



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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Friday, September 07, 2012

Robert J. Ellis, Jr.
650 Poydras St., Suite 2015
New Orleans, LA 70130

Re: **Dennis Firstley VS.**
Department of Public Works
Docket Number: 7892

Dear Mr. Ellis:

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 - 9/7/2012 - filed in the Office of the Civil Service Commission in Room 7W03, City Hall, 1300 Perdido Street, 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,

Germaine Bartholomew
Chief, Management Services Division

cc: Mark D. Jernigan, P.E.
Gregory Brumfield
Jay Ginsberg

DENNIS FIRSTLEY

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF PUBLIC WORKS NO. 7892

The Appointing Authority employed the Appellant as a Traffic Sign Technician with permanent status. By letter dated July 26, 2011, signed by Appointing Authority, Nguyen Phan, the Appointing Authority suspended the Appellant for twenty five (25) days and demoted him to the position of Laborer with a reduction in pay. Thereafter, by letter dated July 29, 2011, the Appointing Authority's supervisor, Deputy Mayor Cedric Grant, notified the Appellant that he was terminated. As set forth in both notifications, disciplinary action was taken after an investigation by the New Orleans Inspector General found that the Appellant falsified his job application by failing to disclose two felony convictions.¹

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 November 3, 2011. 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.

The Appellant testified he submitted his application for employment on July 27, 1998, answering "no" to the question "Have you been convicted of a felony?" He testified that he thought a conviction occurs only when one serves time in jail. The Appellant received probation for his two felony convictions for marijuana distribution and embezzlement.

¹ The Appellant has stipulated that he did "unintentionally" fail to inform the Appointing Authority of prior felony convictions and agrees that the original disciplinary action taken by the Appointing Authority in the letter of July 26, 2011 was appropriate.

The Appointing Authority, Nguyen Phan, testified that he initially suspended and demoted the Appellant, rather than terminating him, because the Appellant was a long term employee, and the department was shorthanded and could use him as a laborer. However, once he conferred with the administration, he agreed that termination was the appropriate disciplinary action for such a serious offense. Mr. Phan stated that he did not sign the revised disciplinary letter as he was out of town on annual leave and the revised letter needed to be sent prior to the Appellant's scheduled return to work from suspension. In his absence, Mr. Grant signed the second letter on Department of Public Works letterhead.

Mr. Grant testified that he reviewed and disagreed with the initial recommendation of suspension and demotion made by the panel because the Appellant's dishonesty on his application did not reflect the standards set by the administration. Mr. Grant testified that he had the authority to overturn the decision of the Appointing Authority because the Appointing Authority, Mr. Phan, worked under his supervision.

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 of proof 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, based on 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.*

Only the Appointing Authority has the authority to take disciplinary action against an employee assigned to its department. *CSC Rule IX §1.1*, specifies that classified employees are terminated by their Appointing Authority, which in this case was the Department of Public Works. This issue arose once before in *Serignet v. Dept. of Health*, 2008-0469 (La. App. 4th Cir. 05/20/09); 15 So3d 1019. In *Serignet*, the appellate court recognized that, under civil service rules, only the Appointing Authority is capable of taking disciplinary action against its employees. *Id.* at 1025. Nonetheless, in *Serignet*, the appellate court affirmed the Commission's decision to disregard its rule and enforce disciplinary action taken by the employees' immediate supervisor, even though not the Appointing Authority. The disciplinary action in *Serignet* was taken in the wake of Hurricane Katrina under the authority of the Louisiana Homeland Security Act, *La.*

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R.S. 29:727. Under these limited, exigent circumstances, someone other than the Appointing Authority was allowed to take disciplinary action. *Id.*

The facts in the instant case are not analogous to *Serignet*. Mr. Grant could not terminate the Appointing Authority's employees under his own authority, regardless of his status as Deputy Mayor and Mr. Phan's supervisor. It does appear, however, based upon Mr. Phan's testimony, that Mr. Grant was simply signing the disciplinary letter in his absence because Mr. Phan was unavailable. Mr. Phan testified that he was prepared to reissue the disciplinary letter and increase the penalty to termination after discussing the matter with the administration. Mr. Phan was out of town and circumstances required that the letter go out immediately. Rather than delay the action until Mr. Phan's return, Mr. Grant signed the letter. The facts in this case suggest that Mr. Grant was not attempting to usurp the authority of Mr. Phan, but was merely acting for him in his absence. It is not our intention to create a new exception to the Civil Service rules. We would hope that the administration will pay close attention to these requirements moving forward in order to avoid challenge.

Considering the foregoing, the Appointing Authority has established by a preponderance of evidence that it disciplined the Appellant for cause and that the penalty was commensurate with the violation. The Appellant's excuse for falsifying his employment application was not credible. The Appellant knew or should have known that pleading guilty to felony charges is a conviction, without regard to whether he served jail time as a consequence. The fact that his dishonesty was not detected for a number of

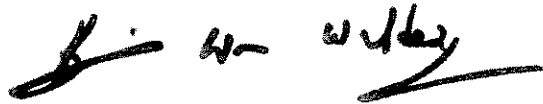
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years does not mitigate his intentional omission of relevant facts from his employment application.

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

RENDERED AT NEW ORLEANS, LOUISIANA THIS 7TH DAY OF
SEPTEMBER, 2012.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION

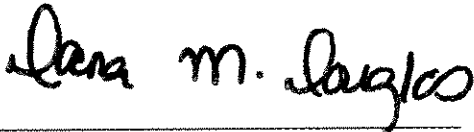


REV. KEVIN W. WILDES, S.J., CHAIRMAN

CONCUR:



JOSEPH S. CLARK, COMMISSIONER



DANA M. DOUGLAS, VICE-CHAIRMAN