CITY OF ATLANTA
CIVIL SERVICE BOARD
FINDINGS OF FACT AND ORDER

APPEAL NO. 2019-032AP

Effective Date: August 21, 2019

APPELLANT: **Darryl James**

Hearing Date: January 30, 2020

City of Atlanta ("City")
Department of Public Works ("DPW")

ACTION:

Dismissal

HEARING OFFICER/BOARD:

Will N. Chandler, II Chair
Mary Ann Phyall
Sterling P. Eaves, DWB

APPEARANCES

City of Atlanta's Representatives:

Staci Miller, Esq., Asst. City Attorney

City/Respondents/Witnesses:

Kenya Moore, Dir. of Human Resources ("HR") for DPW
Dale Fambrough, Interim Dep. Commissioner, DPW
William "Bill" Eckel, Asst. Dir. of Fleet Services, DPW
Darryl James, Appellant

Appellant Counsel/Representatives:

Raemona Byrd-Jones, Esq., SEIU/NAGE

Appellant's Respondents/Witnesses:

Darryl James, Appellant

Observers:

Jacquita Parks, City Attorney's Office
Kimberly Myers, City Attorney's Office

STATEMENT OF AUTHORITY

Under the authority and provisions of Chapter 114, Article VI, Division 3, §114-546 through 556 of the Atlanta City Code ("Code"), a hearing in the above-referenced case was held before the above-named hearing officers of the Atlanta Civil Service Board ("Board") on the date set forth above in Conference Room 2174 of the City Hall Tower located at 68 Mitchell Street, Atlanta, Georgia 30303.

EXHIBITS

City of Atlanta:

C-1. Caduceus USA, drug screen of Darryl James dated May 10, 2019, 5 pages

C-2. City of Atlanta, DPW, letter to Mr. James, re: Return from Administrative Leave, dated August 20, 2019, 1 page

C-3. City of Atlanta, Notice of Proposed Adverse Action ("NPAA"), employee Darryl James, issue date August 1, 2019, 1 page

C-4. City of Atlanta, Notice of Final Adverse Action ("NFAA"), employee Darryl James, issue date August 20, 2019, 1 page

C-5. City Job Description for Vehicle/Equipment Mechanic II (190069) dated January 29, 2020, 2 pages

C-7. City of Atlanta, Code of Ordinances, §114-573, 1 page

C-8. State of Georgia, Department of Public Health, Low THC Oil Registration Card, Issued to Darryl James, issue date September 25, 2018, 2 pages

C-9 City redacted email stream, from Alton R. Greene, MD, Medical Director Caduceus USA Midtown Office, to Kenya J. Moore, City HR Dir., DPW, dated June 23, 2019, 2 pages

Appellant:

A-1. Low THC Waiver Form, Darryl A. James, Patient, dated September 24, 2018, 2 pages

Stipulations (Orally Presented at Hearing):

1. The Appellant admits that he failed two drug screens administered by the City.

2. The Appellant admits that the two drug screens were conducted 8 to 9 months apart in time.

3. The Appellant admits that both drug screens were positive for THC metabolites.

4. The Appellant admits that both drug tests were properly administered.

5. The Appellant admits that the results of both drug screens were valid.

VIOLATIONS

1. City of Atlanta Code of Ordinances, §114-573(a) Positive Test Result of the drug/alcohol analysis made under this division shall constitute cause for which disciplinary action may be imposed, up to and including dismissal.

2. City of Atlanta Code of Ordinances, §114-528(b)(20) Any other conduct or action of such seriousness that disciplinary action is considered warranted.

INFRACTION

"On May 3, 2019, Darryl James completed a DOT test which yielded positive results for a controlled substance. A split specimen was submitted and eventually reconfirmed positive. Management is recommending dismissal."

FINDINGS OF FACT

1. The Appellant was employed as a Vehicle/Equipment Mechanic II in DPW for more than two years at the time of dismissal from City employment.

2. Before employment with the City, the Appellant served in Afghanistan for six (6) years in the U.S. Army as a Diesel Mechanic.

3. In 2018, the City charged the Appellant with an on-the-job accident while he was in control of a City vehicle ("Accident"). As a result, he was administered a drug screen.

4. In May 2019, the Appellant was administered a second drug screen.

DISCUSSION

______The Appellant admits to having tested positive for THC metabolites, a prohibited substance according to the City no-tolerance policy, on two different drug screens which were administered by the City. In defense of himself, the Appellant argues that he has been in treatment for chronic PTSD by medical professionals for years and the low THC CBD oil ("CBD Oil") he ingests is pursuant to his doctor's prescription. The Appellant further argues that his daily ingestion of CBD Oil is legal.

Since the U.S. Army honorably discharged him from active duty, the Appellant has been treated for PTSD by the US Veteran's Administration ("VA"). At the federal level, possession and use of marijuana in any form is not legal and the medical professionals at the VA cannot prescribe CBD Oil for treatment. But the Appellant found a private licensed doctor who authorizes his use of CBD Oil. To comply with new state legislation, the Appellant has also obtained his State of Georgia Low THC Registration Card ("Registration Card") in 2018 which authorizes him to possess and transport small quantities of CBD Oil. It is not clear when the Appellant began use of CBD Oil, he certainly was ingesting it before he applied for his Registration Card.

