



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
SUITE 900 - 1340 POYDRAS ST.  
NEW ORLEANS LA 70112  
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CITY CIVIL SERVICE COMMISSION  
BRITTNEY RICHARDSON, CHAIRPERSON  
JOHN H. KORN, VICE-CHAIRPERSON  
CLIFTON J. MOORE, JR.  
MARK SURPRENANT  
RUTH WHITE DAVIS

Friday, June 17, 2022

AMY TREPAGNIER  
DIRECTOR OF PERSONNEL

Mr. Jack Bohannon  
1340 Poydras St, Ste. 600  
New Orleans, LA 70112

Re: **LaToya Winding VS.  
Sewerage & Water Board  
Docket Number: 9292**

Dear Mr. Bohannon:

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 - 6/17/2022 - 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,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith  
Chief, Management Services Division

cc: Ghassan Korban  
Ashley Ian Smith  
Jim Mullaly  
LaToya Winding

file



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1340 Poydras St, Ste. 600  
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Re: **LaToya Winding VS.  
Sewerage & Water Board  
Docket Number: 9298**

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Doddie K. Smith  
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Ashley Ian Smith  
Jim Mullaly  
LaToya Winding

file

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

**LATOYA WINDING,  
Appellant**

v.

**Docket Nos. 9292, 9298**

**SEWERAGE & WATER BOARD,  
Appointing Authority**

**DECISION**

Appellant, Latoya Winding, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from a claimed constructive discharge on July 2, 2021, the date of her resignation. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a Principal Office Support Specialist. (Tr. at 11; Ex. HE-1). The Sewerage & Water Board filed a motion for summary disposition on November 1, 2021, arguing that Ms. Winding voluntarily resigned and had no right of appeal. The Commission heard oral argument on this motion at its regular meeting on December 13, 2021. (Ex. 1). On January 12, 2022, the Commission denied the motion for summary disposition based on Appellant's assertion that she had no choice but to resign. (Ex. 1). The Commission assigned the development of the factual record for the constructive discharge claim to a Hearing Examiner. (Ex. 1).

A Hearing Examiner presided over a hearing on March 31, 2022. At this hearing, both parties had an opportunity to call witnesses and present evidence on the threshold issue of the voluntariness of the resignation and also on the underlying substantive issue.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated June 6, 2022, and controlling Louisiana law.

For the reasons set forth below, Winding's appeal is DENIED.

## I. FACTUAL BACKGROUND

On July 1, 2021, the Sewerage & Water Board placed Ms. Winding on emergency suspension, presenting her with an investigative report into billing adjustments. (Tr. at 19, 21, 26, 129; Ex. 3). Notably, at the hearing of this matter, Ms. Winding admitted to adjusting the water bills of her personal account, her husband's account, and her mother's account, in violation of Sewerage & Water Board policy. (Tr. at 29). Ms. Winding returned to the Sewerage & Water Board on July 2, 2021, when she signed a resignation form. (Tr. at 13, 19). According to Ms. Winding, the Sewerage & Water Board disciplinary specialist, Byron Iverson, informed her it would be better if she resigned. (Tr. at 20). Ms. Winding admits that Mr. Iverson told her he did not know what the outcome of the investigation into billing adjustments would be. (Tr. at 20-21). She claims Mr. Iverson advised her that she would "keep her years of service" for benefits purposes. (Tr. at 24). Ms. Winding, who was a ten-year employee of the Sewerage & Water Board, testified that she did not know her options. (Tr. at 25). Ms. Winding testified that she felt termination was "inevitable." (Tr. at 197-98).

