

CITY OF ATLANTA  
CIVIL SERVICE BOARD  
**FINDING OF FACT AND ORDER**

APPEAL No. 2019-016AP

Effective Date: March 20, 2019

Hearing Date: July 28, 2022

APPELLANT:

KEVIN TUCKER

DEPARTMENT:

DEPARTMENT OF PARKS &  
RECREATION

ADVERSE ACTION:

Dismissal

HEARING PANEL:

Robert Hawkins, Chair

Carl Touchstone

Constance Russell

**FINAL ORDER**

**APPEARANCES**

City of Atlanta Representative:

John Gainey, Esq.

City of Atlanta Law Department

Appellant Representative:

Gwendolyn R. Gillespie

GRG, Labor Consultant

**STATEMENT OF AUTHORITY**

Under the authority and provisions of Chapter 114, Article VI, Division 3, Sections 114-546 through 556 of the Atlanta City Code (“the Code”), a hearing in the above-referenced case was held before the above-named hearing officers of the Atlanta Civil Service Board (“the Board”) on the date set forth above, via a Zoom Webinar, facilitated by the City, pursuant to Mayor Andre

Dickens' Executive Order regarding the Covid-19 Pandemic

### **BASIS FOR ADVERSE ACTION**

City of Atlanta Code of Ordinances:

- (1) Sec. 114-569(d) Use of Substances—An employee must not report to work or be subject to duty while the employee's ability to perform job duties is impaired due to the use of alcohol, prescription or other legal drugs and substances.
- (2) Sec. 114-528(b)(20)—Any other conduct or action of such seriousness that disciplinary action is considered warranted.

### **PANEL FINDINGS AND CONCLUSIONS**

#### **FINDINGS OF FACT**

The Appellant was employed with the City of Atlanta Department of Parks and Recreation as a recreation operations assistant. His primary responsibilities involved driving for senior programs. On December 18, 2018, Appellant was involved in an accident while driving a City minibus. He did not have a CDL license and had received no training in operating the vehicle. The accident occurred when Appellant pulled under an overhang at the entrance to a location and the emergency exit on top of the vehicle got caught on the driveway overhang's clearance bar. A Department safety and training officer and law enforcement came to the scene. Appellant was directed by the safety officer to take a drug test. He was not cited by the police for a traffic violation.

As part of the drug testing procedure Appellant was given a document titled "Reasonable Suspicion Memo." The document recites that Appellant was required to take a drug test based on reasonable suspicion. However, none of the criteria set forth in the document to support a finding of reasonable suspicion are checked. The accident report prepared by the safety officer is also devoid of any information indicating a reasonable suspicion that Appellant was impaired or under the influence of drugs or alcohol at the time of the accident.

Appellant tested positive for THC metabolites. He testified that he had smoked marijuana five days before the accident. Based on those circumstances Appellant was dismissed.

## LEGAL FINDINGS AND CONCLUSIONS

Appellant was terminated effective March 20, 2019, for alleged violations of City of Atlanta Ordinance Sections 114-569(d) and 114-528(b)(20). The Appellant contends he should be reinstated because the City failed to follow its own procedures. The core facts are not contested. The Appellant was driving a City vehicle, he was involved in an accident, he was directed by a City safety officer to take a drug test, he tested positive and admitted to using marijuana five days before the accident. Those facts are, however, the start of the analysis—not the end.

Sec. 114-569(d) of the City’s ordinances provides that “[a]n employee must not report to work or be subject to duty while the employee’s ability to perform job duties is impaired due to the use of alcohol, prescription or other legal drugs and substances.” In the present case the substance at issue is marijuana, which is not a legal drug or substance under Georgia law. Additionally, while Appellant admitted to using marijuana five days prior to the accident that triggered his drug test, there is no evidence before the Board that he was impaired at the time of the accident. For those reasons the Board finds that City Ordinance Sec. 114-569(d) is not applicable to the present case and provided no grounds for Appellant’s termination.

