CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Wednesday, November 6, 2019

Eric D. Torres
650 Poydras St. Ste. 2615
New Orleans, La. 70130

Re: **Edward Horan VS.**
Department of Safety & Permits
Docket Number: 8822

Dear Mr. Torres:

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 - 11/6/2019 - 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: Zachary Smith
Renee E. Goudeau
Jay Ginsberg
Edward Horan

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

EDWARD HORAN, Appellant, vs. DEPARTMENT OF SAFETY AND PERMITS, Appointing Authority.	DOCKET No.: 8822

I. INTRODUCTION

Appellant, Edward Horan, 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 Safety and Permits, (hereinafter the "DSP" or Appointing Authority) does not allege that the instant appeal is procedurally deficient. Appellant alleges that the Appointing Authority violated his rights under the United States and Louisiana Constitutions when it subjected him to a substance abuse test. The Commission first addresses Appellant's constitutional claims before assessing whether or not the Appointing Authority has sufficient cause to terminate Appellant. At all times relevant to the instant appeal, Appellant served as a Zoning Administrator 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. The undersigned Commissioners have reviewed the transcript, exhibits, and briefs from this hearing, as well as the referee's report. Based upon our review, we DENY the Appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

On July 11, 2018, the Appointing Authority terminated Appellant's employment after Appellant tested positive for a marijuana metabolite after submitting to a substance abuse screening on May 21, 2018. (H.E. Exh. 1). The Appointing Authority indicated that it was Appellant's "unusual and erratic behavior" that prompted Appellant's supervisors to direct Appellant to submit to a substance abuse screening. *Id.*

The Appointing Authority'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.* 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 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. 1; DSP Exh. 2)(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.

(DSP Exh. 2).

Pursuant to Civil Service Rules, an appointing authority may require a classified employee to participate in a substance abuse screening if the appointing authority has "reasonable suspicion" that the employee is under the influence of drugs or alcohol while at work. (C.S. Rule V, § 9.12). Reasonable suspicion must be based upon the following criteria:

> (a) Any observable, work-related behavior or similar pattern of conduct that appears to be abnormal, erratic or otherwise not in conformance with acceptable City policy.
>
> (b) Any observable, work-related behavior or similar pattern of conduct that indicates signs of impairment in normal sensory and/or motor body functions.
>
> (c) Any articulable facts or evidence that indicate possible substance abuse on the job.
>
> (d) Any information or evidence that warrants, or emanates from, an authorized investigation of possible drug-related activity by a specific individual or group.
>
> (e) Any pattern of alcohol and/or drug-related behavior, conduct or activity that is violative of municipal, state or federal law.

Id.

B. Appellant's Work History and Background

Appellant served as a Zoning Administrator since April 2006 and occupied the position during all times relevant to the instant appeal. (Tr. at 7:23-8:2). As Zoning Administrator, Appellant was responsible for reviewing building plans submitted by contractors and residents in

order to ensure such plans conformed to local ordinances. *Id.* at 8:4-22. Appellant also assigned inspectors to instances of alleged zoning violations. *Id.* at 8:15-22.

Jared Munster, PH.D., has served as the Director of DSP between 2012 and July 2018; prior to that time, he served as the Assistant Zoning Administrator. *Id.* at 13:9-18. Mr. Munster stated that he worked with Appellant for approximately ten years and had occasion to interact with him on a day-to-day basis during the time he spent as the Assistant Zoning Administrator. *Id.* at 13:19-14:4. As a result of his working relationship with Appellant, Mr. Munster claimed that he was familiar with Appellant's "general demeanor." *Id.* at 14:5-7.

