

Taxi & Limousine Comm'n v. Turay

OATH Index No. 300/19 (Oct. 23, 2018)

At a fitness proceeding, respondent proved that he unknowingly ingested marijuana, which led to a positive drug test. Dismissal of charge recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
-against-
IBRAHIM TURAY
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Taxi and Limousine Commission (“TLC”), brought this fitness proceeding against respondent Ibrahim Turay, holder of TLC Driver License 5761115. Admin. Code § 19-505(l); 35 RCNY §§ 68-14, 80-14(e) (Lexis 2018). The petition alleges that respondent is unfit to retain a TLC Driver License because of a positive test for marijuana use. Respondent conceded that he tested positive for marijuana use, but raised the affirmative defense of innocent ingestion.

Trial was scheduled for August 30, 2018, and adjourned twice at respondent’s request to give him an opportunity to hire a lawyer. Petitioner consented to both adjournments. On October 10, 2018, respondent appeared for trial without an attorney. I advised respondent of his right to hire a lawyer or representative, explained the benefits of representation, and offered to adjourn the trial again (Tr. 4-5). Declining that offer, respondent said that he was having financial difficulty and unable to hire a lawyer. He noted that his witnesses were present and he “felt confident just coming in and telling the truth” (Tr. 4-5).

At trial, petitioner relied on documentary evidence. Respondent testified and presented a notarized statement from Ms. Bullock, the first-floor tenant in the two-family home where respondent’s family lives. In the statement, Bullock admitted that she used THC butter to bake a

cake that respondent ate, without telling him that it contained a controlled substance (Resp. Ex. A). Respondent also presented testimony from his wife, his father, and Bullock's son.

For the reasons below, I find that respondent proved the defense of innocent ingestion and recommend dismissal of the charge.

ANALYSIS

To protect drivers and the public, petitioner requires annual drug testing of TLC driver licensees. 35 RCNY § 80-14(d) (Lexis 2018). On July 25, 2018, respondent submitted a urine sample that tested positive for marijuana metabolite at the level of 31 nanograms per milliliter, which exceeded the federally recognized cutoff of 15 nanograms per milliliter (Pet. Exs. 3, 4). After receiving notice of the results, petitioner suspended respondent's TLC Driver License and referred the matter to this tribunal for trial to determine whether respondent's license should be revoked (Pet. Ex. 1). Admin. Code § 19-505(l); 35 RCNY § 68-15(a)(1).

Respondent denied that he uses illegal drugs (Tr. 26-27). He conceded that he "experimented a little bit" in high school and college, but that was more than ten years ago (Tr. 26). Respondent testified that he is now a "family man," eating too much food was his "vice," and he occasionally smoked tobacco, but he does not use marijuana (Tr. 27).

According to respondent, he was the primary breadwinner for his family (Tr. 25). At the time of trial, his parents were retired and his wife was nine months' pregnant (Tr. 25). Besides managing his father's two-family home, where respondent lives with his wife and his parents on the second floor, respondent drives for Uber and Lyft (Tr. 25). Respondent has received more than 500 five-star ratings from his passengers, he has earned great reviews, and he has had no passenger complaints (Tr. 28). He testified that he is a careful driver and, for him, passenger safety was a priority (Tr. 28, 35).

Respondent recalled that, after saving enough money, his family was able to send his father on a Haji, a pilgrimage to Mecca (Tr. 28). To celebrate, they hosted a party at their home on July 21, 2018 (Tr. 28). Imams and other dignitaries were invited (Tr. 28-29).

Their first-floor tenants, Bullock and her son, Mr. Williams, hosted a tattoo party the same day (Tr. 28-29). Respondent noted that he often smelled marijuana coming from the tenants' apartment and his father was worried that his devoutly religious guests would be at their home at the same time that Bullock's guests would be drinking and smoking marijuana (Tr. 29,

34). To avoid problems, respondent's father told Bullock that she could not have any smoking, drinking, or loud music going on while his guests were there (Tr. 29-30).

Unbeknownst to respondent, Bullock made "a whole bunch of cupcakes and cakes" and other food with THC butter (Tr. 30). After respondent's party ended, he went to say hello to Bullock and her guests (Tr. 30). Respondent played cards with Williams and his friends for a while, before returning to his home on the second floor (Tr. 31). Respondent recalled that he took half of a chocolate cake with him and he ate most of it that night (Tr. 31). He did not know at the time that it contained THC or any illegal substance (Tr. 34, 36).

