



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION
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AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Thursday, May 16, 2024

Ms. Mytrell Carter

Re: **Mytrell Carter VS.
Sewerage & Water Board
Docket Number: 9519**

Dear Ms. Carter:

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 - 5/16/2024 - 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, Sec. 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
Imtiaz A. Siddiqui
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**MYTRELL CARTER,
Appellant**

Docket No. 9519

v.

**SEWERAGE & WATER BOARD,
Appointing Authority**

DECISION

Appellant, Mytrell Carter, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from the Sewerage & Water Board's October 24, 2023, termination of her employment. (Ex. HE-1). At all relevant times, Appellant had permanent status as an Office Worker in the Sewerage & Water Board's Human Resources Department. (Ex. SWBNO-4). A Hearing Examiner, appointed by the Commission, presided over a hearing on December 14, 2023. 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 March 24, 2024, and controlling Louisiana law.

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

I. FACTUAL BACKGROUND

Ms. Carter began her employment with the Sewerage & Water Board on January 10, 2022. (Ex. HE-1; Tr. at 7-8). In January of 2023, Ms. Carter requested Family and Medical Leave Act (FMLA) leave to care for a family member, and the Sewerage & Water Board granted this leave. (Tr. at 8-9).

Ms. Carter requested additional FMLA leave in 2023 related to her pregnancy and the upcoming delivery of her baby. (Tr. at 9-10). Ms. Carter's treating obstetrician, Amy Grace, M.D., completed a certification of health care provider on May 26, 2023, identifying Ms. Carter's condition as pregnancy. (Ex. Appellant-1; Tr. at 10). Dr. Grace stated that Ms. Carter would need leave from June 27, 2023, until October 23, 2023. (Ex. Appellant-1). Dr. Grace listed the expected delivery date as July 13, 2023. (Ex. Appellant-1). The FMLA form Dr. Grace completed was the Certification of Health Care Provider for *Family Member's Serious Health Condition* under the Family and Medical Leave Act (DOL Form WH-380-F). (Ex. Appellant-1).

In accordance with Civil Service Rule VIII, section 9,¹ Ms. Carter executed an agreement on June 15, 2023, to return to work for at least 12 weeks following her leave. (Ex. SWBNO-3). Ms. Carter's understanding was that her responsibilities were to supply the FMLA form from her treating physician and to provide the birth certificate of her baby to the Sewerage & Water Board after she delivered the baby. (Tr. at 10).

Because Ms. Carter had used one week of FMLA leave in 2023, she was entitled to 11 additional weeks of leave under the Family and Medical Leave Act during the remainder of 2023. (Tr. at 66). Under Civil Service Rule VIII, section 9, the 11 weeks of FMLA leave following the birth of her child were paid. Ms. Carter began her parental leave on July 4, 2023.² (Ex. HE-1).

¹ Civil Service Rule VII, section 9 provides that "[a]ny full-time classified employee with at least twelve months of service shall be eligible to receive up to twelve weeks of paid parental leave that may be used in substitution for unpaid Family and Medical Leave Act (FMLA) leave following the birth or placement (adoption or foster care) of a child..." Civil Service Rule VIII section 9(d) also requires an employee who receives paid parental leave to agree in writing to return to work for at least 12 weeks following the leave. Failure to satisfy this condition may result in recovery of the employer's portion of healthcare expenses during the period of the leave. (Civil Service Rule VIII, section 9).

² Eleven weeks from July 4, 2023, is September 19, 2023.

The Sewerage & Water Board faxed Dr. Grace a request to complete “the correct” FMLA form on July 10, 2023, and, according to Robin Muse, a Management Development Analyst II in the Sewerage & Water Board Benefits Department, Dr. Grace returned this completed form on July 11, 2023.³ (Tr. at 98). Ms. Carter exhausted the paid parental FMLA leave on September 19, 2023. (Tr. at 11, 107).

