 prohibits employees from "using, possessing . . . controlled substances on or to any Department property . . . ." Under rule 2.6, employees shall become familiar with the Department's policy and procedure on substance abuse. General Order No. 2015-03 (January 12, 2015).

Raymond Maglione III started working for the Department as a sanitation worker in 2004, and was promoted to supervisor in 2008. Since then, he has been respondent's supervisor (Tr. 11-12). On November 4, 2018, Mr. Maglione was working the 3:00 a.m. to 11:00 a.m. shift, a special detail, as it was Marathon Sunday in New York City and he was scheduled to supervise six sanitation workers in blocking streets with their trucks to facilitate the runners. When he arrived at work and went to sign in on the blotter, Mr. Maglione noticed that respondent, who was working security detail from midnight to 8:00 a.m., had signed the blotter at midnight, 1:00 a.m. and 2:00 a.m., but not at 3:00 a.m. He testified that sanitation workers who are assigned to security detail must sign the blotter every hour to certify that they had made hourly rounds. Mr. Maglione prepared his paperwork and as he and his drivers were ready to leave, a sanitation worker informed him that respondent was upstairs and unconscious. He immediately notified headquarters and called 911. He testified that emergency personnel from the Fire Department ("FDNY") and the Police Department ("NYPD") responded at or around 3:30 a.m. (Tr. 13-16).

Mr. Maglione followed the response team upstairs and saw the FDNY personnel attempt to rouse respondent. After getting no reaction, they sprayed something in his nostril and his

condition began to change. Simultaneously, they called his name repeatedly, but got no reaction. Emergency medical technicians ("EMTs") from NYU Langone/Lutheran Medical Center arrived and hooked respondent up to an IV into which they administered two injections. Respondent's color returned to normal and he appeared to be awake but did not speak. After being fitted with an oxygen mask, respondent was brought down to the ambulance and taken to the hospital. Sanitation Supervisor Hession went to the hospital with respondent while Mr. Maglione resumed his blockade duties after agreeing to later meet with members of the NYPD at the sanitation garage (Tr. 17-20). At around 1:00 p.m., Mr. Maglione relieved Supervisor Hession at the hospital. Respondent was in the emergency room ("ER") and was awake. Mr. Maglione was later relieved by another worker (Tr. 34-36). Hospital medical records indicate that respondent was admitted on November 4 and discharged on November 7, 2018 (Pet. Ex. 2 at 1).

As the Department's deputy medical director, Dr. Pascale Kerlegrand, a practicing physician for 27 years, supervises the doctors in the Department's clinic. She is a certified medical review officer and a certified CDL (Commercial Driver's License) physician. Dr. Kerlegrand reviews drug testing, medical records and medical charts and helps to establish policy. Prior to working for the Department, she was a staff physician at the Port Authority of New York and New Jersey where she performed similar tasks (Tr. 38-39).

Dr. Kerlegrand reviewed respondent's medical records which the Department received from the hospital and scanned into its computerized system. Those records included toxicology and drug tests that were done on respondent in the ER. She also reviewed the report completed by the EMT first responders (Tr. 49-55; Pet. Exs. 2-6).

The EMT report contained a section on pre-hospital care, which listed respondent's name and other personal details, the date and time that the EMTs received the call, the time that they reached respondent, his condition when they arrived at his location, and what they initially administered. It noted that respondent remained unconscious and they administered nasally, a drug commonly known as Narcan, which Dr. Kerlegrand stated, is normally given only for opioid overdose. Respondent showed little improvement so the EMTs intravenously administered a second dose of two milligrams of Narcan, after which respondent showed improvement. In the narrative section of the report, the writer indicated that after respondent began to show improvement, he told the EMTs that he had taken OxyContin. The report also showed that respondent arrived at the ER at 4:44:06 a.m. (Tr. 57-61; Pet. Ex. 5).

The ER report noted that the reason for respondent's visit to the hospital was "drug overdose" (Tr. 61-62; Pet. Ex. 4). It included information obtained from the EMTs, that respondent was brought in by ambulance and was lethargic but was easily aroused by verbal stimuli. It also noted that respondent was twice treated with Narcan by the EMTs and that he had revealed that he had taken 60 milligrams of oxycodone (Tr. 62; Pet. Ex. 4).

