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DIRECTOR OF PERSONNEL

Monday, May 09, 2016

Mr. Brian Shelby

Re: **Brian Shelby VS.
Department of Sanitation
Docket Number: 8226**

Dear Mr. Shelby:

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 - 5/9/2016 - 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,

A handwritten signature in cursive script that reads "Dottie K. Smith".

Dottie K. Smith
Chief, Management Services Division

cc: Cynthia Sylvain-Lear
Elizabeth S. Robins
Jim Mullaly
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

BRIAN SHELBY

vs.

DEPT. OF SANITATION

DOCKET NO.: 8226

I. INTRODUCTION

Appellant, Brian Shelby, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1. The Appointing Authority, the Department of Sanitation, (hereinafter the "Appointing Authority") does not allege that the instant appeal is procedurally deficient. Therefore, the Commission's analysis will be limited to whether or not the Appellant was disciplined for sufficient cause. According to a letter issued to Appellant by the Appointing Authority on September 13, 2013, Appellant received a twenty-day emergency suspension due to Appellant's:

- Failure to report to work as scheduled on Wednesday, September 11, 2013 and Thursday September 12, 2013, and
- Failure to submit to a drug screening as directed by the Appointing Authority.

(H.E. Exh. 1). The three undersigned Commissioners have reviewed a copy of the transcript of the appeal hearing, as well as the exhibits properly introduced by the Parties, and render the following decision.

II. FACTUAL BACKGROUND

At the time of the alleged incidents that led to Appellant's discipline, he was a permanent, classified employee working as a Laborer with the Appointing Authority. Laborers with the Appointing Authority started their shifts at 6:00 a.m. and worked Monday through Friday. (Tr. at 14:3-4.) Appellant had taken annual leave on Monday (September 9, 2013) and Tuesday (September 10, 2013) but was scheduled to report to work at 6:00 a.m. on Wednesday (September 11, 2013). *Id.* at 16:1-8. However, Appellant failed to report to work on the 11th.

Pursuant to Appointing Authority policy, an employee who anticipate that he/she will be unable to report for their shift on time must contact his/her immediate supervisor. *Id.* at 13:9-18. For Appellant, that immediate supervisor was Ms. Shavette Joseph. *Id.* at 13:21-22. At approximately 3:00 a.m. on the morning of the 11th, Appellant called Ms. Sylvain-Lear, Director of the Department of Sanitation, and informed her that he would not be able to report to work at his regularly scheduled time. *Id.* at 14:13-16. Appellant called Ms. Lear several more times on the 11th, and the reasons Appellant gave Ms. Lear for his inability to report focused on transportation issues from Lafayette to New Orleans. *Id.* at 16:12-18. According to Ms. Lear, Appellant sounded confused during his calls with her and offered several conflicting accounts of his absence. *Id.* at 18:9-17. It is undisputed that Appellant did not report to work on Wednesday, September 11th.

Ms. Lear testified that, as a result of Appellant's odd behavior during the phone conversations on the 11th and Appellant's history of substance abuse, she directed him to report to her office on September 12, 2013 and submit to a drug screening. (H.E. Exh. 1). Appellant acknowledges that Ms. Lear directed him to submit to a drug screening, but admits that he failed to report to Ms. Lear's office and failed to submit to the drug screening. (Tr. at 56:25-57:6).

Appellant claims that he did not submit to the drug screening because he was not in New Orleans on the 12th. *Id.* at 57:6-7.

III. POSITION OF PARTIES

A. Appointing Authority

Appointing Authority asserts that Appellant's failure to report to work and his failure to submit to a drug screening provide ample justification for a twenty-day suspension. The Appointing Authority further calls into question the reasons provided by Appellant for his absences and submits that Appellant is not credible. Finally, the Appointing Authority emphasizes that it has tried to work with Appellant in the past in connection with possible substance abuse and attendance issues with limited (if any) success.

B. Appellant

Appellant represented himself during the course of the appeal hearing. While he did not deny being absent from work on September 11th and 12th, he claims that his absences were due to a bus schedule rather than any failure on his part. Appellant also points out that he did in fact speak with a supervisor on September 11th (Ms. Lear) and told her that he would not be able to come to work. Appellant's excuse for failing to submit to the drug screening mandated by Ms. Lear was that he was not in New Orleans.

IV. STANDARD

It is well-settled that, in an appeal before the Commission under Article X, § 8(A), the appointing authority has the burden of proving, by a preponderance of the evidence: 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir.

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8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, we must then determine if that discipline “was commensurate with the infraction.” *Abbott v. New Orleans Police Dep’t*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep’t of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)).

V. ANALYSIS

A. The Dept. of Sanitation Has Established the Occurrence of the Complained of Activity

1. *Appellant Failed to Report to Work on September 11, 12, 2013.*

There is no dispute that Appellant failed to report to work on Wednesday, September 11, 2013 and Thursday, September 12, 2013. The reasons Appellant offered for his failures are largely irrelevant. Appellant was on annual leave on Monday and Tuesday and evidently chose to spend his leave in Lafayette, Louisiana. It was incumbent upon Appellant, not the Appointing Authority, to secure reliable transportation back to New Orleans in order to be able to report to work promptly at 6:00 a.m. on Wednesday the 11th. He failed to do so and is now subject to discipline.

The fact that Appellant spoke with a supervisor, Ms. Lear, to inform her that he would not be reporting to work on the 11th does not convert his absence as an excused one. Appellant did not allege that he was suffering from a medical emergency or any other factor beyond his control. Instead, he admitted that he would not be able to report to work because he had missed an earlier bus. His reason for missing work on Thursday the 12th is even less acceptable as he represented to Mr. Fournier that he was still in Lafayette despite having earlier represented to Ms. Lear that he was on route to New Orleans via bus on Wednesday the 11th. Based upon the testimony and evidence, it is clear that the Appointing Authority has met its burden with respect to the allegation that Appellant failed to report to work on two consecutive days and that these absences were not excused.

