CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Tuesday, September 20, 2016

Ms. Melissa Wilson

Re: **Melissa Wilson VS.**
Department of Property Management
Docket Number: 8413

Dear Ms. Wilson:

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 - 9/20/2016 - 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, 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: George Patterson
Elizabeth S. Robins
Jim Mullaly
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

MELISSA WILSON vs. DEPARTMENT OF PROPERTY MANAGEMENT	DOCKET No.: 8413

I. INTRODUCTION

Appellant, Melissa Wilson, appeals her termination from the Department of Property Management for the City of New Orleans (hereinafter "DPM" or "Appointing Authority"). At all times relevant to the instant appeal, Appellant was a classified employee with permanent status. In the matter now before the Commission, the Appointing Authority alleges that Appellant was unable to return to work following a prolonged absence caused by a serious medical condition and invoked Rule IX, § 1.1 as grounds for termination. The Appointing Authority does not allege that Appellant misused sick leave or otherwise engaged in misconduct.

II. FACTUAL BACKGROUND

Appellant served as a "Title Abstractor I" in the administrative offices of DPM. Her primary responsibility was processing work orders that came in from various departments throughout the City. (Tr. at 8:10-9:1). In her role as Title Abstractor, Appellant received work orders, time stamped them, and entered the orders in a spreadsheet. She also monitored progress on the work orders to confirm that employees within DPM addressed them. *Id.* According to DPM, there were no other employees who regularly performed the duties that Appellant

performed, and when Appellant was absent, other employees had to take on additional responsibilities. *Id.* at 9-2-16.

On or about February 3, 2015, Appellant stopped reporting to work. Documentation produced by Appellant on or about February 3rd indicated that she was receiving medical treatment and would be out of work until at least March 30, 2015 at which time Appellant's condition would be reassessed. (DPM Exh. 1). Appellant did not return to work on March 30th. Instead, she produced a letter from her physician that stated Appellant's ability to return to work would be reassessed on April 13, 2015. (DPM Exh. 2). On April 14, 2015, Appellant produced yet another physician's letter; this time Appellant's doctor requested that Appellant be excused form work until April 28, 2015. (DPM Exh. 3).

The Appointing Authority honored each one of Appellant's requests for sick leave. However, during Appellant's absences, work orders began to pile up, and the DPM staff was having a difficult time processing requests. (Tr. at 14:4-15:1). George Patterson, DPM Director testified that he believed he and his staff could cope with the loss of Appellant until mid-April at which time the strain caused by the absence would become untenable. Mr. Patterson stated that Appellant was good employee but that her absences were causing a strain on the DPM's operations. *Id.*

Each department within the City of New Orleans maintains certain "Key Performance Indicators" or "KPIs" that the Chief Administrative Officer for the City compiles and releases to the public. One of the Appointing Authority's KPI was completed work orders. Failure to meet KPIs impacts an Appointing Authority's overall rating within City government. Mr. Patterson testified that he was unable to hire a suitable replacement for Appellant while Appellant was on leave. Thus, argued Mr. Patterson, Appellant's absence, though not caused by any alleged

misconduct, negatively impacted the Appointing Authority's ability to process work orders and service its constituents. (Tr. at 17:21-18:10).

Appellant did not return to work on April 28, 2015, and on May 5, 2015, the Appointing Authority sent Appellant notice of a pre-termination hearing scheduled for May 14, 2015. (DPM Exh. 4). The reason cited for the pre-termination hearing was Appellant's apparent inability to return to work. *Id.* DPM also requested that Appellant consider voluntary retirement given that Appellant had exhausted her FMLA leave and did not produce certification from her medical provider that she could work in any capacity for DPM. *Id.*

Appellant attended the pre-termination meeting on May 14th. Also in attendance were Mr. Mr. Patterson, and Elizabeth Robins, an Assistant City Attorney. At this meeting, Appellant produced a letter from her physician that purported to give Appellant "permission" to return to work. (DPM Exh. 5). However, the physician indicated that Appellant suffered from moderate hearing loss and dizziness. The physician also included a caveat that Appellant could return to work on May 18, 2015 "with precautions for sudden loss of balance." *Id.* Upon reviewing the note marked as DPM Exhibit 5, Mr. Patterson, stated that he did not believe that Appellant could safely return to work and that if she did return to work, it would expose the City and the Appointing Authority to liability. (Tr. at 24:18-25:9). Following the meeting, the Appointing Authority decided to terminate Appellant's employment and sent a letter notifying Appellant of its decision on May 15, 2015. (H.E. Exh. 1).

Appellant testified that, at the time of her termination, she had forty-nine (49) days of accumulated, unused sick leave time and almost two weeks of annual leave. (Tr. at 48:8-19). The City did not contest this assertion, but insisted that it was able to terminate Appellant prior to the exhaustion of all of the Appellant's sick leave pursuant to Rule IX, § 1.1 which states:

> When an employee in the classified service is unable or unwilling to perform the duties of his/her position in a satisfactory manner, or has committed any act to the prejudice of the service, or has omitted to perform any act it was his/her duty to perform, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service.

