

CITY OF ATLANTA
CIVL SERVICE BOARD
FINDINGS OF FACT AND ORDER

APPEAL No. 2023-018

Effective Date: June 27, 2023
Hearing Date: November 16, 2023

APPELLANT: Darro Patterson

City of Atlanta
Department of Watershed Management

ADVERSE ACTION:
Dismissal

HEARING OFFICERS:
Herman L. Sloan, Chair
Constance Russell
Suzanne Wynn Ockleberry

APPEARANCES

City of Atlanta Representative:
Robert Steinberg, Esq.
Dominique Smiley, Esq.

City Witnesses:
Jenelle Bonds
Felicia Collins

Appellant:
Darro Patterson

Appellant Witnesses:
Self

STATEMENT OF AUTHORITY

Under the authority and provisions of Chapter 114, Article VI, Division 3, Sections 114-546 through 556 of the City of Atlanta Code of Ordinances (“Code”) a hearing in the above-referenced case was held virtually via Zoom, facilitated by the City, pursuant to Mayor Andre Dickens Executive Order regarding COVID-19, and before the above-named hearing officer of the Atlanta Civil Service Board (“Board”) on the date set forth above.

EXHIBITS

City of Atlanta:

- C1 – Caduceus Test Results
- C2 – Notice of Proposed Adverse Action
- C3 - Notice of Final Adverse Action
- C4 - City of Atlanta Code Municipal Sections

Appellant: C5 - City of Atlanta Drug and Alcohol Policy
C6 – “Employee Issue” Email Thread
None

CHARGES

Dismissal for violation of:

Code Section 114-573 – *Results of drug/alcohol analysis:*

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.

and

Code Section 114-528(b)(20) *Cause for action.*

...

(b) The following actions constitute cause for which disciplinary action may be imposed, but the imposition of disciplinary action shall not be limited to such offenses:

...

(20) Any other conduct or action of such seriousness that disciplinary action is considered warranted.

STIPULATED FACTS BY THE PARTIES

None.

FINDINGS OF FACT

1. Appellant worked for the City of Atlanta Department of Watershed Management (COA) at the time of the incident which led to his dismissal.
2. At the time of the incident which led to his dismissal, Appellant had been employed by COA for 4 years.
3. While employed by COA, Appellant had a Commercial Drivers License (CDL).
4. As part of his employment with COA, Appellant was required to undergo random alcohol and drug testing to maintain his CDL.
5. On April 22, 2023, Caduceus, the drug testing facility for COA, reported that

- Appellant tested positive for cocaine metabolites. (C-1).
6. On June 12, 2023, Appellant was issued a Notice of Proposed Adverse Action (NPAA) for the positive drug screen. (C-2).
 7. The NPAA notified Appellant that the proposed discipline was a dismissal for violation of Code Sections 114-573 and 114-528(b)(20). (C-2).
 8. Appellant was advised that the effective date of the dismissal was June 12, 2023. Appellant was further advised that he had until June 20, 2023 to provide a response to the NPAA. (C-2).
 9. On June 15, 2023, Appellant made an oral response to the NPAA. (C-3).
 10. Appellant was issued a Notice of Final Adverse Action (NFAA). The NFAA advised Appellant that he was being dismissed for violation of Code Section 114-573 and 114-528(b)(20). The dismissal was effective on June 23, 2023. (C-3).

DISCUSSION

Due to Mayor Andre Dickens' Executive Order and COVID-10 pandemic guidelines, the appeal by Darro Patterson was called virtually at 2:00 p.m. on November 16, 2023 via the Zoom Internet platform.

After hearing arguments from both sides and reviewing all of the evidence presented, the Board finds that there was insufficient evidence presented by the City to affirm the dismissal issued to Appellant.

Jenelle Bonds, a COA Benefits Analyst and Designated Employee Representative (DER), testified that in her role as DER, she receives drug test results for all COA employees. Ms. Bonds testified that when drug testing is performed by Caduceus, a urine specimen for the employee is put into two (2) vials to allow for split testing. Split testing occurs if there is a positive result for drugs on the first specimen and the second specimen is tested by another lab to confirm the positive results by the first lab. Ms. Bonds testified that the COA procedure is that if an employee tests positive for drugs, the lab is supposed to contact the employee and ask if the employee wants the second specimen to be tested by a second lab which is paid for by COA. Ms. Bonds testified that she could not affirmatively state that the MRO called Appellant regarding his positive drug test or

determine from COA Exhibit 1 if Appellant's split specimen was sent to a second lab.

Ms. Felicia Collins, a Human Resources Manager with COA, testified that she received an email from a manager regarding Appellant's refusal to complete the alcohol and drug testing required by Department of Transportation (DOT). She testified that she notified the manager that Appellant had to undergo alcohol and drug testing because he had a CDL. Ms. Collins testified that she was informed by Ms. Bonds that Appellant had failed the drug test. She testified that employees who test positive for drugs, even if a first offense, are terminated.

Appellant testified that he did not know about a positive drug test until he received the NPAA. He testified that his phone number was on the testing form and he was never contacted by Caduceus about the results of his drug test. Appellant testified that Caduceus was required to contact him within 48 hours of a positive drug test. He also testified that if a person holding a CDL tests positive for drugs, the Medical Reviewing Officer (MRO) for the lab has to report the results to the Federal Motor Carrier Safety Administration (FMSCA) Clearinghouse which was not done for his positive drug test.

Based upon the evidence presented during the hearing, the Board finds that Appellant was not provided with due process as to how his drug testing and reporting was conducted which requires overturning his dismissal. During his testimony, Appellant referenced various federal regulations regarding the failure by Caduceus to afford him due process. 49 C.F.R. §40.133 allows an MRO to verify a positive test without speaking to the employee before verification in limited instances: a) the employee declines to discuss the test results; b), the DER has contacted the employee and instructed the employee to contact the MRO and 72 hours have passed without the employee contacting the MRO; or c) neither the MRO or DER have been able to reach the employee within ten (10) days of the positive result. 49 C.F.R. §40.23 requires an employer to immediately remove an employee from safety sensitive positions upon receipt of a verified positive drug test. Based upon the evidence presented at the hearing, there is no evidence that either the MRO or Ms. Bonds, as the COA DER, contacted Appellant before the MRO reported a verified positive drug test for Appellant to COA. Nor is there an indication that any of the limited instances allowing an MRO to verify the positive drug test without first speaking to the Appellant are applicable in this matter.

49 C.F.R. §40.153 requires the MRO to advise an employee of the right to have the split specimen tested if the first specimen is positive for the presence of drugs. There is no evidence that the MRO for Caduceus complied with this regulation. Further, 49. C.F.R. §40.171 requires that a MRO must direct the first laboratory that tested the first specimen to have the split specimen tested by a second lab. There is no evidence that the MRO for Caduceus complied with this regulation or that the split specimen was tested by a second lab. In fact, COA Exhibit 1 does not show that the split specimen test was reviewed or verified by a MRO.

ORDER

Based upon the evidence presented, the Board modifies the discipline issued to Appellant and OVERTURNS his dismissal for violation of Code Sections 114-573 and 114-528(b)(20).

This the 27th day of November, 2023.

Respectfully submitted,

Herman L. Sloan

Herman L. Sloan, Chair

Constance Russell

Constance Russell, Board Member

Suzanne Wynn Ockleberry

Suzanne Wynn Ockleberry, Board Member