CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
SUITE 900 – 1340 POYDRAS ST.
NEW ORLEANS LA 70112
(504) 658-3500 FAX NO. (504) 658-3598

MITCHELL J. LANDRIEU
MAYOR

CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
RONALD P. McCLAIN, VICE-CHAIRPERSON
TANIA TETLOW
STEPHEN CAPUTO
CLIFTON J. MOORE, JR.

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Tuesday, April 17, 2018

Aaron P.Mollere, Esq.
425 W. Airline Hwy. Suite B
LaPlace, LA 70068

Re: **Kenneth Fountain VS.**
Department of Human Services
Docket Number: 8673

Dear Mr. Mollere:

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 - 4/17/2018 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, 12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Germaine Simon
Corwin St. Raymond
Jay Ginsberg
Kenneth Fountain

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

KENNETH FOUNTAIN vs. DEPARTMENT OF HUMAN SERVICES	DOCKET No.: 8673

I. INTRODUCTION

Appellant, Kenneth Fountain, brings the instant appeal pursuant to this Commission's Rule II, §10.1. In his appeal, Appellant asks the Commission to find that the Department of Human Services for the City of New Orleans (hereinafter "DHS") subjected him to discipline or discriminatory treatment in retaliation for his engagement in protected activity. At all times relevant to the instant appeal, Appellant served as a licensed practical nurse III for DHS and had provisional status as a classified employee. Appellant stipulated he bore the burden of proof in the instant appeal given his provisional status. (Tr. v. 1 at 22:20-23:13).

A referee, appointed by the Commission, presided over two days of hearing on July 11, 2017 and September 21, 2017. At the hearing, both Parties had an opportunity to call witnesses and present evidence. The referee prepared a report and recommendation based upon the testimony and evidence in the record. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner's report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Applicable Rule

As a provisional employee, Appellant did not have the right to bring an appeal challenging whether or not DHS had sufficient cause to terminate his employment. However, our Rules prohibit appointing authorities from subjecting any employee, regardless of status, to discipline or discriminatory treatment because the employee gave "information, testimony or evidence in a prudent manner to appropriate authorities concerning conduct prohibited by law or regulation which he or she reasonably believes to have been engaged in by any person(s)." (C.S. Rule II, § 10.1). According to Appellant, he engaged in protected activity and was soon thereafter terminated by DHS.

Appellant worked as a "part-time registered nurse" at the Youth Study Center (referred to hereinafter as "YSC"). According to the City of New Orleans's official website, the YSC "serves as the juvenile detention center for Orleans Parish, providing safe and secure pre-trial detention to youths who are charged with committing a delinquent offense."[1] In his capacity as a nurse, Appellant would have daily interactions with incarcerated youth and provide them basic medical assistance. (Tr. v. 2 at 11:5-19, 12:2-4).

B. Alleged Protected Activity

At 2:55 p.m. on Monday, March 27, 2017, Appellant sent an email to Dichelle Williams, Deidre A. Howard and Wayne Ferrier. (App. Exh. 1). Ms. Williams was the Interim Superintendent at the time of the email, Ms. Howard was the YSC Human Resource Manager and Mr. Ferrier was the Director of Finance for the YSC. The email had the subject heading "Medicala

[1] https://www.nola.gov/youth-study-center/ (accessed April 5, 2018).

issues." Ms. Williams acknowledged receiving the email and reviewed it on March 27th after discussing it with Ms. Howard. (Tr. v. 2 at 55:16-23, 55:24-56:2).

The concerns/complaints Appellant included in the email cover three subjects. The first subject is the most serious and pertains to alleged threats of sexual assault. Appellant complains that another nurse at the facility – referred to as "David" – "does not have the knowledge nor ability to deal with these kids at the youth study center." *Id.* Appellant goes on to allege two youths at the YSC complained that David had threatened to "stick his finger [in their] rectum if they kept their behavior up." *Id.*

The second subject Appellant tackled in his email related to the "narcotic count" which Appellant alleges "has been off" since David began working at the YSC. And the third subject pertained to Appellant's workload and the inequity he perceived in work assignments. Appellant dedicated the bulk of his email to this third subject.

Approximately five minutes after Appellant sent the email, Ms. Howard approached him and questioned him about the allegations he had made. (Tr. v. 2 at 16:20-17:4). Appellant then spoke with Ms. Williams about his allegations via phone on April 3, 2017.