The DPM argues that, due to her illness, Appellant was unable to perform the duties of her position in a satisfactory manner and Civil Service Rules contemplate disciplinary action, up to and including termination, in such instances. (H.E. Exh. 1).

III. LEGAL STANDARD

Appointing authorities within the City of New Orleans may only discipline employee in the classified service based upon sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority did not have sufficient cause to issue discipline, he or 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

1. Appellant's Condition at Time of Termination

The Appointing Authority claimed that, when the Appellant's physician indicated that Appellant could return to work but had to have precautions in place for a "sudden loss of balance," Appellant was not truly cleared to return to work. Consequently, DPM argues that Appellant was unable to perform her job duties as Title Abstractor in a satisfactory manner. In support of its argument, DPM points out that Appellant presented a danger to herself and others if she suffered from sudden bouts of dizziness and loss of balance, and she also exposed the DPM to substantial workers compensation liability. The Commission finds that, ***as of May 15, 2015***, Appellant was unable to perform the essential functions of her job.

However, the Commission's inquiry does not end here. Through the course of her testimony, Appellant has raised an issue that the Commission struggles to address. Namely, whether or not the Appointing Authority should have waited until Appellant had exhausted her sick and/or annual leave prior to taking any employment action or should have established that Appellant was permanently disabled.

2. Case Law

In *Marziale v. Dep't of Police*, 2006-0459 (La.App. 4 Cir. 11/8/06, 3–4), 944 So.2d 760, 762, *writ denied,* 2006-2916 (La. 2/2/07), 948 So.2d 1089, the New Orleans Police Department (hereinafter "NOPD") terminated an officer who had thirty years of service after alleging that the officer was unable to perform the duties of his position. The officer had been injured while participating in a wellness program established for employees by the NOPD. *Id.* For three years following the initial injury, the officer was out on extended medical leave. NOPD decided to

terminate the officer and relied on Civil Service Commission Rule IX as justification, just as DPM does now.

The officer appealed his termination and participated in an appeal hearing pursuant to our Rules and Article X, Section 8 of the Louisiana Constitution. The hearing examiner found that it was not clear that the officer would "ever be able to return to the department" and "after allowing [the officer] to remain on medical leave for almost four years, the appointing authority was justified in making a determination as to the [officer's] ability to work in a full capacity." *Id.* at 766. The Commission agreed with the hearing examiner's findings and denied the officer's appeal. The officer appealed the Commission's action to the Louisiana Court of Appeals for the Fourth Circuit.

In assessing the Commission's actions, the Fourth Circuit held that:

> In order to prevail at the hearing, the appointing authority had to establish by a preponderance of the evidence that [the Officer] was either unwilling or unable to perform his duties as a police officer, or that he had failed to submit documentation "justifying his absence," insofar as that was the stated reason for his termination. We find that the appointing authority failed to meet its burden of persuasion.

Id. at 767. The court found that the officer "never stated or admitted that he was unwilling to return to work. In fact, a review of the recording of the pre-termination hearing reveals that [the officer] offered to come back to work." *Id.* at 767. Further, the court observed that NOPD never presented any evidence that the officer was permanently disabled or would not be able to resume his duties at some time in the future. *Id.* at 767.

Recently, the Fourth Circuit affirmed this Commission's decision involving an appeal with facts very similar to the *Marziale* matter. *Laviolette v. Department of Police*, 2016-0095 (La. 4th App. 8/24/2016). In *Laviolette v. Department of Police*, C.S. No. 7994 2016-0095 we ordered the reinstatement of an NOPD Captain terminated by NOPD. Captain Laviolette was out on sick leave recovering from a back injury when NOPD terminated his employment on or about April 2011.

While he did not introduce any evidence showing that he would be able to return to work in the foreseeable future, Captain Laviolette indicated that he hoped to return to work at some point soon. Despite these representations, NOPD proceeded with Captain Laviolette's termination. This Commission granted Captain Laviolette's appeal and ordered NOPD reinstate Captain Laviolette with full back pay and emoluments. In doing so, we held that:

> [A] review of the record reveals that the Appellant indicated he was hopeful that he would return to work in the foreseeable future, but that he was delayed because of difficulties with a doctor's appointment. Because of his many years of uninterrupted service, the Appellant had ample sick leave available while taking affirmative steps to return to work. Finally, there has been no medical determination that Appellant's injuries would prevent him from returning to full duty in the future.

Laviolette, C.S. No. 7994 at 5. The Fourth Circuit adopted our reasoning and affirmed Captain Laviolette's reinstatement. *Laviolette*, 2016-0095 at 7.

In the matter now before the Commission, Appellant produced numerous letters and documents authored by her physicians. Initially, there was nothing in these letters indicating that Appellant would be able to return to work. However, at the pre-termination hearing conducted by the DPM, Appellant produced a letter that, for the first time since Appellant's absences began, purports to return her to work, albeit with substantial limitations and concerns. Appellant herself implored the DPM to allow her to come back to work. It was not Appellant's burden to show that she could return to work in the future, it was DPM's burden to show Appellant could not. Yet, during the course of the hearing, DPM did not introduce any evidence proving that Appellant would not be able to return to work in the future, nor did it suggest that Appellant had failed to produce documentation justifying her absences.