The form Ms. Winding signed, has a box checked with a preprinted reason for resignation: "In Order to Avoid Disciplinary Action (Remarks)." (Ex. 2). Typewritten next to this preprinted reason appears "Under investigation due to allegations of fraudulent conduct." (Ex. 2). Ms. Winding testified that this box was not checked, and that the statement "Under investigation due

to allegations of fraudulent conduct” was added after she signed the document. (Tr. at 13-14). Next to the preprinted “Other (Remarks),” appears the following handwritten statement: “In addition to prior to (investigation) had started a grievance against supervisor who also provided evidence for these accusations.” (Ex. 2). Ms. Winding signed the Resignation Form, and it has a typewritten date of July 2, 2021. (Ex. 2).

Byron Iverson testified that Ms. Winding came to his office on July 2, 2021, and said she wanted to resign: “She appeared in my office without notice and stated she wished to resign.” (Tr. at 135). Mr. Iverson denied telling Ms. Winding it would be best if she resigned. (Tr. at 135). Mr. Iverson informed Ms. Winding of the alternatives and told her she could wait on the recommendation based on the investigation. (Tr. at 136). Mr. Iverson testified that “we hadn't even received a recommendation regarding disciplinary action, so the alternative was to wait until a determination was made and then she could make a better assessment as to what she wanted to do based upon what she was facing.” (Tr. at 136). Termination proceedings had not begun. (Tr. at 136). Mr. Iverson testified that he “plugged in” Ms. Winding’s information on a pdf form, obtaining the information from the Sewerage & Water Board’s human resources software, HRIS, and from Ms. Winding, who was present. (Tr. at 138). Mr. Iverson testified that he checked the box for the reason for resignation “In Order to Avoid Disciplinary Action,” and entered the statement “Under investigation due to allegations of fraudulent conduct” before he presented the form to Ms. Winding. (Tr. at 141-42). Mr. Iverson testified that his practice is to print out the form, and to instruct the employee to review the form for accuracy before signing: “Please verify, prior to signing, that everything is correct.” (Tr. at 138). Mr. Iverson, who testified that he is not the benefits specialist, briefly reviewed Ms. Winding’s options for a pension disbursement. (Tr. at

149). Mr. Iverson testified that he directs employees to the benefits department for advice about pension disbursements. (Tr. at 149).

## II. ANALYSIS

The Commission must address the threshold issue of whether Ms. Winding's resignation was a constructive discharge. If her resignation was voluntary, Ms. Winding has no right of appeal. *Voltolina v. City of Kenner*, 20-151 (La. App. 5 Cir. 12/2/20), 306 So. 3d 640; *Russell v. Mosquito Control Bd.*, 2006-0346 (La. App. 4 Cir. 9/27/06), 941 So. 2d 634. However, if the Sewerage & Water Board forced Ms. Winding to resign, then she has a right to appeal because the Commission will treat the resignation as a termination. *Id.*

As early as 1979, the Fourth Circuit Court of Appeal recognized the effect of a constructive discharge on the due process rights of City of New Orleans classified employees: “[W]e rule that a forced resignation or involuntary resignation by operation of the regulations cannot bar the right to appeal . . . . An opposite result would allow the mere characterization of disciplinary action as a ‘resignation’ to subvert the right to appeal guaranteed in Article 10, § 8 of the Louisiana Constitution. *Peterson v. Dep’t of Streets*, 369 So. 2d 235, 237 (La. App. 4 Cir. 1979).

In 2006, the Fourth Circuit considered whether a retirement was voluntary when the Mosquito Control Board offered an employee the option of retiring in lieu of termination, including lifting a 60-day suspension and allowing the employee to take up to 30 days of annual leave in order to qualify for retirement under the “Rule of 80.” *Russell v. Mosquito Control Bd.*, 2006-0346 (La. App. 4 Cir. 9/27/06), 941 So. 2d 634. The Fourth Circuit recognized that “[b]ecause an employee’s *Loudermill* rights are designed to protect his property right in continued employment, the employee relinquishes those rights when he voluntarily resigns or retires.” *Id.* “Similarly, an

employee has no right to appeal when the employee voluntarily resigns or retires.” *Id.* “However, an employee has a right to appeal when the employee is either forced to resign or involuntarily resigns.” *Id.* Determining that Russell voluntarily retired, taking advantage of the additional benefits offered by the Mosquito Control Board to induce the retirement, the Fourth Circuit applied the following factors, relying on a 1992 decision from the federal Tenth Circuit Court of Appeals:

In determining whether an employee’s retirement choice was voluntary, the federal jurisprudence has enumerated the following four factors for courts to consider: “(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation.” *Parker v. Board of Regents of Tulsa Jr. College*, 981 F.2d 1159, 1162 (10<sup>th</sup> Cir. 1992) (quoting *Stone [v. University of Maryland Medical System Corp.]*, 855 F.2d 167, 173 (4<sup>th</sup> Cir. 1988)).

*Id.* The *Russell* court found that Russell’s retirement was voluntary even though the Mosquito Control Board informed him he would be terminated if he did not resign. *Id.*

This decision is in tension with decisions in the federal procedural due process context. The federal Fifth Circuit Court of Appeals has recognized a constructive discharge when a state civil service employee was offered the choice to resign or be fired: “This court has made clear that a plaintiff may make out a cognizable claim when he alleges particular facts showing that he found himself ‘between the Scylla of voluntary resignation and the Charybdis of forced termination.’” *Holden v. Knight*, 155 F. App’x 735, 739 (5th Cir. 2005). “‘Constructive discharge in a procedural due process case constitutes a § 1983 claim only if it amounts to forced discharge to avoid affording pretermination hearing procedures.’” *LeBeouf v. Manning*, 575 F. App’x 374, 376 (5th Cir. 2014) (quoting *Fowler v. Carrollton Pub. Library*, 799 F.2d 976, 980 (5th Cir.1986)). In 2016, the United States District Court for the Eastern District of Louisiana set forth the federal standard for a 42 U.S.C. § 1983 due process claim based on a constructive discharge:

“[T]o show constructive discharge, an employee must offer evidence that the employer made the employee's working conditions so intolerable that a *reasonable* employee would feel compelled to resign.” *LeBeouf*, 2015 WL 3650797 at 7 (emphasis added). In other words, a constructive discharge occurs when the employer places the employee “between the Scylla of voluntary resignation and the Charybdis of forced termination.” *Fowler v. Carrollton Pub. Library*, 799 F.2d 976, 981 (5th Cir. 1985). Additionally, to establish constructive discharge in a procedural due process case, a plaintiff must demonstrate that forced discharge was used to avoid providing constitutionally-adequate pretermination procedures. *See LeBeouf*, 2015 WL 3650797 at 7 (citing *Fowler*, 799 F.2d at 981).

*Little v. Mizell*, No. CV 15-268, 2016 WL 4384674, at \*3 (E.D. La. Aug. 17, 2016).

In 2010, the Fourth Circuit applied the factors in *Russell*, holding that a police officer had the option of contesting his termination instead of resigning, relying on *Russell*. *Mejia v. Dep't of Police*, 2010-0046 (La. App. 4 Cir. 6/30/10), 43 So. 3d 286.

In 2020, the Fifth Circuit considered whether a classified firefighter voluntarily resigned when the City of Kenner sent him completed retirement forms. *Voltolina v. City of Kenner*, 20-151 (La. App. 5 Cir. 12/2/20), 306 So. 3d 640. Voltolina signed the retirement application, writing “under duress” next to his name. *Id.* Affirming the district court’s reversal of the Fire Civil Service Board, the Fifth Circuit held that Voltolina was constructively discharged, applying the “reasonable employee” test in *Robinson v. Board of Supervisors for the University of Louisiana*, 16-2145 (La. 6/29/17), 225 So.3d 424. “The ‘reasonable employee’ test is an objective test of whether a reasonable person in the employee’s shoes would have felt compelled to resign.” *Id.* The Fifth Circuit relied on the following facts, including Voltolina’s need for continued medical benefits:

The record shows that the representatives of the City signed a Personnel Action Form on August 24, 2018, indicating that Mr. Voltolina was retiring effective August 28, 2018. According to Mr. Voltolina, he made no request to retire and was unaware of the City’s plan to “retire him” until he received a call from FRS on August 25, 2018, indicating he was retiring and needed to fill out paperwork. Mr. Voltolina stated that he received a pre-completed retirement form on August 29,



2019 [sic] indicating that he was retiring as of August 28, 2018 at 11:59 p.m. Mr. Voltolina signed the form agreeing to retire which would allow him to continue receiving his medical benefits, but he wrote “under duress” next to his signature. The same day, he wrote to the FRS, stating, “as of this day, I was informed that I was being forced into retirement. Please accept this as my official letter, under duress, of retirement.”

*Id.*

In February of 2021, the Commission recognized that an employee who voluntarily resigns has no right of appeal, *Hogues v. Dep’t of Property Management*, No 8807 (City of New Orleans Civil Service Commission 2/8/21), and relied on *Voltolina* for the standard for a constructive discharge.

Under the reasonable employee test of *Voltolina* and *Robinson*, the Commission finds that Ms. Winding’s resignation was voluntary. Ms. Winding appeared voluntarily in the office of Byron Iverson on July 2, 2021. The Sewerage & Water Board had made no decision about whether to terminate Ms. Winding’s employment, and the Commission credits Mr. Iverson’s testimony that he did not advise Ms. Winding that she would preserve her years of service for pension purposes if she resigned. The Commission also credits Mr. Iverson’s testimony that the form completed by Ms. Winding had a check next to “In Order to Avoid Disciplinary Action (Remarks) Under investigation due to allegations of fraudulent conduct” when she signed it. Therefore, although Ms. Winding may have felt that termination was “inevitable,” a reasonable employee would have allowed the Sewerage & Water Board to make a decision about the level of discipline for the billing adjustments before making a decision about separating from employment.

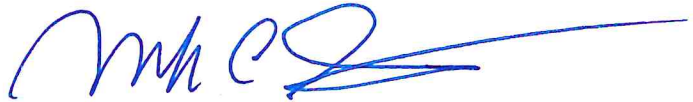
Under the factors applied in *Russell*, Ms. Winding’s resignation was voluntary. Mr. Iverson gave Ms. Winding alternatives to resignation, including waiting on a decision from the Sewerage & Water Board about the penalty. The Commission also finds that Ms. Winding understood the choice she was given. When Ms. Winding appeared at the offices of the Sewerage & Water Board,

she was under suspension, so no threat of immediate termination rushed her decision. Although the effective date of the resignation was printed on the form presented to Ms. Winding, Ms. Winding offered no testimony that she asked for a different effective date. Therefore, under the factors in *Russell*, Ms. Winding's resignation was voluntary.

Because the Commission finds the resignation was voluntary, Ms. Winding has no right of appeal. Ms. Winding's appeal is DENIED.

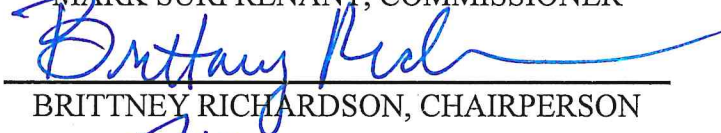
This the 17<sup>th</sup> day of June, 2022.

WRITER:

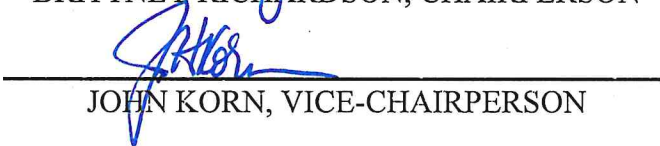


MARK SURPRENANT, COMMISSIONER

CONCUR:



BRITTNEY RICHARDSON, CHAIRPERSON



JOHN KORN, VICE-CHAIRPERSON