C. Termination

On March 27, 2017, DHS Interim Superintendent Dichelle Williams issued Appellant correspondence titled "Notice of Termination." In this correspondence, Ms. Williams indicated that Appellant's termination would be effective March 30, 2017. The notice indicates that the reason for Appellant's termination was his "repeated confrontation with other staff members" and Appellant's provision of "false and inaccurate information" during the ensuing investigation into "the incident." (H.E. Exh. 1(a)). Ms. Williams issued a revised termination notice on April 1, 2017 with a new effective date of Appellant's termination date of April 1, 2017. (H.E. Exh. 1(b)).

Ms. Williams testified that she made the decision to terminate Appellant following a contentious meeting between Appellant and a fellow nurse at the YSC referred to in the record only as "Nurse Brooks." (Tr. v. 2 at 58:8-59:21). And, while the termination notice referenced an investigation, the conflict between Nurse Brooks and Appellant was the actual reason for Appellant's termination. *Id.* at 64:2-19. Ms. Williams described the interaction between Appellant and Nurse Brooks as "unprofessional" and believed that it suggested that there were earlier confrontations between the two. *Id.* at 68:12-69:4. Ms. Howard referenced prior conflicts between Appellant and other staff at the YSC, but did not identify these incidents as serious and noted that there was no written record of them. *Id.* at 87:19-88:23. Ms. Williams described prior incidents between Nurse Brooks and Appellant as "'lil spits and spats." *Id.* at 74:6-15.

Ms. Williams did address the "investigation" referenced in the termination notice and confirmed that it referred to the investigation into the alleged threats made by David to youth at the YCS. *Id.* at 61:16-24, 64:23-65:12. Ms. Howard conducted the "investigation" by interviewing the youth identified in Appellant's letter (referred to hereinafter as "R.H." and "K.F."). After interviewing the youth, Ms. Howard determined that the allegations Appellant included in his email were "unfounded." *Id.* at 77:5-17. Ms. Howard reported this to Ms. Williams who testified that it was her understanding that the youth did not know about the allegations and denied making any such statement to Appellant. *Id.* at 66:13-19. Ms. Howard testified that she collected written statements from R.H. and K.F., but DHS did not attempt to introduce these statements into the record.

R.H. testified as part of Appellant's case-in-chief. He testified, under oath, that he reported a threat of physical abuse to Appellant on the day after the threat occurred. (Tr. v. 2 at 49:24-50:4, 51:2-9). According to R.H., "nurse David" issued the threat to K.F. who then conveyed the threat

to R.H. *Id.* at 52:5-16. R.H. approached Appellant with his allegations because he felt "disrespected." Id. at 51:2-14. R.H. did not mention any statement he provided Ms. Howard and referenced only a conversation he had with Ms. Williams, but that he "never really talked to her about" the allegations. *Id.* at 50:20-25.

The only other "investigation" addressed during the course of the appeal hearing was Ms. Williams's investigation into Appellant's allegation that the narcotic count was off. Ms. Williams sought to call into question the veracity of Appellant's claim that the "count" of prescription medication maintained at the YSC was "off." She noted that she herself had investigated the claim and determined that all of the medication inventory was correct. *Id.* at 67:13-25. Yet, Ms. Williams did acknowledge that "David" used a different method to track the inventory than what YSC protocol established. This could have explained Appellant's belief that the medication count was inaccurate. *Id.* at 72:25-73:5.

III. LEGAL STANDARD

In determining whether or not an Appellant has established a prima facie case of retaliation under Rule II, Section 10.1, the Commission has adopted an approach similar to the one used by the United States Court of Appeals when analyzing retaliation claims under Title VII of the 1964 Civil Rights Act. Under such an analysis, an Appellant establishes a prima facie case of retaliation if s/he establishes that; (1) s/he engaged in activity protected by Rule II, Section 10.1, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action. See *Smith v. Bd. of Supervisors of S. Univ.*, 656 Fed.Appx. 30, 32 (5th Cir. 2016); *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996).

If the Appellant successfully establishes a prima facie case of retaliation, the burden of proof shifts to the appointing authority to introduce evidence of a legitimate, non-retaliatory reason for the adverse employment action. *Id.* If the appointing authority is able to meet its burden, then the inquiry shifts back to the appellant who must prove that the proffered reason is not true but rather pretext for the real retaliatory purpose. *See McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007)

IV. ANALYSIS

A. Has Appellant Established a Prima Facie Case of Retaliation?

1) Did appellant engage in protected activity?