Mr. Munster convened a regular weekly meeting in his office with his staff while he served as Director of the Appointing Authority. At one such weekly meeting on May 21, 2018, Mr. Munster, Appellant, Zach Smith (Building Official) and Jen Cecil (Deputy Director of DSP) were present. *Id.* at 14:21-15:11. During the May 21st meeting, Mr. Munster claimed to have observed Appellant "acting in a way that was not his usual demeanor." *Id.* at 15:12-16. Specifically, Mr. Munster stated that Appellant appeared to be rubbing his palms against his pants and had a speech pattern different from his normal pattern. *Id.* at 15:16-16:4. Mr. Munster testified that he had not seen Appellant engaged in similar behavior prior to the May 21st meeting. *Id.* at 16:11-13. Mr. Smith stated that he had worked with Appellant for more than nine years and agreed with Mr. Munster's observations that Appellant was acting strangely. *Id.* at 55:21-56:3, 56:12-57:24.

Ms. Cecil also shared Mr. Munster's and Mr. Smith's concerns about Appellant's demeanor. She had worked with Appellant for approximately six years and regularly interacted with Appellant during that time. *Id.* at 45:10-17. According to Ms. Ceicil, Appellant was speaking much slower than usual and the May 21st staff meeting and had a very flat affect, which was out of character. *Id.* at 46:8-19.

Following the staff meeting, Mr. Munster attended a larger, departmental meeting attended by additional DSP staff, including Appellant. According to Mr. Munster, by the second meeting, Appellant had ceased rubbing his palms on his pants, but continued to speak in a "halting" speech pattern. *Id.* at 18:3-13.

Based upon their observations, Mr. Munster and Ms. Cecil reached out to Sinead Daniell, the DSP's Human Resource Manager. *Id.* at 20:3-14. Ms. Cecil testified that she believed Ms. Daniell was a "neutral" actor. *Id.* at 50:15-19.

Ms. Daniell had been working for the DSP approximately one-and-a-half years as of May 21, 2018. *Id.* at 29:3-5. She knew Appellant through her work as an HR Manager and interacted with Appellant approximately once per week. *Id.* at 29:13-19. Ms. Daniell recalled receiving a request from Ms. Cecil to assess Appellant's behavior. In order to make an assessment, Ms. Daniell engaged Appellant in a conversation regarding a personnel matter. *Id.* at 32:3-23. After her conversation with Appellant, Ms. Daniell believed that "something was definitely off" with Appellant and believed that Appellant's speech patterns were not normal, that Appellant was "spaced out," glassy eyed and unable to focus. *Id.* at 33:3-9, 42:25-43:5. Ms. Daniell also observed Appellant to be less personable that he usually was. Ms. Daniell asserted that she spoke to personnel with the Civil Service Department who confirmed that it was appropriate for DSP to send Appellant for a substance abuse test based upon Ms. Daniell's description of Appellant's appearance. *Id.* at 35:4-36:6. Ms. Daniell spoke to both Mr. Munster and Ms. Cecil regarding her observations.

After speaking with Ms. Baniell, Mr. Munster believed that there was probable cause to require Appellant submit to a drug screening. *Id.* at 22:17-24. Appellant's role as Zoning Administrator factored into Mr. Munster's decision to require Appellant submit to a drug test. As

Mr. Munster explained, Appellant exercised a great deal of authority and any impairment could substantial negative impacts on the work of DSP. *Id.* at 23:4-13. Given his concerns, Mr. Munster directed Appellant to report to Alere Toxicology to provide a urine sample for a substance abuse test.

After Mr. Munster had directed Appellant to submit to a substance abuse test, Appellant produced bottles of medication. According to Mr. Munster, Appellant produced the medication and told Mr. Munster that the medication could explain his erratic behavior and requested that Mr. Munster withdraw his direction to submit to a drug test. *Id.* at 25:6-15. Mr. Munster declined to withdraw his direction. Mr. Munster believed that the City's Medical Review Officer ("MRO") would be in the best position to determine if Appellant's behavior was a product of prescription medication or illegal drug use. *Id.* at 27:9-14.

