



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION
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AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Tuesday, March 23, 2021

Mr. Fredrick Brooks

Re: **Fredrick Brooks VS.
Department of Human Services
Docket Number: 9113**

Dear Mr. Brooks:

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 - 3/23/2021 - 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,


Stacie Joseph
Management Services Division

cc: Kyshun Webster
Elizabeth S. Robins
Jay Ginsberg
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

FREDERICK BROOKS
Appellant

vs.

DOCKET NO. 9113

JUVENILE JUSTICE INTERVENTION CENTER
Appointing Authority

DECISION

Appellant, Frederick Brooks (hereinafter "Appellant"), brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1, asking this Commission to find that the Juvenile Justice Intervention Center (hereinafter "Appointing Authority") did not have sufficient cause to terminate his employment on November 15, 2019. (Ex. HE-1). At all times relevant to the instant appeal, Appellant was employed as a Juvenile Detention Counselor III had permanent status as a classified employee. (Tr. at 9).

The below Commissioners have reviewed the transcript from the January 15, 2020, hearing, all exhibits introduced into the record, and the October 6, 2020, attached report from the Hearing Examiner, which is advisory in nature. After reviewing this record, we GRANT Appellant's appeal for the reasons set forth by the Hearing Examiner.

The November 15, 2019, letter of termination shall be removed from Mr. Brooks' personnel file and Mr. Brooks shall be reinstated effective November 15, 2019, with all back pay and emoluments of employment.

Judgment rendered this 23 day of March, 2021.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER:

Mark C. Surprenant

Mark C. Surprenant (Mar 12, 2021 10:20 CST)

MARK SURPRENANT, COMMISSIONER

CONCUR:

Brittney Richardson

Brittney Richardson (Mar 12, 2021 15:36 CST)

BRITTNEY RICHARDSON, COMMISSIONER

J. H. Korn

J. H. Korn (Mar 23, 2021 15:24 CDT)

JOHN KORN, COMMISSIONER

FREDRICK BROOKS

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF HUMAN SERVICES NO. 9113

HEARING EXAMINER'S REPORT

I. INTRODUCTION

Fredrick Brooks ("Appellant") was employed by the Department of Human Services ("Appointing Authority") as a Juvenile Detention Counselor III with permanent status at the Juvenile Justice Intervention Center ("JJIC")¹. The Appointing Authority terminated the Appellant effective November 15, 2019, after determining that he violated JJIC Policy 3.7(E) – Abandoning Post. (H.E. Exh. 1).

II. FACTUAL BACKGROUND

A. Allegations Contained in the Disciplinary Letter

The disciplinary letter notified the Appellant of the reasons for his termination stating that:

This letter is to give you formal notice of the final decision to terminate you from your position as a Juvenile Detention Counselor III... due to not following the directives from the Executive Director (Dr. Kyshun Webster) for calling off, leaving your job post before your scheduled end shift, your failure to report to work as scheduled and possibly putting the facility at risk of being out of compliance with the DCFS staff ratio requirements...

...During the (pre-termination) hearing we discussed your failure to follow the call off policy that Dr. Webster had given you. You were instructed on Monday, July 29, 2019 during your documented

¹ The Juvenile Justice Intervention Center is a facility where juvenile offenders are housed while awaiting trial.

meeting that "Dr. Webster was the only person that you were to call in order to request off or when you were calling off." On Friday, November 1 and Saturday, November 2, 2019, you violated this policy by informing the JDC Supervisor on your shift that you were leaving work. On Sunday, November 3, 2019, you called the JDC Supervisor's phone to inform them of your absence. You have left your assigned duty post and you have refused to work the assigned shift that would accommodate your medical restrictions...

