CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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DIRECTOR OF PERSONNEL

LATOYA CANTRELL
MAYOR

Tuesday, June 19, 2018

Danatus K. King
2475 Canal Street, Suite 308
New Orleans, La. 70119

Re: **Keith Mays Sr. VS.**
Department of Fire
Docket Number: 8665

Dear Mr. King:

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 - 6/19/2018 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Timothy McConnell
Renee E. Goudeau
Jay Ginsberg
Keith Mays

file

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LATOYA CANTRELL
MAYOR

Tuesday, June 19, 2018

Danatus K. King
2475 Canal Street, Suite 308
New Orleans, La. 70119

Re: **Keith Mays Sr. VS.**
Department of Fire
Docket Number: 8675

Dear Mr. King:

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 - 6/19/2018 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Timothy McConnell
Renee E. Goudeau
Jay Ginsberg
Keith Mays

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

KEITH MAYS vs. DEPARTMENT OF FIRE	DOCKET Nos.: 8665 & 8675

I. INTRODUCTION

Appellant, Keith Mays, 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 Department of Fire for the City of New Orleans, (hereinafter the "NOFD") does not allege that the instant appeal is procedurally deficient. Therefore, the Commission's analysis will be limited to whether or not NOFD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Fire Captain and had permanent status as a classified employee.

On Tuesday, December 12, 2017, a referee appointed by the Commission presided over an appeal hearing during which both Parties had an opportunity to call witnesses and present evidence. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing, as well as the referee's report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOFD placed Appellant on an "emergency suspension" and subsequently terminated Appellant's employment effective March 23, 2017. (H.E. Exhs. 1, 2; Tr. at 160:20-161:1). The reason for Appellant's suspension and termination was his alleged violation of "CAO Policy #89 (Revised)" and the standard operating procedures of NOFD as articulated in "ADM-01 and ADM-02." (H.E. Exhs. 1, 2). Specifically, NOFD alleged that Appellant violated the above-cited policies and procedures when he consumed marijuana. NOFD relied upon the results of a "positive" substance abuse screening in pursuing discipline against Appellant.

CAO Policy #89 requires that appointing authorities discharge an employee if/when:

1. The employee either refuses to participate in or submit to a search or inspection, urine drug or blood test as outlined in Section 8 of this policy regarding enforcement activities.
2. The employee has submitted to a test and, as outlined in Section 8, has attempted to degrade, dilute, switch, alter, or tamper with the sample.
3. While on city premises, the employee was caught using, manufacturing, distributing, dispensing, selling or possessing any illegal or unlawful drugs.
4. Being convicted for illegal substance possession (either on or off the job).
5. As the result of a first offense confirmed (MRO certified) positive test result as established by City Civil Service Rules for the use of alcoholic beverages or any of the illegal and/or unlawfully obtained (used) drugs prohibited by this policy while working.
6. The use of alcohol on the job, as outlined as a violation of this policy, including a conviction for driving while intoxicated (DWI) during working hours.

(H.E. Exh. 1).

NOFD alleged that Appellant's positive test result established a violation of item #5 above. (H.E. Exh. 1). In addition to CAO policy #89, NOFD cited section 3.3 of its internal substance

abuse testing policy. Pursuant to this policy, "the use of any illegal drugs, controlled substance or the possession of any illegal drugs and controlled substance on duty or off duty is cause for termination.... The 'occasional,' 'recreational,' or 'off duty' use of an illegal drug will not be excused." *Id.*

Civil Service Rules provide for the random testing of employees in "safety sensitive positions." (C.S. Rule V, § 9.11(a)). There is no dispute that Fire Captain is a safety sensitive position within the classified service. NOFD policy ADM-01 states that, "[a]ll employees of the New Orleans Fire Department who are in Fire Suppression, Fire Prevention, or Fire Communication job classifications shall be designated as being safety sensitive position employees for the purpose of Substance Abuse Testing and may be tested randomly." (H.E. Exh. 2).

B. Appellant's Positive Test Result

NOFD employs a rigorous system to ensure that its random substance abuse testing is truly random. (Tr. at 165:13-169:16). On January 31, 2017, the randomized selection procedure identified Appellant and the subject for a random drug screening. He produced a urine sample at Innovative Risk Management Services, an entity that provides urine and blood sample collection services for the City of New Orleans. (Tr. at 7:4-17). The lab responsible for processing the January 31st specimen, Alere, was unable to produce a definitive finding due to the fact that there was an unidentified substance interfering with the testing procedure. (App. Exh. 1; Tr. at 90:5-92:16). As a result, standard operating procedures mandated an immediate re-test. (Tr. at 92:13-16). The re-test occurred on February 3, 2017, and, as a result of the prior interference, a representative of the entity managing the collection site directly observed Appellant's production of the urine sample. (NOFD Exh. 2).