2. Appellant Violated Civil Service Rules by Failing to Submit to a Drug Screening

Appellant acknowledges that Ms. Lear directed him to report to her office on Thursday, September 12, 2013 and submit to a drug screening. Appellant was scheduled to work that day starting at 6:00 a.m. There is no dispute that Appellant failed to report to Ms. Lear's office and did not submit to a drug screening.

The Appointing Authority does not contend that Appellant occupies a safety or security sensitive position. Thus, in order to mandate a drug screening under the Rule, the Appointing Authority must have had "reasonable suspicion to believe that [Appellant's] fitness for duty [was] questionable..." Among the criteria listed that establish this reasonable suspicion are:

- (a) Any observable, work-related behavior or similar pattern of conduct that appears to be abnormal, erratic or otherwise not in conformance with acceptable City policy.
- (b) Any observable, work-related behavior or similar pattern of conduct that indicates signs of impairment in normal sensory and/or motor body functions.
- (c) Any articulable facts or evidence that indicate possible substance abuse on the job.

Rule V, § 9.12(a)-(c). Based upon the testimony offered by the Appointing Authority's witnesses, it is clear that; 1) Appellant had a history of substance abuse and had undergone treatment at the direction of the Appointing Authority, and 2) called a supervisor at 3:00 a.m. and offered confused and conflicting accounts of his pending absence. These facts are sufficient to provide the Appointing Authority with reasonable suspicion that Appellant's fitness for duty was questionable. Therefore, it was appropriate for the Appointing Authority to subject Appellant to a mandatory drug screening.

As the Appointing Authority's witnesses observed, the refusal on the part of an employee to participate in the drug screening process is de facto evidence of that employee's inability to pass such screening:

Refusal to participate in the substance abuse screening procedure, or failure to undergo the screening procedure at the time and place designated for testing, or tampering with or attempting to adulterate the sample, shall be considered to be presumptive evidence of the individual's inability to pass the substance abuse testing procedure.

Rule V, § 9.4. Therefore, pursuant to the Commission's Rules, the Appointing Authority established that Appellant failed the drug screening process.

B. Appellant's Misconduct Impaired the Efficiency of the Appointing Authority

Ms. Lear testified that the crew to which Appellant was assigned was a small one and dependent upon each member reporting to work in a timely manner. (Tr. at 27:24-28:3). When an employee fails to report to work, other members of the crew are forced to take on additional work; the Appointing Authority may also be forced to hire temporary workers to cover an absent employee's work. *Id.* at 28:3-6. The Commission accepts Ms. Lear's testimony and finds that Appellant's unscheduled absences on September 11 & 12, 2013 impaired the efficient operation of the Department of Sanitation.

With respect to Appellant's de facto failure of the drug screening ordered by Ms. Lear, the Commission's own Rules regarding substance abuse recognize that:

In order to protect the health, welfare and safety of the public, co-workers and the individual employee, heighten efficiency and effectiveness of service to the public, and insure the continued integrity of the merit system, a comprehensive program of substance-abuse testing of applicants and employees shall be undertaken in accordance with the provisions of this Rule.

Rule V, §9.1. Thus, an appointing authority must be in a position to require an employee to submit to a drug screening under the conditions established by the Rules. Furthermore, it is clear that the

Rules themselves reflect the serious and adverse impact substance abuse has on the operations of all appointing authorities, including the Department of Sanitation.

C. Appellant's Suspension Was Commensurate With His Offense

Since the Appointing Authority has established that Appellant engaged in misconduct and that the misconduct compromised the public service provided by the Appointing Authority, the Commission now turns to whether or not the twenty-day suspension is the appropriate level of discipline for such misconduct.¹ In performing its analysis, the Commission must determine if the Appellant's suspension was "commensurate with the dereliction;" otherwise, the discipline would be "arbitrary and capricious." *Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (citing *Staehle v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

The Commission finds that Appellant's misconduct was serious and in violation of well-reasons policies established by the Appointing Authority and this Commission's own rules. Further, the Appointing Authority properly considered prior instances of Appellant's misconduct as aggravating factors in issuing the discipline at issue here. Therefore, we find that the twenty-day suspension was commensurate with Appellant's misconduct.

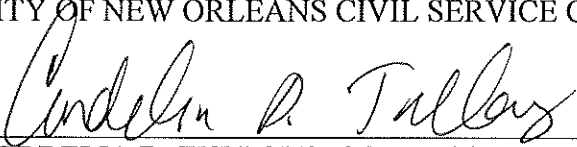
V. CONCLUSION

Upon considering the testimony and evidence submitted in connection with the instant appeal, the Commission finds that the Department of Sanitation had sufficient cause to suspend Appellant for twenty days. Therefore, Appellant's appeal is DENIED.

¹ In making this assessment, the Commission acknowledges that the suspension at issue here was an "emergency" one and that the Appointing Authority reserved the right to issue further discipline at the conclusion of its investigation into Appellant's misconduct. That further discipline is not before us at this time.

Judgment rendered this 5th day of May, 2016

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION


CORDELIA D. TULLOUS, COMMISSIONER

May 5, 2016
DATE

CONCUR


RONALD P. McCLAIN, VICE-CHAIRMAN

May 5, 2016
DATE


TANIA TETLOW, COMMISSIONER

May 6, 2016
DATE