Respondent, who ate quite a bit of food that day, felt a little strange, nauseous, or tired that night and did not feel good the next day (Tr. 31, 34). He told his wife and his father that he did not feel well (Tr. 31). Respondent did not think about it again until he received the results of his drug test (Tr. 31).

He was very confused when he received the positive test results (Tr. 32). Bullock later asked why he was not driving for Uber anymore, and respondent explained that he had tested positive for drug use (Tr. 33). At first, Bullock said nothing (Tr. 33). Shortly afterwards, she told him that the cakes that she had baked contained THC (Tr. 33). Respondent was upset with Bullock (Tr. 33).

Preparing for trial, respondent tried to do some research on the internet. He looked up "cannabutter" and whether ingesting "edibles" would result in greater levels of THC in a urine sample than would result from smoking marijuana (Tr. 36-37). Because he did not understand everything that he read, respondent did not do any further internet research (Tr. 37).

At respondent's request, Bullock submitted a notarized letter (Tr. 33; Resp. Ex. A). Bullock wrote that she had been living in the first-floor apartment for years. At her son's request, she hosted a "tattoo party," featuring a local tattoo artist named "Spider," on July 21, 2018, the same day as respondent's party. Bullock confirmed that she assured respondent that there would be no smoking of anything—especially marijuana—at her apartment that day. When Bullock told Spider about the restrictions, he expressed his disappointment and noted that many of his customers liked to smoke marijuana while they were getting tattoos, because it

helped them relax and distracted from the pain. As a compromise, Bullock agreed to bake “THC filled goodies,” made with “cannabutter”¹ for the tattoo party guests (Resp. Ex. A).

Bullock’s written statement further noted that, on the day of the parties, respondent stopped by her apartment with some leftovers. Respondent played cards with Williams and left with almost an entire cake that Bullock had baked. Bullock knew that respondent did not smoke marijuana, but she assumed that someone had told him that the baked goods contained THC (Resp. Ex. A).

Later, Bullock noticed that respondent stopped driving for Uber and had removed the TLC plates from his car. She asked respondent about it and he told her that he had failed a drug test. Upon discussing it further with respondent, Bullock suspected that he did not know that the cake he took from her party had been baked with THC butter. Bullock talked about it with her son and they realized that nobody had told respondent what was in the cake. After Bullock told respondent and his wife what had happened, respondent became angry and his wife said they were going to a lawyer for advice. Bullock apologized and wrote the notarized letter, but was unable to appear for trial because she had to work (Resp. Ex. A).

Bullock’s son, Williams, testified that he had known respondent for a long time and that respondent did not use marijuana (Tr. 44). Williams further recalled that he hosted a tattoo party, attended by Spider and others, and respondent later visited the apartment and played cards for a few hours (Tr. 38-40). Williams ate some brownies or “half of one brownie,” which he thought were ordinary brownies (Tr. 40, 43, 46). He did not remember whether respondent took cake with him when he left (Tr. 41, 46). Williams claimed that Spider made the brownies, but he did not see Spider bring them and Spider did not say anything about them (Tr. 42-43, 47, 49). According to Williams, he learned the day before the party that the baked goods contained THC, but he could not recall how he found that out (Tr. 46). He denied that his mother ever talked to him about the baked goods, and he added, “She probably didn’t want me to you know” and get “mixed up” in what she was doing (Tr. 49). Williams claimed that nobody in his household ever used marijuana (Tr. 44, 46).

Respondent’s wife testified that there were two simultaneous parties (Tr. 52). She did not attend Bullock’s party, but she recalled that respondent brought back a cake from that party and,

¹ “Cannabutter” or marijuana butter, is made by extracting THC from marijuana and using it to bake food. See *Kourakis v. State*, 474 S.W.3d 536, 537 n.1 (Ark. 2015); *People v. Carruthers*, 301 Mich. App. 590, 602 (2013).

after eating it, he became ill and vomited (Tr. 53). At the time, she thought respondent was suffering from food poisoning (Tr. 53). She further recalled that people on the first floor often smoked marijuana (Tr. 53-54). Nobody in her household, including respondent, smoked marijuana (Tr. 55). At the time of trial, she was nine months' pregnant (Tr. 55). Respondent, who did not drink, but smokes cigarettes "once in a while," is a safe driver and the family's lone breadwinner (Tr. 55-57). When respondent's wife found out about the cakes containing THC, she got angry and confronted Bullock (Tr. 57-58).

