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DIRECTOR OF PERSONNEL

Tuesday, May 24, 2016

Mr. Louis Robein, Jr.
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: **Daniel Hampton VS.
Department of Fire
Docket Number: 8236**

Dear Mr. Robein:

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 - 5/24/2016 - 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 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: Timothy Mc Connell
Shawn Lindsay
Jim Mullaly
Daniel Hampton

file



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MITCHELL J. LANDRIEU
MAYOR

Tuesday, May 24, 2016

Mr. Louis Robein, Jr.
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: **Daniel Hampton VS.
Department of Fire
Docket Number: 8201**

Dear Mr. Robein:

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 - 5/24/2016 - 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 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: Timothy Mc Connell
Shawn Lindsay
Jim Mullaly
Daniel Hampton

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

DANIEL HAMPTON v. DEPARTMENT OF FIRE	Ca NOs. 8201 c/w 8236
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INTRODUCTION

Appellant, a Firefighter with status as a permanent employee in the City's classified service, filed the instant appeal challenging an emergency suspension and subsequent termination. The Commission, through its hearing examiner, combined the two appeals into one matter. Via letter, the New Orleans Fire Department ("NOFD") notified Appellant that he would be terminated effective September 17, 2013. (H.E. Exh. 2). The termination was due to Appellant's alleged failure to meet performance standards at the conclusion of a ninety-day review period that followed Appellant's receipt of a "Needs Improvement" performance rating. *Id.* In addition to Appellant's alleged performance deficiencies, NOFD cites to Appellant's prior discipline and counseling sessions as aggravating factors contributing to its decision to terminate Appellant. *Id.*

Appellant's termination notice was preceded by a letter dated July 9, 2013 through which NOFD placed Appellant on an emergency suspension. (H.E. Exh. 1). According to NOFD, the emergency suspension was based upon an incident during which Appellant reported to work impaired by drugs or alcohol. *Id.* The emergency suspension was to remain in place pending the outcome of a substance abuse test. *Id.*

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. Hearings were held on September 4, 2014, October 13, 2014, October 30, 2014, and December 11, 2014. 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.

After a full review of the transcript of proceedings and the record evidence, we find that the Appointing Authority has met its burden of proof with respect to Appellant's failure to meet performance standards. However, the discipline issued in connection with Appellant's July 2013 emergency suspension did not conform to the requirements of La. R.S. 33:2181. Therefore, Appellant's appeal is DENIED in part and GRANTED in part.

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 on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; see also *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide independently, from 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. 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.*

ANALYSIS

A. Appellant's Performance

1. Rules Regarding Evaluations

For the relevant period of time, the Commission's Rules required that an appointing authority evaluate each one of its classified employees at least annually. Rule XI, § 1.2 (eff. 2013). At the time NOFD evaluated Appellant, there were five possible service ratings, "outstanding," "exceeds requirements," "competent," "needs improvement," and "unsatisfactory." *Id.* at § 1.4. Those employees who received ratings of "needs improvement" or "unsatisfactory" had the option of appealing such a rating to a three-member panel within the appointing authority. *Id.* at § 1.5. After such an appeal, if the employee is unsatisfied with the result, he/she may bring an appeal to the Personnel Director. *Id.* at § 1.6. Absent an appeal, or upon a final disposition of an appeal, the rating becomes final.

An appointing authority must review the work performance of any employee who received a rating of "unsatisfactory" or "needs improvement" ***during the course*** of a ninety-day

period. *Id.* at § 1.7. At the end of the review period, the Rules required the appointing authority to indicate whether or not the employee's performance had improved. If the employee's performance did not improve, the Rules required the appointing authority to take disciplinary action pursuant to Rule IX. Among the types of discipline contemplated by Rule IX at the time was termination.

NOFDS asserts that Appellant was terminated pursuant to Civil Service Rules IX and XI after he received a "needs improvement" service rating, which he did not appeal and that became final, and Appellant's subsequently failed to show improvement over the course of the applicable ninety-day review period.

2. Appellant's Evaluation

In July, 2013, the Appellant was a Firefighter and subject to annual service ratings pursuant to the above-cited Civil Service Rule XI. Superintendent Timothy McConnell testified that NOFD complied with the Rules for issuing evaluations to firefighters; the evaluation process began in January every year and NOFD issued evaluations no later than April 1. (Tr. v. 1 at 10:2-11:1). Supt. McConnell stated that every firefighter that received a rating of "unsatisfactory" or "needs improvement" was notified of his/her right to appeal that rating via letter. *Id.* at 11:8-12:3.