After analysis of the second sample, Alere determined that the sample was above the minimum threshold for marijuana metabolite. (NOFD Exh. 6). As a result, Alere subjected the sample to an additional, more precise testing procedure that confirmed the original result. (Tr. at 110:22-111:16).[1] Pursuant to Civil Service Rules, Alere transmitted the results of Appellant's drug screening to the Medical Review Officer for the City of New Orleans, Joseph Kanter, who verified the results. (NOFD Exh. 7). NOFD introduced a letter that purported to notify Appellant of his positive test result and provide him with an opportunity to submit an explanation for the positive result. Appellant denied that he ever received the notification and claims that he did not have an opportunity to present other medication that could have explained result. (Tr. 178:24-179:24).

On February 17, 2017, NOFD convened a pre-termination hearing during which Appellant had an opportunity to present evidence and call witnesses on his behalf. (H.E. Exh. 2). At the pre-termination hearing, Appellant denied smoking marijuana and claimed that the positive result was the product of second-hand smoke. Appellant's claim, however, was undercut by NOFD's expert witness, Susan Bybee, who testified that she was not aware of any study that supported such a claim. (Tr. at 127:22-128:13). In fact, she suggested that there was a study that came to the opposite conclusion. Namely that second-hand marijuana smoke does not produce "false positive" results. *Id.*

Ultimately, NOFD terminated Appellant's employment as a result of the positive test result.

[1] The reader of the record will note that there are two different "cutoffs" for the screening portion of the test and the confirmation portion of the test. The reason for these two different numbers is the precision of the specific testing method. The screening test is something referred to as immunoassay and the second is chromatography-mass spectrometry. The latter test is more precise and thus has a lower cutoff score. (Tr. at 126:22-127:2).

III. LEGAL STANDARD

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline 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. Appellant's "Emergency Suspension"

On February 14, 2017, NOFD notified Appellant that it was taking immediate corrective action and placing him on "emergency suspension." (H.E. Exh. 1). According to the notice, Appellant would remain on suspension "pending the outcome of a pre-termination hearing to be conducted on Friday, February 17th at 10:00 a.m…." *Id.* In its notice, NOFD observed that Appellant should contact the CAO's office regarding the payment of insurance premiums during

Appellant's suspension. There was no testimony regarding whether or not Appellant's emergency suspension was with or without pay, but the undersigned believe that it safe to assume that it was without pay.

It is undisputed that Appellant is a "fire employee" as defined by statute.[2] And, prior to the discipline of any fire employee, state law requires that such an employee have an opportunity to secure counsel, confront specific written allegations and call witnesses in connection with the allegations. La. R.S. § 33:2181 (B). If a fire employee is disciplined without having such an opportunity, that discipline is an absolute nullity. La. R.S. § 33:2181(C).

Appellant received written notice of NOFD's investigation into his alleged misconduct on February 14, 2017. (H.E. Exh. 1). However, he did not have the opportunity to respond to the allegations until February 17, 2017. (H.E. Exh. 2). In *Hampton v. Department of Fire*, C.S. Nos. 8201 & 8236, (May 24, 2016), NOFD placed a firefighter on emergency suspension pending an investigation into a positive substance abuse screening. It later terminated the firefighter in connection with allegations unrelated to the alleged substance abuse. While the Commission left the termination in place, it vacated the emergency suspension and ordered NOFD to remit to the firefighter all back pay and emoluments related to the period of time Appellant was on emergency suspension. In issuing its order, the Commission found that La. R.S. § 33:2181 required a fire department to provide a fire employee with the opportunity to respond to the allegations of misconduct prior to imposing discipline. *Id.* NOFD appealed the Commission's finding to the Louisiana Court of Appeals for the Fourth Circuit arguing that state law does not require a hearing

[2] "Fire employee" includes any person employed in the fire department of any municipality, parish, or fire protection district maintaining a full-time regularly paid fire department, regardless of the specific duties of such person within the fire department, and who is under investigation with a view to possible disciplinary action, demotion, or dismissal. La. R.S. § 33:2181(A)(1).

prior to the imposition of an emergency suspension. *Hampton v. Dep't of Fire*, 2016-1127 (La.App. 4 Cir. 5/3/17, 4), 220 So.3d 111, 114. The Fourth Circuit disagreed and affirmed the Commission's decision. *Id.*

In the matter now before us, NOFD appears to have instituted a disciplinary sanction prior to providing Appellant with an opportunity to respond to the allegations against him. In keeping with the Commission's prior decisions and Fourth Circuit case law, we find that such an action is an absolute nullity. Thankfully, it appears that there is a very narrow timeframe covered by this violation since NOFD convened a hearing and provided Appellant with an opportunity to respond to the allegations against him three days after placing him on "emergency suspension."

B. Occurrence of the Complained of Activities

NOFD did an excellent job ensuring that the record was complete. Witnesses from both the collection agency and testing laboratory confirmed the chain of command of Appellant's urine sample. (NOFD Exh. 11). Thus, the Commission has no doubt that Appellant produced a urine sample that was above the established cutoffs for both the screening and confirmation phase of the substance abuse test. Appellant's only explanation, that second-hand smoke from his wife resulted in the positive test result, is not supported by anything in the record. Once NOFD established the positive test, Appellant had the opportunity to explain it. Unfortunately, he was unable to do so.