As Mr. Munster's direction, Appellant produced a urine sample to Alere for processing. Appellant's sample tested positive for the presence of a marijuana metabolite in excess of the cutoff score established by the Substance Abuse and Mental Health Services Administration ("SAMHSA"). (DSP Exh. 5). The MRO confirmed the positive result and noted that Appellant did not provide an explanation for the result. *Id.*

As part of his case-in-chief, Appellant called Robert Rivers, the Executive Director of the City of New Orleans's Planning Commission. Mr. Rivers testified that he worked closely with Appellant during the five years preceding Appellant's termination. *Id.* at 70:10-16. Mr. Rivers recalled a conversation he had with Ms. Cecil during which Ms. Cecil asked if Mr. Rivers had noticed Appellant acting unusual during a Planning Commission meeting. Mr. Rivers responded that he had not noticed anything out of the ordinary with respect to Appellant's behavior. *Id.* at 73:18-21.

Appellant then called Leslie Alley, Deputy Director of the City Planning Commission, to testify as to her observations. Ms. Alley testified that she had known Appellant for approximately twenty years. *Id.* at 75:15-20. According to Ms. Alley, Appellant was not acting in an erratic manner on May 21, 2018. *Id.* at 76:25-77:6.

Brooke Perry, a principle city planner for the Planning Commission, testified that, prior to Appellant's termination, Ms. Cecil approached her and asked if she would be interested in Appellant's position since it was likely to be vacant soon. *Id.* at 81:16-25.

During his testimony, Appellant acknowledged that he would get very anxious during meetings with Ms. Cecil and Dr. Munster and his anxiety would cause his hands to shake and could lead to panic attacks. *Id.* at 84:2-12. The anxiety Appellant felt was related to his belief that Ms. Cecil and Dr. Munster were trying to force Appellant out of City employment. *Id.* at 84:24-85:11. In order to mitigate his anxiety, Appellant took a series of medications. On May 21, 2018, Appellant's physician has modified the dosage of his medication. *Id.* at 84:15-18. Appellant claimed that, prior to Ms. Cecil and Dr. Munster's tenure as Deputy Director and Director respectively, he had not received any discipline in his previous eighteen years with the DSP. *Id.* at 85:12-23.

D. Appellant's Termination

On July 9, 2018, Mr. Smith – who had assumed the title of DSP Director following Mr. Munster's departure – presided over Appellant's pre-termination hearing. During the course of the pre-termination meeting, Appellant admitted that he smoked marijuana over the weekend prior to his substance abuse test. (Tr. at 9:5-11). Appellant also asserted that he was on a "host" of medication to manage anxiety caused, he alleged, by treatment he received at work. *Id.* at 9:16-22.

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. Appellant's Due Process Argument

i. Drug Testing of Public Employees

"The Fourth Amendment of the United States Constitution prohibition against unreasonable searches and seizures by government officials is applicable to the states via the Fourteenth Amendment." *George v. Dep't of Fire*, 637 So.2d 1097, 1101 (La. Ct. App.1994) (citing *State v. Church,* 538 So.2d 993 (La.1989). The United States Supreme Court has

emphasized that, "to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313, 117 S.Ct. 1295, 1301, 137 L.Ed.2d 513 (1997)(Georgia statute that required candidates for office to certify that they had passed a drug test was unconstitutional). As explored below, when a government employer requires an employee to produce a blood or urine sample as part of a substance abuse test, courts have viewed such an action as a "search" under the United States Constitution.

The seminal case involving an employer subjecting employees to drug tests was *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In *Skinner*, the Court considered the constitutionality of regulations promulgated by the Federal Railroad Administration ("FRA") that, among other things, provided for post-accident drug testing, even when there was not individualized suspicion that an employee on the scene of the accident was impaired by drugs or alcohol. *Id.* at 606. Railroad employees challenging the regulations argued that an employer, acting under the color of law, should be required to obtain a warrant before testing blood or urine for the presence of proscribed drugs or alcohol.

Ultimately, the Court viewed the governmental interest in securing the safety and wellbeing of the railroad industry to be a compelling governmental interest. Part of the Court's reasoning rested on its assertion that the effected employees have a diminished expectation of privacy as a result of "their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Id.* at 627.

