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

Tuesday, April 13, 2021

Mr. Eric Hessler
PANO 2802 Tulane Avenue #102
New Orleans, LA 70119

Re: **Leroy Joseph Smith VS.**
Department of Police
Docket Number: 9004

Dear Mr. Hessler:

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 - 4/13/2021 - 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
Chief, Management Services Division

cc: Shaun Ferguson
David J. Patin, Jr.
Jay Ginsberg
Leroy Joseph Smith

file

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

LEROY SMITH

V. **DOCKET NO. 9004**

NEW ORLEANS POLICE DEPARTMENT

AMENDED JUDGMENT

Upon the request of Appellant, the Commission amends its March 23, 2021, judgment to reflect the relief to be granted to Appellant.

Appellant, Leroy J. Smith, brings the instant appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1, seeking relief from the discipline imposed by the New Orleans Department of Police. At all times relevant to this appeal, Smith served as a Sergeant for the New Orleans Department of Police and had permanent status as a classified employee.

A hearing examiner, appointed by the Commission, presided over a hearing held on June 5, 2019. At the hearing, both parties had an opportunity to call witnesses and present evidence. Following the hearing, the hearing examiner prepared the attached self-explanatory February 10, 2020 report and recommendation based upon all the testimony and evidence presented in connection with the hearing.

The undersigned Commissioners have reviewed the hearing transcript, all exhibits presented at the hearing, the attached hearing examiner's June 10, 2020 report, and the applicable law. In addition to the Louisiana Fourth Circuit Court of Appeal decision in *Marziale v. Department of Police*, 944 So. 2d 760 (La. App. 4th Cir. 2006), the Commissioners have also particularly reviewed *Wilson v. New Orleans Police Department*, 804 So. 2d 838 (La. App. 4th Cir. 2001).

In *Wilson*, the Fourth Circuit clearly stated that, in a matter such as the present one before this Commission, the appointing authority has the burden to prove by competent medical evidence that the police officer in question would never be able to return to his full duty as a police officer. The *Wilson* court determined that the appointing authority had carried its burden of proof and thus found in favor of the appointing authority. In contrast, in the case presently before this Commission, the appointing authority failed to present medical evidence to the effect that Smith would never be able to return to his full duties as a police officer.

Given all of the above and, in particular, the appointing authority's failure to carry its legally imposed burden of proof, we agree with the report and recommendation of the hearing examiner and GRANT the appeal. Appellant shall be reinstated and shall receive lost wages and all emoluments of employment from March 29, 2019, to present.

Judgment rendered this 13th day of April, 2021.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Mark C. Surprenant
Mark C. Surprenant (Mar 24, 2021 18:12 CDT)

MARK SURPRENANT, COMMISSIONER

CONCUR:

CJ Moore (Apr 13, 2021 13:51 CDT)

CLIFTON J. MOORE, JR., VICE-CHAIRPERSON

J H Korn (Apr 13, 2021 13:48 CDT)

JOHN KORN, COMMISSIONER

LEROY SMITH	CIVIL SERVICE COMMISSION
VS.	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NO. 9004

REPORT OF THE HEARING EXAMINER

The Department of Police ("Appointing Authority") employed Leroy Smith ("Appellant") as a Police Sergeant with permanent status. By letter dated March 29, 2019, the Appointing Authority terminated the Appellant after determining that the Appellant was unable or unwilling to perform the duties of his position under Civil Service Rule IX *Maintaining Standards of Service* due to of a long-term medical condition. The facts upon which the Appointing Authority made its decision is reflected in the first two full paragraphs of the second page of the disciplinary letter, which provides:

> On Sunday, August 13, 2017, while handling a call for service, a vehicle backed into the driver side door of your marked vehicle causing injuries to your back. Due to the extent of your injuries, you were transferred to the Administrative Duties Division on September 3, 2017.
>
> Since transferring to the Administrative Duties Division, you have provided sixteen Physician's Examination Certificate Forms (Form 50's) signed by Dr. Radha Raman, Dr. Michael Haydel, Dr. Richard Vanderbrook, and Dr. Felipe Ramirez from September 18, 2017 – March 15, 2019. All of these documents noted that you were not able to return to full duty.