In 2017, the Appellant was hired by DPW not only because he possessed the training and skills necessary to do the job but because he had a requisite Commercial Driver's License ("CDL"). His primary job duty was to repair City vehicles and equipment that operate on diesel fuel. The Appellant testified that not only are his knowledge and skills rare and in high demand, but he was the "go to guy" for the City repair facility where he worked. He was constantly the person all other employees went to for help or to drive a truck, troubleshoot equipment or a vehicle problem or just ask a question. He states that he was a reliable and conscientious City employee who was without any form of discipline. In fact, DPW Dir. Eckel testified that the Appellant was a good employee and who was never suspected of being "high" or impaired on his job.

Sometime in 2018, the Appellant was directed by his first-line supervisor to move a City refuse truck off of the lift where it was located in the facility and park it in the parking lot. Since he was the only employee at the time who possessed a valid CDL, he was therefore the only one authorized to drive City vehicles being repaired at the facility. It was not unusual for him regularly to be told to perform this task. Conversely, DPW Comm. Fambrough testified that he was unaware of any positions in the DPW repair shop facility that did not require the employee to possess a valid CDL. But the Appellant countered that his co-workers and his first-line supervisor continued to work at the facility for years without valid CDLs due to "medical reasons."

Returning to the Accident, the Appellant had not been the mechanic working on the truck before he was told to remove it from the lift, and he did not know and was not told that the brakes on the vehicle were not in operation. As he backed the truck down a short access ramp from the lift to the floor, he realized he could not stop the truck. Luckily, he was able to steer it to barely avoid colliding with another dump truck in the parking lot. Only scrapes on the bumpers of both trucks resulted. As he was only following directions, the Appellant believes that the accident was not his fault because his supervisor either didn't know about the brakes being

non-existent or he failed to tell the Appellant before he started operating the truck, thereby putting the Appellant in danger.

Because the City has web-cam video technology in its vehicles, the bumper impact of the two vehicles caused a video recording of the Accident to be created. While Dir. Eckel was routinely reviewing the web-cam video data, he saw the Accident. He asked the shop supervisor for the name of the employee who was in the driver's seat and he was told that the Appellant was that person. The Appellant testified that shortly after the Accident, a person from the Safety Department came to the facility and spoke to him and his supervisor.

Dir. Eckel also testified that the City procedure requires that the Safety Department person is to immediately, after an accident, transport the vehicle operator to drug testing. But the Appellant responds that he was not taken for a drug test until more than two weeks after the Accident. Dir. Moore testified that when there is a positive drug screen, City procedure also requires that the employee be immediately removed from their "safety sensitive" position, and to be put on administrative leave until the investigation into the incident is completed. The Mechanic II position is a safety sensitive position because as Dir. Eckel said, in addition to working on heavy City equipment and vehicles, the repair facility mechanics must be able to test drive and operate vehicles. After the accident, Ms. Moore met with the Appellant to make him aware of the positive Accident drug screen result, but in violation of City procedure, no further disciplinary action was taken, e.g., the Appellant was never removed from his safety sensitive position nor was he ever placed on administrative leave as the City procedures promulgate.

At that meeting with Dir. Moore, the Appellant made her aware that he was under medical treatment for PTSD and that he regularly ingested CBD oil as a part of that treatment. He also told her that he had begun the process of obtaining the new Georgia State-issued Registration Card. By way of explanation, Ms. Moore explained to the Board that at that time in 2018, there was great confusion at all levels of management including in the City HR department, DPW management and the City Attorney's Office, about how the City should handle positive THC results from employees under valid medical treatment that caused the positive result. Shortly thereafter, the Appellant obtained his Registration Card and he gave a copy to Dir. Moore. He continued to work just as before, and no discipline was ever issued against the Appellant for the Accident.

In 2019, the Appellant once again underwent a drug and alcohol screen, this time because of the annual DOT testing requirement of each CDL holder. He again tested positive. The City introduced into evidence the printed results of this test plus the email communication between the managing doctor of the City vendor providing drug screening services, Caduceus USA (Dr. Alton Greene) and Dir. Moore. Because of the test results, the City moved forward with the dismissal of the Appellant from City employment. Apparently unknown to Caduceus USA and DPW was that in the year prior, in 2018, CBD Oil was deleted from the U.S. Drug Enforcement Administration's list of prohibited substances, thereby making it legal to possess, transport and use for medical treatment of various chronic conditions including PTSD.[1] Effective in 2018, Georgia laws were enacted allowing legal possession and use of CBD Oil for medical treatment

[1] See https://www.anaviimarket.com/blogs/news/president-signs-2018-farm-bill-making-hemp-legal-here-s-what-you-need-to--know

of PTSD and to decriminalize the transport and possession of the oil within the State, the Georgia Department of Health began issuing an official Registration Card to qualified individuals.[2] Also, the medical testing community changed the maximum limit of THC a person could have in their drug screen urine to be 50ng/ML.[3] Because the Board is without definitive evidence to the contrary, it is left to interpret the Appellant's THC level results as 15ng/ML which was well below the accepted maximum limit.