After she exhausted her paid parental leave, Ms. Carter visited the Sewerage & Water Board on September 28, 2023, to inquire about a return date and her schedule. (Tr. at 12, 60). Ms. Carter met with her supervisors, Miera Moore, Utility Services Manager in Human Resources, and Juli Sholar, Human Resources Director. (Tr. at 60, 110-11). Ms. Carter testified she verbally informed Ms. Moore in late September that she was not medically cleared to return to work. (Tr. at 44, 59, 162). Ms. Moore instructed Ms. Carter to contact Robin Muse in Benefits about the required documents to return to work. (Tr. at 33).

According to the emails offered into evidence by the Sewerage & Water Board, Ms. Carter emailed Ms. Moore and Ms. Sholar requesting a modified schedule based on her childcare needs on September 28, 2023. (Ex. SWBNO-4). Ms. Carter also requested leave on October 23-24, 2023, but this request was denied by Miera Moore on October 3, 2023. (Tr. at 38; Ex. SWBNO-4). In this email chain, Ms. Carter informed Ms. Moore and Ms. Sholar on Wednesday, October 4, 2023, that she could return to work “tomorrow.” (Ex. SWBNO-4). In reply on October 4, rejecting Ms. Carter’s offer to return on October 5, Ms. Moore stated by email to Ms. Carter, “See you Tuesday Oct 10, 2023. A holiday is Monday.” (Ex. SWBNO-5). On Friday, October 6, 2023,

³ This completed form was not offered into evidence.

at 12:38 PM, Ms. Carter informed Ms. Moore and Ms. Sholar by email that she had not been medically approved to return to work:

Hi ladies

I appreciate the adjustments made to my schedule upon my return, as eager as I am to return I haven't been medically approved just yet, My appointment is set for Wednesday [October 11], so I will get back with you all no later than Friday [October 13] letting you'll know whether I'm cleared or not to return. Thanks for time and patience.

(Ex. SWBNO-5).

Despite the October 6 email, Ms. Moore testified she expected Ms. Carter to return to work on Tuesday, October 10, 2023. (Tr. at 55, 116, 118). When Ms. Sholar called Ms. Carter following her failure to return to work on October 10, Ms. Carter again informed Ms. Sholar she was not cleared to return to work. (Tr. at 125).

Ms. Carter testified she had post-partum depression, but she did not wish to disclose this diagnosis to the Sewerage & Water Board. (Tr. at 150). Ms. Carter received mental health treatment for post-partum depression with a counselor through the Sewerage & Water Board's Employee Assistance Program until her employment was terminated. (Tr. at 149).

Ms. Muse explained that after Ms. Carter exhausted her FMLA leave, the Benefits Department of the Sewerage & Water Board required a doctor's note for additional leave or a doctor's note authorizing Ms. Carter to return to work (with or without restrictions). (Tr. at 69). Ms. Muse further testified that the FMLA form she sent to Ms. Carter informed Ms. Carter of these requirements to return to work or to extend her leave.⁴ (Tr. at 78). Ms. Carter testified she

⁴ Ms. Carter objected to the admission of the FMLA notice on the bases that she failed to receive the notice and that the document was not signed. (Tr. at 74). The Hearing Examiner denied the Sewerage & Water Board's motion to admit the written FMLA notice for the reasons articulated by Ms. Carter and because of the appearance of another employee's name on the second page of the document instead of Ms. Carter's name. (Tr. at 74). The Sewerage & Water Board failed to

did not receive the written notice informing her of the dates of her leave or her obligations under FMLA.⁵ (Tr. at 32).

Ms. Muse also testified that the Sewerage & Water Board would have approved additional leave without pay if Ms. Carter had supplied a doctor's note for additional leave. (Tr. at 70-72, 97). Specifically, Ms. Muse testified that "[h]er FMLA leave would have been exhausted, but she would have been able to continue out on non-FMLA leave." (Tr. at 97). The non-FMLA leave could have extended to January 19, 2024. (Tr. at 75). The Human Resources Director testified that the Sewerage & Water Board would have accommodated Ms. Carter by approving additional leave if Ms. Carter had provided the appropriate documentation. (Tr. at 125-128).

