



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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MAYOR

Tuesday, December 22, 2020

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Lance Martin VS.
Department of Fire
Docket Number: 9060**

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 - 12/22/2020 - 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
Chief, Management Services Division

cc: Roman Nelson, Interim
Daniel T. Smith
Jay Ginsberg
Lance Martin

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

LANCE MARTIN
Appellant

Docket No. 9060

v.

NEW ORLEANS FIRE DEPARTMENT
Appointing Authority

DECISION

I. Summary of the Decision

Appellant, Lance Martin, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his termination imposed by the New Orleans Fire Department ("NOFD") on July 19, 2019. (Ex. HE-1). At the time he was terminated, Appellant was employed as a firefighter with the NOFD and had permanent status as a classified employee. A Hearing Examiner, appointed by the Commission, presided over a hearing held on October 8, 2019. At this hearing, both parties had an opportunity to call witnesses and present evidence. The Hearing Examiner provided the Commission with his attached advisory report dated June 10, 2020.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the October 8, 2019 hearing, all exhibits submitted at the hearing, the post hearing memoranda submitted by the parties, the Hearing Examiner's June 10, 2020 report, and controlling Louisiana law. For the reasons set forth below, we DENY the appeal.

II Analysis

Prior to his July 19, 2019 termination, the record clearly indicates that Appellant had a history of alcohol abuse. As indicated in Superintendent of Fire McConnell's July 19, 2019 termination letter to the Appellant: "On July 18, 2018 you were driving and struck several parked cars with your vehicle then left the scene and drove several blocks to the rear yard of NOFD headquarters, located at 317 Decatur Street. ...It was reported that during the July 18, 2018 episode you were belligerent and disrespectful towards the on-duty members stationed at fire headquarters that night." (Ex. HE-1).

To obtain assistance to deal with his alcohol misuse problems and as a condition precedent to disciplinary action not being initiated against him relative to the above referred to July 18, 2018, incident, the Appellant agreed to enter the NOFD's Employee Assistance Program (EAP). (Ex.

HE-1). In connection therewith, the Appellant signed a “Return to Work Consent for Information Disclosure” Agreement dated July 20, 2018, with the terms of that Agreement effective from that date until July 20, 2020. (Ex. NOFD-1). Paragraph V of NOFD-1 provided that “being under the influence of alcohol . . . [or] use/consumption of alcohol . . . **at any time** cannot be tolerated and will result in termination of employment with the Department/Agency.” (Emphasis added).

Subsequent to signing NOFD-1, Appellant was arrested for driving while under the influence of alcohol on October 10, 2018 and on July 12, 2019 in clear violation of NOFD-1. (Tr. at 13-14). Appellant was off-duty on both of those occasions. There is no evidence in the record to indicate that Appellant’s alcohol abuse problems ever adversely affected his on-duty responsibilities as a firefighter.

Regarding the Appellant’s consumption of alcohol on July 12, 2019, NOPD officers reported to 9800 Lake Forest Boulevard because Appellant was sitting in his truck which was parked across both lanes of traffic with no rear wheels. (Ex. NOFD-2). The Appellant was wearing NOFD sweatpants at that time. (Tr. at 26). He was arrested for DWI. At the October 8, 2019 hearing, NOPD Officer John Walker testified that his standardized field sobriety test done on the Appellant on July 12, 2019 indicated that the Appellant was impaired because of his alcohol consumption. (Tr. at 21). The Appellant admitted to Officer Walker that he had been drinking alcohol on July 12, 2019. (Tr. at 20-21). Furthermore, at the October 8, 2019 hearing, the Appellant admitted he had been drinking alcohol on July 12, 2019. (Tr. at 14). Ultimately, according to supplemental documents submitted by Appellant, Appellant plead guilty to reckless operation of a vehicle on August 10, 2020, in municipal court, and the DWI charge was dropped.

In his July 19, 2019 termination letter to the Appellant, Superintendent of Fire McConnell stated: “Your conduct has jeopardized the safety of yourself and the general public. Your actions have also represented the New Orleans Fire Department (NOFD) in a manner that is detrimental to the standards of the fire service. The Department has provided you with assistance and allowed you the opportunity to modify your conduct over the last twelve months through the City’s Employee Assistance Program (EAP). However, you have continued to engage in actions that have twice resulted in your arrest for driving while under the influence of alcohol (intoxicated) after entering the EAP. . . . As required by the program, you signed a ‘Return to Work Consent for Information Disclosure’ agreement, which obligated you to abstain from, ‘*...future incidents whenever they may occur during the term of employment of: ...being under the influence of alcohol, ...use/consumption of alcohol. ...at any time cannot be tolerated and will result in termination from employment...*’” (Ex. HE-1)

The Commission has a duty to decide independently from the facts presented in the record whether the NOFD carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for terminating the Appellant and, if so, whether the termination was commensurate with the dereliction. *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984). Legal cause exists whenever an employee’s off-duty conduct impairs the efficiency of the public service in which the employee is engaged. See *Beba v. Dept. of Fire*, 2005-1209 (La. App. 4 Cir. 5/31/06) and *Jones v. New Orleans Fire Dept.*, 785 So. 2d 866 (La. App. 4th Cir. 2001). The key question for this Commission to decide is whether Appellant’s off-duty alcohol misuse, in clear violation of NOFD-1, impaired the efficient operation of the NOFD and justified his termination on July 19, 2019.

