



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
SUITE 900 – 1340 POYDRAS ST.
NEW ORLEANS LA 70112
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

BRITNEY RICHARDSON,
CHAIRPERSON
CLIFTON J. MOORE, JR, VICE-
CHAIRPERSON
JOHN KORN
MARK SURPRENANT
RUTH WHITE DAVIS

Monday, September 13, 2021

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Hon. Michael Bageris
935 Gravier Street, Suite 2110
New Orleans, LA 70112

Re: **Brejean Balancier VS.
Sewerage & Water Board
Docket Number: 9102**

Dear Mr. Bageris:

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 - 9/13/2021 - 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: Ghassan Korban
Joseph Zanetti
Christina Carroll
Brejean Balancier

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**BREJEAN BALANCIER,
Appellant**

Docket No. 9102

v.

**SEWERAGE & WATER BOARD,
Appointing Authority**

DECISION

Appellant, Brejean Balancier, brings this appeal pursuant to Article X, § 8 of the Louisiana Constitution and this Commission's Rule II, § 10.1 (whistleblower) and Rule II, § 4.6 (sex discrimination based on pregnancy) seeking relief from her October 25, 2019, termination. (Ex. HE-1). At all relevant times, Appellant was a probationary employee serving as a Developmental Analyst I in the Purchasing Department of the Sewerage & Water Board. (Tr. at 18; Ex. HE-1)). A Hearing Examiner, appointed by the Commission, presided over a hearing on November 10, 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 Hearing Examiner's report dated February 1, 2021, and controlling Louisiana law.

For the reasons set forth below, Balancier's appeal is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

The Sewerage & Water Board terminated the employment of Brejean Balancier on October 25, 2019, because of Balancier's insubordination, inability to work as part of a team, and her disruptive behavior. (Ex. HE-1).

The Sewerage & Water Board hired Ms. Balancier on February 4, 2019 to work in the Purchasing Department. (Ex. HE-1). Ms. Balancier's job duties included receiving requisitions, completing purchase orders, advertising bids, and hosting bid meetings. (Tr. at 18). Ms. Balancier's supervisor was Conestler Green. (Tr. at 19). Ms. Green gave Ms. Balancier a positive three-month evaluation. (Tr. at 113-114). On August 6, 2019, Ms. Green completed the Three Month Performance Assessment form, and stated under "strengths" the following: [expediting] all work assignments requisitions and purchase orders assign[ed] to her." (Appellant Ex. 6; Tr. at 114). In "Areas for Improvement," Ms. Green stated "Need to learn the bidding process for contracts, and advertisement of a contract." (Appellant Ex. 6). Ms. Green testified Balancier was a "good employee" and that she had no problems with Balancier. (Tr. at 115).

Patti Wallace, the Purchasing Manager, began supervising Balancier on June 24, 2019. (Tr. at 19, 147). On July 30, 2019, Ms. Wallace directed Balancier to issue a purchase order to Piccadilly in accordance with a spreadsheet prepared by Wallace outlining meals ordered during Hurricane Barry and the invoices. (Ex. Appellant-1; Tr. at 158). The invoices were prepared by Piccadilly, and a Sewerage & Water Board employee signed each invoice when the employee accepted the meals from Piccadilly. (See Tr. at 98; Ex. Appellant-2C). This Sewerage & Water Board expense was FEMA reimbursable. (Tr. at 104).

The Sewerage & Water Board Accounting Department informed Balancier that the supporting documentation did not match the purchase order. (Tr. at 26). An employee in the Accounting Department also emailed Wallace to inform her of the discrepancy. (Tr. at 159). According to Ms. Wallace, the purchase order, invoice, and the record of the Sewerage & Water Board employee who received the meals should match. (Tr. at 173). Each employee who received a meal was required to sign for the meal. (Tr. at 99).

On August 16, 2019, Ms. Wallace directed Balancier to obtain a corrected invoice related to the Piccadilly purchase order with the number of meals reduced from 591 to 590. (Ex. Appellant-1; Tr. at 28). Balancier tried to contact Piccadilly to obtain a corrected invoice, but she had difficulty getting in touch with Piccadilly Accounts Receivable. (Tr. at 29). Between August 16, 2019, and August 20, 2019, Balancier and Wallace corresponded by email about Balancier's inability to reach Piccadilly Accounts Receivable. (Tr. at 160; Ex. Appellant-2G, Ex. Appellant-2H, Ex. Appellant 2I).

Balancier also contacted the employees who had signed off on the invoices, including Joe Ladetz, Janell Jones, and Angie Johnson, to ascertain the error in the meal count. (Tr. at 30-33; Tr. at 103-08). During her investigation, Balancier became concerned that the meals for Sunday were missing. (Tr. at 37). When the "numbers didn't add up," Balancier began to suspect the purchase order was fraudulent. (Tr. at 41). Balancier emailed Wallace about her concern that the purchase order was fraudulent. (Tr. at 43). According to Wallace, Balancier told Wallace that Balancier was uncomfortable issuing a purchase order because of a discrepancy in the meal count. (Tr. at 161). After Balancier had a conversation with Wallace about the purchase order, Wallace emailed Balancier and instructed Balancier to correct the invoice, not to investigate accuracy of the information (Tr. at 45). Wallace viewed Balancier's failure to have Piccadilly adjust the invoice and her investigation into the discrepancy as insubordinate. (Ex. B-1 at 2; Tr. at 163).

Following her termination, through a public records request, Balancier requested the names of all employees who were working on the dates in question from the Emergency Operations Center, and the information Balancier received differs from the spreadsheet provided by Ms. Wallace. (Tr. at 45-46; Ex. Appellant-2B; Ex. Appellant-4).

Balancier complained to Chante Powell in the Internal Audit department of the Sewerage & Water Board and to a Sewerage & Water Board attorney, Erica Latham. (Tr. at 41). Latham testified that Balancier reported to her that she thought the purchase order was illegal and that the Board was requesting payment for employees who were not present at work. (Tr. at 89). Balancier expressed a concern to Latham that Balancier's credentials were on the purchase order. (Tr. at 90). Latham and Balancier had a conversation with Ed Morris, another Sewerage & Water Board attorney, who instructed Balancier to bring this concern to Balancier's supervisor. (Tr. at 91).

Balancier also filed an internal grievance against Ms. Wallace on September 4, 2019, and described Wallace's conduct as harassing on September 27, 2019. (Tr. at 241-42). Wallace criticized Balancier for declining a second monitor on September 5, 2019, and, when recommending termination, characterized this behavior as insubordinate. (Tr. at 51; Ex. B-1). Wallace also claimed Balancier was leaving work without authorization. (Tr. at 52). After a staff meeting on July 29, 2019, Ms. Balancier requested a copy of her job duties. (Tr. at 152-53). Wallace viewed Balancier's behavior as disruptive. (Tr. at 150). In a subsequent staff meeting, Balancier complained about her workload to Wallace, but the employee who distributed the assignments testified that Balancier received "a lot of the work." (Ex. B-1; Tr. at 130, 156). Wallace testified that Balancier was on leave periodically because of Balancier's pregnancy, and Wallace would re-assign Balancier's work back to her when Balancier returned. (Tr. at 156).

The Employee Relations Manager testified that Balancier refused to attend the mediation of her grievance because Balancier was upset about the number of attendees. (Tr. at 208). Balancier informed the Employee Relations Manager that she was going to contact her attorney and civil service. (Tr. at 208). The Employee Relations Manager determined that Balancier was

uncooperative with the process. (Tr. at 210). Balancier's grievance was closed due to a failure to participate. (Tr. at 204).

The Disciplinary Specialist, Byron Iverson, participated in the harassment claim investigation, and he determined that Balancier filed the harassment complaint to shield her from disciplinary action. (Tr. at 247). Iverson testified Balancier was unprofessional in tone and manner during the process. (Tr. at 244).