Ms. Muse testified she asked for Ms. Carter's return to work date on October 10, 2023, anticipating Ms. Carter would obtain this date at her doctor's appointment on October 11, 2023. (Tr. at 46). Ms. Muse requested additional documentation of the reason for her medical leave by email to Ms. Carter on October 16, 2023, at 9:39 AM, noting that the Sewerage & Water Board had failed to receive any additional documents from her physician following the October 11 visit. (Ex. Appellant-3). Ms. Carter relayed her treating physician's request for clarification at 1:09 PM on October 16. (Ex. Appellant-3). Because the form completed by Dr. Grace provided a return date of October 23, 2023, Ms. Carter asked Ms. Muse to identify the additional documentation the Sewerage & Water Board required from Dr. Grace: "as a relate to the additional documents

proffer the FMLA notice. In addition, Ms. Muse testified that she "more than likely" signed a version of the notice. (Tr. at 74). Ms. Muse also testified that she regularly sends a copy of the FMLA notice to employees requesting leave by U.S. mail and by email. (Tr. at 74). The Sewerage & Water Board failed to offer a signed version of the notice or a copy of the email from Ms. Muse to Ms. Carter attaching the FMLA notice into evidence.

⁵ The Department of Labor requires the employer to provide written notice to the employee of the dates of approved FMLA leave. 29 CFR § 825.300. The DOL's suggested fill-in form for the written notice is publicly available at [WH-381 \(dol.gov\)](https://www.dol.gov/eis/wh381).

requested, my original documents that were already provided states that I am due to return on October 24, my Dr. wants to know is there an additional form that needs to be filled out or what exactly are you guys requesting please advise so that I can get this returned to you all as soon as possible.” (Tr. at 15-16; Ex. Appellant-3). According to Ms. Carter, Ms. Muse failed to respond to this email.⁶ (Tr. at 16). Ms. Carter testified that if the Sewerage & Water Board had identified the form to be completed, she would have provided the documentation. (Tr. at 149). In a subsequent phone conversation, Ms. Carter informed Ms. Sholar she would return to work on October 23, 2023. (Tr. at 34).

When Ms. Carter reported to work on October 25, 2023, the Sewerage & Water Board informed her she was terminated for failing to return to work. (Tr. at 163). The October 25, 2023, letter of termination states that the termination was effective October 24, 2023. (Ex. HE-1). Ms. Carter testified that Dr. Grace cleared her to return to work on October 25, and that she arrived at the Sewerage & Water Board with this note from her doctor, but that the Sewerage & Water Board terminated her employment before she provided the document. (Tr. at 151-52). Ms. Carter also testified that the reason for the delay was the necessity of a visit with Dr. Grace: “So, my date was October 23rd, and I had to wait until my doctor had another appointment.” (Tr. at 163).

II. ANALYSIS

A. The Sewerage & Water Board Failed to Provide Appropriate Due Process Protections to Ms. Carter

The Sewerage & Water Board erroneously characterized its termination of Ms. Carter’s employment as a voluntary resignation. Ms. Carter did not voluntarily resign. The Sewerage &

⁶ Ms. Muse testified that she responded to the email on October 16, but she did not have a copy of the email. (Tr. at 85).

Water Board terminated her employment. The Commission credits the testimony of Ms. Carter that she failed to receive the federally required written notice of the dates of her FMLA leave or the documentation requirements the Sewerage & Water Board required to return to work or extend her leave. The Sewerage & Water Board's offer of an unsigned form with internal inconsistencies and the absence of documentation of the claimed emailed notice support Ms. Carter's testimony that she failed to receive the written notice.