On March 25, 2013, NOFD issued Appellant notice that his service rating for the year 2012 was "needs improvement." (NOFD Exh. 2). Supt. McConnell noted that the Appellant was the lowest rated employee in the entire Department. (Tr. v. 1. at 13:11-12). The Commission finds that the notice issued to Appellant complied with the Rules in that Appellant had proper notice of his rating and his right to appeal that rating. (NOFD Exhs. 2, 3). Appellant chose not

exercise his right to appeal his evaluation and thus his rating became final. *See* Rule XI, § 1.7. Therefore, the Commission finds that NOFD has established, by a preponderance of the evidence, that Appellant's performance did not meet standards during the course of 2012.

3. Appellant's 90-Day Review Period

Pursuant to the Rules, NOFD monitored Appellant's performance over the course of the next ninety days. Throughout the course of Appellant's ninety-day review period, NOFD, through Captain Charles Howley and Chief John LeBlanc, re-evaluated Appellant's performance. (Tr. v. 1 at 18:11-17; NOFD Exhs. 23, 25). According to Capt. Howley and Chief LeBlanc, Appellant failed to show improvement at the conclusion of the review period. *Id.* As a result, NOFD initiated a pre-termination hearing as required by Rule IX, and gave Appellant an opportunity to address performance concerns raised by his supervisors; Appellant's presentation failed to persuade Supt. McConnell who ultimately made the decision to terminate Appellant. (NOFD Exh. 4; Tr. v. 1 at 18:23-19:10).

During his testimony, Supt. McConnell recounted an incident on June 16, 2013 when Appellant did not report to work and indicated to his supervisors that he was sick. In reality, Appellant had been arrested for allegedly operating a vehicle under the influence of alcohol and was incarcerated in Tangipahoa Parish. (NOFD Exh. 5 at 1, 18). In connection with Appellant's June 16th arrest, his Louisiana driver's license was suspended. (Tr. V. 1 at 61:16-19). On occasion, firefighters are called upon to drive NOFD vehicles, including fire engines/trucks. (Tr. v. 1 at 65:13-14). Therefore, NOFD policy requires firefighters to report any loss of a driver's license, for any reason. *Id.* at 63:13-24. Appellant failed to notify anyone in NOFD that his license had been suspended in clear violation of NOFD policy. When viewed in context of

Appellant's documented substance abuse counseling and very poor attendance record, the Commission finds that Supt. McConnell properly considered Appellant's actions and omissions on June 16, 2013 as evidence that Appellant had failed to improve his performance during the ninety-day review period.¹ For example, one of the primary concerns identified in Appellant's February 2013 performance evaluation was his "dependability." (NOFD Exh. 24). Appellant's failure to report to work due to his arrest for operating a motor vehicle under the influence of drugs and/or alcohol and his failure to notify NOFD that his driver's license had been suspended serves to underscore NOFD's concerns about Appellant's dependability.

During the pre-termination meeting, Appellant had the opportunity to present evidence and/or call witnesses in order to show that, contrary to his supervisor's assertions, Appellant's performance had improved; Appellant's lone witness spoke of the need for an open exchange between firefighters and their supervisors, not that Appellant had improved his performance over the course of the ninety-day review period. (Tr. v. 1 at 42:21:43:2; H.E. Exh. 2).

Chief McConnell also testified regarding Appellant's disciplinary record with the Department, which he considered in determining the appropriate action to take. Appellant's

¹ The Commission notes that there was a great deal of discussion regarding Appellant's other DWI arrests over the course of several years. Appellant objected to any testimony related to his DWI arrests and insisted that only convictions would be relevant. Further, Appellant asserted that the NOFD did not properly establish that Appellant's DWI arrests were part of the discipline issued to him. The Commission sustains the Appellant's objections in part. Unless the prior DWIs were documented as prior instances of discipline, they would not count towards a consideration of progressive discipline. However, it is clear that there was ample evidence that members of NOFD, including Supt. McConnell, had counseled Appellant regarding substance abuse and that such abuse negatively impacted Appellant's ability to perform his job satisfactorily. That Appellant was arrested for DWI DURING HIS 90-DAY REVIEW PERIOD helps to establish Appellant's lack of professionalism and dependability. Therefore, the Commission will accept Supt. McConnell's testimony regarding Appellant's June 16, 2013 arrest but will not consider Appellant's prior arrests for DUI/DWI. According to Supt. McConnell's own testimony, he did not consider the DWI when considering the appropriate discipline for Appellant. Rather, he considered Appellant's dishonesty in reporting sick when he was in jail and Appellant's failure to report a suspended driver's license. (Tr. v. 1 at 70:11-19).

disciplinary record is lengthy and replete with instances of lost equipment, sick abuse, absenteeism, failure to follow simple instructions, substance abuse, DUI arrests, having a suspended driver's license, driving while having a suspended driver's license, and false and inaccurate reporting. (NOFD Exh. 5).

