FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE
UNDER DELEGATION FROM THE CIVIL SERVICE COMMISSION

RODNEY LANCE SUDDUTH

Appellant

v.

SEATTLE CITY LIGHT

Respondent

CSC and
Hearing Examiner File:
CSC-05-01-004

Introduction

Rodney Lance Sudduth was terminated from his employment at Seattle City Light and appealed the termination to the Civil Service Commission. Pursuant to SMC 4.04.250 L.7, the Civil Service Commission delegated the appeal to the City of Seattle Hearing Examiner for hearing and decision.

At a prehearing conference, the following were established as the issues the Appellant wished to raise:

A. Was the Appellant properly notified of non-compliance with his "last chance agreement"?

B. Was the Appellant prejudiced in contesting his termination by a related sequence of events outside the workplace?

C. Did the Department terminate the Appellant without just cause?

Seattle City Light (Department) filed a prehearing motion to dismiss issues A and B, stating that since a requirement for notice is part of the criteria for "just cause" under the Personnel Rules, issue A was actually a part of issue C; and that Issue B concerned matters that were irrelevant to the Appellant's termination, which was governed by the requirements of a federal regulation. The motion to dismiss was denied by an order issued on November 14, 2005, which stated that if, following hearing, it appeared that issue A was simply a part of Issue C, the Examiner could address the two issues together as one in the decision, and that because it appeared that the Appellant was attempting to raise a constitutional question in Issue B, he would be allowed the opportunity to make a record on the issue at hearing.

The hearing on the appeal was held on December 13, 2005, before the Hearing Examiner (Examiner). The Appellant represented himself. The Department was represented by Patsy Taylor, Personnel Specialist Supervisor.

After considering the evidence in the record, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Applicable Law and Rules

1. In 1994, the City of Seattle adopted Ordinance 117418, which established Chapter 4.77, entitled Drug-Free Workplace and Drug and Alcohol Testing Ordinance." The Ordinance recites that it was adopted, in part, because some City employees "are subject to drug and alcohol testing under the Federal Omnibus Transportation Employee Testing Act of 1991 and federal regulations" adopted by the United States Department of Transportation. The Ordinance authorized the Personnel Director to develop a "Drug and Alcohol Testing Program to implement the federal regulations . . . ." (Exhibit 1)

2. The Personnel Director established the City's "Drug & Alcohol Testing Program for DOT Covered Employees" (Program) in 1995, and has updated it periodically. (Exhibit 2)

3. The Program provides for random drug testing for employees who drive commercial motor vehicles, and states that these employees are prohibited from reporting for, or remaining on duty with an alcohol concentration of 0.02% or greater in their bodies. The Program also states that a "refusal to submit," which includes failing to appear for a drug and alcohol test when required, will be treated as a test that shows the permitted alcohol concentration has been exceeded, or a "positive test".

4. The Program establishes a detailed random drug testing procedure. The procedure requires that when an employee is randomly selected for testing, the employees is to proceed immediately to the designated collection site. The employee can request notice of the test results.

5. The Program also prescribes the procedures to be followed after an employee has received a positive test result. These include a 30-day suspension, the potential for an employee to return to work under a "last chance agreement," evaluation and treatment for substance abuse, and follow-up random testing. In case of a positive test following return to work, the Program does not provide for notice to the employee; it simply says refers to the last chance agreement for applicable procedures.

6. The Program also includes lists of expectations for employees, supervisors and department CDL coordinators. Under "Employees Expectations," the Program states that

> as a DOT covered employee you must comply with all federal drug and alcohol testing regulations, which include, but are not limited to:
> 1. **Read** and be familiar with the . . . Drug and Alcohol Testing Program for Covered Employees.
> 2. **Report** to work alcohol and drug free.
>
> . . . .

4. **Submit** to all required alcohol and drug testing and **cooperate** with all aspects of the testing process.
5. **Proceed immediately** to the designated collection site when directed.

. . . .

9. **Test negative** for the presence of alcohol and drugs.
10. **Maintain** a current CDL . . . and **inform** employer of all license status changes.