The Commission strongly encourages employees to refrain from the "second-hand smoke" defense in these cases. In doing so, the undersigned observe that the drug use policy of NOFD and other appointing authorities does not require intent. Here, even if the Commission had accepted Appellant's dubious claim that it was his wife's heavy pot smoking that yielded the positive result, he still would have exceeded the prescribed limit. The danger the policy seeks to avoid is employees in safety sensitive positions reporting to work under the influence of drugs or

alcohol. For instance, if a firefighter is at a party and someone spikes the punch and he/she over imbibes on the spiked punch, he or she would be just as drunk if they had consumed the alcohol on purpose. Employees in safety sensitive positions occupy a unique space in municipal government and are rightly held to a higher standard when it comes to substance abuse. Therefore, such employees need to be hyper-aware of their surroundings and avoid, to the extent possible, being compromised by the poor/reckless decisions of others.

We find that NOFD has established that Appellant violated NOFD Policy 3.3 which prohibits the use, on or off duty, of illegal drugs. However, we do not find that NOFD established that Appellant violated paragraph 5 of CAO Policy #89. Appellant's sample exceeded the acceptable thresholds and established that he had consumed marijuana within the past twenty-four to seventy-two hours. (Tr. at 128:14-22). Paragraph 5 of Policy #89 identified on-duty consumption of illegal or illicit drugs to be a terminable offense. Per NOFD's own witness, different individuals have different metabolisms and it is not possible for the substance abuse screening to narrow down Appellant's drug use more than between one and three days. This distinction has little practical effect for Appellant given NOFD's separate policy regarding off-duty drug use. However, the Commission wishes to make such a distinction in order to make its interpretation of Policy #89 clear.

C. Impact on the Appointing Authority's Efficient Operations

The policy statement underpinning the Commission's rule regarding substance abuse testing is as follows:

> 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 in accordance with the provisions of this Rule.

(C.S. Rule V, § 9.1).

When an employee in a safety sensitive position consumes illegal drugs, he/she puts coworkers and citizens in a precarious position. Appointing authorities rightly dissuade even the off-duty use of illegal substances for those in safety sensitive positions and Civil Service Rules provide for the random testing of employees in such positions. In order to protect the rights of classified employees, the Civil Service Rules require testing sites to maintain certification from the Substance Abuse and Mental Health Services Administration ("SAMHSA"). (C.S. Rule V, § 9.7(g)). The minimum cutoff concentrations employed by Alere and NOFD are the same ones established by SAMHSA.

The Commission accepts NOFD's position that an employee whose substance abuse test result exceeds the proscribed limits for an illegal drug compromises the efficient operation of the Fire Department. Appellant's consumption of marijuana impacted his ability to competently and safely perform his duties. The impact of Appellant's compromised state is aggravated by the fact that he occupied a position of leadership in NOFD as a Fire Captain.

Based upon the foregoing, the undersigned Commissioners find that NOFD has established that Appellant's misconduct impaired the efficient operations of the Fire Department.

D. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's discipline 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).

Pursuant to Civil Service Rules regarding substance abuse, appointing authorities have wide discretion in formulating disciplinary and/or corrective action. (C.S. Rule § 9.15). While an appointing authority may decide to give an employee the option of enrolling in a rehabilitation program, it is under no obligation to do so. Superintendent McConnell testified that NOFD has given employees the option of enrolling in rehabilitation programs when such employees self-identify as having a problem with substance abuse. (Tr. at 162:10-163:3). But, for those members of NOFD who test positive for illegal drugs following an accident or through a random screening, termination has been the only disciplinary sanction used by NOFD. *Id.* at 163:15-164:6.

Furthermore, NOFD's substance abuse policy puts employees on notice that even off-duty use of illegal drugs is sufficient grounds for termination. While the Commission is not bound by a penalty matrix adopted by an appointing authority, advanced notice of a severe disciplinary sanction tied to specific misconduct suggests such discipline not arbitrary or capricious.

Based upon the above findings, we hold that while NOFD had the discretion to provide Appellant with a rehabilitation option, its decision to terminate Appellant was not so severe as to be arbitrary or capricious.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES-IN-PART and GRANTS-IN-PART Appellant's appeal. The Commission finds that termination was an appropriate level of discipline and will not disturb NOFD's decision. With respect to Appellant's "emergency suspension," the Commission finds that NOFD's imposition of discipline prior to conducting a hearing violated La. R.S. § 33:2181. Therefore, any days that Appellant served an unpaid suspension prior to a pre-disciplinary hearing shall be restored to Appellant.

Judgment rendered this 19th day of June, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

MICHELLE CRAIG, CHAIRWOMAN

5/15/2018
DATE

CONCUR

TANIA TETLOW, COMMISSIONER

6/15/2018
DATE

STEPHEN CAPUTO, COMMISSIONER

6-18-18
DATE