

ELTON SMITH

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

NORDC

NO. 8158

Appellant was first hired by NORD as a transient Laborer on April 26, 2010 and was transferred between departments (to NORDC) on January 23, 2011. His status changed from transient to probationary on February 20, 2011, with probationary status. The Appellant was terminated by letter dated March 20, 2013, after submitting to a Post-Employment Drug Screen on February 15, 2013, pursuant to CAO Policy No. 89 and Civil Service Rule 5, Section 9, where he tested positive for marijuana metabolite.

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 September 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 reviewing the testimony and evidence, we find that the Appointing Authority has demonstrated that the Appellant was disciplined for cause and that the present appeal is DENIED.

The testimony and evidence was as follows:

MS. SUSAN BYBEE:

Ms. Bybee is a responsible person and the non-negative production manager at Alere Toxicology Services, meaning that she oversees the overall drug screen testing of the laboratory. She has been accepted as an expert by numerous tribunals in Toxicology and urine drug testing.

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Alere Toxicology Services is a forensic urine drug testing lab and Ms. Bybee oversees every aspect of the drug screen testing process from receiving the specimen, through the initial screen of the specimen, through the confirmatory testing, and the ultimate reporting of the specimen results.

Ms. Bybee testified that she reviews all of the documents within the litigation package to ensure that all the documents are there and complete, that they are true copies of our original documents, and that she verifies that the testing was performed correctly. She testified further that she personally reviewed the litigation package in this case, which was admitted as NORDC Exhibit 1. Ms. Bybee testified that NORDC Exhibit 1 is authentic.

Ms. Bybee explained the process of obtaining a specimen and maintaining custody and control of same throughout the process. Ms. Bybee went through the litigation package and testified that the chain of custody procedures were followed in this case.

Ms. Bybee testified that after the sample is deemed to be in a proper chain of custody, it then goes in for the initial testing process. She testified that, in this case, the initial screen result was a positive initial screen for marijuana metabolite. Ms. Bybee testified that a confirmation screening was then performed, which confirmed the presence of marijuana metabolite; meaning the urine specimen collected from the Appellant on February 15, 2013, was a confirmed positive screen for the presence of marijuana metabolite.

Ms. Bybee testified that all applicable SAMHSA guidelines were met in this case.

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MS. BRANDY BURKE:

Ms. Burke is a medical assistant at Concentra Medical Center on Baronne Street in New Orleans. She is a certified drug screen collector who has collected hundreds of drug screens.

Ms. Burke testified as to the collection procedure that was performed on February 15, 2013, when the Appellant's drug screen was collected. She testified that the patient is called to the back, asked for his I.D. and his date of birth to just confirm the patient's identity. Once that is confirmed, the patient is asked to take all his belongings out of his pockets and remove anything he has on his waist such as cell phones, keys, towels, which are then locked into a cabinet or drawer. The patient then washes his hands. Then the procedure is explained to the patient (e.g., the amount of specimen, don't flush the toilet, come right back out as soon you're done). Once the patient exits with the specimen, the patient is informed to remain and watch as the specimen is sealed. Once the specimen is sealed, the donor initials the side of the bottle stating that he observed the specimen sealed. Once sealed and initialed, the donor observes as the specimen is placed in a FedEx package to be shipped to the lab.

Ms. Burke testified that she collected the drug screen for Mr. Smith's drug screen on February 15, 2013, and that all of the applicable procedures outlined above were followed.

MS. DEBRA CALDERON:

Ms. Calderon is the Human Resources Administrator for NORDC and has been since April, 2013.

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Ms. Calderon testified that City employees are required to submit to a second screening, a post-employment drug screening, before they are able to become permanent employees in the City classified service. She testified that the Appellant was required to submit to a post-employment drug screening on February 15, 2013, which he failed.

MS. MARY JO WEBSTER

Ms. Webster is the Chief Operating Officer for NORDC and is responsible for oversight of all HR, budgetary, policy and finance functions.

Ms. Webster testified that on February 15, 2013, the Appellant was required to submit to a post-employment drug test pursuant to Civil Service Rule 5, Section 9. She testified that the Appellant's Civil Service status was still probationary after he had been with NORDC for three and a half years (and on probationary status for just over two years) and that Civil Service regulations required a post-employment drug test in order to move the Appellant into permanent status. Ms. Webster testified that the Appellant's status could not be changed in the personnel system from probationary to permanent without first receiving a successful clean drug screen on a post-employment test. She testified that a review of the Appellant's personnel file indicated that he had not submitted to any such post-employment screen, which is why he was required to do so on February 15, 2013.

Ms. Webster testified and the evidence received shows that the Appellant received due process prior to his termination, including notice of and participation at his pre-termination hearing. The Appellant was afforded an opportunity to be heard and present evidence on his own behalf.

LEGAL PRECEPTS

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action by his employer 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.; 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

The Appellant was required to submit to a Post-Employment Drug Screen pursuant to Chief Administrative Officer Policy Memorandum 89 and Civil Service Rule

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V, Section 9, prior to being removed from probationary status and gaining permanent classified status in the City civil service. Accordingly, on February 15, 2013, Appellant submitted to the screen. Appellant tested positive for marijuana metabolite. The Appellant was afforded notice and an opportunity to be heard at a pre-termination hearing, which he attended. The Appellant was subsequently terminated solely on the basis of the positive screen.

In a case where the only evidence against an employee is the positive result of a drug test and no corroborating evidence of substance abuse exists, the chain of custody becomes the critical issue and must be proven by the appointing authority with great care. Blappert v. Department of Police, 94-1284, p. 5 (La.App. 4 Cir. 12/15/94), 647 So.2d 1339, 1343. "To satisfy this standard, '[t]he party seeking to introduce test results must first lay a proper foundation by connecting the specimen with its source, showing that it was properly labeled and preserved, properly transported for analysis, properly taken by an authorized person, and properly tested.'" Id., quoting George v. Department of Fire, 93-2421, p. 13 (La.App. 4 Cir. 5/17/94) 637 So.2d 1097, 1106.

Krupp v. Department of Fire, No. 2007-CA-1260, (La. App. 4th Cir. 11/19/08), 995 So.2d 686, 692 (internal citation and quotation included).

In this case, NORDC established a valid chain of custody of the urine sample obtained from the Appellant for testing purposes. Regarding the custody and control form, it is undisputed that Ms. Burke completed the form while collecting the specimen from the Appellant, in the presence of the Appellant, and sent the form with the specimen for testing. Ms. Bybee testified that she approved the positive test results because she was able to verify that the specimen identification number on the chain of custody form signed by Ms. Burke and the Appellant clearly matched the specimen identification numbers on the urine specimen vials bearing the Appellant's name and initials. She also testified that she was able to verify which employees handled the specimen vials from the

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time they arrived at the laboratory from Concentra through the completion of the drug testing procedure. According to Ms. Bybee, the chain of custody was properly completed in this case.

Thus, the Appointing Authority has met its burden of proof and established by a preponderance of the evidence that the Appellant was disciplined for cause.

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

RENDERED AT NEW ORLEANS, LOUISIANA THIS 20th DAY OF October, 2015.




RONALD P. McCLAIN, VICE-CHAIRMAN

CONCUR:



TANIA TETLOW, COMMISSIONER



CORDELIA D. TULLOUS, COMMISSIONER