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Thursday, August 18, 2016

Mr. Donovan A. Livaccari
101 W. Robert E. Lee, Suite 402
New Orleans, LA 70124

Re: **Mario Cole VS.
Department of Police
Docket Number: 8192**

Dear Mr Livaccari:

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 - 8/18/2016 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, 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: Michael S. Harrison
Shawn Lindsay
Victor Papai
Mario Cole

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CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

MARIO COLE vs. DEPARTMENT OF POLICE	DOCKET No.: 8192
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I. INTRODUCTION

Appellant, Mario Cole, 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 Police Department for City of New Orleans, (hereinafter “NOPD”) 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 disciplined for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

On January 8, 2013, NOPD alleges that Appellant reported to Concentra Medical Center for a random drug screening test. (H.E. Exh. 1). Appellant produced a urine sample as part of the screening process and the sample allegedly tested positive for morphine. *Id.* NOPD subsequently terminated Appellant’s employment.

NOPD alleges that Appellant’s actions violated Rule 3, paragraph 7 of the NOPD Operations Manual, CAO Policy Memorandum #89, and New Orleans Civil Service Commission Rule V, § 9. (H.E. Exh. 1). NOPD Rule 3, paragraph 7 reads as follows:

Employees shall be guided by the City's substance abuse policy as defined under Rule V, Section 9 of Civil Service Rules and C.A.O. Policy Memorandum #89 (Revised) dated 9/99. An employee shall not report to duty under the influence of any drug, medication, or other substance impairing his/her normal sensory and/or motor body functions.

Id.

The Commission's Rule V, § 9 is extensive and contains provisions regarding the testing of classified employees for the presence of illegal or illicit drugs. In its letter notifying Appellant of his termination, NOPD cites the following language from Rule V:

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 with the provisions of this rule.

Id.

The portion of the CAO Policy Memorandum #89 cited by NOPD in the termination letter to Appellant is below:

Paragraph VII-Prohibited Substance Definitions/Categories

- A. A prohibited substance includes the presence of any confirmed detectible amount of those substances listed in the following sections in the employee/person while working regardless of when or where the substance cleared their systems.
- B. Illegal drugs, such as, but not limited to, marijuana (pot, dope, hash, or hashish), cocaine (coke, rock, crack, or base), LSD (acid), PCP (angel dust, crystal), MDMA (ecstasy), heroin, (smack, black tar), opium, morphine, and any other illegal or unlawfully obtained drug.

Id.

NOPD alleges that, as a result of Appellant's positive drug screening result, Appellant is unable or unwilling to perform the duties of his position and discipline in the form of termination is warranted pursuant to Rule IX, § 1.1.

B. Testing Process

Susan Bybee, an employee of Alere Toxicology Services, testified as part of NOPD's case-in-chief. Ms. Bybee has over twenty years of experience in the field of toxicology and drug screening, and was a supervisor at the laboratory charged with testing the urine sample produced by Appellant. (Tr. at 26:16-23). NOPD offered Ms. Bybee as both a fact witness and an expert witness with respect to the urine specimen produced by Appellant. After a brief *voire dire* by Appellant's counsel, the hearing examiner accepted Ms. Bybee as an expert in the field of toxicology and the interpretation of drug screening results.

Ms. Bybee testified that the laboratory that tested Appellant's urine sample has a strict policy with respect to monitoring the chain of custody to ensure that samples are not tampered with or compromised. Based upon Ms. Bybee's review of the testing protocols recorded by the chain of command documents, she determined that the laboratory staff had followed all proper procedures. Ms. Bybee then explained the results of the testing.

According to Ms. Bybee, each specimen undergoes an initial screening based upon threshold concentrations or "cutoffs" provided by the employer, in this case, the City of New Orleans. The initial screening of Appellant's specimen reflected a "presumptive positive" for the opiate class of drugs. (Tr. at 32:6-10). As a result, the laboratory staff processed the specimen through what Ms. Bybee described as "confirmatory testing." *Id.* at 33:1-6. The confirmatory testing provides a greater level of detail than the initial screening and can identify substances in a specimen unique to morphine as opposed to codeine, and other opiate class substances. *Id.* at 37:5-11. The confirmatory testing showed that Appellant's urine sample contained a concentration of morphine in excess of the cutoff established by the City of New Orleans leading to a "positive" test result. *Id.* at 33:7-10, 34:12-15.