In April of 2012, Appellant already had a lengthy disciplinary record with NOFD. (NOFD Exh. 5). Nevertheless, NOFD offered Appellant an opportunity to participate in the employee assistance program ("EAP") following substantiated allegations of misconduct stemming from lost equipment, failure to report to work on time, and a violation of NOFD's sick leave reporting policy. (NOFD Exh. 7). Appellant's thirty-day suspension was "postponed" pending Appellant's successful completion of a treatment regimen with the EAP. *Id.* Then, in February 2013, Appellant received a sixty-day suspension related to allegations that Appellant violated NOFD's sick leave procedures. (NOFD Exh. 8).

Based upon the above, the Commission finds that NOFD has established that Appellant failed to improve his performance during his ninety-day review period. Thus, the Rules required NOFD to discipline Appellant in accordance with Rule IX. In determining what level of discipline to issue, Supt. McConnell properly considered sustained allegations of misconduct against Appellant as well as Appellant's failure to respond to earlier counseling.

B. Appellant's Positive Drug Tests

Appellant did not receive any discipline related to his positive drug test on January 18, 2013 and the event did not enter into Supt. McConnell's review of Appellant's past discipline. (NOFD Exhs. 13, 15). However, Supt. McConnell advised Appellant that reporting to work

under the influence of a substance, whether legal or illegal, which hinders the ability to perform duties is unacceptable. (NOFD Exh. 13).

Under NOFD policy, the use of prescription drugs is only permitted by an employee when the taking of them does not affect job performance or produce effects that might risk injury to the employee or others. (Tr. v. 1 at 92:2-9; NOFD Exh. 17). In the case of the Appellant, if prescription drugs were the cause of his incoherent state, then he would not be permitted to use them at work. *Id.* Examples of drugs that can affect work performance include substances that are noted to cause drowsiness, dizziness, excitability or other mood altering affects. NOFD advised Appellant that if he continued to show a lack of judgement with respect to the use of medication while on duty, the Department would take the corrective action necessary to guard his personal safety, the safety of the other members, and the safety of the citizens. *Id.*

On July 2, 2013, Appellant's supervisors observed Appellant acting in an erratic manner and again required Appellant submit to a drug screening. Appellant's screening came back positive for amphetamines. (NOFD Exh. 16). In his letter to Appellant, the Medical Review Officer raises the possibility that the positive result was caused by prescription medication. *Id.* However, the letter also notes that any medication that would result in a positive test "is a central nervous system depressant which causes neurologic impairment." *Id.* Once again, Appellant produced a prescription for medication that could have resulted in the positive result for amphetamines.

Nevertheless, NOFD has established, by a preponderance of the evidence, that Appellant reported to work on July 2, 2013 impaired by prescription medication in violation of NOFD police. However, even if Appellant's erratic behavior and poor performance was not related to

Appellant's use (or misuse) of prescription medication or illegal drugs, his behavior would be evidence of an overall failure to appreciate his predicament and take positive steps to improve his performance. As Supt. McConnell observed, it was not the positive drug test that contributed to the decision to terminate Appellant's employment, it was his troubling behavior. (Tr. v. 1 at 148:1-7).

Finally, while Appellant's emergency suspension must be overturned due to procedural deficiencies – as explained in the section immediately below – Supt. McConnell properly considered Appellant's conduct on July 2, 2013 as further evidence that Appellant was not performing in a satisfactory manner.

C. Appellant's July 2013 Emergency Suspension

NOFD placed Appellant on an "emergency suspension" due to an allegation that he reported to work on July 2, 2013 impaired by illegal or illicit drugs. (H.E. Exh. 1). In his notice to Appellant of the emergency suspension, Supt. McConnell stated that "this emergency suspension shall remain in effect pending the outcome of the July 2, 2013 drug test." *Id.* That July 2nd drug test was positive for Amphetamines. (NOFD Exh. 16). Following the test, Appellant produced a prescription for Adderall, the ingestion of which could have accounted for Appellant's positive test result. (See NOFD Exh. 15 at p. 1, 3, 5; NOFD Exh. 16). The record reflects that Appellant was not provided with a hearing regarding his emergency suspension.