The disciplinary letter cited JJIC Policy 3.7 (E. Abandoning Post), which provides as follows:

1. Employees shall not leave their assigned post until authorized by the Superintendent, an Assistant Superintendent or the Shift Supervisor on duty and properly relieved by another staff member or relieved by the shift supervisor.
2. An employee who leaves his/her post without being properly relieved is considered to have Abandoned their post (the relief staff member must be physically present at the assigned post before the staff member can leave his/her assigned post). This shall result in disciplinary action up to and including termination of employment.
3. If an employee failed to report to work for three consecutively scheduled working days, he/she shall be considered to have abandoned his/her job and shall be terminated.

(H.E. Exh. 1)

The disciplinary letter does not reference any past performance issues or disciplinary actions. Consequently, this appeal is restricted to the November 1, 2, and 3, 2019 attendance issues for purposes of determining whether cause existed for taking disciplinary action and, if so, whether termination was an appropriate penalty.

B. Sick Leave Use and Investigation of Sick Leave Abuse Policy

On May 2 2019, Kyshun Webster, as the Interim Director of the JJIC, issued a new policy for sick leave use and the investigation of sick leave abuse. (JJIC Exh. 1). He testified that the purpose of the policy was to end a past-practice of employees leaving voice mail messages to take unscheduled sick-leave without the approval of a higher-level supervisor to confirm the legitimacy of sick leave requests prior to approval. (Tr. at 74 -75). On page two of the document, the policy provides directions under the heading *EMPLOYEE SICK-LEAVE QUALIFYING CALL-IN*, which provides:

Employee must initiate a call-in to the most-senior department head within (3) hours of the emergency sick-call. The employee has an obligation to respond to an employer's phone calls to inquire and determine whether an absence is potentially qualifying for sick leave. Only emergency sick-call ins should be done in this way. An emergency sick-call is a last resort due to immediately declining health conditions. Other requests for sick-leave for scheduled doctor's appointments can proceed using the normal channels for leave requests.

The policy provides a "Table of Most-Senior Department Heads" for an employee to call. Dichelle Williams is listed as the most-senior department head for the Juvenile Detention Department where the Appellant was assigned. (JJIC Exh. 1; Tr. at 15 -16).

The policy provides instructions to obtaining "Sick Leave Verification" on page three of the policy. Under the heading *SICK LEAVE VERIFICATION*, there is contained a procedure for calling in. It provides as follows:

1. Contact the most-senior department supervisor within 3 hours of shift change via phone until you reach a live voice.
2. The most-senior department head will qualify the call by requiring the employee to respond to the following questions:

- a. Why are you requesting leave?
- b. Does your sickness impede your ability to function in any way at work?
- c. As a result of your sickness, are you confined to home or a hospital?
- d. What address will you be at all day while you are sick and/or confined?
- e. When will you be back at work?

The policy provides what are captioned as *KEY DEFINITIONS*. Included are the following:

No call/no show	An unscheduled absence without proper notification to the employee's supervisor or department.
Unscheduled Absence	Failure to report to work on a scheduled workday or working less than half of a scheduled workday due to tardiness or leaving early without a written and approved time off request...
Unscheduled Early Departure	Failure to work a complete workday due to an early departure without a written and approved time off request. Please refer to Unscheduled Absences above when an early departure results in working less than half of a scheduled workday.

Finally, the policy provides progressive discipline guidelines to address sick leave abuse under the caption *SUPERVISOR DUTY OF RESPONSIBILITY WITH DOCUMENTATION OF UNSCHEDULED ABSENCES* as follows:

Supervisors should follow the corrective action progression described below to address unscheduled absences, tardiness and unscheduled early departures. When an employee has accumulated two occurrences, each two occurrences thereafter

will advance the corrective action process, up to and including termination of employment. Tardiness and early departure are counted as a half occurrence for disciplinary purposes. However, depending on the situation, corrective action may be accelerated, repeated or taken out of sequence, and the Department reserves the right to effect immediate termination should it be warranted...

Verbal warning upon two (2) occurrences.

Written warning upon four (4) occurrences.