The hospital records for respondent showed that on November 6, 2018, one of the hospital's licensed, certified social workers ("LCSW") assessed him for substance abuse. The LCSW recorded respondent's admission that in the preceding 12 months, he had frequently used prescription medication for the feeling, and that "he was sober for 9 months and recently relapsed after graduating from Bridge Back to Life." He also acknowledged using a prescription opiate pain reliever not as prescribed or not prescribed to him in the preceding three months (Tr. 63-68; Pet. Exs. 2, 6).

At the hospital, respondent was given two additional doses of Narcan, and his condition improved (Tr. 71-73; Pet. Ex. 2 at 12, 13). Looking at the records, Dr. Kerlegrand testified that the hospital initially diagnosed respondent with drug overdose based on what the EMTs had reported and what respondent had said to the hospital medical staff, in addition to clinical indicators such as respondent's pupils, his respiratory rate, his level of oxygenation on supplementation, and his response to Narcan, which binds opioid receptors in the brain and prevents other opioid molecules from binding to those same receptors. To confirm the initial diagnosis, the hospital did a urine screening for multiple drugs. Initial testing showed that respondent tested positive for opiates. Dr. Kerlegrand stated that OxyContin is a form of opiate and if ingested, would account for a positive test. But the screening results also indicated "negative" for OxyCodone.[2] A note on the drug screening report cautioned that positive results were considered unconfirmed and recommended further testing to eliminate false positives. Both respondent's flowchart and his inpatient record noted that he had ingested 60 milligrams ("mg") of Oxycodone/OxyContin. Given the negative reading for OxyCodone, Dr. Kerlegrand suggested that respondent may have ingested a different opiate which responded favorably to Narcan (Tr. 68-71, 99-100, 119; Pet. Ex. 2 at 10; Pet Ex. 3).

Dr. Kerlegrand distinguished between the random drug testing that the Department conducts on its sanitation workers and the drug screening test that was performed on respondent

[2] Dr. Kerlegrand testified that the terms oxycodone and oxycontin are used interchangeably (Tr. 93).

at the hospital. She explained that the Department follows a strict procedure such that two tests are done if a sample tests positive for drugs. The second, confirmation test, is a gas chromatography test. It is considered to be the most accurate test, as it is almost impossible to give a false positive reading. For worksite drug testing, employers are legally obligated to use a confirmatory gas chromatography test. The Department tests for opioids including OxyContin, which is considered an opiate (Tr. 88-90, 116). Based on respondent's hospital drug screening report, Dr. Kerlegrand testified that no gas chromatography test had been done (Tr. 94-95; Pet. Ex. 3). She noted that the hospital drug test panel was for medical use only and was therefore medically sufficient for a diagnosis and for a determination on how to treat respondent. She further explained that the test is an objective one that is considered a point-of-care test which has to meet a certain standard. Such tests are 92 to 93 percent accurate (Tr. 97-98, 117-18). Dr. Kerlegrand stated that a test may result in a false negative reading in that it may report a particular substance as not being present in the urine when, in fact, it is. For point-of-care tests, false negative results can occur about 25 percent of the time (Tr. 118).

After being admitted to the hospital, respondent developed rhabdomyolysis, a condition that causes destruction of muscle cells. Dr. Kerlegrand stated that there can be a causal connection between rhabdomyolysis and a drug overdose because when the drug user is comatose and unable to move, oxygen cannot be transported to all the tissues, and cells begin to expire. Dr. Kerlegrand's explanation was supported by the hospital's assessment that respondent's symptoms of rhabdomyolysis were due to a drug overdose. However, the assessment indicated no one specific drug but a "[c]ocktail likely consisting of opiates . . . possibly containing fentanyl" (Tr. 122; Pet. Ex. 2 at 32). The report also entertained that respondent may have used "IV drugs as well as cocaine" *Id.* Dr. Kerlegrand concluded that respondent had ingested a prohibited substance when he was found unconscious based on similar markers used by the hospital in its initial diagnosis as well as his positive urine test for opiates (Tr. 57, 74-77, 93-94; Pet. Ex. 2 at 3, 13, 17; Pet. Ex. 4 at 122).

Dr. Kerlegrand testified that in evaluating his fitness to return to work in November 2018, her only concern was whether or not respondent was cleared by a substance abuse professional, his private therapist or an Employee Assistance Unit ("EAU") therapist, and that he would have been screened for alcohol and drugs. She stated that respondent was eventually cleared to return to work (Tr. 83-88).