Respondent's father, a retired school counselor, testified that there was a party to celebrate his Haji on July 21, 2018, attended by family members and Imams. He recalled telling Bullock to refrain from drinking and smoking that day (Tr. 64). To his knowledge, respondent did not smoke marijuana (Tr. 64). Sometimes he smelled marijuana coming from the first floor, but he did not know what, if anything, happened on the day of the party (Tr. 66).

Innocent ingestion of a controlled substance is an affirmative defense to a positive drug test. *See Taxi & Limousine Comm'n v. Bah*, OATH Index No. 3047/09 at 5 (June 11, 2009) ("New York courts have long recognized that innocent or unknowing ingestion is a defense to a positive drug test"), *citing Connor v. New York City Police Dep't*, 22 A.D.3d 425 (1st Dep't 2005); *Gaudio v. Schembri*, 221 A.D.2d 165 (1st Dep't 1995); *Green v. Sielaff*, 198 A.D.2d 113 (1st Dep't 1993). To prevail, a respondent must prove innocent ingestion by a preponderance of the evidence. *Taxi and Limousine Comm'n v. Hussain*, OATH Index No. 787/08 at 2 (Oct. 12, 2007), *adopted*, Comm'r Dec. (Nov. 15, 2007); *Transit Auth. v. Coleman*, OATH Index No. 455/92 at 27 (Mar. 12, 1992), *adopted*, Auth. Dec. (Apr. 1, 1992), *aff'd*, 198 A.D.2d 12 (1st Dep't 1993). A preponderance of evidence means that "the existence of the fact is more likely than its non-existence." Prince, *Richardson on Evidence* § 3-206 (Lexis 2008).

Because illegal drug use affects public safety, this tribunal closely scrutinizes claims of innocent ingestion on a case-by-case basis; relevant factors include the respondent's credibility and the presence of corroborating witnesses or documents. *See, e.g., Taxi & Limousine Comm'n v. Salim*, OATH Index No. 0094/18 (Sept. 15, 2017), *adopted*, Comm'r Dec. (Sept. 25, 2017) (licensee offered credible testimony, supported by physical evidence, that he never used illegal drugs and that someone may have used marijuana in the same hookah pipe he had used at a hookah bar); *Taxi & Limousine Comm'n v. Alexiadis*, OATH Index No. 0053/18 (Aug. 24, 2017), *adopted*, Comm'r Dec. (Sept. 1, 2017) (licensee and a family member credibly testified

that the licensee mistakenly used family member's prescription medicine); *see also Taxi & Limousine Comm'n v. Fall*, OATH Index No. 2302/18 at 9-10 (July 3, 2018) (crediting licensee's claim, corroborated by other witnesses, that he unknowingly ingested marijuana when he ate chocolate given to him by another patron a bar); *but see Taxi & Limousine Comm'n v. Saghir*, OATH Index No. 1256/17 at 3 (Feb. 17, 2017), *adopted*, Comm'r Dec. (Mar. 10, 2017) (rejecting licensee's unsupported claim that he may have unintentionally taken cocaine after he became intoxicated); *Taxi & Limousine Comm'n v. Singh*, OATH Index No. 2587/14 at 4 (July 25, 2014), *adopted*, Comm'r Dec. (Aug. 14, 2014) (rejecting taxicab driver's "self-serving and implausible claim that a jealous fellow-driver may have laced a cigar or cigarette with cocaine which respondent unwittingly smoked a few days before the drug test"); *see also Dep't of Correction v. Hodge*, OATH Index No. 264/14 at 5-6 (Apr. 11, 2014), *adopted*, Comm'r Dec. (May 20, 2014) (rejecting correction officer's unsupported claim that herbal tea, which contained hemp seed, caused her to test positive for marijuana use); *Fire Dep't v. Persico*, OATH Index No. 2207/04 at 2-3 (July 25, 2005), *adopted*, Comm'r Dec. (Aug. 15, 2005) (rejecting paramedic's unsupported claim that use of appetite suppressant caused him to test positive for illegal use of controlled substance).

Here, respondent presented credible and corroborated evidence of innocent ingestion. *See Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998) (in assessing credibility, fact-finder may consider "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice and the degree to which a witness' testimony comports with common sense and human experience"). Respondent persuasively testified about the events preceding his drug test. He explained that he stopped by Bullock's apartment and helped himself to some cake, without knowing that it contained THC.

