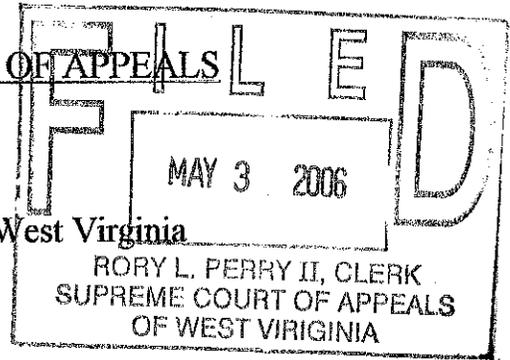


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

at Charleston

Appeal from the Circuit Court of Cabell County, West Virginia



CAPTAIN EARL F. LEGG, JR.,
Plaintiff-Appellee,

vs.

SUPREME COURT CASE NO. 33044

Cabell County Circuit Court Case No. 05-C-394
Judge John L. Cummings

MAYOR DAVID A. FELINTON, and
THE CITY OF HUNTINGTON, W.Va. and
THE CITY OF HUNTINGTON, W.Va.
FIREFIGHTER'S CIVIL SERVICE
COMMISSION,
Defendants-Appellants.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

This matter comes before the Court by way of a Petition for Appeal of the July 14, 2005 Order of Cabell County Circuit Court Judge, John L. Cummings, overturning the February 17, 2005 decision by Appellant, City of Huntington, W.Va. Firefighter's Civil Service Commission ("Commission") pursuant to §8-15-25 of W.Va. Code, as amended, to terminate Appellee's 15 year employment as a decorated, veteran Captain with the City of Huntington Fire Department for a "substituted - refusal to test" drug screen. Omitted from Appellant's Statement of the Case is the fact that this February 17, 2005 Order was entered after Captain Legg had already been terminated, replaced and given an exit interview. Said decision of the Appellant Commission was contrary to, and overturned, the July 16, 2004 decision of the City of Huntington Firefighter's Internal Hearing Board which held that exigent circumstances did not exist to justify a reasonable suspicion search under Policy 19-J of the Appellant's General Policy and Procedure Manual and that the City of Huntington did not prove that the Appellee substituted or altered his urine specimen.

In its Brief, the City of Huntington (Appellant) further omits several key facts of the case or is otherwise inaccurate in its representation of the facts of this case to the Court. Specifically, Appellee would point out the following omissions and/or inaccuracies.

After Firefighter Michael Gianinni's April 10, 2004 arrest for possession of a "controlled substance" (Transcript p. 32) not crack cocaine as stated on page 1 of

Appellant's Statement of the Case, Firefighter Giannini met with Deputy Chief Beckett at Deputy Chief Beckett's direction. While Firefighter Gianinni did indicate to Chief Beckett that several firefighters needed help, at no time did he indicate to Deputy Chief Beckett that Captain Legg needed help. (Transcript p. 42) In fact, he testified that the words "Captain Earl Legg needs help" never came out of his mouth. (Transcript p. 42). Also omitted by the Appellant is the important fact that Firefighter Gianinni never testified that he had witnessed any type of abnormal behavior on the part of Captain Legg. (Transcript p. 37 thru 42) and nowhere in the record does Firefighter Gianinni tell Chief Fuller, Deputy Chief Beckett, or any supervising officer, that he has witnessed any drug abuse by Captain Legg. As well, Appellant omits in its Statement of the Case that Brandi Gianinni never testified she had personally witnessed any type of abnormal behavior on the part of Captain Legg consistent with the use of prohibited narcotics (Transcript p. 29 thru 36).

Further, witness Brandi Gianinni never testified that Captain Legg got her husband involved with smoking crack cocaine (Transcript p. 34) and her testimony was so unclear and confusing regarding how Captain Legg was supposedly involved in getting her husband to abuse drugs and be arrested that the President of the Firefighter's Civil Service Commission, Charles Bagley, stated on the record that he was "not really clear as to why you're blaming Captain Legg for your husband's arrest," and Ms. Gianinni refused to clear that confusion up for the Commissioner stating "If I have to [answer Commissioner

Bagley's question], I will, but if I don't have to, I don't wish to." (Transcript p. 36).

