



CITY OF NEW ORLEANS

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Monday, March 3, 2025

Mr. Louis Robein
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: **Michael Windsay VS.**
Department of Fire
Docket Number: 9663

Dear Mr. Robein:

Attached is the action of the Civil Service Commission at the Commission's meeting on Monday, 2/3/2025.

Yours very truly,

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

Doddie K. Smith
Chief, Management Services Division

cc: Roman Nelson
Jalen Harris
Michael Windsay 5420
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**MICHAEL WINDSAY,
Appellant**

Docket No. 9663

v.

**DEPARTMENT OF FIRE,
Appointing Authority**

ORDER

The Department of Fire (NOFD) moved for summary disposition of Captain Michael Windsay’s appeal pursuant to Civil Service Rule II, section 4.1, on the basis that Captain Windsay has no right of appeal as a probationary employee in the position of Fire District Chief. The Commission heard oral argument on this motion at its special meeting on February 3, 2025. The parties submitted additional briefing following oral argument on the issue of the appeal rights of permanent employees removed from a higher position during the working test period.

On March 17, 2023, NOFD adopted Policy ADM-04-23-POL, setting forth the certifications to be obtained by probationary Fire District Chiefs in order to obtain permanent status. NOFD promoted Captain Windsay to Fire District Chief on October 8, 2023. On October 5, 2024, NOFD informed Captain Windsay that he had not successfully completed his working test period because of his failure to obtain certifications in Incident Safety Officer and Instructor II. NOFD returned Captain Windsay to his permanent position as Fire Captain.

Captain Windsay filed a disciplinary appeal, arguing that he is a permanent employee who has suffered a demotion under Civil Service Rule II, section 4.1. Captain Windsay never obtained permanent status in the position of Fire District Chief, so he has no right to appeal NOFD’s removal of him from this position. Civil Service Rule II, section 4.1, gives “regular employees in the

classified service” the right to appeal a demotion. Civil Service Rule VII, section 1.1, provides that “[e]very person appointed to a position in the classified service after certification of his name from an original entrance employment list *or a promotion list*, shall be tested by a working test while occupying the position.” (emphasis added). Rule VII, section 1.1, allows the appointing authority to remove an employee from a position during the working test period if the appointing authority determines that the employee is unable or unwilling to perform his duties satisfactorily. The only requirement is notice to the Personnel Director and the employee. Further, Civil Service Rule VI, section 4.7 governs the return of an employee to a lower classification:

Whenever a regular employee has been promoted to a higher classification, the employee shall be granted a promotional leave of absence from the position the employee formerly occupied until the individual acquires full Civil Service status in the higher class . . .

Should the employee be removed by the appointing authority during the probationary period from the position to which the employee had been promoted, the employee shall be reinstated to the former position, unless the removal is for disciplinary reasons of a nature to justify the dismissal of a regular employee.

Read together, Rule VII, section 1.1 and Rule VI, section 4.7 give NOFD the authority to remove an employee from a higher position for which the employee has not gained permanent status. Rule VI, section 4.7 also implicitly states that a probationary period failure is not discipline. Although courts have referred to a probationary period failure as a demotion, removal from a position based on a failure of the working test period is not disciplinary in nature, and is not a demotion under Rule II, section 4.1. *See Giarrusso v. City of Kenner*, 04-69 (La. App. 5 Cir. 5/26/04), 875 So. 2d 872, 875, *writ denied*, 2004-1589 (La. 10/8/04), 883 So. 2d 1021.

The Fourth Circuit Court of Appeal considered the argument of a Sewerage & Water Board employee who had obtained permanent status as a paralegal and asserted she had a right to appeal her removal from the position of Management Development Analyst II in Support Services:

As previously discussed, Moton's position in Support Services was probationary, subject to a one-year working test period ending on October 27, 2020. The Civil Service Rules provide that “[r]egular employees in the classified service shall have the right to appeal disciplinary actions to the [CSC].” Rules of the Civil Service Commission for the City of New Orleans, Rule II, Section 4.1. **Because Moton was demoted prior to the end of her working test period she was not yet a “regular employee” in her position in Support Services, and had no right to a general disciplinary appeal of her demotion.** *Balancier v. Sewerage & Water Bd. of New Orleans*, 2022-0255, p. 4 (La. App. 4 Cir. 10/19/22), 351 So.3d 439, 443 (probationary employees have no right of appeal) (citing *Harness v. New Orleans Recreation Dev. Comm'n*, 2017-0107, p. 3 (La. App. 4 Cir. 6/14/17), 222 So.3d 820, 822); see also *Bordelon v. Dep't of Police*, 389 So.2d 905, 906 (La. App. 4th Cir. 1980) (holding that civil service employee who had gained permanent status in one position but who was probationary in a promotional position had no right to appeal demotion from the probationary promotional position).

Moton v. Sewerage & Water Bd., 2022-0747 (La. App. 4 Cir. 5/10/23), 368 So. 3d 151 (emphasis added). In the same way, Captain Windsay was removed from the position of Fire District Chief prior to the end of his working test period, so he never became a regular employee in that position. Therefore, he has no right of appeal under Civil Service Rule II, section 4.1.

Likewise, Captain Windsay has no due process right related to removal from the position of Fire District Chief because he has no property interest in the position of Fire District Chief. In order to have a right to due process right, an employee must have a property interest in employment. A property right may be created by Civil Service Rules, state constitutional provisions, or statutes. Property interest “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law’.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 at 1491, 84 L.Ed.2d 494 (1985). “Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil

service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause).” *Bell v. Dep't of Health & Hum. Res.*, 483 So. 2d 945, 949–50 (La. 1986). Under Civil Service Rules and the Louisiana Constitution, a permanent Fire Captains has no property interest in a Fire District Chief position for which he had not completed a working test period. Captain Windsay’s property interest is only in the position of Captain.

Even if NOFD were required to provide Captain Windsay with minimal due process, the Commission finds that NOFD informed Captain Windsay of the certification requirements and provided appropriate notice to him of his removal from the position of Fire District Chief.

Captain Windsay has also argued that he suffered demotion without being afforded the protections of the Firefighter Bill of Rights, La. R.S. 33:2181(A)(1). The Firefighter Bill of Rights defines a “fire employee” as an individual who is “under investigation with a view to possible disciplinary action, demotion, or dismissal.” La. R.S. 33:2181(A)(1). NOFD’s removal of Captain Windsay from the position of Fire District Chief was not disciplinary in nature. *See* Rule VI, section 4.7. Because NOFD never commenced an investigation of Captain Windsay with a view toward discipline, the Firefighter Bill of Rights has no application.

NOFD’s motion for summary disposition is GRANTED.



Brittney Richardson (Mar 2, 2025 06:28 CST)

BRITTNEY RICHARDSON, CHAIRPERSON



JOHN KORN, VICE-CHAIRPERSON

Mark C. Surprenant
Mark C. Surprenant (Feb 24, 2025 14:57 CST)
MARK SURPRENANT, COMMISSIONER