



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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Monday, May 14, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Leo Callier III
711 Second Street
Gretna, LA 70053

Re: **David McGee VS.
Sewerage & Water Board
Docket Number: 8476**

Dear Mr. Callier:

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 - 5/14/2018 - 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,

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

Doddie K. Smith
Chief, Management Services Division

cc: Bruce H. Adams
James E. Thompson, III
Brendan M. Greene
David McGee

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

DAVID McGEE vs. SEWERAGE & WATER BOARD	DOCKET No.: 8476
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I. INTRODUCTION

Appellant, David McGee, brings the instant appeal 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 “S&WB”) does not allege that the instant appeal is procedurally deficient. Therefore, the Commission’s analysis will be limited to whether or not the S&WB disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Pumping Station Operator for the S&WB and had permanent status as a classified employee.

On Wednesday, November 15, 2017, a referee appointed by the Commission presided over an appeal hearing during which both Parties had an opportunity to call witnesses and present evidence. Appellant waived his appearance at the hearing pursuant to Civil Service Rule II, Section 4.13(c) and was represented by counsel. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing, as well as the referee’s report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

The S&WB terminated Appellant's employment effective Monday, November 23, 2015. (H.E. Exh. 1). The reason for Appellant's termination was his alleged possession of an alcoholic beverage on S&WB grounds, violation of S&WB Policy regarding substance abuse testing, and failure to maintain standards of service pursuant to Civil Service Rule IX, Section 1. *Id.*

Civil Service rules establish that appointing authorities may require an employee to participate in a substance abuse screening if there exists a "reasonable suspicion" that the employee's fitness for duty is "questionable." (C.S. Rule V, § 9.12). Included among the criteria to establish a reasonable suspicion are; abnormal or erratic behavior, conduct that indicates signs of impairment in normal sensory and/or motor body functions, articulable facts or evidence that indicates possible substance abuse on the job. (C.S. Rule V, §§ 9.12(a)-(e)). S&WB Policy establishes that employees who refuse or fail to submit to substance abuse testing are subject to termination. (S&WB Exh. 7). The possession of and/or the consumption of alcohol on S&WB property is strictly prohibited. (S&WB Exh. 5).

B. October 28, 2015

On October 28, 2015, Richard Reiss was working as a "relief" operator at Pump Station #2 on Broad Street, New Orleans. (Tr. v. 2 at 27:14-25). As a Pumping Plant Operator, Mr. Reiss was responsible for monitoring all equipment at the station and supervising subordinate workers. Pumping Plant Operators work eight-hour shifts and may report to their shifts up to thirty minutes early without express permission from their supervisor. (S&WB Exh. 2). The S&WB staffs each main pumping station with an operator twenty-four hours a day, seven days a week. Mr. Reiss's shift was scheduled to run from 3:00 p.m. – 11:00 p.m. Appellant, who was also a pumping plant

operator, was scheduled to work the following shift from 11:00 p.m. to 7:00 a.m. the following morning.

At approximately 9:00 p.m., Mr. Reiss, who was familiar with Appellant's voice, overheard Appellant loudly complaining to another S&WB in the Pump Station about Mr. Reiss. The gist of Appellant's complaint about Mr. Reiss was that he refused to take sick leave, even when sick. *Id.* at 28:25-29:16. Mr. Reiss instructed Appellant to leave the station as he was far too early to begin his 11:00-7:00 shift.irate, Appellant confronted Mr. Reiss using profanity and offensive terms like "cracker." *Id.* at 31:14-20. Nevertheless, Appellant eventually complied with Mr. Reiss's request to leave.

Soon after this interaction with Appellant, Mr. Reiss received a call from Richard Bolden, an Assistant Station Supervisor with the S&WB. Mr. Bolden initially called to ask Mr. Reiss to cover for the 7:00 a.m. - 3:00 p.m. shift immediately after Appellant's. Mr. Reiss refused stating that he would rather limit his interactions with Appellant given the earlier conflict. *Id.* at 32:23-34:2. When Mr. Bolden learned of the confrontation between Mr. Reiss and Appellant, he decided to go to Pump Station #2 and get a clearer picture of the incident. *Id.* at 59:1-18. Mr. Bolden also contacted his supervisor, Andrew Fiorella, who accompanied him to Pump Station #2.