Based on the FMLA leave form completed by her treating physician and her failure to receive the written FMLA notice, Ms. Carter reasonably believed her leave (both paid and unpaid) extended to October 23, 2023. (Ex. Appellant-1; Tr. at 28-29). Even though Ms. Carter contacted her supervisors about returning to work after the paid leave expired, she informed them on October 6, 2023, before she was expected to return on October 10, 2023, that she was not medically cleared to return to work. When Ms. Muse emailed her on October 16, 2023, requesting additional documentation, Ms. Carter reasonably asked for clarification about the documentation required from her treating physician, but no record evidence exists of a response from Ms. Muse for additional information. Further, the Sewerage & Water Board had earlier requested completion of medical forms directly by fax to Dr. Grace, yet the record reflects no effort by the Sewerage & Water Board to confirm the necessity of leave after September 19, 2023, with Dr. Grace, or to update the FMLA form. On October 25, 2023, the Sewerage & Water Board stated that Ms. Carter had been on unapproved leave without pay for nine consecutive days. (Ex. HE-1). However, this conclusion ignores Dr. Grace's certification of leave until October 23, 2023.

Ms. Carter was entitled to notice and an opportunity to be heard in advance of a termination of employment under the due process clauses of the federal and state constitutions. *Cleveland Bd.*

of Education v. Loudermill, 470 U.S. 532, 542 (1985); *Bell v. Dep't of Health and Human Resources*, 483 So. 2d 945, 951 (La. 1986).

The Sewerage & Water Board relied on Civil Service Rule IX, section 1.1(a), which provides that an Appointing Authority may terminate the employment of an employee in the classified service if the employee is unable to unwilling to perform the duties of her position. (Ex. HE-1). Civil Service Rule IX, section 1.2 requires an Appointing Authority to provide a pre-disciplinary hearing before the termination of employment and also requires the appointing authority to “notify the employee of the disciplinary action being recommended *prior to taking action.*” (emphasis added). The Sewerage & Water Board chose to deny Ms. Carter a pre-disciplinary hearing and pre-deprivation notice of its intention to terminate her employment in violation of Civil Service Rules.

Civil Service Rules have the effect of law. La. Const., art. X, § 10(A)(4). The Fourth Circuit Court of Appeal recently addressed the Constitutional authority for the Commission’s rulemaking and the effect of the Commission’s Rules in the context of the Sewerage & Water Board’s termination of its Human Resources Director:

The Commission derives its authority from Article X of the Louisiana Constitution, which establishes the city civil service system “and includes all persons holding offices and positions of trust or employment in the employ of each city having over four hundred thousand population and in every instrumentality thereof.” La. Const. art. X, § 1; *Scott v. Dep't of Police*, 2006-0956, p. 2 (La. App. 4 Cir. 1/31/07), 951 So.2d 1281, 1282. While the Commission's primary function is “as a quasi-judicial body,” the Louisiana Constitution also empowers the Commission “to generally supervise the civil service system and to establish rules for that system's administration.” *Scott*, 2006-0956, p. 3, 951 So.2d at 1282. That is, the Louisiana Constitution vests exclusive authority with the Commission “for the administration and regulation of the classified service, including the power to adopt rules for regulating employment,” as well as “pay, removal, certification, [and] qualifications” La. Const. art. X § 10(A)(1)(a) (1974). That constitutional provision, La. Const. art. X, § 10(A)(1)(a), “specifically confers broad and general rulemaking powers upon [the Commission] to administer and regulate in [the

delineated] areas.” *Reimer v. Med. Ctr. of La. at New Orleans*, 1995-2799, p. 4 (La. App. 4 Cir. 1/29/97), 688 So.2d 165, 168. Further, La. Const. art. X, § 10(A)(4) provides that “[r]ules adopted pursuant hereto shall have the effect of law” See also *Scott*, 2006-0956, p. 3, 951 So.2d at 1282 (stating that the rules promulgated by the Commission “have the effect of law” (citing La. Const. art. X, § 10(A)(4)). As this Court has previously held, the Commission’s “exclusive power to adopt rules regulating the classified service in the areas specifically enumerated in Section 10(A)(1) cannot constitutionally [be] infringe[d] on” *New Orleans Firefighters Ass’n Local 632 v. City of New Orleans*, 590 So.2d 1172, 1175 (La. 1991).

