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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13
Justice

In the Matter of Francia Gomez

- v -

New York City Department of Education

INDEX NO. 118663/06

MOTION DATE 2/1/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 55

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this petition is granted.

In this Article 78 proceeding, petitioner Francia Gomez challenges respondent's determination to permanently revoke her school bus driver certification. The determination was based upon Ms. Gomez's one day delay in submitting to a random drug test. She was employed by Logan Bus Company, a private bus company that contracts with the Board of Education to transport schoolchildren. She was directed to go for the drug test on April 26, 2006 but did not appear for the drug test until the following morning. Although her drug test was negative and she had no prior disciplinary history and had passed the only previous drug test given in 2002, the New York City Office of Pupil Transportation ("OPT") decided to permanently revoke her school bus driver certification as of May 11, 2006

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

permanently revoke her school bus driver certification as of May 11, 2006 and she was suspended from her employment. The OPT's determination was affirmed by the Department of Education.

Petitioner has shown that the determination was arbitrary and an abuse of discretion. At a disciplinary conference that was conducted by the OPT, petitioner explained that although she was told by her supervisor on April 26, 2006 that she was to appear at a laboratory in Queens for a random drug test that day, she did not go for the test because she had a doctor's appointment (this was confirmed by an affidavit submitted by her doctor), and that after the appointment, she finished her rounds as a bus driver at around 5 PM. Ms. Gomez explained that she believed that the lab would be closed at that hour, so she decided to wait until the next day to appear for the test. She testified that she knew that she was supposed to go on April 26th, but did not know that there was a possibility that she would permanently lose her certification to drive a bus if she waited until the following day to take the test.

Petitioner signed a sheet provided by her supervisor that states that her signature indicates that she has been notified to appear and will appear on April 26, 2006 for a drug test, and the sheet further provides that "I UNDERSTAND THAT FAILURE TO SUBMIT TO A TEST ON THE ABOVE DATE MAY RESULT IN DECERTIFICATION." However, on this record, the court concludes that respondent acted arbitrarily when it decided to permanently decertify petitioner. Respondent relies on the U.S. Department of Transportation's Drug Testing Handbook and the Code of Federal Regulations. Respondent argues that 26 C.F.R. § 40.191 defines a refusal to take a DOT mandated drug test as failing to appear for any test. In fact, the Code actually provides that an employee has refused to take a drug test if the employee has, among other things, "fail[ed] to appear for any test (except a pre-employment test) *within a reasonable time*, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do

so by the employer." (emphasis supplied). As noted, petitioner did not appear at the laboratory until the morning after the day she was told to appear. According to respondent, petitioner could have timely appeared until midnight on April 26, 2006. There is no indication in the record as to why respondent found that petitioner's appearance on the morning of April 27, 2006 was not considered to be within a reasonable time as contemplated by the Code of Federal Regulations.

Moreover, the Handbook, which respondent asserts was provided to petitioner as part of her employment with Logan Bus Company, provides in pertinent part, that if an individual tests positive, refuses a test, or violates DOT drug and alcohol rules, the following actions may be taken:

- A supervisor or company official will immediately remove you from DOT- regulated safety-sensitive functions.
- You will not be permitted to return to performing DOT regulated safety - sensitive duties until you have:
  - Undergone an evaluation by a Substance Abuse Professional (SAP)
  - Successfully completed any education, counseling or treatment prescribed by the SAP prior to returning to service;
  - Provided a negative test result for drugs and a breath test less than 0.02. (Return to duty testing).
- Upon return to a safety-sensitive job, you will be subject to unannounced testing for drugs and/or alcohol no less than 6 times during the first 12 months of active service with the possibility of unannounced testing for up to 60 months (as prescribed by the SAP).

[Handbook, p. 11]

Upon denying petitioner's appeal of the OPT's decision to permanently revoke her bus driver certification, Deputy Chancellor Grimm found that "[t]he penalty appears to be wholly appropriate." [Grimm determination, October 13, 2006]. However, the penalty is wholly disproportionate in view of the fact that petitioner's drug test, which was taken less than 24 hours after she was directed to appear, was negative, and she received a harsher penalty than is

provided for by the Department of Transportation's Handbook for individuals who test positive for drugs. Even those testing positive are permitted to return to work after they have received counseling and provided a negative drug test. Furthermore, even assuming that petitioner's failure to take the test on the appointed day and her taking of the drug test one day late is considered a "refusal" to take the test, the Administrative Code provides that any driver who refuses to take a drug test shall be immediately removed from active duty for a period of at least one year and shall not return to active duty until passing a drug test (NYC Code § 17-610). There is no provision to the effect that any driver who refuses to take a test shall be permanently decertified as a bus driver.

Significantly, it is worth noting that under the provisions of the Administrative Code, if petitioner had failed the drug test, she would have been immediately removed from active duty, but she also would have had the opportunity to retake the test within 30 days, and additionally, if petitioner had failed the test, she would have had the opportunity to return to active duty upon undergoing any recommended treatment and passing a drug test. Instead, because she was one day late in submitting to a drug test which she passed, her certification was permanently revoked.

In defending this proceeding, respondent has argued that because petitioner was aware that she was required to submit to a drug test, and she failed to appear on the appointed day and made no attempt to advise her employer that she had a circumstance preventing her from reporting for the test, it was not arbitrary or capricious for respondent to permanently revoke her certification. However, this argument rings hollow in light of the fact that if petitioner had failed the drug test, she would have been given the opportunity, under both the federal guidelines and the Administrative Code, to return to active duty. The penalty of permanent revocation of petitioner's certification based upon this record is harsh and constitutes an abuse of discretion (see generally Mapp v. Burnham, 23 AD3d 37 [2005], lv granted 8

NY3d 804; Smith v. Board of Educ., 221 AD2d 755 [1995], lv denied 87 NY2d 810 [1996]).

Under these circumstances, where petitioner has not been on active duty for over one year (since May 11, 2006), the court will not remand the matter to respondent for consideration of an appropriate penalty. The determination is vacated and annulled.

ADJUDGED that the petition is granted.

Dated: 5/29/07

SA-S

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE