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

Wednesday, July 31, 2019

Mr. Imtiaz A. Siddiqui
900 Camp Street Suite 4C16
New Orleans, LA 70130

Re: **Gregory Matusoff VS.**
Department of Fire
Docket Number: 8879

Dear Mr. Siddiqui:

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 - 7/31/2019 - 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Timothy McConnell
Eraka Williams Delarge
Brendan M. Greene
Gregory Matusoff

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

GREGORY MATUSOFF, Appellant, vs. DEPARTMENT OF FIRE, Appointing Authority.	DOCKET No.: 8879

I. INTRODUCTION

Appellant, Gregory Matusoff, 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 Department of Fire for the City of New Orleans, (hereinafter the "NOFD") does not allege that the instant appeal is procedurally deficient. Therefore, the Commission's analysis will be limited to whether or not NOFD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a firefighter and had permanent status as a classified employee.

A referee, appointed by the Commission, presided over an appeal hearing during which both Parties had an opportunity to call witnesses and present evidence.[1] The undersigned Commissioners have reviewed the transcript and exhibits from this hearing, as well as the referee's report. Based upon our review, we DENY the Appeal and render the following judgment.

[1] There were two days of hearing in this matter, March 12, 2019 and March 21, 2019. On the first day of hearing, the Parties did not introduce any exhibits or testimony to the record. Therefore, for ease of reference, the Commission will cite to testimony using "Tr. at _" as opposed to referencing the March 21st date each time.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

On December 5, 2018, NOFD terminated Appellant's employment after Appellant allegedly tested "positive for a marijuana metabolite after submitting to a post-injury drug test on November 10, 2018." (H.E. Exh. 1). NOFD further alleged that Appellant had failed to provide the City's Medical Review Officer (hereinafter "MRO") with any information that explained or otherwise mitigated the positive test result. *Id.* Based upon the positive drug test, and Appellant's failure to provide an adequate explanation for the positive test, NOFD found that application of a City policy mandated Appellant's termination.[2]

Specifically, NOFD's termination notice cited to Policy #89 promulgated by the City's Chief Administrative Officer for the proposition that Appellant's actions warranted a "first offense discharge." *Id.* According to NOFD, Policy #89 mandates discharge "when an employee tests positive for any of the drugs prohibited by the policy while working." *Id.*

CAO Policy #89 requires that appointing authorities discharge an employee if/when:

1. The employee either refuses to participate in or submit to a search or inspection, urine drug or blood test as outlined in Section 8 of this policy regarding enforcement activities.

2. The employee has submitted to a test and, as outlined in Section 8, has attempted to degrade, dilute, switch, alter, or tamper with the sample.

3. While on city premises, the employee was caught using, manufacturing, distributing, dispensing, selling or possessing any illegal or unlawful drugs.

4. Being convicted for illegal substance possession (either on or off the job).

5. **As the result of a first offense confirmed (MRO certified) positive test result as established by City Civil Service Rules for the use of alcoholic beverages or any of the**

[2] NOFD's termination notice to Appellant also alleged that Appellant had failed to notify his supervisors that he had been prescribed medications that "could have detrimental effects" on Appellant's performance in violation of established policy. During the appeal hearing, however, NOFD Superintendent Timothy McConnell testified that NOFD terminated Appellant for his positive drug test rather than for his failure to notify supervisors of his prescription medication. (Tr. v. 2 at 314:5-18, 333:1-7).

illegal and/or unlawfully obtained (used) drugs prohibited by this policy while working.

6. The use of alcohol on the job, as outlined as a violation of this policy, including a conviction for driving while intoxicated (DWI) during working hours.

(H.E. Exh. 4 at p. 10). (emphasis added)

Policy #89 also addresses an employee's use of illegal drugs off-duty and provides that:

> Any employee whose off-duty conduct which is related to the use, sale, manufacture or abuse of any drug, prescription drug, controlled dangerous substance or alcoholic beverage that may or may not result in criminal charges or conviction shall be subject to disciplinary action up to and including, immediate termination if the City believes that this off-duty conduct possibly could involve any of the following: affects such individual's safe performance of the job; jeopardizes the safety of the other employees, the general public or the City's property; reduces the community's trust in the ability of the City to carry its responsibilities due to the notoriety or adverse effects of the employee's conduct.

Id.

Civil Service Rules require that employees in "safety sensitive positions" participate in substance abuse testing when such an employee is involved in an "on-the-job accident, sustains an on-the-job injury, or is associated with a 'near-miss' on-the-job incident." (C.S. Rule V, § 9.13). There is no dispute that, Appellant, as a firefighter, occupied a safety sensitive position within the classified service.

B. Appellant's Work History and Background

Appellant began working as a firefighter for NOFD in 2006. (Tr. at 17:23-18:2). Prior to his career as a firefighter, Appellant had been an extremely active individual, often participating in endurance races. *Id.* at 368:6-9. He carried a feeling of invincibility into his work as a firefighter and eventually paid the price. Beginning in 2016, Appellant sustained a series of work injuries culminating in an incident that required Appellant to aid in the evacuation of a very heavy civilian

during a medical call for service. *Id.* at 368:16-369:10. Due to the strain on his body caused by on-the-job injuries, Appellant missed approximately one year of work (August 2016 through August 2017). *Id.* at 369:19-24. Appellant's one-year absence was briefly interrupted by a stint with NOFD on "light duty." *Id.* at 369:25-370:3.

In August 2017, Appellant provided NOFD with a certification from his physician that Appellant could return to work without any restrictions. *Id.* at 371:11-372:5. In order to manage the pain he was experiencing due to his various injuries, Appellant's physician has prescribed Appellant a variety of medications. (NOFD Exh. 6). Included in these prescriptions were various muscle relaxers and pain killers. *Id.* Appellant denied that he used any medication that had the potential of adversely impacting his work as a firefighter while on duty. (Tr. at 376:16-377:8). Upon his return to work, Appellant served without incident until November 10, 2018.

On November 10th, Appellant was part of a team of firefighters who responded to a fire located at a local restaurant. When Appellant arrived on scene, he and his fellow firefighters proceeded to the roof where they discovered that the restaurant's ventilation system was on fire as a result of trapped grease. While Appellant was assisting his fellow firefighters, he slipped on an unseen pipe and fell hard on his side and hip. The fall resulted in a very serious injury that exacerbated Appellant's prior injuries. *Id.* at 19:20-20:15. District Chief Thomas Howly was the "incident commander" for the November 10th fire and was responsible for coordinating NOFD's response. *Id.* at 352:17-353:5. District Chief Howly recalled speaking to Appellant at the scene of the November 10th fire and testified that Appellant did not appear to be under the influence of any drugs or alcohol at the time. *Id.* at 353:21-354:4.

Because Appellant sustained an injury in the course and scope of his work as a firefighter, NOFD policy and Civil Service rules mandated that Appellant submit to a substance abuse test. (C.S. Rule V, § 9.13).

C. Appellant's Positive Test Result

For the administration of substance abuse testing to employees after normal working hours, the City of New Orleans contracts with Tulane Drug Analysis Lab ("TDAL"). William Montgomery is an on-call medical technical for TDAL and was responsible for the collection of a urine sample from Appellant on the evening of November 10th. (NOFD Exh. 4; Tr. at 116:14-24). After collecting Appellant's urine sample, Mr. Montgomery transported the sample to TDAL's offices where it was stored until the following business day (Monday, November 12, 2018) when it was retrieved by personnel working for Alere Toxicology ("Alere"). (Tr. at 118:6-119:8). Mr. Montgomery testified that all urine samples, including Appellants, are stored at room temperature. *Id.* at 119:9-19.

During all times relevant to the instant appeal, Alere was the entity that actually conducted the analysis of urine samples produced by City employees. Alere conducted all testing and analysis pursuant to guidelines established by the Substance Abuse and Mental Health Services Administration ("SAMHSA") and was certified by the National Institute of Drug Abuse. *Id.* at 131:8-20, 183:14-24. Susan Bybee served as a "responsible person" for Alere in November 2018 and supervised the testing of samples for the presence of illegal or illicit substances. Ms. Bybee has testified at numerous prior Civil Service appeal hearings. *Id.* at 132:4-23. When processing samples, Alere uses "cutoffs" (the minimum concentration of a particular metabolite) established by SAMHSA when determining "positive" results. (Tr. at 135:7-12; NOFD Exh. 5).

Per SAMHSA guidelines, Alere processes a urine sample using an initial screening test. In Appellant's case, the urine sample he produced tested positive for marijuana metabolite above the SAMSHA cutoff of fifty nanograms per milliliter. (Tr. at 156:12-21; NOFD Exh. 6 at p. 29). As a result of the screening result, Alere subjected Appellant's sample to a second, more precise test employing Liquid Chromatography with a Tandem Mass Spectrometry ("LC-MS"). (Tr. at 183:1-10; NOFD Exh. 6 at p. 46). Through the confirmatory testing, Alere established the presence of a marijuana metabolite in Appellant's body in excess of the cutoff amount established by SAMHSA. *Id.*

Following Alere's confirmatory test, an employee with the Civil Service Department received notice of the test. On November 16, 2018, Lisa Hudson, the Director of the Civil Service Department, notified Appellant of the positive test and that he had five days to provide any information to the City's Medical Review Officer ("MRO") that would explain the result. (H.E. Exh. 5). Appellant claimed that he received Ms. Hudson's letter on November 21, 2018, which was the deadline to submit information to the MRO. Given the language of the letter, Appellant believed that he had missed the deadline for providing mitigating information to the MRO. (Tr. at 403:12-404:4). Upon receiving the test results from Alere, Dr. Jennifer Avegno, the City's MRO, verified the positive test and notified the Civil Service Department of her verification. (NOFD Exh. 1; Tr. at 60:6-61:15).

D. Appellant's Termination

Following Dr. Avegno's confirmation of Appellant's positive drug test, NOFD initiated a pre-termination hearing. In its notice to Appellant regarding the pre-termination hearing, NOFD indicated that the hearing would give Appellant an opportunity to present his "case as to why [he] should not be terminated or otherwise disciplined." (H.E. Exh. 3). Deputy Superintendent Terry

Hardy presided over Appellant's pre-termination hearing on December 3, 2018. At the hearing, Appellant alleged that the positive test result was a product of an over-the-counter CBD oil (Ananda Hemp CBD) he was taking to manage inflammation and pain. In support of his claim, he produced information he had found on-line. According to Appellant, it was possible that the CBD oil he took, which he claimed has a THC concentration of 0.3% likely caused the positive result.

During a follow-up phone call with Appellant, Deputy Superintendent Hardy asked why Appellant had not provided any information to the MRO. Appellant responded that he did not believe that he had time to respond since he received the notice on the same day of the deadline to provide anything to the MRO. (Tr. at 229:2-230:10). Deputy Superintendent Hardy then summarized the pre-termination hearing for NOFD Superintendent McConnell who made the decision to terminate Appellant's employment.

Superintendent McConnell believed that the positive drug test established that Mr. Matusoff had an illegal drug in his system while working. *Id.* at 284:17-285:7. This led to a concern that the concentration of THC in Appellant's body may have contributed to Appellant's injury. *Id.* at 280:16-24. According to Superintendent McConnell, NOFD always pursued termination as a disciplinary sanction when a firefighter tested positive for an illegal substance. *Id.* at 314:5-18, 333:1-7. He went on to observe that, even if Appellant had provided the same documentation to the MRO that he produced during his pre-termination hearing, it was unlikely that NOFD would have imposed a lesser sanction since the substance Appellant tested positive for was an illegal substance. *Id.* at 334:19-335:21.