The takeaways from the *Skinner* case are: 1) the collection of an employee's blood or urine for the purposes of drug screening by a governmental agent is a search that triggers an analysis under the Fourth Amendment; 2) the governmental agent need not obtain a warrant if the reason

for such a search is based on a "special need;" and 3) in analyzing whether or not the government has articulated a "special need" courts look whether or not the public's safety and security are impacted by the job duties of the employee.

Soon after the Supreme Court issued its decision in *Skinner*, Louisiana adopted a law that pertained to the drug testing of public employees. La. Rev. Stat. Ann. § 49:1015.This law provides that a public employer may require an employee to produce a blood or urine sample based upon "circumstances which result in reasonable suspicion that drugs are being used [by the employee]." *Id.* In order to collect a sample and conduct a drug test of a public employee, the employer must adopt and promulgate a written policy. *Id.* The Civil Service Rule establishing the circumstances under which a classified employee may be required to submit to a substance abuse test meets this the law's requirement of a written policy.

The Commission observes that the Louisiana State Constitution also protects individuals from unreasonable searches and seizures. Article I, Section 5 of the Louisiana State Constitution provides that:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

La. Con. art. I, § 5.

The Louisiana Supreme Court has found that, Article I, Section 5 of the Louisiana Constitution "accords greater protection of privacy rights than does the Fourth Amendment." *State v. Brown*, 2009-2456 (La. 5/11/10, 5), 35 So.3d 1069, 1072. Bearing this in mind, an appointing

authority must establish an explicit "special need" justification for any governmental action that purports to infringe upon an individual's right to privacy (such as a urinalysis or blood test).

Louisiana courts have determined that it is "reasonable for a governmental employer to order an employee to submit to a drug test on the basis of individualized suspicion in certain circumstances depending upon:" (1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof. *George*, *supra* at 1101 (citing *Banks v. Department of Public Safety and Corrections,* 598 So.2d 515, 518-19 (La.App. 1st Cir.1992).

ii. Reasonable Suspicion and Appellant's Drug Test

Appellant argued that his drug test constituted an illegal search and seizure by a governmental entity in violation of the Fourth Amendment of the United States Constitution.

The Appointing Authority disputes Appellant's claim and relies heavily on a case out of the Louisiana Court of Appeals for the Third Circuit, *Ned v. Lake Charles Mun. Fire & Police Civil Serv. Bd.*, 98-199 (La.App. 3 Cir. 11/12/98, 6); 721 So.2d 577, *writ denied,* 98-3121 (La. 2/5/99); 738 So.2d 8.

While *Ned* shares some characteristics with the instant appeal, there are some distinguishing aspects. First, the public employee in question was a police officer and thus occupied a security sensitive position charged with enforcement of the law. Here, Appellant served as a Zoning Administrator who reviewed building plans for compliance with City Ordinances. The Commission appreciates the fact that Appellant's job was/is important, but it is not a safety-sensitive or security-sensitive position. Second, the individuals who observed the officer's allegedly erratic behavior in *Ned* were seasoned law enforcement personnel. In fact, the court explicitly stated that the witnesses of the erratic behavior "were experienced police officials," and

as such "their observations of [the employee] provided more than enough reasonable suspicion to warrant ordering [the employee] to take a drug screen." *Id.* at 581.[1]

Here, none of the four individuals who testified that they observed Appellant's allegedly erratic and "spaced out" behavior were law enforcement personnel. The Commission appreciates that Ms. Daniell was a human resource professional, but there is no evidence in the record that speaks to a specialized ability (or training) to recognize the symptoms of someone acting under the influence of illegal or illicit drugs or alcohol. Similarly, Mr. Munster, Mr. Smith and Ms. Cecil have no training in the recognition of impairment and relied instead upon their knowledge of Appellant's "typical" demeanor and actions. Given that Appellant did not occupy a safety-sensitive or security sensitive position and the individuals who allegedly observed his "erratic" behavior were not trained, experience law enforcement personnel, the Commission finds that the instant appeal presents a matter for first impression.