Under Rule II, Section 10.1, an employee engages in protected activity when s/he gives any "information, testimony or evidence in a prudent manner to appropriate authorities concerning conduct prohibited by law or regulation which he or she reasonably believes to have been engaged in by any person(s)." In the matter now before the Commission, there is no dispute that Appellant reported an alleged threat to commit a felony[2] issued by a YSC employee/agent. Not only was the alleged threat to commit a felony, but it was issued to a juvenile under the care and supervision of the YSC. Appellant testified that he learned of the alleged threat through R.H., a juvenile residing at the YSC.

R.H. testified that he spoke to Appellant about the threat. This suggests that Appellant had a reasonable belief that "Nurse David" did in fact issue the threat. DHS claimed that Appellant's allegations were false because R.H. and K.F. told Ms. Howard that they did not know anything about the allegations. They allegedly put this denial in writing. The hearing examiner observed

[2] Sexual battery is a felony under state law and includes the "intentional touching of the anus or genitals of the victim by the offender ... without the consent of the victim." La. R.S. 14:43.1 defined by state law as

that, if the statement R.H. allegedly provided to Ms. Howard contradicted his testimony, then DHS had every opportunity to confront R.H. with this inconsistent statement and impeach his credibility. The fact that DHS was "comfortable with the testimony" suggests to the Commissioners that the alleged written statements do not in fact contradict R.H.'s statement.

Appellant also reported that the "narcotic count has been off" suggesting that Nurse David was either failing to properly document the intake and distribution of medications or was guilty of a more nefarious transgression. The Parties agreed that Nurse David did not follow YSC protocol in tracking medications. While this is and of itself was not serious misconduct, it is reasonable to conclude that Nurse David's failure to follow protocol led Appellant to believe that there was an error in the medication inventory.

Based upon the foregoing, the Commission finds that Appellant did engage in protected activity as defined by Rule II, Section 10.1.

2) Did Appellant suffer an adverse job action?

There is no dispute that DHS terminated Appellant's employment and that termination constitutes an adverse job action.

3) Is there a causal link between Appellant's protected activity and the adverse job action?

The ultimate question for the Commission in a retaliation case is whether an appellant's protected activity was the "but for" cause of the adverse employment action. At the prima facie stage, however, the standard for establishing the "causal link" element of Appellant's prima facie case is much less stringent. *See Long*, 88 F.3d at n. 4. For a prima facie case, an appellant need not prove that retaliation was the sole factor motivating the adverse employment action. *See Stroud v. BMC Software, Inc.*, 07-20779, 2008 WL 2325639, at *5 (5th Cir. June 6, 2008).

"Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required to make out a prima facie case of retaliation." *Swanson v. Gen. Servs. Admin.,* 110 F.3d 1180, 1188 (5th Cir.1997) (emphasis omitted); *see also Armstrong v. City of Dallas,* 997 F.2d 62, 67 (5th Cir.1993) (finding the causal link prong established where "[t]he only evidence available to support an inference of discrimination ... is the temporal proximity" of the protected activity and the adverse employment action). The Supreme Court has noted that "cases that accept mere temporal proximity ... as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509 (2001); *see also, Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007)("temporal proximity alone, when very close, can in some instances establish a *prima facie case* of retaliation.").

In the matter now before the Commission, DHS took adverse action against Appellant mere hours after Appellant engaged in protected activity. This is the definition of "very close" as contemplated by the Supreme Court. Bearing the above in mind, the Commission finds that Appellant has met his initial burden in establishing a causal connection between his protected activity and his termination. Therefore, he has established a prima facie case of retaliation and the burden now shifts to DHS to proffer a non-retaliatory reason for termination.

B. Has the Appointing Authority Established a Non-Retaliatory Reason for Termination?

According to the Termination notice, DHS terminated Appellant for "repeated confrontation" with other staff members at the YSC and for "providing false and inaccurate information in the ensuing investigation of the incident." The Commission takes each of these in turn.

The record does not contain any evidence regarding "repeated" confrontations between Appellant and other staff at the YSC other than "'lil spits and spats" that were not serious enough for DHS to even document them in writing. In fact, Ms. Williams testified that she based her decision to terminate Appellant on **one** interaction between Nurse Brooks and Appellant at a meeting called by Ms. Williams to address allegations Appellant made against Nurse Brooks. The Commission does not doubt that emotions ran hot during that meeting, but there is nothing in the record to suggest that there were repeated confrontations. Based upon the record before us, DHS has not established that its termination of Appellant was based upon "repeated confrontations" with staff.

