

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

CLARENCE JOHNSON, Jr.	
vs.	DOCKET NO.: 8365
SEWERAGE AND WATER BOARD	

I. INTRODUCTION

Appellant, Clarence Johnson, Jr., appeals his termination pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1. The Appointing Authority, the Sewerage and Water Board for the City of New Orleans, (hereinafter the “Board”) does not allege that the instant appeal is procedurally deficient. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was terminated for sufficient cause.

II. FACTUAL BACKGROUND

The Appellant, a permanent employee in the classified service, was terminated on October 13, 2014 after the Board had substantiated allegations that Appellant violated Civil Service Commission Rule V, §9 and the Board’s alcohol and substance abuse policy #67. Appellant began employment with the Board on February 16, 2009 and served in the position of Pumping Plant Operator at the time of his termination.

Appellant had tested positive for a controlled substance prior to the positive test result that led to his termination. In fact, following the Appellant’s first positive drug test result on or about January 2014, he agreed to enter a certified rehabilitation program as an alternative to dismissal. (Tr. 14:6-15:8). Eight months later, Appellant was subjected to a random drug test.

There was conflicting testimony as to why this test was administered. Appellant testified that the Board performed the test in order for the Board to assess Appellant's suitability for a promotion. *Id.* at 13:15-19. Appellant was aware that he would be subject to a drug test as a result of his application for promotion, but did not know when the test would occur. Yet, according to Appellant's supervisor, Conrad James, the second drug screening was administered as part of a monitoring process following Appellant's prior positive result. *Id.* at 31:20-32:1.

The reasons for the second test are ancillary to that test's results. On September 15, 2014, Appellant submitted to a substance abuse test during which he supplied a urine sample to a laboratory designated to perform such tests by the Personnel Director. (Hearing Officer Exh. 1). As part of its case in chief, the Board called Susan Bybee, who stated she was employed by Alere Toxicology Services, as a "Responsible Person" and as a non-negative production manager. The Board Attorney then introduced her curriculum vitae. (Board Exh. 1). The Appellant did not challenge Ms. Bybee's qualifications, expertise or experience and the Commission accepts Ms. Bybee as an expert regarding the handling and analysis of the urine specimen produced by Appellant.

According to Ms. Bybee, Appellant's specimen tested positive for "Benzoylecgonine" which is a cocaine metabolite indicating that cocaine was in the Appellant's system at the time of the testing. (Tr. at 59:1-24; Board Exh. 2A). Ms. Bybee further testified that none of the medication Appellant identified as having taken before his random drug testing could have caused a "false positive" test result for cocaine. (Tr. at 60:5-62:13, 74:15-75-5). Finally, Ms. Bybee reviewed the chain of custody report and explained how that report confirmed that it was the Appellant's sample that produced the positive result. (Tr. at 76:12-78:13; Board Exh. 2B). Appellant disagreed with Ms. Bybee's testimony, but was unable to produce any evidence other

than his strong disagreement, to support his position. Appellant also failed to call into question the handling of his urine sample and did not allege that the independent laboratory had somehow confused Appellant's sample with someone else's or that his sample was somehow contaminated.

It is clear that the sole basis for Appellant's termination was his second positive test result rather than anything having to do with his performance. (Tr. at 32:2-20). Indeed, according to Mr. James, Appellant was an excellent employee and he, along with many other staff members were sad to see him go. *Id.* at 32:2-20, 37:6-14.

III. LEGAL STANDARD

It is well-settled that, in an appeal before the Commission, 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. *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, we 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)).

IV. POSITION OF PARTIES

A. Appointing Authority

The Board argues that the process through which Appellant's urine sample was collected, maintained and tested unequivocally shows a positive result for the presence of cocaine in

Appellant's system. Furthermore, its expert testified that the alternative theories offered by Appellant had no basis in science and that the medicine Appellant allegedly took prior to his drug test could not have caused a "false positive" result. Finally, while Appellant's supervisors acknowledged that Appellant was a good employee, the Board stated that a second positive drug test result warrants termination.

B. Appellant

Appellant steadfastly denies that he used cocaine and insists that the positive drug test resulted from medications he was taking due to a severe cold. In support of this position, Appellant testified that, since his stint in rehabilitation, he has been subject to no fewer than eight random drug screenings and passed all of them. Appellant also made clear that he very much enjoyed his job and would not do anything to jeopardize his position.

V. ANALYSIS

A. The Board Has Established the Occurrence of the Complained of Activity

Based upon the evidence and testimony presented at the appeal hearing, the undersigned Commissioners find that the Board has shown, by a preponderance of the evidence, that Appellant, failed to successfully complete the substance abuse screening test on September 15, 2014. The Commission also finds that this was the second time Appellant failed such a test. Through testimony and evidence, the Board has established that the urine sample produced by Appellant for the purposes of the substance abuse screening tested positive for a cocaine metabolite. Further, the Board has shown that Appellant's sample was collected, maintained and tested in a responsible and appropriate manner. Finally, the Board's expert provided convincing testimony that contradicted the defense offered by Appellant. Namely, that some combination of cold medicines resulted in a "false positive."

B. Appellant's Misconduct Impaired the Efficiency of the Board

While there was no testimony as to the effect Appellant's drug use had on the efficient operation of the Board, the Commission recognizes that its own Rules regarding substance abuse were adopted:

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.

Rule V, §9.1.

Thus, it is clear that the Rules themselves show that substance abuse has an adverse impact on the operations of all appointing authorities, including the Board.

C. Appellant's Termination was Commensurate with his Offense

Rule V, §9.15 states that, upon receiving information regarding an employee's positive drug test, "the appointing authority shall take such action as in its discretion is deemed appropriate...." The Rules require that, in taking any action in response to a positive drug test, the appointing authority weigh several factors including: 1) The nature of the position occupied by the employee, 2) The nature and quality of the employee's performance on the job, 3) The employee's length of service with the City, 4) The severity of the employee's substance abuse problem, 4) The employee's acknowledgment of the substance abuse problem and willingness to seek assistance, 5) The existence of previous attempts at rehabilitation and their results, and 6) Other relevant facts or information that the appointing authority may obtain which have a bearing on continuing the individual's employment with the City.

The Rules make clear that appointing authorities have substantial discretion on the level of discipline to impose upon employees who test positive for illegal drugs. In the matter now

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before the Commission, it appears that the primary reason for Appellant's termination was the fact that he had previously tested positive for cocaine use and entered a rehabilitation program as an alternative to termination. There can be no doubt that Appellant was aware of the consequences of a second positive result on a drug test. For his part, Appellant failed to offer evidence or testimony of any factors that warrant mitigation of the discipline imposed upon him by the Board.

VI. CONCLUSION

Upon considering the evidence and testimony presented by the parties, we find that the Board has satisfied its burden of proof and shown that Appellant engaged in the conduct of which he stood accused. Furthermore, Appellant's conduct compromised the operations and efficiency of the Board. Finally, we find that termination was commensurate with Appellant's offense. Based upon the foregoing, the Commission hereby finds that the Board had sufficient cause to terminate the Appellant. Therefore, Appellant's appeal is hereby DENIED. Appellant's termination shall stand.

Judgment rendered this 21st day of December, 2015.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



RONALD P. McCLAIN, VICE-CHAIRMAN




DATE

CONCUR



TANIA TETLOW, COMMISSIONER



DATE

C. Johnson
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CORDELIA D. TULLOUS, COMMISSIONER


DATE