The pertinent facts in *Beba* and in the 1999 New Orleans Civil Service Commission matter of *Sanders v Dept. of Fire* (cited by the Hearing Examiner) are distinguishable from those in this present case. In the present case, in contrast to *Beba* and *Sanders*, we are dealing with a situation where the Appellant signed an Agreement (Ex. NOFD-1) whereby he obligated himself not to drink any alcohol at any time for two years with the known consequence being termination for his failure to abide by his Agreement. Moreover, in *Beba*, there was a factual dispute as to whether the complained of misconduct (sexual harassment) did or did not occur as opposed to there being no factual dispute herein that the Appellant drank alcohol on both October 10, 2018 and July 12, 2019, in violation of his Agreement. Finally, in both *Beba* and *Sanders*, the NOFD failed to offer any evidence or sufficient evidence that the efficiency of its operation was impaired by the firefighter's off-duty misconduct.

In the present case, the Commission finds that the entire record shows that the NOFD has carried its burden of proving that the Appellant's failure to comply with the provisions of NOFD-1 did impair the efficient operation of the NOFD and his termination was justified. Given his signing of NOFD-1, Appellant knew or should have known that termination was a likely consequence for his breach of NOFD-1.

As Deputy Chief Albert R. Thomas, Jr., testified at the October 9, 2019 hearing, both the NOFD and the Appellant are bound to abide by the obligations imposed upon each other under the EAP program. Compliance with all terms of the NOFD-1 is important to ensure not only the integrity and success of the EAP Program, but also everyone's confidence in the Program's effectiveness. (Tr. at 37-38, 44-45). Even though participation in the EAP program is confidential, the public is now aware that Appellant violated the terms of the EAP agreement because of his present appeal proceeding.

Moreover, as Superintendent McConnell indicated in his July 19, 2019 termination letter (Ex. HE-1), Appellant's conduct "jeopardized the safety of yourself and the general public. Your actions have also represented the New Orleans Fire Department (NOFD) in a manner that is detrimental to the standards of the fire service." Chief Thomas also testified that Appellant's misconduct on July 12, 2019 adversely affected the NOFD's public image and thus could adversely affect its efficient operation in the public's mind. (Tr. at 44-45).

To have the Appellant knowingly violate the terms of NOFD-1 and then try to avoid the stated consequence of termination despite that breach by arguing that his misconduct occurred off-duty and thus did not affect the efficient operation of the NOFD, even though the Agreement pertained to off-duty conduct as well, is very concerning to this Commission. This Commission agrees with the NOFD that granting Appellant's appeal, given the facts presented, would in the eyes of the NOFD, its firefighters, and the public potentially damage the integrity and effectiveness of the EAP specifically and correspondingly the NOFD's overall efficiency, credibility, and effectiveness in the eyes of all. The EAP was designed to help Appellant and others similarly situated deal with alcohol related problems while they are given a second chance to avoid discipline. That is commendable and is certainly a Program to be endorsed and supported. However, if you are going to have a Program, especially one dealing with helping employees who have alcohol problems working in a profession where public safety is paramount, you should definitely have the ability to hold the employee accountable to abide by its terms. If not, why have

the Program in the first place? If the NOFD cannot maintain the integrity of its EAP by its termination of the Appellant, then that certainly can cause other firefighters and the public to lose confidence in what the NOFD is doing overall in terms of the efficient and safe operation of its department.

Finally, the Fourth Circuit Court of Appeal stated in *Branighan v. Department of Police*, 362 So 2d 1221, 1223 (La. App. 4th Cir. 1978): “The superintendent of police is charged with the operation of his department, and the Civil Service Commission is not his supervisor. The superintendent is the one who must run his department and exercise discretion in relation to disciplining his officers, and the Commission is not charged with exercising that discretion.” The superintendent of fire is similarly charged to run the NOFD. Superintendent McConnell decided that the Appellant’s misconduct and breach of NOFD-1 warranted termination. The record fully supports that decision.

II. Denial of Appeal

For all the reasons set forth above, this Commission DENIES the Appellant’s appeal.

This the 22nd day of December, 2020

CIVIL SERVICE COMMISSION

WRITER:

Mark C. Surprenant
Mark C. Surprenant (Dec 22, 2020 14:30 CST)

MARK SURPRENANT, COMMISSIONER

CONCUR:

J H Korn
J H Korn (Dec 22, 2020 14:52 CST)

JOHN KORN,
COMMISSIONER

I concur with the decision of Commissioners Surprenant and Korn, but additionally, as the Fourth Circuit Court of Appeal stated in *Branighan v. Department of Police*, 362 So 2d 1221, 1223 (La. App. 4th Cir. 1978): “The superintendent of police is charged with the operation of his department, and the Civil Service Commission is not his supervisor. The superintendent is the one who must run his department and exercise discretion in relation to disciplining his officers, and the Commission is not charged with exercising that discretion.” The superintendent of fire is similarly charged to run the NOFD. Superintendent McConnell decided that the Appellant’s misconduct and breach of NOFD-1 warranted termination. The record fully supports that decision.



Brittney Richardson (Dec 22, 2020 14:39 CST)

BRITTNEY RICHARDSON,
COMMISSIONER