The Commission next turns to DHS's claim that it terminated Appellant for providing "false and inaccurate" information regarding an "investigation." Though the hearing notice is exceedingly vague, Ms. Williams clarified that "the incident" referred to in the notice was the investigation into alleged threats by Nurse David. As noted above, the Commission found that Appellant's belief that Nurse David had issued a threat against R.H. and K.F. at the YSC was reasonable given R.H.'s own testimony. In support of its claim that Appellant's allegations were "false and inaccurate," DHS relied entirely upon a claim by Ms. Howard that R.H. and K.F. provided written statements that contradicted Appellant's account. Those statements are not in the record and their absence is beyond conspicuous.

Under state law, any individual, including licensed nurses, who provides health care services to children is a "mandatory reporter." La. Child. Code Ann. art. 603(17)(a). Thus, as a licensed nurse, Appellant was a mandatory reporter. And, a mandatory reporter who has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse or neglect must report such abuse and/or neglect. La. Child. Code Ann. art. 609(1). The Commission

finds that, based upon the report Appellant received from R.H., he had cause to believe that the physical or mental health of R.H. and K.F. was endangered. Therefore, he had no choice but to report his concerns to his supervisors. Whether or not the allegations turned out to be true is entirely beside the point. Had any employee been the recipient of such an egregious allegation and failed to report it, the Commission expects that such an employee would be summarily dismissed. What DHS has done in terminating Appellant's employment for providing "false and inaccurate" information regarding an investigation is discourage staff members from bringing allegations to supervisors for fear of reprisal.

DHS introduced no evidence that Appellant provided false or inaccurate information regarding the "investigation" referenced in the termination notice. In fact, what is more likely is that Appellant reported an alleged threat to his supervisors, as he was obligated to do under state law, and that his supervisors failed to take the report seriously.

C. Has Appellant Established that the Appointing Authority's Proffered, Non Retaliatory Reason for Termination was Pretext for Retaliation?

While the Commission has found that DHS has failed to proffer a business-related, non-retaliatory reason for Appellant's termination, it will engage in a brief discussion regarding the final element of a retaliation analysis.

During her testimony, Ms. Williams provided a different reason for Appellant's termination than the reason contained in the official termination notice. The reason went from a) "repeated confrontations with other staff members" and "providing false and inaccurate information" regarding an investigation into threats allegedly made against juveniles at the YSC, to b) **one** heated interaction between Appellant and Nurse Brooks. Black's Law Dictionary defines "pretext" as the "ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." Thus, the reason stated in Appellant's termination

notice is already pretext for the alleged "real" reason. Namely, the hostilities between Nurse Brooks and Appellant that occurred in Ms. Williams's office.

These shifting reasons for termination severely undermine DHS's case. Indeed, courts have found that "the combination of suspicious timing with other significant evidence of pretext" is enough to overcome a motion for summary judgment and present a question of fact for the jury. *E.g.*, *Evans v. City of Houston*, 246 F.3d 344, 356 (5th Cir. 2001); *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 409 (5th Cir. 1999); *Stephens v. Bd. of Supervisors of Univ. of Louisiana Sys.*, CV 16-6885, 2017 WL 6610468, at *7 (E.D. La. Dec. 27, 2017).

Here, there is no question that the timing of Appellant's termination is suspicious given that it came mere hours after he engaged in protected activity. Further, there is significant evidence of pretext given that DHS readily admits that the reasons stated in the termination notice were pretext for an alleged "real" reason. There is also substantial evidence in the record that establishes that the two foundations upon which the termination notice rests are unsupported. Given the totality of circumstances, the Commission believes that, even if one were to find that the reason for Appellant's termination proffered by DHS was a legitimate, non-retaliatory reason, Appellant would have been able to establish that such a reason was pretext for a retaliatory motive.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission finds that DHS terminated Appellant's employment in retaliation for Appellant engaging in protected activity. Therefore, we hereby GRANT Appellant's appeal. DHS shall remit to Appellant all back pay and emoluments related to his termination and reinstate him.

Judgment rendered this 17th day of April, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Ronald L. McClain

RONALD McCLAIN, VICE-CHAIRPERSON

4-16-18

DATE

CONCUR

STEPHEN CAPUTO, COMMISSIONER

4-13-18

DATE

Tania Tetlow

TANIA TETLOW, COMMISSIONER

4-16-18

DATE