Termination of employment upon eight (8) occurrences.

Employees will be subject to immediate corrective action for no call/no show. Two (2) or more consecutive workdays of no call/no show may be considered job abandonment and result in termination of employment.

To reinforce the importance of the attendance policies, because of past attendance concerns, Dr. Webster met with the Appellant to discuss his expectations on July 29, 2019.

C. July 29, 2019 Meeting

The parties confirmed that Dr. Webster and Christina Dickerson met with the Appellant on July 29, 2019 to discuss various issues.² According to a "Documentation of Meetings" form utilized by the department, the purpose of the meeting was to "Address Workplace Performance, Reiterate a Policy or Procedure Expectation and Reinforce Previous Expectations." According to the document, one of the items covered was "Attendance (Call off, showing up on

² Ms. Dickerson, who was the departments Chief Operating Officer, is no longer employed by the Department and did not testify.

time)" with a proviso that "Dr. Webster is the only Person that can authorize a call off." (JJIC Exh. 2).

III. APPOINTING AUTHORITY'S VERSION OF EVENTS

Dr. Webster testified that call-off means "I can't come to work; I can't be on that shift that you are expected to be on whether it's eight hours or twelve hours". (Tr. at 75 – 76). When questioned further, Dr. Webster testified that he does not distinguish between not calling in for work (calling off) and leaving work early for purposes of tracking attendance patterns and determining whether an employee has abandoned his or her job. He testified that, in either circumstance, requesting employees are required to contact the most senior department head prior to absenting themselves from work. The consequence of failure to call in / obtain permission is that the absence is considered unexcused and therefore without pay. (Tr. at 76 -78).

Regarding the Appellant, Dr. Webster testified that he informed the Appellant during the July 29, 2019 meeting that he needed to contact him directly if he was calling off or missing time. Dr. Webster stated that he gave the Appellant special instructions that he was to contact him directly if he was calling off or missing time rather than Dichelle Williams, who was the Appellant's senior most department head. (TR. at 79 – 80). Dr. Webster testified that the Appellant's past pattern was to leave voice messages rather than to actually make contact with a responsible person when he was scheduled to work and attempted to called off prior to his shift. Consequently, Dr. Webster wanted to

monitor the Appellant's practices personally. (Tr. at 80). To that end, he gave the Appellant his cell phone number to call or text him if he was missing work. (Tr. at 79 – 80). Because the Appellant took time off on November 1, 2, and 3, 2019 without calling or texting him, Dr. Webster terminated his employment. (Tr. at 80 – 82, 106).

Dr. Webster acknowledged that the Appellant had suffered a work-related injury and that he had medical limitations when he returned to work on October 30, 2019. (Tr. at 86). The Appellant's medical provider released the Appellant to return to work with restrictions. Specifically, the Appellant was limited to sedentary work (sitting, occasional walking, standing, lifting less than 10 pounds). (JJIC Exh. 6). The night shift occurs while the residents are confined to their sleeping quarters and, as a consequence, there are minimal interactions between the Appellant and the residents allowing for a sedentary assignment. Consequently, the Appointing Authority assigned the Appellant those shifts. (Tr. at 34).

Dr. Webster also acknowledged that the Appellant was the only employee required to contact him exclusively to obtain approved time off. (Tr. at 99). Finally, Dr. Webster acknowledged that the Appellant provided medical documentation concerning his medical condition prior to his termination which included a proviso that the Appellant should avoid the night shift. (Tr. 106, Appellant Exh. 1). Dr. Webster took no actions to confirm or disprove the limitations prescribed by his medical provider. As reflected in the disciplinary

letter as a justification for termination, Dr. Webster concluded that the Appellant had abandoned his job and had refused to return to work. This conclusion was based on the medical documentation precluding the Appellant from working the night shift and that there were no other assignments he could work given his limitations. (Tr. at 115 - 116).