(Emphasis in original)

7. Under Personnel Rule 1.3.3 C, "justifiable cause" requires that:
   1. The employee was informed of or reasonably should have known the consequences of his or her conduct;
   2. The rule, policy or procedure the employee has violated is reasonably related to the employing unit's safe and efficient operations;
   3. A fair and objective investigation produced evidence of the employee's violation of the rule, policy or procedure;
   4. The rule, policy or procedure and penalties for the violation thereof are applied consistently; and
   5. The suspension or discharge is reasonably related to the seriousness of the employee's conduct and his or her previous disciplinary history.

Events Leading To Termination

8. The Appellant was employed with the Department in a position that required a CDL and held such a license. In 2001, he signed a document entitled "Receipt of Department of Transportation (DOT) Commercial Driver's License & Coast Guard Drug Test Educational Materials," which acknowledged that he had received the materials and understood that it was his responsibility to read the material, abide by its requirements and resolve any questions about it with his supervisors. (Exhibit 22)

9. On February 2, 2004, the Appellant was arrested for driving under the influence of alcohol. His license to drive any vehicle was suspended on July 17, 2004, but he did not inform his supervisor of the suspension.

10. On July 27, 2004, the Appellant's supervisor was notified that the Appellant was to submit to a random drug test that day. After his supervisor gave him the form for the test, the Appellant went to her office and told her of the license suspension. He informed the supervisor that his lawyer had told him that since he no longer had a valid license, he did not have to take the test.

11. After the Appellant returned to work, his supervisor checked with the Drug Test Coordinator about whether the suspended license would relieve the Appellant of the obligation to take the test. The Coordinator responded that since the Appellant had not informed the supervisor of the suspended license until after he was selected for a random drug test, he was still required to take the test. However, when the supervisor tried to

find the Appellant to give him this information, she discovered that he had left work, telling a co-worker that he needed to see his lawyer.

12. The Appellant testified that his lawyer had told him not to discuss his DUI case, and therefore, he did not immediately inform his supervisor about the suspended license.

13. The Appellant contends that in mid-May or June, 2004, he began working in a position that did not require a CDL, although it did require a valid driver's license. The Department maintains that at the time the Appellant was notified of the random test on July 27, 2005, the Appellant still held a position that required a CDL.

14. The Department investigated the Appellant's actions concerning the test and determined that under DOT regulations and the City's Program, his refusal to take the test and failure to inform his supervisor of the change in his license status both violated the Program.

15. The Appellant received a memo from the Acting Deputy Superintendent for the Department entitled, "Notice of Employee's Opportunity to Respond to Disciplinary Action". (Exhibit 8) The memorandum proposed that the Appellant be terminated, but recommended that the sanction be reduced to a 30-day suspension if the Appellant agreed to successful completion of numerous conditions, including an evaluation by the City's Substance Abuse Professional, successful completion of the assigned course of treatment and passing all future random and follow up drug screening tests. The memo also stated that **"[f]ailure to meet any of these conditions will result in <u>your immediate dismissal.</u>"** (Emphasis in original.)

16. The memorandum referred to in Finding ___ included information on how to respond concerning the proposed disciplinary action, and on how to appeal it to the Civil Service Commission. However, there is no evidence that the Appellant filed an appeal.

17. On August 17, 2004, the recommended discipline was imposed by a letter from the Department Superintendent which reiterated the fact that failure to meet all conditions would result in the Appellant's "immediate dismissal". (Exhibit 6) The letter included information on how to appeal the discipline being imposed and the time limit for doing so, but there is no evidence in this record that the Appellant filed an appeal.

18. As part of the imposed discipline, the Appellant signed a "Return to Work Agreement," also referred to as a "last chance agreement," which the Program defines as a "contractual agreement between the City and an employee outlining requirements that must be met by an employee to retain employment after having engaged in a prohibited behavior." Paragraph 7 of that Agreement reads as follows: "I understand that any future confirmed "positive" findings from a drug or alcohol screening test . . . will result in termination."

19. In late August, 2004, the Appellant began a treatment program with a treatment provider he selected. The Certified Employee Assistance Professional working with the

Appellant recommended that he be randomly tested for drugs and alcohol 18 times during the first year following his return to safety-sensitive duty, 14 times during the second year and 8 times during the third year.

20. On April 14, 2005, the Appellant submitted to a random test and tested positive for alcohol. (Exhibits 9 through 11) He met that afternoon with the Department's South Electrical Services Division Director, who confirmed that the Appellant's test had been positive for alcohol, that he was now on paid administrative leave, and that he could lose his job. (Exhibit 9)

21. It was recommended that the Appellant be terminated, and he met with the Department Superintendent about the matter on May 3, 2005. The Superintendent terminated the Appellant's employment effective May 16, 2005. (Exhibit 4)

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to delegation from the Civil Service Commission under SMC 4.04.250.

