CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

REV. KEVIN W. WILDES, S.J.,
CHAIRMAN
AMY L. GLOVINSKY
JOSEPH S. CLARK
COLEMAN D. RIDLEY, JR.

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Tuesday, July 02, 2013

Brett J. Prendergast
4603 S. Carrollton Avenue
New Orleans, La. 70119

Re: **Barry Walton VS.**
Facilities, Infrastructure & Communit
Docket Number: 8121

Dear Mr. Prendergast:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 7/2/2013 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

Germaine Bartholomew

Germaine Bartholomew
Chief, Management Services Division

cc: Cedric S. Grant
Elizabeth S. Robins
Jay Ginsberg

BARRY WALTON	**CIVIL SERVICE COMMISSION**
VERSUS	**CITY OF NEW ORLEANS**
FACILITIES, INFRASTRUCTURE & COMMUNITY DEVELOPMENT	**DOCKET NO. 8121**

The Office of Facilities, Infrastructure & Community Development ("Appointing Authority") employed Barry Walton ("Appellant") as a Housing and Community Development Administrator with permanent status.[1] The Appellant obtained permanent status effective May 7, 2006, after completing a six month working test period. The Appellant remained in his permanent classified position until January 19, 2007, when he requested and was granted a leave of absence so that he could accept the unclassified position of Director of Planning and Resource Development. On December 21, 2012, the Appellant received written notification from Deputy Mayor Cedric Grant that his services as Director of Planning and Resource Development were terminated effective December 31, 2012. The termination letter did not provide the Appellant with written cause for the termination or address the issue of the Appellant's return to his last permanent position from which he requested and was granted a leave of absence.

By a reply letter the same day, the Appellant requested that Deputy Mayor Grant begin the process of returning him to his last classified civil service position as a Housing and Community Development Administrator. Also, through its Director of Personnel, Lisa Hudson, the Department of Civil Service verified the Appellant's right to return to his classified civil service position by letter dated December 28, 2012.

Deputy Mayor Grant disregarded Ms. Hudson's instruction, choosing to interpret civil service rules in such a way as to deny the Appellant's return to his previous classified position.

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[1] The Appointing Authority's department name has changed over time. The termination letter came from a division of City government called Facilities, Infrastructure, and Community Development. For purposes of this decision, the designation Appointing Authority will apply to all entities that have employed the Appellant during the relevant period.

Specifically, Mr. Grant stated in a January 9, 2013 letter that, because the Appellant did not request an extension of the Special Leave of Absence without pay pursuant to Civil Service Rule VIII, Section 5 and 6, his status became unclassified. The Appointing Authority also contends that, because the Appointing Authority failed to instruct the Appellant to take a drug test at the end of his probationary period, he never obtained permanent status.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on May 1, 2013. Testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

The Appellant's working test period was set for six months ending on May 7, 2006 and no extension of the Appellant's working test period was sought by the Appointing Authority or approved by the Director of Personnel. Although the Appointing Authority should have required the Appellant to submit to a drug screen during the probationary period, it failed to do so. It was not the Appellant's responsibility to initiate the screening, and the Appointing Authority was foreclosed from penalizing the Appellant for its oversight.

Sometime in 2008, it was discovered that the Appointing Authority had not sent the Appellant for a drug screen at the end of the probationary period. Although not required, the Department of Civil Service changed the Appellant's status for a day to allow him to submit to a drug screen as a probationary employee and satisfy internal processes. The Appellant completed the process and he retained his permanent status. Thus, the Appellant was a permanent classified employee when his leave of absence was granted.

Civil Service Rule VIII, Section 6.1 enables a permanent classified employee to accept an unclassified position without surrendering his or her permanent status in the position he or she is leaving by requesting a special leave of absence without pay. The Rule provides:

> An Appointing Authority may grant a regular employee special leave of absence without pay whenever such leave is for the purpose of enabling such employee to accept an unclassified position in the city service, except an elective office. Any such leave heretofore granted by an appointing authority for the purpose herein expressed may be extended by such appointing authority from the date such leave was originally granted; provided, however, that the leave without pay herein authorized shall automatically end whenever an employee resigns from his unclassified position or his employment therein is otherwise terminated.

The Appellant unequivocally requested a leave of absence for the specific purpose for which the rule was created. He sought to take another position without surrendering his vested property interest in the permanent position he held. The term of the leave of absence was defined by the term of the appointment in the unclassified position. As provided in Rule VIII, Section 6.1, the leave of absence ended upon separation from the unclassified position, whether voluntary or involuntary. At that point, consistent with the clear intent of the rule, the Appointing Authority was required to return the Appellant to his last classified position.

LEGAL PRECEPTS

An employer cannot subject an employee who has gained permanent status in the classified city civil service to disciplinary action except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal as to the factual basis for the disciplinary action is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to make an independent judgment, based on the facts presented, whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters v. Department of Police of New Orleans*, *supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The Appointing Authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The Appointing Authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

CONCLUSION

The Civil Service Commission promulgates rules which have the force and effect of law. Its interpretation of its own rules are given deference unless arbitrary and capricious or characterized by an abuse of discretion. *DeLarge v. Department of Finance,* 94-1684, P.6 (La. App. 4 Cir. 3/27/96, 672 So. 2d 1029, 1030. We interpret our rules as follows:

(1) The Appellant obtained permanent status pursuant to our rules once he completed the working test period. The Appointing Authority cannot extend the probationary period by failing to take necessary steps to direct its employees to submit to a drug screen. If the Appellant had refused to submit to a drug screen, he would have not obtained permanent status. That did not happen.

(2) The Appellant requested a leave of absence without pay to accept an unclassified position. His request was consistent with civil service rules and, upon his separation from his unclassified position, his leave of absence ended causing the Appointing Authority to return the Appellant to his last classified position.

(3) The Appointing Authority's termination letter failed to provide any cause for the Appellant's termination. While cause is not necessary to remove someone from an unclassified position, if the Appointing Authority desired to remove the Appellant from the classified position from which he was on a leave of absence, sufficient and specific cause is required.

Therefore, the Appointing Authority has failed to establish by a preponderance of evidence that it terminated the Appellant from his permanent classified position for just cause.

Considering the foregoing, the Appellant's appeal is GRANTED, and the Appointing

B. Walton
#8121

Authority is ordered to reinstate the Appellant to his last classified position with all back pay, costs and emoluments of employment.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 2nd DAY OF JULY, 2013.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION

REV. KEVIN W. WILDES, S.J., CHAIRMAN

CONCUR:

COLEMAN D. RIDLEY, JR., COMMISSIONER

JOSEPH S. CLARK, COMMISSIONER