Respondent sat stoically in the trial room and did not testify. But his counsel challenged the reliability of respondent's hospital records because they mentioned that information was gathered from "patient's brother," whom he claimed respondent does not have, and because of statements of drug use attributed to respondent whom counsel suggested was in no condition to speak based on the narrative in the medical reports (Tr. 91-92, 100-02). Dr. Kerlegrand opined that the relationship of the person providing the information about the patient is not germane. Rather, the hospital was more concerned about getting information to build a clinical picture to aid the patient. Further, in a situation such as respondent's the patient's consciousness would wax and wane and it was therefore not an anomaly to find that respondent had made the statements attributed to him (Tr. 102-05, 119-20). Respondent's counsel identified discrepancies in respondent's weight in different sections of his hospital medical report (Tr. 110-12; Pet. Ex. 6 at 228, 231). Dr. Kerlegrand conceded that medical records may contain errors (Tr. 115).

In spite of respondent's attempt to cast doubt on the results of the drug screening done on him at the hospital, there was no evidence of any deficiencies in the testing itself. Dr. Kerlegrand credibly explained the likelihood of: 1) a false negative such that respondent may have taken OxyContin even though the report reflected that he was negative for it; and 2) the possibility that respondent had ingested some opiate other than OxyContin, that would have reacted favorably to Narcan. Her explanation was consistent with the hospital report which indicated that respondent may have ingested some form of drug cocktail, including the possibility of cocaine. While Dr. Kerlegrand conceded that medical reports may contain errors, I found the inconsistencies identified by respondent to be insubstantial.

In sum, respondent's condition on the job, his eventual response to the increased doses of Narcan administered to him at the Sanitation garage and then at the hospital, and his positive test for opiates, established that respondent was under the influence of a prohibited drug while on the job. Not only that, but the fact that he signed the blotter at midnight, 1:00 a.m. and 2:00 a.m., but not at 3:00 a.m. suggested that at some point during his shift, respondent ingested the prohibited drugs. Ingesting and being under the influence of a prohibited drug while on the job is in violation of Department rules.

FINDING AND CONCLUSION

Respondent tested positive for illegal drug use on November 4, 2018, in violation of rules 2.1, 2.4 and 2.6 of the Department's Code of Conduct.

RECOMMENDATION

At my request, the Department provided an abstract of respondent's personnel record. Respondent was appointed as a sanitation worker on September 18, 2006. For his performance evaluations for the periods which ended June 30, 2013, June 30, 2014 and June 30, 2015, respondent received an overall rating of "satisfactory." For the period that ended June 30, 2016, respondent was deemed "unratable due to his sick record." The evaluation form indicated that respondent missed 106 days of work that year, 54 of which were due to a line of duty injury. For the period that ended June 30, 2017, respondent received a rating of "conditional." The evaluation noted that he is a quality worker but his medical record and punctuality are below Department standards. It also showed that he called out sick on 11 occasions for a total of 32 days, and was absent without leave ("AWOL") on nine occasions. For the period that ended June 30, 2018, respondent was deemed "unratable." The supervisor noted that respondent's performance could not be evaluated because he had not performed his tasks for over half of the rating period due to limited duty, medical leave and leave without pay. The evaluation showed that he missed 152 days of work during that rating period.

On November 1, 2017, respondent pled guilty to a charge that he tested positive for codeine/morphine on October 21, 2017. He was suspended pre-trial for 16 days and he agreed to drug testing before he could be returned to duty. On November 2, 2017, respondent tested positive for heroin/morphine. A Last Chance Agreement which he executed with the Department on January 11, 2018, indicated that respondent was permitted to enter a drug rehabilitation program immediately following his positive drug test. A clause in a separate document which was attached to the Last Chance Agreement, provided that if respondent did not successfully complete the rehabilitation program, he ceased to cooperate with EAU, abused drugs or alcohol or otherwise demonstrated unsatisfactory progress, the penalty would be pretrial suspension and resignation with charges pending.

For the proven charge in this proceeding, the available penalties under the Administrative Code are a pay fine or suspension up to 30 days or termination of employment. Admin. Code §

16-106(a) (Lexis 2019). The Department's substance abuse policy provides that where there is a third violation of the policy, the employee will receive a pre-trial suspension without pay for 30 calendar days, and the Department will either submit the employee's resignation pursuant to an outstanding Last Chance Agreement, or will seek the employee's termination. PAP 2012-02 § 7.5 (Mar. 12, 2012). Petitioner seeks respondent's termination from employment.