3. Sick Leave

The Commission observes that sick leave is a benefit enjoyed by classified employees which becomes vested once earned in accordance with our Rules. And, employees cannot be deprived of such a benefit without sufficient cause. Here, Appellant argues that, since she was absent due to a documented medical issue, she was entitled to exhaust her sick leave prior to her termination.

Our Rules define "sick leave" and "sick leave with pay" in the following manner:

> "Sick Leave": absence from duty because of the employee's (1) illness or injury, or (2) quarantine by health authorities. Sick leave ***shall also be granted*** for absence because of death in the immediate family of the employee (see definition for "immediate family").
>
> "Sick Leave with Pay": (a) payment on account of sickness or accident disability (including quarantine by health officials and absence before or after childbirth due to medical reasons); or (b) payment for time absent due to death in immediate family.

Rule I, ¶¶ 70, 71 (emphasis added).

Based upon a reading of these Rules, it is clear that, provided that classified employees produce the appropriate documentation required by Rule VIII, § 2, he or she is entitled to use any sick leave he or she has accumulated. The Commission notes that our Rules do not limit the number of sick leave days an employee may accumulate, nor does it limit the number of sick leave days an employee may use in a calendar year. In fact, our Rules contemplate that an employee may use more than thirty sick leave days in one year. *See* Rule VIII, § 2.2(d).

In, *Ziegler v. Dep't of Fire*, 426 So.2d 311 (La. App. 4 Cir. 1983), *writ denied,* 441 So.2d 752 (La. 1983), the New Orleans Fire Department (hereinafter "NOFD") terminated an employee after an incident during which the employee suffered a seizure and struck his head. The employee's treating physician opined that the seizure was related to the employee's history of

alcoholism and then provided a conflicting diagnosis. First, the physician indicated that the employee was "totally and permanently disabled," but then observed that the employee's condition could improve through a "long-term rehabilitation program." *Id.* at 312. NOFD chose to terminate the employee.

According to testimony at trial, the employee had accumulated almost one year of "statutory" sick leave. The employee argued, as Appellant does here, that he should have been allowed to use his sick leave to recover and enter a rehabilitation program. *Id.* at 313. NOFD's superintendent argued that it was difficult to maintain adequate staffing without replacing the employee. The Fourth Circuit held that the staffing consideration "alone cannot be sufficient to terminate employment if the employee is entitled to take sick leave and is not totally and permanently disabled. ***The solution to this apparently difficult problem lies in reform of the leave policy, not the dismissal of employees who are not totally and permanently disabled***." *Id.* at 313 (emphasis added); *see also Brumfield v. Dep't of Fire*, 569 So.2d 75, 77 (La. App. 4 Cir. 1990)(employee should be allowed to use twenty-nine weeks of statutory sick leave remaining at the time of his dismissal to enter substance abuse rehabilitation program).

The parallels to the instant dispute are clear. The Commission's rule have the force and effect of law. *Paul v. New Orleans Police Dep't*, 96-1441 (La. App. 4 Cir. 1/15/97, 6); 687 So.2d 589, 592, *writ denied,* 97-0364 (La. 4/18/97); 692 So.2d 447 (Citing La. Con. Art. X., § 10(A)). Thus, benefits accumulated by Appellant through the operation of our Rules are rightly described as "statutory," just like the sick leave accumulated by the employee in *Ziegler*. There are no limitations on a classified employee's use of sick leave provided that he or she produces the necessary documentation, which Appellant has. Therefore, we do not find that the DPM was justified in terminating Appellant prior to Appellant's exhaustion of her sick leave.

V. CONCLUSION

In the matter now before the Commission, the Appointing Authority did not discipline Appellant. It separated her from employment due to her alleged inability to perform the essential functions of her job as a result of Appellant's illness. Nevertheless, Appellant had accumulated a substantial amount of sick and annual leave prior to her illness. The Commission observes that this volume of accumulated sick leave is typical of a long-term employee with an excellent record of attendance and performance.

The Commission appreciates that the Appointing Authority was in an untenable position with two equally unpalatable choices. DPM's first choice was to leave an important position unfilled and wait until Appellant exhausted her leave before taking any personnel action. DPM opted for its second choice which was to terminate Appellant and fill the position she vacated with a probationary appointment. In doing so, DPM had the burden of showing that Appellant either failed to submit documentation justifying her absence, was permanently disabled, or would not be able to resume her duties at some time in the future. We find that it failed to meet its burden.

Based upon the foregoing, the Commission finds that the Appointing Authority did not have sufficient cause to terminate Appellant's employment. The Commission hereby GRANTS Appellant's appeal. Appointing Authority shall reinstate Appellant and remit to her any and all back pay and emoluments.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 10 th day of Sept., 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON — DATE 9/14/2016

RONALD P. McCLAIN, VICE-CHAIRMAN — DATE 9/19/16

TANIA TETLOW, COMMISSIONER — DATE 9/1/16