2. The Department must show by a preponderance of the evidence that Department's decision to terminate the Appellant was made with justifiable cause. CSC Rule 5.31.

3. The Appellant testified that there were extenuating circumstances that should excuse his reporting to work on April 14, 2005, with alcohol in his system, in that two close relatives had passed away in 1995 and 1999, respectively, another passed away on April 10, 2005, and he was not able to attend any of the funerals. Although an employee might take time off from work following the loss of a close relative, these circumstances do not justify the Appellant's coming to work in violation of the City's Program, which is designed to protect the safety of all employees and the public.

4. The Appellant asserted that he was not properly notified that he was out of compliance with his last chance agreement. However, the Program does not require that employees be notified when they fail a random test after returning to work following the 30-day suspension for a positive test. It simply refers to the last chance agreement, which did not include a notification requirement. In any event, the evidence shows that the Appellant clearly aware by the afternoon of the day of the test that he had failed it. There is no error here.

5. The Appellant stated that he was unable to contest his termination because of the events surrounding his arrest for DUI and the subsequent loss of his license.

6. The Appellant had received a copy of the Program and stated that he had read it. The Program clearly required that he notify his supervisor of his suspended license. Although the Appellant may have believed that his attorney's advice prevented him from telling his supervisor about it, there is no evidence that he took any steps to seek clarification of the advice in light of the Program's requirement. Thus, the record does not support the

Appellant's claim that circumstances surrounding his license suspension prevented him from meeting Program requirements. And they had no impact on his ability to contest his termination eight months later.

7. It is not clear whether the Appellant was properly subject to random drug testing in July of 2004, when he left work rather than submit to a test. The evidence is conflicting on this point and consists entirely of the parties' testimony. However, the Appellant was given two opportunities to appeal the disciplinary results of that test – once when discipline was recommended, and once when it was imposed in mid-August of 2004. Over a month elapsed between the time the Appellant refused to submit to the test and the end of the period for appealing the discipline imposed. This gave the Appellant ample opportunity to contact his attorney for advice on whether filing an appeal would negatively impact his DUI case, and to file the appeal. He did not appeal, and he cannot now raise the issue in this appeal. The Appellant was not prejudiced in contesting his termination by events outside the workplace.

8. The evidence supports the Department's action. The Appellant was informed in the last chance agreement, and in the Superintendent's August 17, 2004 letter, of the consequences of a positive drug test. The Program's rules are clearly related to City Light's safe operations. The Appellant did not claim that the test was in any way tainted, or that the Program's rules were applied inconsistently. The Appellant's termination is reasonably related to the seriousness of his misconduct.

Decision

The Department had justifiable cause to terminate the Appellant, and the Department's decision is **AFFIRMED**.

Entered this 20th day of December, 2005.

Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner is subject to review by the Civil Service Commission. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules 6.02 and 6.03.

BEFORE THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

Rodney Lance Sudduth
Appellant,

V.

City Light
City of Seattle, Respondent

DISMISSAL ORDER

CSC No. 05-01-004

The Civil Service Commission hereby enters the following:

Whereas the Appellant filed an appeal regarding the Department's decision to terminate employment

Whereas the Commission delegated the hearing of the appeal to the City's Hearing Examiner

Whereas the Hearing Examiner issued a Decision on the appeal, December 20, 2005

Whereas neither party submitted a Petition of Review of the decision within ten days

Whereas the Commission reviewed and affirmed the Hearing Examiner's Decision at its January 18, 2006 meeting

ORDER

This appeal is hereby **DISMISSED WITH PREJUDICE.**

Issued this **18th** day of **January, 2006**

FOR THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

Glenda J. Graham-Walton, Executive Director

Commission decisions are final and conclusive unless a party of record makes application for a writ of review to the Superior Court of the State of Washington for King County within fourteen (14) days of issuance. You may only request that the Commission reconsider its decision if you believe that the decision is based on fraud, mistake or misapplication of fact or law. Such motion must be filed with the Commission within fourteen (14) days of the decision and may be decided on the record.

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