CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Monday, May 24, 2021

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

Re: **Roy Neely VS.**
Department of Fire
Docket Number: 9210

Dear Mr. Robein:

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 - 5/24/2021 - 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
Stacie Joseph
Management Services Division

cc: Roman Nelson
Michael J. Laughlin
Jay Ginsberg
Roy Neely

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

ROY NEELY,
Appellant

Docket No. 9210

v.

DEPARTMENT OF FIRE,
Appointing Authority

DECISION

Appellant, Operator Roy Neely, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his termination effective September 26, 2020. (See Exhibit HE-1). At all relevant times, Appellant was employed as a Fire Operator and had permanent status (Tr. at 112). A Hearing Examiner, appointed by the Commission, presided over a hearing on November 18, 2020. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the post-hearing memoranda submitted by the parties, the Hearing Examiner's report dated March 18, 2021, and controlling Louisiana law.

For the reasons set forth below, Neely's appeal is GRANTED.

I. FACTUAL BACKGROUND

Roy Neely, who was on duty at Engine 7 on Basin Street, attempted to respond to a call late in the night of September 1, 2020. (Tr. at 14, 201). As Neely was driving the fire truck out of the station, the garage door of the fire house fell on the truck. (Tr. at 201). The garage door did not damage the fire truck or the fire house. (Tr. at 202). Because of this accident, Neely's District

Chief ordered a post-accident drug test. (Tr. at 76). Because of the late hour, the contractor who collects the drug specimen traveled to the fire station on Basin Street. (Tr. at 14). Jeffrey Mendler, who owns Toxicology and Drug Analysis Laboratory (TDAL), the contractor, arrived about 11:45 PM. (Tr. at 14). Neely underwent an alcohol breath test, which was negative. (Tr. at 207). Mendler gave Neely a cup to collect the urine specimen, and Mendler stayed outside the door of the restroom. (Tr. at 18, 207). At 11:55 PM, Neely produced a urine specimen, but it was out of temperature range because it was too hot. (Tr. at 19, 22, 209). Mendler testified that all cups have a temperature slip on the bottom, and the acceptable range is 90° to 100°. (Tr. at 15). Mendler opened a second cup and poured the specimen into that cup to be sure the temperature strip was working. (Tr. at 20).

Because the specimen did not meet the temperature requirements, Mendler informed Neely he would need to produce a second specimen under direct observation. Over a period of three hours, an employee may drink up to 40 ounces of liquids. (Tr. at 21). Mendler started a water log, and over three hours, Neely drank over 40 ounces of liquids. (Tr. at 22). Neely's second attempt to produce a sample was at 12:36 AM on September 2, and the third attempt was at 12:55. (NOFD-3, Unusual Collection Form). Neely's third attempt was at 2:57 AM. (NOFD-3, Unusual Collection Form; Tr. at 23). Neely did not produce urine, so Mendler noted all three failed attempts as "shy bladder." (NOFD-3, Unusual Collection Form; Tr. at 25). According to Mendler, this term originates from SAMHSA Guidelines, and indicates Neely did not produce urine. (Tr. at 25). Mendler gave a copy of the collection form to Neely, and Mendler gave the employer copy to Captain Blackwell. (Tr. at 27; Ex. NOFD-3). Mendler also emailed the results the morning of September 2 to Doddie Smith, with the Civil Service Department. (Tr. at 40). Doddie Smith and

Shanquell Wilson in the Civil Service Department are the Designated Employer Representatives. (Tr. at 41). Mendler also sent the collection form to the lab, Alere. (Tr. at 42; NOFD-4).

The Civil Service Department manages the contract with TDAL. (Tr. at 179; *See* NOFD-1). TDAL follows SAMHSA (Substance Abuse and Mental Health Services Administration) Guidelines and Department of Transportation regulations for drug testing. (Tr. at 12; *See* NOFD-2, Bid Specifications at ¶ I(c)). The Bid Specifications required compliance with SAMHSA Guidelines, La. R.S. 49, and Civil Service Rules. (NOFD-2, Bid Specifications). Mendler testified that City employees are non-DOT employees, so the DOT regulations do not technically apply. (Tr. at 12). However, Mendler testified the DOT regulations are the "gold standard," and "we follow those guidelines the best we can the whole way through." (Tr. at 12).

In the Bid Specifications, the collection of a blood or hair sample is addressed: "If a medical condition makes it impossible to produce a urine specimen, Contractor upon request will collect a hair or blood sample for testing." (NOFD-2, Invitation to Bid at ¶ I(c)). Mendler testified that if Civil Service had requested hair or blood testing, then the test would have been performed. (Tr. at 35-36). Mendler also testified that a blood test is as accurate as a urine test. (Tr. at 50). The Personnel Director testified that the Civil Service Department could have directed further testing by blood or hair. (Tr. at 181). For example, in the past, the contractor sought permission to use a hair sample for an employee with kidney issues. (Tr. at 168). In that situation, the contractor would contact Civil Service about conducting a different type of test. (Tr. at 171-72).

