



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
BRITTNEY RICHARDSON, CHAIRPERSON
JOHN H. KORN, VICE-CHAIRPERSON
CLIFTON J. MOORE, JR.
MARK SURPRENANT
RUTH WHITE DAVIS

Tuesday, December 27, 2022

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Ms. Jessica Vasquez
400 Poydras Street, Ste. 900
New Orleans, LA 70130

Re: **Mubashir Maqbool VS.
Sewerage & Water Board
Docket Number: 9378**

Dear Ms. Vasquez:

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 - 12/27/2022 - 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
Chanelle Collins
Jay Ginsberg
Mubashir Maqbool
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**MUBASHIR MAQBOOL,
Appellant**

Docket Nos. 9378

v.

**SEWERAGE & WATER BOARD,
Appointing Authority**

DECISION

Appellant, Mubashir Maqbool, brings this appeal pursuant this Commission's Rule II, § 10.1 alleging that the Sewerage & Water Board engaged in discriminatory treatment of him because of his whistleblower activity. At all relevant times, Appellant had permanent status as a Senior Principal Engineer. (Tr. at 41). A Hearing Examiner, appointed by the Commission, presided over a hearing on August 12, 2022. This hearing was limited to the threshold issue of whether Appellant was eligible for promotion on June 10, 2022. 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 October 10, 2022, and controlling Louisiana law.

As the hearing officer's report sets forth, Ms. Maqbool's whistleblower appeal fails because his name was not on the eligible list for the position of Senior Engineering Division Manager on June 10, 2022. A copy of the hearing officer's report is attached and incorporated by reference.

I. FACTUAL BACKGROUND

Mr. Maqbool filed a whistleblower appeal with the Commission alleging that the Sewerage & Water Board failed to promote him to the position of Senior Engineering Division Manager on June 10, 2022, because of his whistleblowing activity. At the hearing, Shelly Stolp, who was serving as the Personnel Administrator in the Recruitment and Selection Division of the Civil Service Department during all relevant times, testified that Ms. Maqbool's name was not on the certification list provided to the Sewerage & Water Board on June 10, 2022. (Tr. at 19).

The Civil Service Department accepts applications for the position of Senior Engineering Division Manager on a continuous basis, even if a Department is not actively hiring for this position. (Tr. at 15). Ms. Stolp explained that the eligible list is "fluid." (Tr. at 15). The Civil Service Department "keep[s] the position open because we know there's going to be more than one vacancy." (Tr. at 15). In general, after a candidate applies for a position, Civil Service Staff ensure the candidate meets the qualifications of the position. (Tr. at 16-17). The eligible list is a list of candidates who have meet the minimum qualifications. (Tr. at 16-17). A certified list is a "snapshot" of the eligibility list that the Civil Service staff provides to a Department when the Department submits a requisition to fill a vacancy. (Tr. at 17).

Ms. Stolp explained that Mr. Maqbool's application for this position was originally received on March 25, 2021. (Tr. at 10). A candidate remains on the eligible list for one year. (Tr. at 21). Mr. Maqbool testified that he learned on June 10, 2022, that the Sewerage & Water Board was in the process of hiring a Senior Engineering Division Manager. (Tr. at 41). Mr. Maqbool applied on Friday, June 10, 2022, at 8:45 PM. (Tr. at 34). Even though Civil Service staff backdate the application to the date it was received, because Civil Service staff must review the application, the earliest Mr. Maqbool could have appeared on the eligible list was Monday, June 13, 2022. (Tr.

at 34). The Personnel Director, Amy Trepagnier, informed Mr. Maqbool that he was on the eligible list on June 13, 2022. (Tr. at 41). However, the Civil Service Department had provided the certified list on June 10, 2022, and Mr. Maqbool's name was not on the list. (Tr. at 31).

