

CIVIL SERVICE COMMISSION MINUTES

December 7, 2022

A meeting of the Civil Service Commission was held at 2:34 p.m., via Videoconference/Teleconference.

Present via Videoconference:

Bryan J. Fletcher
Melissa Johnson
Ira Sharp
Peter B. Smith

Absent:

Will Rodriguez-Kennedy

Comprising a quorum of the Commission

Support Staff Present:

Todd Adams, Executive Officer
Morgan Foley, Commission Legal Advisor

Approved
Civil Service Commission
January 4, 2023

**SAN DIEGO COUNTY CIVIL SERVICE COMMISSION
REGULAR MEETING AGENDA
DECEMBER 7, 2022**

1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation

2:30 p.m. OPEN SESSION: Videoconference/Teleconference

Notice pursuant to Government Code Section 54954.2.

**CLOSED SESSION AGENDA
Videoconference - Not open to public**

- A. Commissioner Johnson: CONSIDERATION OF PUBLIC EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(B)) James J. Cunningham, Esq., on behalf of **2022-145**, former Building Maintenance Engineer, appealing a Final Order of Removal and Charges from the Department of General Services.

**OPEN SESSION AGENDA
Videoconference/Teleconference**

ORDER OF BUSINESS

A. **ROLL CALL**

**Present: Fletcher, Johnson, Sharp, Smith
Absent: Rodriguez-Kennedy**

B. **APPROVAL OF MINUTES:** Regular meeting of November 16, 2022.

Motion by Commissioner Smith to approve the minutes of November 16, 2022; seconded by Commissioner Sharp.

Motion carried with all Commissioners present in favor.

C. **NON-AGENDA PUBLIC COMMENT:**

None.

D. **AGENDA ITEM DISCUSSION:**

Mr. Cunningham requested to speak on item #3.

E. FORMATION OF CONSENT AGENDA

Item Nos. 1, 2, 4 and 5 formed the Consent Agenda.

Motion by Commissioner Smith to approve the Consent Agenda; seconded by Commissioner Sharp.

Motion carried with all Commissioners present in favor.

F. DISCUSSION ITEMS

Item No. 3 was pulled for discussion.

AGENDA ITEMS

TELECONFERENCED PUBLIC MEETINGS

1. Continuance of Teleconferencing Meeting Option Pursuant to Government Code Section 54953(e).

RECOMMENDATION: Approve motion to find, pursuant to Government Code section 54953(e)(3), the Civil Service Commission has reconsidered the circumstances of the State of Emergency and state and local officials continue to recommend measures to promote social distancing.

Approved.

CONFIRMATION OF ASSIGNMENT

2. Commissioner Smith: Bradley Fields, Esq., on behalf of **2022-211P**, **2022-212P**, and **2022-213P**, appealing their non-selection for the classification of Deputy Probation Officer by the Probation Department.

Confirmed.

DISCIPLINE

Findings

3. Commissioner Johnson: James J. Cunningham, Esq., on behalf of **2022-145**, former Building Maintenance Engineer, appealing a Final Order of Removal and Charges from the Department of General Services.

Mr. Cunningham requested to speak on this item; however, when given the chance, he stated that he was having computer problems and told the Commission to "go forward".

FINDINGS AND RECOMMENDATIONS:

Employee 2022-145 appealed a Final Order of Removal and Charges removing him from the position of Building Maintenance Engineer in the Department of General Services ("Department"). The Commission appointed, Commissioner A. Melissa Johnson, to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. A hearing was held on October 3 and 4, 2022.

The causes of discipline are dishonesty, inefficiency, insubordination, profanity, and failure of good behavior.

During the hearing, the Sr. Departmental Human Resources Officer referred to notes that she had prepared for her testimony at the hearing. The Department Director, Marko Medved, prior to making his decision to remove the Employee from his position, discussed the Employee's proposed discipline with a Building Maintenance Supervisor, a Facilities Support Manager, the Chief of Facilities Operations, the Assistant Director, and Departmental Human Resources Officers.

Employee contends these types of oral communications should have been memorialized in some sort of writing or investigative report.

In responding to the Employee's motion to require a second *Skelly* conference based on an alleged "secret investigation" by Mr. Medved, the Department contends that all of the conversations he had (except for the post-*Skelly* verbal report and discussion with the *Skelly* Officer) took place "prior to the issuance of the Proposed Order of Removal [and Charges]." It was the testimony of the Sr. DHRO that meetings with Mr. Medved and the Assistant Director occurred both before the Proposed Order of Removal and Charges was prepared (prior to the *Skelly* conference) and after the conference and before the Final Order of Removal and Charges was issued.

The Commission agrees with the Department's analysis of *Skelly* in addressing the Employee's motion to require a second *Skelly* conference. The Employee has not advanced evidence to persuade the Commission that there was a violation of the Employee's procedural due process rights prior to the

decision to remove the Employee. It is the Employee's burden to prove that new charges, or new potential discipline based on new charges, have been injected into this proceeding post-Skelly. He has not met this burden. Accordingly, the Employee's motion to continue the hearing and require a second Skelly conference is **DENIED**.

During the period of July 29, 2021, through December 30, 2021, the Employee was absent from work for 510.9 hours. This is 32 hours less than the Department's finding of 542.9 hours on the basis that 32 of those hours were County holidays, including Labor Day, Veteran's Day, Thanksgiving, and the day following Thanksgiving. These holidays, representing 32 hours, should not be included in the hours for which he was absent.

Of the remaining 510.9 hours the Employee provided doctors' notes excusing him from work for 240 of those hours. Even with a doctor's note, the absences are correctly included in the Department's analysis and reflect that the Employee was absent from work slightly more than 58.5% of the time during that period. This finding considers that no time protected by family medical leave was included in the calculation of hours due to absences.