TDAL sent an email to Shanquell Wilson, a Senior Office Support Specialist in the Civil Service Department, about the unusual collection, informing the Department that the temperature was out of range. (Tr. at 185). TDAL also informed Ms. Wilson that Neely was unable to produce a specimen in the three-hour window. (Tr. at 187). Ms. Wilson understood that NOFD would have

been the point of contact with TDAL for a blood or hair test. (Tr. at 195). Ms. Wilson's job duties include sending letters out with results of drug tests. (Tr. at 183). Under these circumstances, Ms. Wilson testified the drug test would be categorized as a refusal. (Tr. at 188). So, Ms. Wilson sent out a letter dated September 8, 2020, informing Neely and NOFD that the result of the drug test was a refusal/positive test result. (NOFD-11). Ms. Wilson also called NOFD and informed Chief Hardy that Neely had refused to take the drug test. (Tr. at 109-10).

Former Superintendent McConnell testified that Civil Service determined Neely failed the drug test. (Tr. at 124). Superintendent McConnell testified that under Civil Service Rules, a refusal is treated as a failed drug test. (Tr. at 117; NOFD-11). Because CAO Policy Memorandum 89 mandates termination for a failed drug test -- "first offense discharge" -- NOFD had no choice but to terminate Neely's employment. (Tr. at 144, 147-48; NOFD-7). McConnell also testified that any employee under the influence of drugs would impair the efficient operation of the fire department. (Tr. at 120).

Neely testified that before the end of his tour of duty at 7:00 AM, his captain ordered him to drive his personal vehicle to another station to deliver the reports to the District Chief. (Tr. at 214-16).

No one informed Neely that if Neely failed to produce a sample in the three-hour window, the test would be deemed a refusal. (Tr. at 224). Neely testified he would have submitted to a hair or blood test. (Tr. at 226-27). Neely believed he would undergo another drug test following his failure to produce a specimen overnight. (Tr. at 218). So, Neely reached out to Terry Hardy, the Deputy Chief of Safety and Investigations, on September 2 about 2:00 PM. (Tr. at 74; Appellant-5). Neely texted photos of the documents Mendler had given Neely to Chief Hardy on September 2. (Tr. at 217). When Chief Hardy failed to respond, Neely called Chief Hardy again on September

5. (Tr. at 219). Chief Hardy informed Neely Chief Hardy did not receive the text messages, so Neely re-sent the photos of the collection documents. (Tr. at 220).

When Neely reported to work for his next shift on September 7, he was sent to Headquarters where he sat in a room from 7:00 AM to noon. (Tr. at 221, 248). On September 7, NOFD suspended Neely with pay and set a pre-termination hearing on September 9. (Tr. at 223). Neely underwent a drug test at Ochsner at his own expense on September 8, and the test was negative. (Tr. at 225; Appellant-3). Neely appeared at the pre-termination hearing and described the circumstances surrounding the September 1-2 drug test. (Tr. at 92). Neely also provided the negative drug screen from September 8 at the pre-termination hearing. Chief Hardy, who conducted the pre-termination hearing, testified that it did not matter whether NOFD believed Neely was physically unable to produce a specimen because NOFD is required to terminate employees in refusal cases. (Tr. at 94-95).

Superintendent McConnell made the decision to terminate Neely's employment, effective September 26, 2020. (Tr. at 93; HE-1). Superintendent McConnell testified that Civil Service determined Neely failed the drug test, and his decision was based on the September 8, 2020, letter from Civil Service. (Tr. at 124, 132; NOFD-11).

Neely had served in the fire department for over 11 years with no prior discipline. (Tr. at 199-200). At the time of his termination, Neely was on the "flying squad," qualified to operate a heavy technical rescue unit. (Tr. at 202). Neely was also on the eligible list for the position of captain. (Tr. at 232).

II. ANALYSIS

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending and terminating the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans,* 454 So. 2d 106 (La. 1984).

The Commission finds that the Appointing Authority has failed to carry its burden of showing good or lawful cause to terminate Neely, and, even if cause existed, has failed to show that termination was commensurate with the dereliction.

First, the Commission finds that the Appointing Authority has failed to carry its burden of showing the occurrence of the complained of activity. NOFD charged Neely with a violation of Civil Service Rule V, § 9.4, concerning a refusal to participate in the substance abuse screening process. (NOFD-8). The Commission acknowledges that a collection of a specimen out of temperature range can indicate that the employee tampered with the test. *See Krupp v. Dep't of Fire*, 2007-1260 (La. App. 4 Cir. 11/19/08), 995 So. 2d 686, 693 ("The evidence in this case supports the Civil Service Commission's finding that Krupp was untruthful and attempted to alter the first urine sample to avoid a positive test result."). The Commission further acknowledges that a failure to produce a urine sample over three hours after drinking over 40 ounces of liquid is suspicious. However, Neely did not "refuse" to participate in the drug testing process. *Jackson v.*

Sewerage & Water Board, 2009-0071 (La. App. 4 Cir. 5/13/09), 13 So. 3d 225, 227-28 (concerning employee who initially refused treatment and drug testing at hospital after losing consciousness and upholding Commission's grant of appeal). Neely cooperated with the drug testing process, drinking over 40 ounces and attempting to produce a second specimen on three occasions.

