



MITCHELL J. LANDRIEU  
MAYOR

# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
SUITE 900 – 1340 POYDRAS ST.  
NEW ORLEANS LA 70112  
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

REV. KEVIN W. WILDES, S.J.,  
CHAIRMAN  
AMY L. GLOVINSKY  
JOSEPH S. CLARK  
COLEMAN D. RIDLEY, JR.

LISA M. HUDSON  
DIRECTOR OF PERSONNEL

Friday, September 06, 2013

Mr. Kevin Boshea  
2955 Ridgelake Dr., Suite 207  
Metairie, LA 70002

Re: **David Desalvo Jr. VS.  
Department of Police  
Docket Number: 8038**

Dear Mr. Boshea:

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 - 9/6/2013 - 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 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, reading "Germaine Bartholomew".

Germaine Bartholomew  
Chief, Management Services Division

cc: Ronal Serpas  
Gregory Brumfield  
Jay Ginsberg  
David Desalvo Jr.

**DAVID DESALVO**

**CIVIL SERVICE COMMISSION**

**VERSUS**

**CITY OF NEW ORLEANS**

**DEPARTMENT OF POLICE**

**DOCKET NO. 8038**

The Department of Police (“Appointing Authority”) employed David DeSalvo (“Appellant”) as a Police Officer with permanent status. The Appointing Authority terminated the Appellant’s employment by letter dated June 5, 2012, for violation of internal rules regarding Use of Drugs and CAO Policy Memorandum #89 for the City of New Orleans relative to Substance Abuse. The factual basis for the determination is found in the second paragraph of the disciplinary letter that provides as follows:

The investigation determined that on January 20, 2012, you submitted to a post-accident substance abuse screening test at Tulane Medical Center. On Tuesday, January 24, 2012, the Public Integrity Bureau was notified that the test result of your urine sample revealed a positive test of Marijuana Metabolite following the drug screening. You were administratively reassigned and an investigation was initiated.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on May 8, 2013. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

The following facts are not in dispute: The parties accepted the validity of all testing results chains of custody. The parties stipulated that the urine sample result relied upon by the Appointing Authority for taking disciplinary action provided that the Appellant had a T.H.C. level of 43 nanograms per milliliter, which is violative of departmental policy. The parties also stipulated that on January 25, 2012, one day after

the Appointing Authority informed the Appellant of his test results, he provided a urine sample and a hair sample that were tested by the Tulane Drug Analysis Laboratory, both of which were found to be negative for marijuana metabolites.

The parties agreed that the Appellant was subjected to post-accident testing after an arrested subject resisted arrest. Specifically, while the Appellant was restraining the subject, his partner was attempting to handcuff him. However, the Appellant's partner failed to secure the second hand and the arrested subject pulled the one handcuffed hand away striking the Appellant on the top of his head. The blow caused a small laceration that required medical treatment and triggered the Appointing Authority's post-accident testing protocol.

The Appellant contends that the Appointing Authority did not have a just cause to subject the Appellant to a drug screen because the injury was not because of anything that he did. According to the Appellant, it was his partner's mistake that resulted in the injury.

The Appellant also contends that the Appointing Authority should have considered the negative drugs screens that he provided, which were from samples taken five days after the initial drug screen. The Appellant contends that if the first test was positive than the other tests would have been positive also.

The only witness with expertise in the area of drug screening that testified was Susan Bybee, who is employed by Alere Toxicology Services, the laboratory that tested the Appellant's initial sample. Ms. Bybee's title is Responsible Person and Non-Negative Production Manager. Ms. Bybee manages the personnel that perform the testing, reviews the test results, and confirms the tests' validity. Ms. Bybee stated that

she has been in the field since 1998 and has testified between twenty and thirty times, where on most occasions she was declared an expert in her field.<sup>1</sup> She testified that the Appellant's test results were confirmed positive. When questioned regarding the Appellant's subsequent test results, Ms. Bybee testified that the Appellant could test negative for marijuana metabolites within twenty four to forty eight hours after the first screening, if the Appellant was a casual user. She also discounted the hair sample explaining that hair samples only uncover long term use. She stated that it takes a while for marijuana to actually turn up in hair follicles.

#### LEGAL PRECEPTS

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide independently, based on the facts presented, whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters v. Department of Police of New Orleans, supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App.

---

<sup>1</sup> In the instant case, the Appellant did not request that Ms. Bybee be declared an expert.

4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

### CONCLUSION

The Appointing Authority has established by a preponderance of evidence that it terminated the Appellant for legal cause. The Appointing Authority has a legitimate governmental interest in testing safety sensitive employees who sustain work related injuries. Further, there is no evidence to suggest that the drug screen relied upon by the Appointing Authority was in error. The fact that the Appellant tested negative five days later merely seems to indicate that he did not use marijuana between the initial and subsequent drug screens.

D. DeSalvo  
#8038

Considering the foregoing, the Appellant's appeal is DENIED.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 6th DAY OF  
SEPTEMBER, 2013.

CITY OF NEW ORLEANS  
CIVIL SERVICE COMMISSION

  
REV. KEVIN W. WILDES, S.J., CHAIRMAN

CONCUR:

  
AMY L. GLOVINSKY, COMMISSIONER

  
JOSEPH S. CLARK, COMMISSIONER