Besides his absenteeism issues, the Employee frequently arrived late at the start of his shift as many as 11 times between August 30, 2021, and December 3, 2021. He failed to accurately record his arrival time on five days, resulting in his being overpaid for a total of 1.70 hours over those five (5) days.

In late September of 2021, the Employee was assigned the task of painting parking space lines in a County parking lot, using yellow paint. The Employee deliberately applied yellow paint to the exterior of his County work truck. The Employee also splattered paint on the exterior and interior of the same truck, either deliberately or without any concern that his hands, clothes, or both, were covered with wet paint when he entered and subsequently operated the truck.

On or about September 28, 2021, the Employee's supervisor directed him to clean the paint from the interior and exterior of the truck. The Employee ignored this directive. Thereafter Employee's supervisor gave multiple and additional directives to the Employee to clean the truck, all of which were ignored by the Employee until his supervisor was transferred to a different location when the Employee finally cleaned the

paint off the truck. This refusal to comply with a supervisor's directive lasted for two months.

On four occasions the Employee inappropriately used profanity in the workplace, even after being admonished to stop doing so, and in meetings with not only his supervisor but Human Resources personnel. The indiscriminate use of profanity in these settings was typically sudden responses and in a loud, or shouting, voice.

Employee is not guilty of dishonesty based on the reasonable explanation by the Employee as to his timekeeping entries. Additionally, Employee was uncertain about whether he was required to provide COVID-19 testing results once he had received full-vaccination status on September 8, 2021.

Employee is guilty of inefficiency due to his unwillingness or inability to arrive to work on time and avoid such an extraordinary number of unplanned absences. It is recognized that during this period the Employee was faced with personal and extraordinary difficulties due to the unexpected loss of his father and fiancé. However, these personal struggles do not completely absolve him of his responsibilities to others, especially those in the Department who depend on him and support him in his work.

Employee is guilty of insubordination for his unwillingness to follow directions from his supervisors and others in the Department. Regardless of his mental struggles resulting from personal loss, it is inappropriate to lash out to others, to verbally abuse others through the use of profanity and yelling, to deliberately damage County property, to not heed the direction of supervisors and Human Resources staff, and to fail to follow the simplest of directions and requirements as an employee, such as to come to work and to be on time.

Employee is guilty of profanity by the unprovoked and inappropriate use of expletives to and around co-workers, supervisors, and the Department's Human Resources representatives.

Employee is guilty of failure of good behavior for the reasons expressed above. It is unacceptable for the Employee to disregard County and Department policies and procedures with such conduct he has demonstrated. Even accepting some mitigating circumstances, it is only reasonable for the Department to expect that the Employee acts courteously, avoids outbursts and profanity, cares for County property

properly, and follows directions from his supervisor, all to support a conflict-free workplace.

The Department asks that the Commission uphold the Employee's removal. The Department stresses that it isn't one of the Causes stated, but the totality of the Causes that justify his removal. When asked about each of the Causes, and whether each, alone, would justify removal Mr. Medved admitted that he could not support the action; that it was the totality of the conduct complained of. Mr. Medved further explained that it was his belief that using progressive discipline (e.g., an unpaid suspension) would be ineffective.

The Employee has acknowledged that much of his conduct was the result of his grieving over the sudden loss of his father and fiancé, and issues that follow such losses. While he has explained some of his conduct, he also blames others for causing him to react the ways that he did.

While the Employee's conduct should not be rewarded, it remains the Department's burden to produce the evidence to support the Causes presented, and to prove that the Employee has committed the violations alleged. As mentioned above, that burden was not met with respect to Cause I, dishonesty. While it appears that the other causes can be somewhat mitigated (but not excused) by the emotional struggles of the Employee following such traumatic events in his life that occurred in 2021, and although the Employee's skills were sufficient for the position he held for four and one-half years, the Commission agrees that the Employee has not provided evidence that he recognizes his obligation to conform to the basic dictates of the workplace, that is, that he is responsible for (1) avoiding disruption from outbursts and inappropriate use of profanity; (2) carefully maintaining in good order his workplace, tools, and equipment; and (3) the avoidance of inefficiency by making it to work on time every day he is assigned and not excused by his supervisor.

Based on the findings and conclusions set forth above, it is hereby recommended that the Final Order of Removal and Charges is affirmed; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Commissioner Johnson to approve the Findings and Recommendations; seconded by Commissioner Sharp.

During discussion of this motion, Commissioner Smith stated, after reviewing the documents related to this appeal, he agrees with the overall decision, however, he would have found the Employee guilty of dishonesty. He emphasized that all employees are entitled to work in an environment free from harassment, hostilities from other employees, and profanity. He stated it is important for the Commission to explain the rationale for its conclusions and decisions regarding appeals under its jurisdiction and he plans on making more statements in the future to provide employees, departments, and the public greater insight.

Motion carried with all Commissioners in favor.

SELECTION PROCESS

Findings

4. **2022-214**, Applicant, appealing the Department of Human Resources' removal of his name from the employment list for Deputy Sheriff Cadet-Detentions/Court Services.

RECOMMENDATION: Ratify. Appellant has been successful in the appellate process provided by Civil Service Rule 4.2.2 and his name has been returned to the employment list.

Ratified.

OTHER MATTERS

Extension of Temporary Appointments

5. Health and Human Services Agency

1 Office Assistant: **2022-215**

RECOMMENDATION: Ratify.

Ratified.

ADJOURNED: 3:21 p.m.

ASSISTANCE FOR THE DISABLED:

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(619)531-4908. To the extent reasonably possible, requests for accommodation or assistance should be submitted at least 24 hours in advance of the meeting so that arrangements may be made. An area in the front of the room is designated for individuals requiring the use of wheelchair or other accessible devices.