During the course of Ms. Bybee's cross-examination, the parties stipulated to the introduction of evidence showing that Appellant had submitted to four prior drug screenings, and in each instance, the results were "negative" for the presence of illegal or prohibited substances. App. Exhs. 1(A)-(D). However, as the hearing officer observed, the Commission gives very little weight to such evidence, especially in light of the safety sensitive position occupied by Appellant.

Rosemary Thomas, the operations director for Concentra Medical Center, testified about the policies and practices at the facility that collected Appellant's urine sample. (Tr. at 93:1-16). Ms. Thomas provided detailed testimony with respect to how a sample is collected and the precautions taken by Concentra staff to ensure that each individual sample is accurately labeled for testing. *Id.* at 95:9-25. The only actual "testing" performed at the Concentra facility is a temperature reading; such a reading is necessary to protect against test subjects swapping out tainted urine for "clean" urine produced earlier. *Id.* at 96:2-14.

During her direct examination, Ms. Thomas reviewed the chain of custody documents introduced through Ms. Bybee and opined that the Concentra staff had followed all required policies and procedures related to the collection of Appellant's urine sample. *Id.* at 98:10-19.

C. NOPD's Investigation

As a result of Appellant's positive drug screening result, NOPD opened an internal investigation through the Police Integrity Bureau on February 20, 2013. (NOPD Exh. 3). Sergeant Lesia Latham Mims was responsible for conducting the investigation and interviewed both Appellant and Ms. Ashley Franks, Appellant's then-fiancée. (NOPD Exh. 4).

Appellant told Sgt. Mims that he had injured his shoulder while lifting weights and was in a great deal of pain. In an attempt to help Appellant cope with the pain and rest comfortably, Ms.

Franks gave him what Appellant described as a small white pill. Appellant denies knowing what the pill was and claimed that he believed it to be ibuprofen or Aleve. *Id.* It was only after Appellant learned of his positive drug screening result that he asked Ms. Franks what was in the pill she had given to him. Ms. Franks told Appellant that the pill was morphine for which she had a prescription. Ms. Franks testified that she had been in a car accident in 2011 and since that time had been prescribed medication to help her manage her pain. When she provided Appellant with the pill, she did not think she was violating the law or that Appellant would somehow be punished as a result of taking the pill. (NOPD Exh. 4).

NOPD received a sixty-day extension in order to complete its investigation into Appellant's positive drug test, and Ms. Mims submitted her report to PIB supervisors on April 10, 2013. On June 20, 2013, NOPD informed Appellant that the investigation into his alleged misconduct had reached its conclusion. (NOPD Exh. 6). Appellant appeared at a disciplinary hearing on July 9, 2013 over which Deputy Superintendent Darryl Albert presided. (NOPD Exh. 8). Immediately following the hearing, Deputy Superintendent Albert recommended that NOPD terminate Appellant's employment. Later that same day, NOPD issued a letter notifying Appellant of his termination.

III. LEGAL STANDARD

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued 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

Based upon the testimony and evidence in the record, the Commission makes the following findings of fact:

1. Appellant ingested a pill that contained morphine on or about the night of January 7, 2013.
2. Appellant reported to work on January 8, 2013 for the day shift.
3. During the course of his shift, Appellant received a directive from his supervisor to report to Concentra Medical Services on Barone Street in the CBD for a random drug screening.
4. The urine sample produced by Appellant on January 8, 2013 was tested by a laboratory operated pursuant to Substance Abuse and Mental Health Services Administration (hereinafter “SAMHSA”) guidelines as required by our Rules.
5. The specimen produced by Appellant on January 8, 2013 contained concentrations of morphine in excess of the limits established by the City of New Orleans and NOPD.