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

NOFD terminated Appellant after confirming that Appellant produced a urine sample that tested positive for a marijuana metabolite. Appellant did not challenge the accuracy or validity of the test result, but claimed that it can be explained. Appellant asserts that the level of marijuana metabolite in his body on November 10, 2018 was the result of an over-the-counter CBD oil he consumed as part of his pain management regimen.

Civil Service Rules establish that any testing laboratory must obtain certification from SAMHSA and conduct testing in accordance with standards established by SAMHSA. (C.S. Rule V, § 9.7(g)). And, the standards established by SAMHSA track those established by federal law. For marijuana metabolites (THCA), federal law deems 50ng/mL to be the initial test cutoff and 15 ng/mL for the confirmatory cutoff concentration. (Mandatory Guidelines for Federal Workplace Drug Testing Programs, 73 FR 71858-01, § 3.4). Thus, the Civil Service Rules incorporate cutoff concentrations established by federal law. THC (Tetrahydrocannabinols) is a "schedule I" controlled substance and is illegal pursuant to federal law. 21 U.S.C.A. § 812 (c)(17)(West). There is no dispute that Alere's testing process complied with Civil Service Rules or that Appellant produced a sample that tested positive for a schedule 1 controlled substance.

Appellant's defense rests largely upon his argument that the CBD oil he consumed was a legal product at the time he took it. This assertion is very much in dispute. Effective December 20, 2018 – two weeks after Mr. Matusoff's termination – a new bill was signed into law that allowed for the manufacture of products derived from hemp provided that the THC concentration was no more than 0.3 percent. (7 U.S.C.A. § 1639o(1) (West)). Prior to December 20th, under both federal and Louisiana law, any product containing THC was illegal.

The Commission finds that the Parties' dispute regarding when a 0.3% CBD product became legal is largely irrelevant. Thus, the Commission will assume, without deciding, that the CBD product Appellant consumed was legal as of November 10, 2018. This does not help Appellant.

The Commission compares the instant matter to a scenario in which an employee consumes several alcoholic beverages and reports to work. While the employee may not exhibit any external signs of impairment, if he/she gets into an accident with a City-owned vehicle and during a

subsequent substance abuse test is revealed to have a blood alcohol content ("BAC") in excess of 0.04, he/she has violated the CAO's policy. Thus, while alcohol is a legal product that is widely available, City policy still prohibits consumption to the extent where it may compromise an employee's ability to safely perform his/her job. An employee in such a situation may claim that he/she thought that she was consuming non-alcoholic beverages with only trace amounts of alcohol. Such an excuse would not alter the fact that the employee's BAC exceeded the clearly established threshold.

The Commission recognizes that BAC may not be a precise measure of how impaired an individual is, but it is the standard established by City policy.

In the matter now before us, Civil Service Rules establish the threshold level for marijuana metabolite. Even if the product Appellant consumed was legal, he consumed so much of it that it brought the level of marijuana metabolite above the permissible threshold. As the Commission has observed numerous times in the past, employees in safety-sensitive and/or security-sensitive positions must be hyper-aware of the products they consume.

Appellant admitted that he knew the requirements of Policy #89. He also knew that the CBD oil he was using contained THC. He apparently believed that the concentration of THC was not sufficient to produce a positive drug test. He was wrong. The Commission accepts testimony from Ms. Bybee that impurities in the manufacturing process could impact the concentration of THC in a particular product. Given the caution Appellant apparently took with his other medications, the Commission is puzzled as to why Appellant did not attempt to better understand the potential impact on his job that his use of CBD oil could have.

Finally, Appellant asserts that NOFD did not establish that he consumed an illegal drug "while working" and Policy #89's mandate for termination in such circumstances does not apply.

The Commission agrees that Alere's test did not establish that Appellant consumed an illegal drug while at work. Ms. Bybee acknowledged that Alere's tests could establish THC use by a donor between one and three days. Thus, it is possible that Appellant consumed THC prior to his shift on November 10, 2018. This does not prevent the Commission from finding that Appellant had an impermissible concentration of THC in his body while working. It only establishes that NOFD had some discretion in determining the appropriate level of discipline. NOFD was not in a position to ignore the test results. Civil Service Rules require an appointing authority to take some action when an employee tests positive for a controlled substance while at work.