The second ground for termination, City Ordinance Sec. 114-528(b)(20) provides that employees may be disciplined for “[a]ny other conduct or action of such seriousness that disciplinary action is considered warranted.” Sec. 114-528(b)(20) is a catch all provision that allows the City to address situations that merit discipline but may not be covered by more specific provisions in the Code. It does not, however, exist in isolation and must be considered in relation to other pertinent ordinances.

The events at issue in the present case are directly addressed in the City’s motor vehicle policy. The drug testing procedure set forth in the motor vehicle policy states:

“In the event that a vehicle operator is involved in a motor vehicle accident or collision, all supervisors or safety officers notified of the occurrence of a motor vehicle accident or collision shall ensure that an alcohol/drug analysis is conducted if (1) the vehicle operator is cited for any traffic code violations, or (2) reasonable suspicion exists. Reasonable suspicion must be based on specific, objective facts about the conduct of an individual that would lead the reasonable person to suspect that the individual is or has been using drugs. Observations which may constitute a factual basis for determining reasonable suspicion may include but are not limited to the following, alone or in combination:

- Slurred Speech.
- Alcohol on breath.
- Inability to walk a straight line.

- Behavior which is so unusual and inappropriate in its nature as to create an unsafe work environment or disrupt the normal working condition.
- Possession of alcohol and/or illegal drugs.

City of Atlanta Vehicle Use Policy Sec. 25.

Based on the plain language of the vehicle use policy the mere fact of an accident is not sufficient to authorize requiring an employee to submit to a drug test. Rather, the employee must have been given a traffic citation or reasonable suspicion of drug use must be present. Here there is no evidence that either precondition existed. Law enforcement was called but Appellant was not issued a traffic citation. The responding safety officer provided no indication in either the accident report or the reasonable suspicion memo that there was reason to suspect drug use. Accordingly, the Board concludes that Appellant was compelled to take a drug test in violation of the City's vehicle use drug testing policy. His subsequent admission of having used marijuana days earlier was made in the context of contesting the proposed termination triggered by the unauthorized drug test.

As the City's representative noted in his closing remarks to the Hearing Panel, the City has an interest in disciplining employees after they have displayed behavior that warrants a drug test and the test is positive. (Emphasis by the Board). That is not what happened here. The record before the Board is that the employee was not given a traffic citation and there is no evidence that he was impaired at the time of his accident. Under those circumstances the discipline for a first accident is not termination.

The evidence in the present case establishes the City compelled the employee to take a drug test in violation of its own policies. The employee subsequently made incriminating statements in an effort to save his job. Clearly, but for the unauthorized drug test the employee would not have disclosed his prior drug use. Taking the admission of prior drug use at face value, the discipline for employees who admit to substance abuse is not necessarily termination. Such employees may be referred to EAP or be subject to other interventions short of termination.

### **ORDER**

Appellant was terminated based upon a policy associated with the finding that a motor vehicle accident can be attributed to an employee's drug use. The facts presented here do not support application of that policy. There is no evidence that the Appellant was in fact impaired at the time of the accident and no evidence giving rise to a reasonable suspicion of impairment. Because the City failed to comply with its own policies the Appellant was improperly required to submit to a drug test and later admitted to prior drug use. Rather than being considered independently, the results of the unauthorized drug test and the subsequent admission were

combined to support termination. Had the City followed its own procedures, however, neither the test nor the admission would have occurred. Based on the evidence presented and the City's failure to comply with its own drug testing protocol, the Board finds that the City of Atlanta has failed to meet its burden of proof and **REVERSES** the discipline imposed by the City against the Appellant and **GRANTS** the appeal.

This 29th Day of August 2022.

*Robert Hawkins*

Robert Hawkins, Chair

*Constance Russell*

Constance C. Russell

*Carl Touchstone*

Carl Touchstone