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CITY CIVIL SERVICE COMMISSION

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Monday, October 01, 2012

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Bernard Dyer Jr.

Re: **Bernard Dyer Jr. VS.**
Recreation Department
Docket Number: 7807

Dear Mr. Dyer:

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 - 10/1/2012 - filed in the Office of the Civil Service Commission in Room 7W03, City Hall, 1300 Perdido Street, 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,

A handwritten signature in cursive script, reading "Germaine Bartholomew".

Germaine Bartholomew
Chief, Management Services Division

cc: Victor N. Richard, III
Shawn Lindsay
Jay Ginsberg
file

BERNARD DYER

CIVIL SERVICE COMMISSION

VS.

CITY OF NEW ORLEANS

**NEW ORLEANS DEPARTMENT
OF RECREATION**

NO. 7807

The New Orleans Department of Recreation ("Appointing Authority" or "NORD") employs Bernard Dyer ("Appellant") as a Recreation Leader Assistant with permanent status. The Appointing Authority suspended the Appellant for five days by letter dated December 1, 2010, following a determination that he violated rules contained in the NORD Bantam Football Handbook. Specifically, the Appointing Authority determined that the Appellant knowingly allowed a ninth grade participant to play on his team while also participating as a player for the St. Augustine High School freshmen football team.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on March 24, 2011. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

The rule in question provides as follows:

E. Exceptions:

With the following exceptions, children who live nearer to a playground that is not in the district in which they reside will be allowed to participate at the nearest playground with the approval from the NORD Director...

4. **NORD prohibits dual participation in programs.** [Emphasis not added].

- a. A player who participates on his school's tackle football team **shall not** be eligible to participate in the NORD Bantam Football Program. [Emphasis not added].

The Appellant was the head coach for the St. Roch Crusaders, a NORD Bantam Football team. He testified that the bantam football season began in September of 2010 and continued through November. His team began practicing without pads in August of 2010. He first learned prior to the beginning of the NORD season that one of the Crusaders' players, Juan Offray, was also playing for the St. Augustine High School freshmen football team when Mr. Offray came to practice with a broken finger. The Appellant informed Mr. Offray that he had to make a decision between playing for his school team and playing for the playground team since the rules of the NORD Bantam Football League prevented him from playing for both teams. According to the Appellant, Mr. Offray chose to play for the St. Roch Crusaders. As a consequence of his player's decision, the Appellant was satisfied that the dual participation rule was no longer an issue.

On or around October 25, 2010, the Appointing Authority received a written protest from Ira Toney, the head football coach of the Milne Playground football team, alleging that on Saturday September 23, 2010, Juan Offray played for the St. Roch Playground football team against the team he coached.¹ (City Exhibit 3) Coach Toney alleged that Juan Offray also played for his freshmen high school football team St. Augustine High School.

After learning of the protest, the Appellant met with Kyle Gilford, the St. Augustine High School Freshmen Football coach, to find out whether Mr. Offray was

¹ The protest letter states that the game occurred on "10-23-10". However, the parties stipulated that the game actually occurred on 9-23-10. The protest letter was prepared on 10-25-10, and it appears that Coach Toney confused his numbers.

still on the team. Coach Gilford informed the Appellant that he was no longer on the team and, at the Appellant's request, prepared a letter confirming that Mr. Offray was no longer on the team. (City Exhibit 1). The letter was undated, but, according to the Appellant, it was prepared shortly after the October 25, 2010 protest letter was received by the Appointing Authority. The letter stated that "at the present time" Mr. Offray does not play football for St. Augustine High School. The implication from the letter was that Mr. Offray did play for St. Augustine High School until Coach Gilford learned of the dual participation. However, the letter stopped short of reporting the date that Mr. Offray was no longer a participant on the team. The Appellant presented the letter to the Appointing Authority in response to the protest.

Shortly afterwards, by letter dated November 11, 2010, the Appointing Authority received confirmation from St. Augustine High School's Athletic Director, Clifford Barthe, that Mr. Offray participated on the St. Augustine High School Freshmen Football team during the 2010 season. (City Exhibit 2). Based upon Coach Barthe's letter, and without any further investigation, the Appointing Authority determined that the Appellant knowingly played an ineligible player as defined by the dual participation prohibition.

LEGAL PRECEPTS

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action by his employer except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); Walters v. Department of Police of New Orleans, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the City Civil Service Commission. The burden of proof on appeal, as to the factual basis

for the disciplinary action, is on the appointing authority. Id.; Goins v. Department of Police, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide independently, from the facts presented, whether the Appointing Authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. Walters, v. Department of Police of New Orleans, supra. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. Cittadino v. Department of Police, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The Appointing Authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. Id. The Appointing Authority must also prove that the actions complained of bear a real and substantial relationship to the efficient operation of the public service. Id. While these facts must be clearly established, they need not be established beyond a reasonable doubt. Id.

The Appellant contends that he was unaware that of any allegations that his player was still playing for his school team until he received the written protest. He testified that he had informed his player before the first game of the season that he could not play football for both the NORD team and his high school team. He made it clear that a decision had to be made between the two teams. When he learned of the allegations, he asked the freshmen coach to prepare a letter explaining the situation, which does not appear to be in conflict with the subsequent letter prepared by the athletic director. No one seems to know when Mr. Offray played his last game for St. Augustine High School,

B. Dyer
#7807

or whether he left the team prior to the September 23, 2010 game against Milne. The two letters do not help in this regard.

The Appointing Authority has failed to establish by a preponderance of evidence that the Appellant knowingly violated the dual participation rule or presented fraudulent documentation. The Appellant's belief that there was no dual participation at the time of the alleged infraction was not unreasonable. If Mr. Offray had left his school team in August as directed by the Appellant, the rules are unclear as to whether he was ineligible to play for a playground team whose season had not yet begun.

Based upon the foregoing, the Appellant's appeal is GRANTED and the Appointing Authority is ordered to pay the Appellant five days of back pay with emoluments of employment.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 1st DAY OF
OCTOBER, 2012.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION


AMY L. GLOVINSKY, COMMISSIONER

CONCUR:


JOSEPH S. CLARK, COMMISSIONER


REV. KEVIN W. WILDES, S.J., CHAIRMAN