Where an employee has violated the Department's substance abuse policy for a third time, this tribunal has usually recommended a penalty of termination from employment. *See Dep't of Sanitation v. Anonymous*, OATH Index No. 1821/15 (June 3, 2015), *modified on penalty,* Comm'r Dec. (July 8, 2015); *Dep't of Sanitation v. Anonymous*, OATH Index No. 3381/09 at 4 (July 31, 2009); *Dep't of Sanitation v. Betancourt*, OATH Index No. 1463/07 (May 7, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-103-SA (Nov. 5, 2007); *Dep't of Sanitation v. Anderson*, OATH Index No. 1135/06 (Sept. 22, 2006); *Dep't of Sanitation v. King*, OATH Index No. 1836/04 at 5 (Aug. 27, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-03-SA (Apr. 15, 2005); *Dep't of Sanitation v. Richins*, OATH Index No. 167/01 at 27 (Oct. 15, 2001). Only rarely have we recommended a penalty short of termination under similar circumstances. *See Dep't of Sanitation v. Johnson*, OATH Index No. 746/05 (Oct. 5, 2005), *modified on penalty*, Comm'r Dec. (Dec. 4, 2005) (60-day suspension for a long-term employee with lengthy disciplinary record and a prior last chance agreement, who tested positive for alcohol use modified by Commissioner to include one year probation and drug and alcohol testing for the remainder of the employee's career); *See also Dep't of Sanitation v. Anonymous*, OATH Index No. 1637/12 (June 19, 2012), *modified on penalty*, Comm'r Dec. (Aug. 15, 2012) (30-day suspension and drug and alcohol testing for remainder of career for sanitation worker who tested positive for alcohol use three years after receiving a 41-day suspension for violating substance abuse policy twice within two months).

At trial, I granted respondent's request to submit documentation in mitigation of my penalty recommendation. A respondent who seeks mitigation of the penalty bears the burden of showing that mitigation is warranted. *Dep't of Correction v. Potter*, OATH Index No. 969/96 at 6 (Apr. 29, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-97-40-A (June 4, 1997) ("mitigating factors may, in a few isolated cases, warrant a penalty of less than termination for illegal drug use, even though the overriding policy generally mandates dismissal for such misconduct").

In an undated, typewritten statement which he signed and which appeared to be directed to the Department, respondent stated that he has been struggling with pain medication due to a line of duty injury in October 2014,[3] and that he had voluntarily checked himself into multiple inpatient programs over the course of three years. He noted that his last inpatient program was in March 2018, after he had signed his Last Chance Agreement. Respondent pleaded for another chance because he is the breadwinner of his family which includes three young daughters. He noted that his case was scheduled for trial before this tribunal on June 11. In addition, respondent submitted an EAU Monthly Outpatient Progress form dated June 6, 2019, which was completed for the month of May 2019. The form disclosed that respondent had attended five group sessions and five individual sessions, was making good progress, and that he was an active, interested and positive participant.

Ingesting and being under the influence of a prohibited substance in the workplace, especially where respondent was on security detail, is a serious form of misconduct for which termination of employment is entirely appropriate. Respondent's written statement did little to persuade me otherwise. There was no indication that the drugs that respondent had ingested were prescribed to him, and indeed, the hospital records indicated that he had admitted to abusing prescription opiates and using opiate drugs that were not prescribed to him in the three months preceding his bout of unconsciousness on the job.

Respondent, who was represented by counsel, knowingly executed a Last Chance Agreement in January 2018, after which he entered a drug treatment program. He provided no documentation regarding that program, its duration, when it ended, and how he was eventually assessed. The EAU form which he submitted showed that he received some form of outpatient treatment in May 2019, six months after he was found unconscious on the job and one month in advance of trial. This seemed to be a timely and calculated attempt to avoid losing his job. What is apparent is that, in spite of significant rehabilitation efforts, respondent continues to relapse. Further, his expression at trial convinced me that he is not fully rehabilitated.

I therefore recommend that respondent be terminated from his job.

Notwithstanding that recommendation, respondent's personnel records support that his troubles may have started with his line of duty injury in 2015 to 2016. Therefore, as an

[3] Respondent's evaluation indicates that respondent was out for 54 days during the period July 1, 2015 and June 30, 2016, due to a line of duty injury, and not in 2014 as respondent stated.

alternative to termination, petitioner should consider placing respondent on a leave of absence pursuant to Section 72 of the Civil Service Law, which would give him sufficient time to be fully rehabilitated.

Ingrid M. Addison
Administrative Law Judge

July 15, 2019

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

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