



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
BRITTNEY RICHARDSON, CHAIRPERSON
JOHN H. KORN, VICE-CHAIRPERSON
CLIFTON J. MOORE, JR.
MARK SURPRENANT
RUTH WHITE DAVIS

Thursday, October 27, 2022

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Jesse Gutter

Re: **Jesse Gutter VS.
Sewerage & Water Board
Docket Number: 9350**

Dear Gutter:

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 - 10/27/2022 - 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, Sec.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,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Ghassan Korban
Ashley Ian Smith
Jim Mullaly
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**JESSE GUTTER,
Appellant**

Docket No. 9350

v.

**SEWERAGE & WATER BOARD,
Appointing Authority**

DECISION

Appellant, Jesse Gutter, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his November 23, 2021, termination. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a Networks Maintenance Technician I. (Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on February 11, 2022. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated July 8, 2022, and controlling Louisiana law.

For the reasons set forth below, Mr. Gutter's appeal is DENIED.

I. FACTUAL BACKGROUND

Mr. Gutter began working at the Sewerage & Water Board on September 15, 2021. (Ex. HE-1). The last position Mr. Gutter held was a Networks Maintenance Technician I in Zone 5 (New Orleans East), and his immediate supervisor was Matthew McAcy. (Tr at 18). Mr. Gutter worked as part of a crew supervised by Mr. McAcy to maintain the water and sewer for New

Orleans East. (Tr. at 19). Six to seven individuals comprised a crew, and the members of the crew worked in close proximity to each other, including riding in a truck together. (Tr. at 23-24).

The Sewerage & Water Board adopted a policy effective September 27, 2021, that all employees must be vaccinated or take Covid tests twice per week. (Tr. at 20; Ex. SWBNO-B). Mr. Gutter submitted three Covid-19 test results in October 2021. (SWBNO-A). Mr. McAcy collected Mr. Gutter's test results. (Tr. at 21). Mr. McAcy noticed that the handwriting on the test results was exactly the same, so Mr. McAcy suspected that the test results were falsified. (Tr. at 22). Mr. McAcy recommended the termination of Mr. Gutter for falsifying the test results, and Mr. Gutter admitted falsifying the results dated 10/9/21 and 10/11/21 at his pre-termination hearing. (Tr at 23). Mr. Gutter also admitted falsifying the results at the July 8, 2022, hearing. (Tr. at 11).

Sewerage & Water Board policy provides that termination is the penalty for the first offense of “[f]alsification of any records or reports, including time cards of employees hours of work.” (Ex. SWBNO-C at 6).

II. ANALYSIS

A. Legal Standard

1. The Appointing Authority must show cause for discipline

“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep’t of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.*

“Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.” *Id.* “It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, 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 in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094).

2. The Appointing Authority must show the discipline was commensurate with the infraction

The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep't*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984). The Appointing Authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

B. Application of Legal Standard to Sewerage & Water Board's termination of Mr. Gutter

1. The Sewerage & Water Board has shown cause for Mr. Gutter's termination

The Sewerage & Water Board has carried its burden of showing the complained-of activity occurred. In this case, Mr. Gutter admittedly falsified his Covid-19 test results on two occasions. Under the Sewerage & Water Board's Progressive Discipline Policy, the penalty for falsification of any records of reports is termination. (Ex. SWBNO-C at 6). Falsifying tests required to provide a safe workplace for Mr. Gutter's co-workers impaired the efficient operation of the Sewerage & Water Board. Mr. Gutter testified that "[s]omeone could get really, really sick" if he had reported to work with Covid.

2. The Sewerage & Water Board has shown the penalty is commensurate with the infraction

Termination was commensurate with the violation and in accord with Sewerage & Water Board policy.

For the foregoing reasons, Mr. Gutter's appeal is DENIED.

This the 27th day of October, 2022.

WRITER:

Mark C. Surprenant
Mark C. Surprenant (Jul 14, 2022 15:52 CDT)

MARK SURPRENANT, COMMISSIONER

CONCUR:

J H Korn
J H Korn (Jul 15, 2022 12:33 CDT)

JOHN KORN, VICE-CHAIRPERSON

Ruth White Davis
Ruth Davis (Jul 14, 2022 18:01 CDT)

RUTH DAVIS, COMMISSIONER