Even if a failure to produce a specimen may be deemed a refusal, Civil Service Rule V, § 9.4, provides as follows: "Refusal to participate in the substance abuse screening procedure, or failure to undergo the screening procedure at the time and place designated for testing, or tampering with or attempting to adulterate the sample, shall be considered *presumptive evidence* of the individual's inability to pass the substance abuse testing procedure." (emphasis added). The Appointing Authority terminated Neely because the Civil Service Department deemed the failure to produce a sample a refusal/positive result, without considering the unique circumstances of this case or Neely's subsequent negative result. (Tr. at 92; NOFD-11). The Civil Service Department erred by categorizing the deemed refusal a positive test result instead of presumptive evidence of drug use, but the responsibility to determine discipline rests with the Appointing Authority, who should have conducted a meaningful review of the facts and circumstances before making a decision about discipline. Chief Hardy, who conducted the September 9 pre-termination hearing, testified that even if he believed Neely was physically unable to produce a sample at the hearing, NOFD was required to terminate Neely's employment. (Tr. at 92). Therefore, the Appointing Authority improperly applied Rule V, § 9.4 by treating the refusal as a failed drug test and not as presumptive evidence of drug use.

The Commission notes the contractor performing the collection has agreed to perform hair or blood collection when requested, and Neely testified he was willing to provide a blood or hair sample. (NOFD-2). When an employee is unable to produce a sample over a period of three hours,

the SAMHSA Handbook directs the collector to "[n]otify the agency's designated representative for authorization to collect an alternate specimen." [1] The record indicates that neither TDAL, the Appointing Authority, nor the Civil Service Department believed it had authority to initiate this request, so this additional testing was never requested.

The "gold standard" DOT regulations, 49 CFR Part 40, provide that the Designated Employee Representative should consult with the Medical Review Officer and direct the employee to obtain an evaluation from a licensed physician concerning the employee's failure to provide a sufficient specimen. 49 CFR § 40.193(c). These regulations also require distribution of the collection form to the MRO. 49 CFR § 40.193(b)(4)-(5). The SAMHSA Handbook, Chapter 7(F)(2), also requires distribution of the collection form to the MRO when an employee fails to provide a sufficient specimen because of a shy bladder. The record indicates that the MRO was never consulted and Neely was never advised to seek the evaluation of a physician.

Second, because the Appointing Authority has failed to carry its burden of showing that the complained-of activity occurred, the Appointing Authority has necessarily failed to show that Neely's out-of-range sample and inability to produce a second specimen impaired the efficient operation of the department. Superintendent McConnell testified that anyone under the influence of drugs would impair the efficient operation of the department. (Tr. at 120). Superintendent McConnell also testified that CAO Policy Memorandum 89 mandates termination for a first offense of drug use. (Tr. at 125) However, the Appointing Authority has failed to offer any evidence that Neely was under the influence of drugs. The evidence, at best, shows that under the applicable policies and procedures, a failure to produce a specimen is deemed a refusal to submit to a test, which, in turn, is deemed a positive test result.

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[1] Specimen Collection Handbook (samhsa.gov) at p. 30, Chapter 7(F)(2) (effective 10/1/17).

Third, the penalty is not commensurate with the infraction. The only infraction committed by Neely was a failure to produce a specimen while under direct observation, which should not warrant termination of employment. Also, NOFD failed to consider mitigating factors, including Neely's tenure and lack of prior discipline. *Matusoff, v. Dep't of Fire*, 2019-0932, p. 8 (La. App. 4 Cir. 5/20/20), 2020 Westlaw 2562940.

Fourth, Neely failed to receive due process. NOFD did not afford Neely a meaningful opportunity to be heard. *Matusoff* ,2019-0932, pp. 6-7. "'[T]his right to notice and opportunity to be heard must be extended at a meaningful time and a meaningful manner." *Id.* (quoting *Moore v. Ware,* 2001-3341, p. 11 (La. 2/25/03), 839 So. 2d 940, 949)). Superintendent McConnell and Chief Hardy testified that Neely's termination was a foregone conclusion based on CAO Policy and the Civil Service Department's letter deeming the failure to produce a specimen a "refusal" and a "positive test." (NOFD-11). Chief Hardy testified that NOFD was required to terminate Neely's employment even if the Appointing Authority believed Neely was unable to produce a specimen. (Tr. at 92). Therefore, Neely's September 9 pre-termination hearing was meaningless.

For all the above reasons, the appeal is GRANTED. Operator Neely shall be reinstated as of September 26, 2020, with all back pay and other emoluments of employment.

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This the 24th day of May, 2021

WRITER:

Mark C. Surprenant
Mark C. Surprenant (May 18, 2021 17:43 EDT)

MARK SURPRENANT, COMMISSIONER

CONCUR:

Brittney Richardson (May 21, 2021 10:26 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

J H Korn
J H Korn (May 22, 2021 10:25 EDT)

JOHN KORN, COMMISSIONER