IV. APPELLANT'S VERSION OF EVENTS

The Appellant acknowledged that the policy requires an employee to initiate a call-in to the most senior department head within three hours of taking emergency sick leave. He confirmed that Dichelle Williams was the most senior department head for purposes of calling in. However, he denies receiving a directive regarding from whom to obtain permission to leave work early and contends that leaving work early is not a call off. (Tr. at 15 -16). He testified that if something occurs at work and you have to leave, you notify your immediate supervisor. (Tr. at 16). He stated that during the July 29, 2019 meeting with Dr. Webster, he was instructed to contact Dr. Webster or Ms. Dickerson if he was calling off. (Tr. at 16 – 17). When confronted with JJIC Exh. 2, the July 29, 2019 documentation of meeting, the Appellant stated that Dr. Webster had exclusive authority to approve or deny paid time off for a call off but that permission could be obtained from either Dr. Webster or Ms. Dickerson. (Tr. at 18 – 19).

The Appellant confirmed that he had a second meeting on August 16, 2019 with Christina Dickerson, during which she reiterated that if he needed time off, he was to speak directly to Dr. Webster. He testified that the meeting

occurred after he spoke to his supervisor about taking days off, and he was instructed to ask for authorization from Dr. Webster. (JJIC Exh. 4; Tr. at 25 -26).

The Appellant sustained a neck and back injury in mid-August 2019 while on the job, and was absent from the job as a result until his release to return to work on October 30, 2019. (JJIC Exh. 5, JJIC Exh. 6 and Tr. at 29 – 34).

The Appellant returned to work on November 1, 2019 and was scheduled to work the night shift from 11:00 pm to 7:00 am. (November 1 – 2). On November 2, 2019, the Appellant left work before the end of his shift. He testified that, due to the cold conditions of the facility and the employer's denial of his request for a space heater, he began to experience pain, but could not take prescribed pain medication because it made him drowsy. He left his post at or around 5:10 am. (JJIC Exh. 7; Tr. at 35). He notified his immediate supervisor, Schantalyn Jones, and received permission to leave work early. He did not call or attempt to contact Dr. Webster or Christina Dickerson. (Tr. at 37 - 38). The Appellant explained that he was not "calling off" because calling off occurs before your shift if you are informing the department that you are not coming to work. "Calling off" does not apply to circumstances that occur during your shift when you are leaving work early. (Tr. 38). Ms. Jones confirmed that there was sufficient coverage for the shift and that she gave the Appellant permission to leave early because of his medical condition. She further testified that she was never informed that Dr. Webster was the only person who could authorize the Appellant to leave early. (Tr. at 145 – 149).

The Appellant returned to work for his next shift, which ran from 11:00 pm, November 2, 2019 until 7:00 am, November 3, 2019. For the same reasons, he left early, at 3:00 am., after notifying his supervisor, Mr. Jackson, and receiving his permission.³ (Tr. 39 -42).

The Appellant did call off for his next shift, which began at 11:00 pm, November 3, 2019, and ended on November 4, 2019. due to muscle spasms. He testified that he tried to call Dr. Webster, but he did not answer. He stated that he called and texted Ms. Dickerson at 7:00 pm to inform her of his unsuccessful attempt to contact Dr. Webster. Ms. Dickerson informed him that Dr. Webster was on vacation. He also called the immediate supervisor's phone. (Tr. at 43 - 47). He acknowledged that he never received permission to miss the shift. (Tr. at 55). However, the Appellant provided a copy of his text message to Ms. Dickerson, which provided:

Good Afternoon, I will not be able to make my scheduled shift today. For the past two nights, I have tried to work with the accommodations provided however after about two hours in the extremely cold environment my injuries become aggravated. In addition, because I have to remain alert while at JJIC I am unable to take my medication as prescribed. I look forward to speaking with you about what changes can be made so that I can return to work and be effective.