Based upon the record, the Commission finds that Appellant violated Policy #89 by having a concentration of THC in his body above the SAMHSA cutoffs.

B. Impact on the Appointing Authority's Efficient Operations

The policy statement underpinning the Commission's rule regarding substance abuse testing is as follows:

> In order 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, a comprehensive program of substance-abuse testing of applicants and employees shall be undertaken in accordance with the provisions of this Rule.

(C.S. Rule V, § 9.1).

When an employee in a safety sensitive position consumes illegal drugs or medication that impacts his/her ability to work, he/she puts coworkers and citizens in a precarious position. In its termination letter to Appellant, Superintendent McConnell wrote that, by consuming an illegal substance, Appellant compromised the safety of himself, his fellow firefighters and the residents or New Orleans. The Commission agrees. Appointing authorities rightly dissuade even the off-

duty use of illegal/illicit substances for those in safety sensitive positions and Civil Service Rules provide for the random testing of employees in such positions.

The Commission accepts NOFD's position that an employee whose substance abuse test result exceeds the proscribed limits for an illegal drug compromises the efficient operation of the Fire Department.

Based upon the foregoing, the undersigned Commissioners find that NOFD has established that Appellant's misconduct impaired the efficient operations of the Fire Department.

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 Commission has observed that the City's substance abuse policy does not require intent. *Mays v. Department of Fire*, C.S. No. 8665, at p. 7 (June 19, 2018); *see also Cole v. Department of Police*, C.S. No. 8192, at p. 9 (Aug. 18, 2016). In *Cole*, a police officer tested positive for morphine in excess of the cutoffs established by SAMHSA and claimed that it was a result of mistakenly taking his wife's pain medication. *Cole*, *supra*, at 4-5. NOPD terminated that officer and the officer appealed. In sustaining the discipline, the Commission cautioned that employees "need to be hyper-aware as to what they put into their bodies, particularly when it comes to medication." *Cole*, *supra* at 9. The danger substance abuse policies seek to prevent is "employees in safety-sensitive positions reporting to work under the influence of drugs or alcohol." *Mays*, *supra*, at 7-8. In the matter now before us, as in *Mays*, a firefighter reported to

work under the influence of an illegal drug as established by a test using cutoffs established by the Federal Government. There is no dispute as to these facts.

Appellant relies upon *Mays* for the proposition that NOFD did not establish that Appellant used an illegal drug "while at work." This distinction, however, only speaks to the mandatory nature of the penalty rather than whether or not Appellant violated City policy. CAO policy #89, in the section immediately following the circumstances that mandate termination, clearly states that an employee's off-duty use of an illegal drug may result in discipline up to and including termination. Thus, NOFD had the discretion to terminate Appellant for off-duty use of marijuana/THC.

In *Mays*, Superintendent McConnell testified that NOFD has provided employees with the option of enrolling in a rehabilitation program after a positive drug test when the employee self-identifies a substance abuse problem. *Mays, supra* at 10. On the other hand, for those employees who test positive after an accident, injury or through a random drug test, NOFD has always pursued termination. The case before us now is consistent with Superintendent McConnell's representation. While other forms of discipline are available, when an employee in a safety-sensitive position tests positive for an illegal substance while at work, termination is not arbitrary or capricious. *See Cole v. Dep't of Police*, 2016-1075 (La.App. 4 Cir. 5/17/17, 7); 221 So.3d 252, 257.

For the above-stated reasons, the Commission finds that Appellant's termination was commensurate with his misconduct.

V. CONCLUSION

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

Judgment rendered this 31st day of July, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

JOHN H. KORN, COMMISSIONER — DATE 7/29/19

CONCUR

MICHELLE CRAIG, CHAIRWOMAN — DATE 6/24/2019

BRITTNEY RICHARDSON, COMMISSIONER — DATE 7/23/2019