Sewerage & Water Board Policy for Probationary Employees provides that probationary employees who have at least three months of tenure should be placed on a Performance Improvement Plan prior to termination. (Ex. Appellant-10). The Employee Relations Manager testified that she was not aware of a document called a Performance Improvement Plan for Balancier. (Tr. at 226). Patti Wallace testified that the planning session on August 7, in which each employee participated, along with the counseling she provided Balancier constituted a Performance Improvement Plan. (Tr. at 194, 196).

II. ANALYSIS

Civil Service Rule II, § 10.1 provides as follows:

No employee shall be subjected to discipline or discriminatory treatment by an appointing authority because he or she gives information, testimony or evidence in a prudent manner to appropriate authorities concerning conduct prohibited by law or regulation which he or she reasonably believes to have been engaged in by any person(s). If the employee incurs such treatment despite this admonition, he or she shall have a right of appeal to this Commission.

The Commission applies the same standard to "whistleblower" action under Rule II, § 10.1 as to other discrimination appeals. *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12), 87 So. 3d 925, 927. In disciplinary actions where the classified employee alleges discrimination,

the burden of proof on appeal, **as to the factual basis for the discrimination**, is on the employee. La. Const. art. X, § 8(B); *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12), 87 So. 3d 925, 927 (quoting *Goins v. Dep't of Police*, 570 So.2d 93, 94 (La. App. 4th Cir.1990)). *See also* Civil Service Rule II, §§ 4.4, 4.8. In 1983, the Fourth Circuit Court of Appeal held the Commission erred by relying on the Title VII *McDonnell-Douglass* burden-shifting framework for discrimination claims under Article X, Section 8(B) of the Louisiana Constitution. *Mixon v. New Orleans Police Dep't*, 430 So. 2d 210, 212 (La. App. 4 Cir. 1983) (“we conclude the Commission erred in applying the federal burden of proof standard instead of the burden specified in LSA–Const. Art. 10 § 8(B).”).

The Commission finds that Balancier gave information in a prudent manner to appropriate authorities about conduct prohibited by law under Rule II, § 10.1. She complained to her supervisor, the internal auditor, and in-house counsel about potential fraud, which is prohibited by law. The Commission finds that Balancier reasonably believed the purchase order she was directed to request was fraudulent. In this case, Balancier’s supervisor treated her questions about the discrepancy between the purchase order and the invoice as insubordinate behavior, and based her termination, in part, on this claimed insubordination. This point of view undermines Wallace’s conclusion that Balancier was “disruptive” and had “inability to work as part of a team” - - both given as reasons for Balancier’s termination. Wallace’s opinion of Balancier in these respects was likely influenced by Balancier’s complaint of suspected illegal activity. Based on the totality of the evidence, including Balancier’s positive evaluation by her former supervisor, the failure of the Sewerage & Water Board to follow its own policy by placing Balancier on a Performance Improvement Plan prior to deciding to terminate her employment, and the Sewerage & Water Board’s conclusion that Balancier was “uncooperative” and “unprofessional” because she did not

want to meet with Sewerage & Water Board managers about *her own grievance*, the Commission finds that Balancier has shown that her complaints of potential illegal activity caused her termination of employment.

The Commission finds that Balancier has failed to carry her burden of proof as to sex discrimination based on pregnancy under Rule II, § 4.6.

The Commission grants Balancier's appeal based on Rule II, § 10.1. The Sewerage & Water Board shall reinstate Balancier with back pay and all other emoluments of employment from October 25, 2019, to the present. The Commission denies Balancier's appeal based on Rule II, § 4.6.

This the 13th day of September, 2021

WRITER:

J H Korn
J H Korn (Jul 28, 2021 12:25 CDT)

JOHN KORN, COMMISSIONER

CONCUR:

BRD
Brittney Richardson (Aug 5, 2021 16:51 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

CJ Moore
CJ MOORE (Sep 13, 2021 12:27 CDT)

CLIFTON J. MOORE, JR., VICE-CHAIRPERSON