When Mr. Bolden and Mr. Fiorella arrived at Pump Station #2, Appellant had not yet returned for the start of his shift. *Id.* at 60:17-24. At approximately 10:45, Appellant returned to Pump Station #2. And upon Appellant's arrival, Mr. Bolden and Mr. Fiorella observed Appellant acting in an erratic manner with what looked to be a beer in his hand. *Id.* at 60:25-61:23, 93:8-21. Due to their concerns about Appellant's behavior, Mr. Bolden contacted the S&WB's risk assessment director and requested the administration of a substance abuse screening to Appellant.

Id. at 62:23-25. Appellant initially agreed to participate in the substance abuse screening but changed his mind over the course of the evening.

Ms. Tremekia Jones, a contractor engaged by the S&WB to administer after-hours substance abuse testing to employees, reported to Pump Station #2 sometime between 11:00 p.m. and midnight. Ms. Jones was prepared to administer both a breathalyzer exam to measure Appellant's blood-alcohol content and to collect a urine sample from Appellant for a drug screening. *Id.* at 15:9-13. For approximately forty-five minutes, Ms. Jones waited at the Pump Station as Mr. Bolden and Mr. Fiorella tried to convince Appellant to cooperate. Ultimately, Appellant refused to produce any sample for Ms. Jones and Ms. Jones was unable to administer any screening. Ms. Jones captured Appellant's refusal to participate in the substance abuse screening on her cell phone. The footage of Appellant's refusal is in evidence as "S&WB Exhibit 1."

On the video footage, Appellant claims that he was not actually at Pump Station #2 because he was "out sick" or alternatively that he was on "emergency vacation." This is inconsistent with the S&WB's well-established protocols for using sick and/or annual leave. Mr. Bolden testified that S&WB employees who seek to use sick leave must contact a direct supervisor no later than one hour prior to the start of their shift. There was no evidence in the record of Appellant making such contact. Apparently, Appellant attempted to use sick leave and/or annual leave the moment he reported for his 11:00-7:00 shift and saw Mr. Bolden and Mr. Fiorella waiting for him.

III. LEGAL STANDARD

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline without sufficient cause, he/she may bring an appeal before this

Commission. *Id.* It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, an 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 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, it must then determine if that discipline “was commensurate with the infraction.” *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

IV. ANALYSIS

A. Occurrence of the Complained of Activities

The Commission accepts that Mr. Bolden and Mr. Fiorella were familiar enough with Appellant to recognize his behavior on the night of October 25, 2015 as “erratic” and strange. Furthermore, Appellant had what look like a beer in his hand when he reported for work. Given these undisputed facts, Appellant’s supervisors had ample cause to believe that Appellant’s fitness for duty was impaired by alcohol or drugs. Therefore, their request that Appellant submit to a substance abuse test was reasonable and in conformance with Civil Service Rules.

There is no dispute that Appellant refused to submit to a substance abuse screening in violation of both Civil Service Rules¹ and S&WB policy. The Commission emphatically rejects any assertion that Appellant was somehow not responsible for submitting to a substance abuse test because he was “out sick” or on “emergency vacation.” As a preliminary matter, employees who are genuinely ill do not attempt to report to work one-and-a-half hours early and again fifteen minutes before the start of their shift. Secondly, Appellant did not follow the established protocols of the S&WB for reporting absences or requesting annual leave. Finally, the Commission finds that it is more likely than not that Appellant, confronted by two supervisors, recognized the seriousness of his situation (and possibly the level of his impairment) and sought to avoid a substance abuse screening by any available means.