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-Dougllass* 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).”). Recently, the Fourth Circuit Court of Appeal, in a plurality opinion, applied the *McDonnell Dougllass* framework in a mixed motive whistleblower appeal by

a probationary employee. *Balancier v. Sewerage & Water Board of New Orleans*, No. 2022-0255 (La. App. 4 Cir. 10/19/22), 2022 Westlaw 11119572. Under either standard, Mr. Maqbool's claim fails because the Sewerage & Water Board had no opportunity to discriminate against him when the June 10, 2022, certified list did not include his name.

For these reasons, Mr. Maqbool's appeal is DENIED.

This the 27th day of December, 2022.

WRITER:

Mark C. Surprenant
Mark C. Surprenant (Dec 21, 2022 17:38 CST)

MARK SURPRENANT, COMMISSIONER

CONCUR:

Brittney Richardson
Brittney Richardson (Dec 23, 2022 14:17 CST)

BRITTNEY RICHARDSON, CHAIRPERSON

CJ Moore
CJ MOORE (Dec 21, 2022 11:42 CST)

CLIFTON J. MOORE, JR., COMMISSIONER

MUBASHIR MAQBOOL

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

SEWERAGE & WATER BOARD

DOCKET NO. 9378

HEARING EXAMINER'S REPORT

INTRODUCTION

Mubashir Maqbool ("Appellant") is employed by the Sewerage & Water Board ("Appointing Authority") as a Senior Principal Engineer with permanent status. The Appellant filed an appeal under Civil Service Commission Rule II, Section 10.1 alleging that the Appointing Authority failed to promote him to the position of Engineering Division Manager in retaliation for engaging in whistleblower activity. Specifically, the Appellant contends that the Appointing Authority should have promoted him to a vacant position that was awarded to another candidate on June 27, 2022.¹

FACTS

The undisputed facts establish that the Appellant was on the eligible list for Senior Engineering Division Manager from March 25, 2021 until March 25, 2022, when his place on the list expired. (Appellant Ex. 8). He reapplied and was

¹ The Hearing Examiner narrowed the Appellant's appeal to the most recent promotional opportunity, ruling that previous promotional opportunity claims had prescribed because the allegations occurred more than 30 days prior to filing the appeal. The Hearing Examiner also determined that the Appellant's pay claims were not subject to appeal in a hearing limited to claims raised under Civil Service Commission Rule II, Section 10.1.

placed on the eligible list for the position again retroactively from his application date of June 10, 2022 until June 10, 2023. (Appellant Ex.'s 1 & 9).

Kaitlin Tymrak was promoted to Senior Engineering Division Manager on June 27, 2022 from requisition 2022-01639. (Appellant Ex. 7). Civil Service Department staff certified the eligible list for this promotion on June 10, 2022, prior to the Appellant's placement back on the eligibility list. The Appellant's name was not on the eligibility list that was provided by the Civil Service Department to the Appointing Authority to make a selection. This was because Mr. Maqbool applied for Senior Engineer Division Manager position after the certification list was already provided to the Appointing Authority for selection. Maqbool submitted his application at 8:45 pm on Friday June 10, 2022, after working hours, and was placed on the register on Monday, June 13, 2022, retroactive to his application date. Although the Civil Service Department back-dated his eligibility date to the date of his application, consistent with Civil Service Department policy, in actuality he was not eligible until June 13, 2022 after the certification was created by the Civil Service Department and provided to the Appointing Authority. (Tr. at 26 – 34).

CONCLUSION

The Appellant was not on the list of eligibles considered for promotion by the Appointing Authority because he submitted his application after the list of eligibles was already provided to the Appointing Authority for selection. The

Appointing Authority could not have selected or rejected the Appellant because he was not a candidate. As such, the Appellant has failed to establish that he suffered an adverse employment action at the hands of the Appointing Authority. Without an adverse employment action, there is no basis for claiming retaliation.

The Appellant has failed to establish a *prima facie* case for whistleblower retaliation. Consequently, his appeal should be dismissed.²

October 10, 2022
DATE

S/ Jay Ginsberg
HEARING EXAMINER

² See *Fountain v Dept. of Human Services*, CSC Docket No. 8673. An adverse employment action is required for a *prima facie* case of retaliation based upon whistleblower activity.