Additionally and for decades, Federal law requires that the City must give preference to US veterans in the hiring and employment processes.[4] After hiring a veteran, tax credits are given to employers once the veteran has been on the job for at least 120 days.[5] All would agree with the Board that hiring and retaining veterans, especially disabled veterans, is not only financially but also as a matter of public policy, the right thing to do. Yet, even though the City hires veterans, it appears to throw out the baby with the bathwater when it takes its inflexible no-tolerance stance. Even when a positive drug screen is from a City employee who (1) is a veteran with valid medical reason for the substance to be in his urine, (2) did not fail his drug screen as defined by currently accepted medical limits and (3) has never appeared impaired or "high" and (4) has never failed to perform his job due to his use of CBD Oil, the City dismisses the employee.

Unfortunately, this is not the first time in the last year that an appeal based on this very question has been heard by the CSB: How should the City handle positive drug screens when the employee has a legally and medically accepted reason for the result? The steadfast answer remains that no matter *why* an employee has a positive drug screen from prohibited substances, the employee will be dismissed from City employment. In this way, the City keeps turning a blind eye to the fact that it employs humans - imperfect humans with maladies who will test positive for prohibited substances when taking accepted, medically necessary and prescribed substances for treatment of chronic conditions such as HIV or AIDS or PTSD. The City's no-tolerance policy requires its employees to decide between two calamitous options - either they take their prescribed medicine thereby improving the quality of, or even saving their life OR they don't take their legal medicine but they keep their City job because they will not have a positive drug screen result from a prohibited substance.

The Appellant also points out that in the process of dismissing him from City employment, a meeting of the Appellant with the DPW Commissioner was denied to him. While the meeting was originally scheduled, as soon as the Appellant realized he was unable to get back to the meeting in time from a personal emergency which took him out-of-state, he was told that no requested rescheduling would occur because he knew about the meeting time and should have planned accordingly. In this way the Appellant states that he was denied a critical opportunity to directly make his arguments to the one person who was authorized to change the employment termination decision.

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[2] See https://dph.georgia.gov/low-thc-oil-faq-general-public.

[3] See https://www.redwoodtoxicology.com/resources/cutoffs_methods/screen-confirm_urine

[4] See https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals/.

[5] See https://www.military.com/hiring-veterans/resources/tax-credits-for-hiring-veterans.html.

It is undisputed that the Appellant possesses skills in high demand, was a good and reliable City employee with no discipline in his file. After 6 years of voluntary military service from which he was honorably discharged, he was returned to the U.S. disabled with a chronic condition for which he receives medically necessary and legal treatment. But in opposition, the contracted testing medical lab for the City, Caduceus USA has promulgated that "CBD/THC oil is not considered a valid reason for causing a positive THC result." The Board is perplexed over this position since neither the City nor the Appellant called Dr. Greene to testify at the hearing. It therefore was not possible for the Board to obtain an answer to why, given the enabling laws as well as accepted medical standards which have been in effect well before 2019, this City vendor continues to take this position. Directed by this vendor's inaccurate medical conclusion, the City has its justification to remain unwavering in enforcing its no-tolerance of positive drug screen policy.

In conclusion, and in light of the foregoing, this appeal points out that the City has additionally violated accepted mores of fairness and tolerance. But most disturbing is that the City has virtually made illegal that which the Federal Government and the State of Georgia have made legal. Accordingly, CSB strongly recommends that the City urgently reevaluate its no-tolerance policy and practices to not only be in compliance with applicable CBD Oil laws but with the Americans with Disabilities Act which *requires* that the City accommodate physically and mentally challenged City employees. The Board also recommends that the City direct Caduceus USA to reevaluate its drug screen results and procedures to comply with current medical standards and the law.

If however, the City is unwilling to adjust the no-tolerance drug policy to carve out an exception as a legally required accommodation for those employees who are under medically supervised treatment, it should at a minimum, give to the Appellant that which other employees in the DPW repair facility have already and for some time been given: The Appellant keeps his Vehicle/Equipment Mechanic II job, but he will not drive City vehicles, he will not be required to maintain or be annually drug-tested for his CDL, and he will be exempted from random drug screens because his position will therefore not be defined as safety sensitive- all due to "medical reasons."

ORDER

This Board **GRANTS THE APPEAL** and directs the City to reinstate the Appellant to City employment, paying him all wages and benefits retroactive to the effective date of his employment termination in accordance with City Code.

This the 12 th day of February 2020.

Signed:

Will Chandler

Will N. Chandler, II Chair

Mary Ann Phyall

Mary Ann Phyall

Sterling Eaves

Sterling P. Eaves, DWB