Appellant attempted to call into question the “cutoff” concentration of opiate/morphine established by the City/NOPD that would result in a “positive” test result. The Commission finds

that the concentration - 2,000 nanograms per milliliter - is the same concentration established by the SAMHSA. (Tr. at 85:8-23). Therefore, the cutoff is not arbitrary or capricious. Further, the very reason for substance tests is that an individual employee may not exhibit obvious signs of being under the influence of a narcotic or opiate but may nevertheless suffer from compromised reaction time, judgment and alertness.

Based upon the foregoing, the Commission finds that NOPD has established, by a preponderance of the evidence, that Appellant reported to work on January 8, 2016 under the influence of morphine.

B. Impairment of Efficient Operation of Appointing Authority

Appellant reported to his assignment at the Third District on January 8, 2013. As part of his duties, Appellant was responsible for responding to citizens' calls for service "as well as anything that he may [have] see[n] in progress." Appellant wore an NOPD uniform, carried a badge, and was armed with a gun while on duty.

Understandably, NOPD is very sensitive to the adverse impact on an Officer's reflexes, judgment and perception caused by the consumption of opiates and other types of medication by that Officer. As Deputy Superintendent Albert notes, when an Officer has taken some form of medication that makes the Officer "lethargic, sleepy or otherwise change[s] his or her mood, [that Officer] may be placed on limited duty; they may be placed on desk duties, they may be placed away from the public as to not put the public at harm." (Tr. at 149:12-15). Ms. Bybee testified that an opiate, like morphine, can cause "sleepiness, dizziness and those kinds of things."

As noted above, the Commission has found that Appellant ingested morphine on or about the night of January 7, 2013 and reported to work on January 8, 2013. NOPD had no notice that Appellant had consumed medication that could render him a risk to the public and/or his co-

workers and did not have an opportunity to ameliorate that risk by placing Appellant on administrative duty. When an Officer reports to work with morphine in his or her system in concentrations above industry-wide standards, as was the case here, that Officer severely compromises NOPD's ability to competently and safely serve the public. Therefore, the Commission finds that NOPD has met its burden of proof regarding this element of our analysis.

C. Discipline Commensurate with Offense

In conducting its analysis, the Commission must determine if the Appellant's termination 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 recognizes that Officers, like Appellant, are in the position to "take someone's liberty or possibl[y] someone's life," and individuals with such power cannot be under the influence of narcotics while wielding such power. NOPD has not only an interest, but a responsibility to monitor and prevent illegal or illicit drug use by Officers.

The public and fellow NOPD Officers depend upon all NOPD personnel making reasoned, informed decisions, often in heated, high stakes situations. While termination is the most extreme punishment contemplated by our Rules in connection with a failed substance abuse screening, NOPD has an interest and a responsibility to use powerful deterrents to prevent Officers from compromising their safety and the safety of others through the use of illegal or illicit drugs.

The Rules afford appointing authorities, like NOPD, a great deal of discretion in administering discipline following a positive substance abuse test. However, it must take into account certain factors in coming to a conclusion with respect to the appropriate level of discipline.

Rule V, § 9.15. The first factor identified by the Rules is the “nature of the position occupied by the employee, (i.e., sensitive per se, sensitive, or non-sensitive).” There is no dispute that Appellant, as a police officer, occupies a security sensitive position. Rule V, § 9.3(a). This consideration led NOPD to conclude that the only appropriate level of discipline was termination.

The Commission also notes that Appellant was aware that NOPD subjected officers to random drug screening, and was aware that his fiancée had a prescription for powerful pain medication as a result from an automobile accident. Further, CAO Policy #89 specifically identifies morphine, a powerful pain medication, as a prohibited substance. Given these facts, Appellant should have exercised better judgment on the night of January 7, 2013. If there is a moral to this unfortunate situation, it is that Officers need to be hyper-sensitive as to what they put into their bodies, particularly when it comes to medications.

While the Commission recognizes that other forms of discipline were available, terminating an Officer for testing positive for morphine during his shift was not arbitrary or capricious.

V. CONCLUSION

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

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M. Cole
No. 8192

Judgment rendered this 18 th day of August, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

8/17/2016

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

8/17/16

DATE



TANIA TETLOW, COMMISSIONER

8/16/16

DATE