(H.E. Exh. 1)

The Appointing Authority introduced into evidence the sixteen Physician's Examination Certificates that are referenced as New Orleans Police Department Form 50. (NOPD Exh. 4). The Appointing Authority utilized the Form 50's to track

the Appellant's medical progress in order to gauge when the Appellant would be able to return to work and in what capacity. A review of the Appellant's Form 50 submissions reflects that, prior to his termination, the Appellant provided Form 50's releasing him to limited duty, but with no estimated date for his return to full duty. In fact, at the time of his termination, the Appellant was working full-time in a limited duty assignment writing reports for the Alternative Police Response Unit. (Tr. p. 9).

The Appointing Authority conducted a "Rule IX" Hearing on March 26, 2019. Dep. Supt. Christopher Goodley of the Management Services Bureau testified that he was a member of the panel conducting the Appellant's hearing. He testified that the panel reviewed the Form 50 submissions provided by the Appellant and they reflected no estimated date that the Appellant could return to work in a full-time capacity. (Tr. pp. 29 – 31). Dep. Supt. Goodley stated that when questioned during the Rule IX hearing, the Appellant could not provide an estimated date when he could return to full duty. (Tr. p. 42).

As explained by Dep. Supt. Goodley, Limited Duty Assignments are temporary assignments for police officers who are recovering from illnesses or injuries that will eventually resolve and allow a police officer to return to full-duty performing all tasks of a police officer. (Tr. pp. 20 – 22). In the Appellant's case, the medical documents provided and the Appellant's representations gave no indication that he would return to full-duty at any particular time in the future.

Consequently, based upon the limitations in the medical documentation provided, the Appellant was terminated. (Tr. pp. 49 – 50).

On cross-examination, Dep. Supt. Goodley acknowledged that the panel did not determine that the Appellant would never return to full duty. (Tr. pp. 58 and 61). Dep. Supt. Goodley emphasized that the Appellant was unable to give a future estimated date for return and that limited-duty assignments were not for indefinite periods of time. (Tr. pp. 71 -72). Dep. Supt. Goodley also acknowledged that the Appointing Authority did not seek a second medical opinion, stating that it is the Appellant's responsibility to apprise the Appointing Authority of his medical condition. (Tr. pp. 59 – 60 and 65 - 66).

The Appellant testified that, prior to his termination, he was employed by the Appointing Authority for almost 28 years. (Tr. p. 87). He stated that he was never told by his treating physician that he would never return to full-duty. (Tr. p. 89). The Appellant explained that as a result of the injury to his back he had a pinched nerve that prevents him from using his weapon, which makes him unable to return to a full-duty position. (Tr. p. 13). The Appellant stated that there are potential treatments that give him hope for a full recovery and a return to full duty. However, the Appellant did not provide any medical documentation regarding any recommended medical treatment or surgery that would resolve his long-term back issue. (Tr. p. 93).

CONCLUSION

In order to prevail, the Appointing Authority must establish by a preponderance of evidence that the Appellant was either unwilling or unable to perform his duties as a police sergeant. *See Marziale v. Department of Police*, 2006-0459 (La. App. 4th Cir. 11/08/06); 944 So.2d 760. In Rule IX cases, the Appointing Authority has an extremely heavy burden. In *Marziale*, the Court noted that the Appointing Authority should have requested an independent medical evaluation and, as a result, that it failed to present any evidence that Marziale was permanently disabled or would not be able to resume his duties at some time in the future. The Appellant never stated or otherwise indicated that he was unwilling to return to work. Also, there was no medical determination that the Appellant's injuries would prevent him from returning to full duty in the future. *Id*.

The heavy burden established in *Marziale* requires the Appointing Authority to provide an independent medical evaluation where, as in this case, the Appellant's medical provider fails to provide sufficiently clear documentation of the length of expected leave status, particularly when the Appellant represents that he intends to return to work "someday".

Based upon the foregoing, The Appellant's Appeal is should be GRANTED.

February 10, 2020
DATE

S/ Jay Ginsberg
HEARING EXAMINER