CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

KERRY WEST vs. SEWERAGE AND WATER BOARD	DOCKET NO.: 8287

I. INTRODUCTION

Appellant, Kerry West, appeals his termination pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1. The Appointing Authority, the Sewerage and Water Board for the City of New Orleans, (hereinafter the "Board") 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 terminated for sufficient cause.

II. FACTUAL BACKGROUND

Appellant, a permanent employee in the Classified service, began his employment with the Board in 1989 as a laborer in the "grass department." (Tr. at 18:11-19). On or about August 15, 2012, Appellant was involved in a serious accident while driving a fully loaded, City-owned vehicle. *Id.* at 21:1-25. Appellant was working in his capacity as a Board employee at the time of the accident and was screened for drugs and alcohol immediately following the accident; that screening indicated that Appellant had not been under the influence of drugs or alcohol at the time of the accident. *Id.* at 22-23. As a result of the accident, Appellant suffered injuries and did not return to work. In fact, between the day of the incident and the date of his termination, Appellant did not return to active work for the Board. *Id.* at 23:17-24.[1]

[1] In May of 2014, Appellant was promoted to "networks maintenance technician II," which Appellant describes as being a "labor intensive" job. *Id.* at 19:3-8, 20:1-10. However, it appears that Appellant never actually performed the

Following his accident, Appellant came under the care of Dr. Watermeier, who served as Appellant's treating physician. *Id.* at 24:5-9. Appellant also saw Dr. Steiner who conducted an examination and provided Appellant with a second opinion as to his injuries as well as an assessment as to what light duty jobs would be within Appellant's ability to perform. (Board Exhs. 1, 1a; Tr. at 24:12-14).

Appellant testified that his physical activity is severely limited by his injuries and he cannot do such mundane tasks as mow his lawn or wash his truck. *Id.* at 29:9-13. The Board pressed Appellant on this point during its case-in-chief and brought up the results of an investigation commissioned by the Board that involved surveillance of the Appellant. (Board Exh. 7). The Board arranged for an investigation and surveillance of Appellant in connection with Appellant's worker's compensation claim. (Tr. at 58:12-17). According to the Board, the investigator observed Appellant carrying groceries and moving obstructions. *Id.* at 59:14-18.[2] As a result of the Dr. Steiner's report, a Functional Capability Examination, and the physical activities undertaken by Appellant during the course of the investigation/surveillance, the Board determined that Appellant was able to perform a light-duty assignment. (Board Exhs. 1, 2; Tr. at 59:4-18).

Pursuant to the City's policy, employees who are injured on the job may be offered light duty positions depending upon the department and the type of work the employee is capable of performing. (Tr. at 12:18-25). In the Appellant's case, he was examined by Dr. Steiner who recommended that Appellant engage in another course of physical therapy, but also indicated that

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work of a networks maintenance technician II. The Commission also notes that Appellant entered a Deferred Retirement Option Plan ("DROP") in 2011, approximately one year before his accident, and continued to receive DROP payments until the effective date of his termination, June 6, 2014. *Id.* at 27:10-28:6.

[2] The Commission notes that Ms. Linda Paisant's testimony on this matter is inconsistent with the report introduced by the Board during the course of the hearing. Specifically, the investigator's report introduced by the Board indicates that the investigator "never observed [the Appellant] outside his residence." (Board Exh. 7).

Appellant could return to work in a light duty capacity. (Board Exhs. 1, 1A). Appellant admits that he was offered a light-duty position as a hydrant inspector and was told to report to work on May 12, 2014. *Id.* at 40:20-41:5. Appellant did not report to work as directed because, in his opinion, he was still "hurt" and could not perform even light-duty work. *Id.* at 41:20-42:2. While Appellant maintained that he was not fit to return to any type of duty, he did not produce any reports or documentation supporting this positon nor did he give the Board any indication that he would be able to report to work in the foreseeable future. *Id.* at 66:10-20. In response to Appellant's refusal to report to work, the Board conducted a hearing at which Appellant had an opportunity to respond to an allegation that he was unwilling or unable to work. (Hearing Officer Exh. 1). The Board terminated Appellant following this hearing. *Id.*

During the instant appeal hearing, Appellant acknowledged that, at the time the Board offered him a light duty assignment, he was "unable or unwilling" to accept the position and report to work. Tr. at 90:2-8. He also conceded that his physician did not clear him to return to work until November 2014, five months after his termination. *Id.* at 90:10-16.

III. POSITION OF PARTIES

A. Appointing Authority

The Board takes the position that there was sufficient cause to terminate Appellant under Rule IX, §1.1 because Appellant was unwilling or unable to report to work. The Board's asserts that it took into account Appellant's physical limitations and made a reasonable attempt to accommodate those limitations by offering Appellant a light-duty position as a hydrant inspector. When Appellant was unwilling or unable to accept the hydrant inspector position, the Board acted within the Rules in terminating Appellant.

B. Appellant

Appellant represented himself during the course of the hearing, and admitted that he was unable and/or unwilling to report to work in the capacity as hydrant inspector. Nevertheless, Appellant appears to contend that his termination was premature and not for sufficient cause.

IV. STANDARD

Rule IX, Section 1.1 states in pertinent part:

> When an employee in the classified service is unable or unwilling to perform the duties of his/her position in a satisfactory manner, or has committed any act to the prejudice of the service, or has omitted to perform an act it was his/her duty to perform, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circumstances to maintain the standard of effective service.

The corrective actions contemplated by the Rule include termination, involuntary retirement, reduction in pay, demotion and suspension. *Id.*

Where an appointing authority undertakes reasonable measures to accommodate an employee who has been injured, even if such measures are ultimately unsuccessful, an appointing authority has discharged its responsibilities under the Rules. *See Martin v. Sewerage And Water Bd.*, 2002-1415 (La. App. 4 Cir. 1/8/03, 3); 834 So.2d 672, 674-75. As the Hearing Officer points out, in order to find sufficient cause for termination under Rule IX, §1.1, it is not necessary that an appointing authority prove that an employee refused to report for work after being offered a reasonable accommodation. Rather, it is enough to show that an employee failed to produce any information that would indicate that the employee could return to work immediately or "on a date certain in the near future." *Adams v. Dep't of Police*, 2012-1268 (La. App. 4 Cir. 2/20/13, 5); 109 So.3d 1003, 1006.

V. ANALYSIS

The material facts of this case are not in dispute. Appellant sustained injuries in the course of his work and those injuries resulted in various physical limitations. Based upon an assessment by a physician seen by Appellant for a second opinion, and a Functional Capability Examination, the Board offered Appellant a light-duty position as a hydrant inspector. (Tr. at 79:11-18). At the time he was offered the light-duty position, Appellant refused to report to work and did not provide the Board with any information as to when he would be able to report. (Tr. at 66:10-20). In fact, it was not until five months after his termination that Appellant's treating physician cleared him to report to work. Given these facts, the Commission finds that the Board has shown that Appellant was unwilling or unable to report to work. Thus, there is sufficient cause for Appellant's termination.

V. CONCLUSION

Upon considering the testimony and evidence submitted in connection with the instant appeal, the Commission finds that there was sufficient cause to terminate Appellant under Rule IX, §1.1. Therefore, the appeal is DENIED and the Appellant's termination is sustained.

Judgment rendered this 1st th day of December, 2015

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

Joseph S. Clark — 11/1/05
JOSEPH S. CLARK, COMMISSIONER — DATE

CONCUR

12/01/05
MICHELLE D. CRAIG, CHAIRPERSON — DATE

Ronald P. McClain — 11/30/15
RONALD P. McCLAIN, VICE-CHAIRMAN — DATE