The Appellant also texted his undated work restrictions. Although Ms. Dickerson had responded to earlier emails that are part of the text stream, she did not

³ Day light savings time ended on November 3, 2019. Therefore, while the time he left was 3:00 am, he worked five hours.

acknowledge or respond to the Appellant's text messages seeking approval for time off or additional accommodations to address his medical condition.

(Appellant Exh. 2; Tr. at 46 - 55).

V. ANALYSIS

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action by his employer 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 burden 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 undisputed facts establish that the Appellant returned to work on a limited duty basis after suffering a work-related injury. To accommodate the Appellant's limitation, the Appointing Authority scheduled the Appellant for the overnight shift reasoning that because the residents were asleep it was less likely that he would have to exert himself in the performance of his duties. On the first night, the Appellant worked six hours and ten minutes of his eight-hour shift, leaving due to medical reasons. He notified his immediate supervisor and confirmed that the shift had adequate coverage before leaving. On the second night, the Appellant worked five hours of his eight-hour shift because of medical reasons. Again, he notified his immediate supervisor and confirmed that the shift had adequate coverage before leaving. He did not contact Dr. Webster prior to leaving his shift on either occasion. On the third night, the

Appellant notified the most senior department head four hours before his shift began that he was not coming to work for medical reasons. He sent a text message to Ms. Dickerson, but received no directives or responses. He also forwarded a revised doctor's note restricting the Appellant from working the over-night shift because of his condition.

Regarding the Appellant's decision to leave work early on his first two shifts following his return from workers' compensation leave, he was not "calling off" as defined by policy. Based upon the July 29, 2019 Documentation of Meeting (JJIC Exh. 2), the instruction to contact Dr. Webster did not anticipate or address leaving work early. It spoke only to "a call off". If Dr. Webster had instructed the Appellant to call or text him in the early hours of the morning if he had to leave work early, those instructions should have been included in the meeting notes. Therefore, based upon the foregoing, the Appointing Authority has not established that the Appellant failed not follow instructions or abandoned his job when he obtained permission from his supervisor to leave early on November 1st and 2nd.⁴

Regarding the Appellant's failure to contact Dr. Webster before taking sick leave on November 3rd, the Appointing Authority placed stringent conditions on the Appellant for calling off. He was required to contact Dr. Webster. He failed to contact Dr. Webster, but there is no evidence that his

⁴ In fact, the Appellant's actions are not even considered "an early departure" for disciplinary purposes according to the Appointing Authority's policy because the Appellant did not depart after working less than half of his assigned shift. See policy KEY DEFINITIONS cited above on page 4.

request for sick leave was otherwise deceitful. He had a documented medical condition and he made concrete efforts to notify his employer. There is certainly no evidence that the Appellant abandoned his job as defined by the Appointing Authority's written policy. At most, the Appellant had one unexcused absence because he failed to obtain permission from Dr. Webster.

Finally, taking action against the Appellant based upon a revised doctor's note further restricting the Appellant's ability to work was premature. The Appointing Authority neither investigated the Appellant's medical issue nor confirmed that the Appellant was unwilling or unable to work. Instead, the Appointing Authority arbitrarily deemed the Appellant to have abandoned his job and terminated his employment.

The Civil Service Commission has a duty to decide independently, from 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*. In the instant case, the Appellant's one unexcused absence would not even warrant a verbal warning based upon the Appointing Authority's progressive discipline policy, and the Appointing Authority provided no rationale for diverging from its written policy. Based upon the foregoing, termination is not commensurate with the Appellant's transgression.

VI. CONCLUSION

The Appointing Authority has failed to establish by a preponderance of evidence that the Appellant abandoned his job.

Considering the foregoing, the Appellant's appeal should be GRANTED, and the Appointing Authority ordered to reinstate the Appellant with all back pay and emoluments of employment.

October 6, 2020
DATE

s/ Jay Ginsberg
HEARING EXAMINER