Appellant did not testify and did not rebut any of the allegations with respect to his behavior. In a written statement Appellant submitted with his appeal he admitted that he did not attempt to call in sick until after he met Mr. Bolden and Mr. Fiorella at Pump Station #2. He also included the dubious claim that he had a root beer instead of an alcoholic beverage on the night in question. The “root beer” was in a “Coors Light Koozie sleeve.” The Commission finds Appellant’s written submission to be utterly without credibility.

The S&WB established that it had sufficient justification to require Appellant to submit to a substance abuse screening. By refusing to participate in such screening, Appellant violated Civil Service Rules and S&WB Policy.

¹ Civil Service Rule V, Section 9.12 mandates that an employee participate in a substance abuse screening when there is reasonable suspicion to believe that the employee’s fitness for duty is impaired by alcohol or drugs. Appellant did not have the option of passing on this screening and the S&WB did not have the option of simply sending Appellant home.

B. Impact on the S&WB's Efficient Operations

Appellant's actions caused disruption on several levels but the Commission focuses on the misconduct cited in the termination notice in evidence as "Hearing Examiner Exhibit 1." In that letter, the S&WB indicated Appellant's possession of an alcoholic beverage on S&WB and his refusal to submit to a substance abuse screening as the misconduct warranting termination. Both had an adverse impact on the S&WB's efficient operations as explained below.

Appellant's actions occupied the time of Mr. Bolden and Mr. Fiorella for approximately two hours. This was two hours where these supervisors were unable to perform their supervisory duties over other Pump Stations. This in turn compromised the S&WB's capacity to respond to other emergencies.

Appellant's actions also prevented the S&WB from adequately monitoring its safety sensitive personnel and ensure that they are not compromised by drugs or alcohol. Both the Commission and S&WB have adopted detailed rules regarding substance abuse testing. The policy underlying the Commission's rules mandate the adoption of a comprehensive substance-abuse program to "protect the health, welfare and safety of the public, co-workers and the individual employee, heighten efficiency and effectiveness of service to the public, and insure the continued integrity of the merit system." (C.S. Rule V, § 9.1). By refusing to participate in the S&WB substance-abuse-prevention program, Appellant compromised the goals underlying the policy and rules.

Appellant's possession of an alcoholic beverage on S&WB grounds violated a common sense policy that strictly prohibits employees from possessing intoxicating beverages. S&WB employees are responsible for the operation and maintenance of substantial pieces of equipment

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that use massive amounts of energy. It is a dangerous environment and the S&WB has adopted rules that acknowledge the danger and attempt to mitigate it.

Based upon the foregoing, the Commission finds that the S&WB has established that Appellant's misconduct impaired the S&WB's efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's discipline was "commensurate with the dereliction;" otherwise, the discipline would be "arbitrary and capricious." *Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (citing *Staehle v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

The Civil Service Rules dictate that an employee's failure to participate in substance abuse screening "shall be considered presumptive evidence of the individual's inability to pass the substance abuse testing procedure." (C.S. Rule V, § 9.4). In the event of an employee's refusal to participate in substance abuse screening, appointing authorities have wide discretion with respect to corrective action. (C.S. Rule V, § 9.15). Such corrective action ranges from referral to a rehabilitation program to termination.

Mr. Bolden and Mr. Fiorella spent approximately two hours trying to convince Appellant to submit to a substance abuse screening. They did so, not because they were intent upon collecting damning evidence of Appellant's substance abuse, but because both men understood that Appellant's refusal would result in his termination. If Appellant agreed to the substance abuse screening, he could have avoid termination, even if he tested positive for drugs or alcohol. The S&WB's policy provides for a rehabilitation option for an employee's first offense. Those employees who refuse the test do not have such an option.

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Based upon the above findings, we hold that termination was an appropriate level of discipline for Appellant's misconduct.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES the Appellant's appeal.

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Judgment rendered this 14th day of May, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



MICHELLE CRAIG, CHAIRWOMAN

4/25/2018

DATE

CONCUR



TANIA TETLOW, COMMISSIONER

5/14/18

DATE



CLIFTON J. MOORE, Jr., COMMISSIONER

5/2/2018

DATE