Respondent did not try to portray himself as a naïve soul who had led a perfect life. Instead, he candidly conceded that he had experimented with drugs when he was in high school and college. But that was more than a decade ago. Respondent credibly asserted that he is now a mature adult, who is responsible for supporting his family, and who prides himself on being a safe driver. Though he occasionally smokes tobacco and eats too much, he no longer uses illegal drugs. Respondent also acknowledged that he tried to do his own research about drug testing on the internet, but his research was limited and he did not understand everything that he read.

Most importantly, respondent explained in specific detail why July 21 was a momentous day for his family. His elderly father was celebrating his pilgrimage to Mecca and religious people were invited to their home. Out of respect for their guests, respondent's father asked Bullock to refrain from smoking marijuana that day.

Bullock's notarized statement corroborated respondent's testimony. She explained that she was hosting a tattoo party and that she had been warned about smoking marijuana that day. Against her own penal interest, Bullock admitted that she baked cakes using THC butter. *See People v. Brown*, 26 N.Y.2d 88, 92 (1970); *see also People v. Starling*, 85 N.Y.2d 509, 514-15 (1995) (noting that section 220.00(1) of the Penal Law's definition of "sale" includes any transfer, even if there is no exchange of money). Bullock also described how it was not until after the positive drug test that respondent had discovered what she had done.

Respondent's case would have been stronger if Bullock had testified. However, hearsay is admissible at this tribunal. See 48 RCNY § 1-46(a) (compliance with technical rules of evidence, including prohibition against hearsay, not required at OATH). Indeed, petitioner often relies on hearsay as the sole basis for proving a fact or to corroborate other evidence. *See, e.g., Taxi & Limousine Comm'n v. Basar*, OATH Index No. 874/12 at 5 (Jan. 20, 2012) (upholding license suspension based on hearsay document); *Taxi & Limousine Comm'n v. Carniol*, OATH Index No. 1736/11 at 10 (June 24, 2011), *aff'd*, 42 Misc. 3d 199 (Sup. Ct. N.Y. Co. 2013), *aff'd*, 126 A.D.3d 409 (1st Dep't 2015) (rejecting hearsay challenge to GPS records).

Furthermore, respondent's father and respondent's wife corroborated his defense. Though they had an obvious self-interest in testifying on respondent's behalf, that does not necessarily mean they lacked credibility. They both testified in a clear, straightforward fashion. Respondent's father conceded that he was not aware of what took place in Bullock's apartment on the day of the party, but he confirmed that it was an important occasion for him and that he specifically asked Bullock to refrain from smoking marijuana. Likewise, respondent's wife confirmed that she angrily confronted Bullock after finding out that the cakes contained THC.

There were some inconsistencies in respondent's defense, but most of them stemmed from Williams's testimony. His recollection of the party was hazy and he seemed intent on shifting blame away from his mother. Williams claimed that he never smoked marijuana and he only ate half of one brownie. He also said that a friend, not his mother, baked the cakes, but it was unclear how he arrived at that conclusion. I did not credit much of what Williams said, but

his conflicting and inconsistent testimony demonstrated that respondent did not coach him or tell him what to say.

Some might find it odd that a landlord's son would bring leftovers to a tenant's apartment and leave with some cake. However, when two families live close together in the same house for many years, they are not merely landlord and tenant—they are neighbors. And, like many New York neighbors, they may not always share lifestyles, but they often share food.

Based on the record as a whole, respondent met his burden of showing that he ingested baked goods that, unbeknownst to him, contained THC and this led to his positive drug test. Respondent's credible testimony was corroborated by Bullock's detailed notarized statement and the testimony from respondent's wife and respondent's father. Viewing the evidence in its entirety, including respondent's sincerely expressed concern for passenger safety, persuaded me that respondent did not knowingly ingest a controlled substance. Thus, respondent is fit to retain his TLC Driver License. *See Taxi & Limousine Comm'n v. Wakefield*, OATH Index No. 1315/18 at 6 (Feb. 15, 2018) (innocent ingestion defense supported, in part, by driver's sincere recognition of the dangers of driving under the influence of a controlled substance).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent testified positive for marijuana use.
2. Respondent proved that he did not knowingly ingest marijuana.
3. Respondent is fit to possess a TLC Driver License.

RECOMMENDATION

The charge should be dismissed.

Kevin F. Casey
Administrative Law Judge

October 23, 2018

SUBMITTED TO:

MEERA JOSHI

Commissioner

APPEARANCES:

MARK WHEELER, ESQ.

Attorney for Petitioner

IBRAHIM TURAY

Respondent