McClendon v. Sewerage & Water Bd. of New Orleans, 2023-0531 (La. App. 4 Cir. 4/5/24). The Fourth Circuit also recognized that “the Civil Service Rules ‘must be recognized and enforced by the courts unless they violate basic constitutional rights or are unreasonable.’” *Id.* (citing *Reimer*, 1995-2799, p. 4, 688 So.2d at 168). Therefore, the Sewerage & Water Board may not adopt a policy allowing it to characterize terminations of employment as voluntary resignations in violation of *Loudermill* and Civil Service Rules requiring notice and an opportunity to be heard.

In this case, the Sewerage & Water Board wholly failed to give Ms. Carter a pre-deprivation hearing, as required by *Loudermill*. In addition, the Sewerage & Water Board failed to comply with Civil Service Rule IX, section 1.2, by failing to give Ms. Carter advance written notice of its intent to terminate her employment. Just as in *Desdunes v. Sewerage & Water Board*, Docket No. 9454 (Civil Service Commission 3/14/24), *motion for appeal filed 4/16/24*, the Sewerage & Water Board’s reliance on its policy characterizing an absence of three consecutive days as a voluntary resignation is unpersuasive in this case.

More importantly, a pre-termination hearing in this case may have given Ms. Carter a clear opportunity to explain the medical condition preventing her from returning to work and her failure to provide the additional documentation requested by the Sewerage & Water Board. According to the testimony of the Sewerage & Water Board, if Ms. Carter had provided documentation from

her mental health provider or Dr. Grace, the Sewerage & Water Board would have extended her unpaid leave until January 19, 2024.

B. The Sewerage & Water Board Failed to Show Cause for Termination


“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep’t of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.* “Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.” *Id.* “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 Sewerage & Water Board has failed to show cause for the termination of Ms. Carter’s employment. First, the Sewerage & Water Board has failed to show that Ms. Carter abandoned her job. Contrary to the testimony of the Human Resources Director (Tr. at 139), the Department of


Labor requires the employer to provide written notice to the employee of the dates of approved FMLA leave. 29 CFR § 825.300. If the Sewerage & Water Board had provided this notice, then Ms. Carter would have understood the dates of her approved FMLA leave and the requirements to return to work. Second, the Sewerage & Water Board's refusal to accept Dr. Grace's medical opinion that Ms. Carter's condition required leave until October 23, 2023, because that opinion was part of a FMLA certification is unreasonable, especially when Dr. Grace was responsive to the Sewerage & Water Board's earlier direct request that Dr. Grace complete the "correct" FMLA form. (Tr. at 97-98). The Sewerage & Water Board has also failed to show that it informed Ms. Carter of the additional documentation it needed from Dr. Grace, even after Ms. Carter asked on October 16, 2023, what form her doctor needed to complete. Ms. Muse's testimony that she responded to the October 16 email is unavailing. Even if the Sewerage & Water Board rejected Ms. Carter's explanation for her failure to report to work on October 23 and 24, the penalty for a second offense of unexcused absence is a letter of reprimand under the Sewerage & Water Board's Attendance Policy. (Ex. SWBNO-2 at 5).

The Commission grants Ms. Carter's appeal on the basis that the Sewerage & Water Board failed to provide her with notice and an opportunity to be heard under Civil Service Rule IX and the due process clauses of U.S. and Louisiana Constitutions. The Commission also grants Ms. Carter's appeal on the basis that the Sewerage & Water Board has failed to show that she voluntarily abandoned her job. The Sewerage & Water Board shall reinstate Ms. Carter and reimburse her all lost wages and other emoluments of employment from October 24, 2023, to the date of her reinstatement.

WRITER:


Andrew Monteverde (May 14, 2024 14:19 CDT)
ANDREW MONTEVERDE, COMMISSIONER

CONCUR:


Brittney Richardson (May 16, 2024 16:26 CDT)
BRITTNEY RICHARDSON, CHAIRPERSON


Mark Surprenant (May 14, 2024 14:58 EDT)
MARK SURPRENANT, COMMISSIONER