Louisiana Revised Statutes establish certain minimum requirements for the issuance of discipline to "fire employees." Appellant, as a firefighter, falls under the statute's definition of "fire employee." La. R.S. § 33:2181(A). Among the requirements for investigations involving fire employees is that the employer notify the employee of the nature of the investigation, list the

specific charges the employee faces and provide the employee an opportunity to present evidence or call witnesses in connection with the allegations. *Id.* The statute also provides that:

No fire employee shall be disciplined, demoted, dismissed or be subject to any adverse action unless the investigation is conducted in accordance with this Subpart. Any discipline, demotion, dismissal or adverse action of any sort taken against a fire employee without complete compliance with the provisions of this Subpart is an absolute nullity.

La. R.S. § 33:2181(C).

Appellant was not provided with an opportunity to present evidence regarding the allegation that he violated NOFD policy by reporting to work impaired by drugs and/or alcohol. In fact, the Therefore, NOFD failed to adhere to the procedural requirements regarding Appellant's discipline related to the July drug test. As a result, that discipline is an absolute nullity and must be rescinded. The Commission emphasizes that the record shows that Appellant was provided with a pre-termination hearing related to his inability to improve his performance during the ninety-day review period in accordance with La. R.S. § 33:2181. Furthermore, Appellant's inability to perform rudimentary tasks and carry out simple orders on July 2, 2013 contributes to the record documenting his performance problems.

D. Appellant's Failure to Meet Performance Standards Impaired NOFD's Ability to Deliver Essential Services to the Citizens of New Orleans

The Commission finds that when an employee fails to meet established performance standards, such a failure necessarily impacts the efficient operation of an appointing authority. And, for firefighters, there are clear examples where poor performance has real and potentially catastrophic consequences to the firefighter him/herself, fellow firefighters and the community in general. NOFD expects all firefighters to drive apparatus if necessary and to don highly technical and complex safety equipment. *Tr. v. 1* at 43:9-13. Once this equipment is on,

firefighters enter burning, unstable structures/locations and attempt to save lives and property.

Capt. Howley summarized the expectations for a firefighter in the following manner:

With an operation you have to show up on scene, be on top of your game within a couple of seconds, and you're expected to save house, life or both at the same time. You've got to be able to move and think and it's gonna drastically affect [the operation].

Tr. v. 2 at 26:13-17.

The Commission accepts the testimony from Supt. McConnell and Capt. Howley that Appellant's failure to meet performance standards detracted from an entire engine house's ability to quickly react to ever-changing, life threatening situations. Further, the Commission finds that the efficiency and overall performance of Appellant's former colleagues in Engine 25 has improved dramatically since his termination. *See* Tr. v. 2 at 27:11-14. Therefore, NOFD has established that Appellant's poor performance impaired NOFD's ability to deliver services to the citizens of New Orleans.

E. Appellant's Termination was Commensurate with his Offense

In conducting its analysis, the Commission must determine if 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). As part of his consideration in terminating Appellant, Supt. McConnell took into consideration Appellant's past misconduct. During the course of the hearing, NOFD introduced evidence that Appellant had received numerous warnings and suspensions related to a range of misconduct. Appellant did not challenge these instances of earlier discipline. Supt. McConnell

also testified that he personally counselled Appellant regarding Appellant's alleged substance abuse problems.

Despite receiving discipline, counseling and support, Appellant failed to improve his performance. In fact, Captains Howley, Daigle and Schmidt all testified that, in their estimations, Appellant was a "sub-par" performer and the "weakest link" on his engine. They also testified that they believed Appellant's poor job performance placed his own life, the lives of those with whom he worked, and the members of the public he served in danger.

Therefore, the Commission finds that Appellant had ample notice that his performance needed improvement. And, when Appellant failed to improve his performance during the review period, termination was an appropriate disciplinary action. Especially since Appellant had several documented instances of prior discipline and counseling.

CONCLUSION

For the foregoing reasons, the appeal is DENIED in part and GRANTED in part. The Appointing Authority shall remit to Appellant all back pay and emoluments related to his emergency suspension. However, Appellant's termination due to his failure to meet performance standards pursuant to Rules IX and XI shall remain in effect.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 24th DAY OF May, 2016.



JOSEPH S. CLARK, COMMISSIONER

D. Hampton
#8201 & 8236

CONCUR:


CORDELIA D. TULLOUS, COMMISSIONER


MICHELLE D. CRAIG, CHAIRPERSON