This is a close call for the Commission, but other aspects of the record suggest that the DSP did have enough cause to compel Appellant to submit to a substance abuse screening. The key part of the record for the Commission was Appellant's own acknowledgment that he had a great deal of anxiety at work and that his anxiety would manifest itself physically with panic attacks and shaking hands. It is more likely than not that an observer of such behavior, who was not familiar with Appellant's diagnosis of anxiety or his medications, would perceive Appellant's actions as odd and/or erratic. Further, since the behavior was out of character for Appellant based upon the witnesses' years of interactions with Appellant, it would be fair for a witness to assume that there was some external element causing the behavior.

[1] The Fourth Circuit has also found that statements and observations form police officers may establish reasonable cause for a substance abuse screening. *George, supra at* 1102.

The witnesses Appellant called were credible, but did not appear to have specific knowledge of the meeting in question. At most, Appellant's witnesses testified that they did not notice anything out of the ordinary, but were not focused on Appellant. On the other hand, Ms. Daniell, Ms. Cecil and Dr. Munster were focused on Appellant's actions and mannerisms during the course of the day on May 21st.

As a result of the above findings, the Commission holds that the DSP did have reasonable suspicion that Appellant was under the influence of drugs and/or alcohol. Such suspicion was sufficient to mandate Appellant submit to a substance abuse screening. In making this finding, the Commission emphasizes that: a) two of the witnesses testified that they regularly worked with Appellant for several years and were familiar with his typical mannerisms and demeanor, b) one of the witnesses was an HR professional with no prior involvement in Appellant's discipline, and c) Appellant acknowledged that he exhibited some of the observed behaviors in the past due to anxiety. Other appointing authorities are hereby put on notice that it requires more than a simple hunch by a supervisor to establish reasonable suspicion.

B. Occurrence of the Complained of Activities

DSP 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. Instead, Appellant relied upon a due process argument that hinged upon a finding that the DSP did not have reasonable suspicion to mandate he submit to a substance abuse test.

In the preceding sections of the instant decision, the Commission has considered and ultimately rejected Appellant's due process argument.

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 I controlled substance.

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.

C. 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).

Mr. Smith testified that Appellant occupied a position of trust within DSP as Zoning Administrator. According to Mr. Smith, Appellant was "a very public figure" whose decisions at work had "huge impacts on the development community. *Id.* at 66:1-7. Any impairment in Appellant's judgment potentially jeopardized the health and safety of individuals occupying structures reviewed by Appellant.

Based upon the foregoing, the undersigned Commissioners find that Appellant's misconduct impaired the efficient operations of the DSP.

D. 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).

In the matter now before us, an employee responsible for enforcing building codes and ordinances reported to work under the influence of an illegal drug. There is no dispute as to these facts. The Commission notes that DSP 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, the DSP had the discretion to terminate Appellant for off-duty use of marijuana/THC. Indeed, Mr. Smith acknowledged that other forms of discipline were available.

Nevertheless, while other forms of discipline are available, the circumstances here warrant termination. Appellant's decisions at work have the potential to impact the safety of City residents. When such an individual reports to work under the influence of an illegal substance, termination is neither arbitrary nor capricious. *See Cole v. Dep't of Police*, 2016-1075 (La.App. 4 Cir. 5/17/17, 7); 221 So.3d 252, 257. Further, Mr. Smith testified that the DSP has consistently pursued termination as a sanction when an employee reports to work under the influence of an illegal drug. Appellant did not introduce any evidence to contradict this claim.

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 6th day of November, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

CLIFTON MOORE, JR., VICE-CHAIRMAN — DATE 11/5/19

CONCUR

MICHELLE D. CRAIG, ~~CHAIRWOMAN~~ — DATE 11-5-2019

BRITTNEY RICHARDSON, COMMISSIONER — DATE 11-5-19