While Appellant states in its Statement of the Case that it is "significant to note" that Michael Gianinni was allegedly "begging" his wife not to tell Deputy Chief Beckett that Captain Legg smokes crack cocaine in the hose tower after everyone goes to bed and also drinks beer on duty (Transcript p. 48 and Memo of Record of Deputy Chief Jerry Beckett), at no time did Deputy Chief Beckett ask the Gianinni's to sign-off on his "Memo of Record" and at no time does Firefighter Gianinni testify before the Commission that he was begging his wife not to make such allegations to Deputy Chief Beckett (Transcript p. 37 thru 42).

The next omission of the Appellant on page 1 of its Statement of the Case regards Chief Fuller's decision to request a reasonable suspicion drug test of Captain Legg after speaking with Deputy Chief Beckett on April 14, 2004. It is very significant to note here that Chief Fuller waited until April 18, 2004 to request a reasonable suspicion drug test some four days after he testified "I thought we had an emergency on our hands" (Transcript p. 88). The way the test was requested/handled is that at approximately 7:00 a.m. on Sunday, April 18, 2004, Appellant, through its employee and removing officer, Huntington Fire Chief Greg Fuller, requested Captain Legg to submit to a "reasonable suspicion" drug screen pursuant to Policy 19-J of the City's General Policy and Procedure Manual. Again, this request for a reasonable suspicion drug test was made four days after the aforesaid complaint was made to Deputy Chief Jerry Beckett by civilian Brandi

Giannini. Neither the crack cocaine allegation made by Brandi Gianinni against Captain Legg nor the consumption of alcohol allegation she made were substantiated by any witness called by the City at hearing. Specifically, the Appellant in its Brief failed to direct this Court to the actual testimony of Deputy Chief Beckett that he had never observed Captain Legg smoking crack cocaine on duty, never observed Captain Legg drinking beer on duty, never had reports from other firefighters that they found any evidence Captain Legg, or anyone for that matter, smoked crack or drank beer in the hose tower and he went on to testify that he felt Captain Legg to be an "excellent" firefighter and "good" supervisor (Transcript p. 54 & 55). Further omitted from Appellant's Statement of the Case is the fact that, upon receiving the information from Ms. Giannini on April 14, 2004, neither Chief Fuller, Deputy Chief Beckett nor any supervising officer called Captain Legg to come into department headquarters and notify him he was under investigation (Transcript p. 55 & 56) or request a reasonable suspicion drug screen until April 18, 2004, when arrangements had been made by Appellant, City of Huntington, W. Va., through its employee, Chief Fuller, or at his direction, to have an employee of E.M.S.I. testing facility located at 529 6th Avenue, Huntington, West Virginia, open said facility at approximately 7:30 a.m. for the specific purpose of collecting a urine sample of the Appellee that Sunday.

Continuing on page 1 of Appellant's Statement of the Case, Appellant inaccurately characterizes Appellee's D.U.I. arrest as a "recent" arrest when, in fact, Captain Legg's

arrest was not "recent" as he was arrested in September 2002 and he had already been disciplined for that situation which occurred in Ohio, not during work hours and in Captain Legg's personal vehicle.

While the Appellant is correct in its Statement of the Case that the Appellee consented to the reasonable suspicion drug test and voluntarily accompanied Chief Fuller to said facility and provided the required urine specimen, which was split into two samples, Appellant fails to mention that Captain Legg was allowed to return to work notwithstanding the fact that he was suspected of using crack cocaine and drinking beer while on duty and, again, notwithstanding the testimony of Chief Fuller that he "felt this matter required some urgency. I thought we had an emergency on our hands" (Transcript p. 88), which led him to request a reasonable suspicion test in the first place. Regarding Appellant's further Statement of the Case that Captain Legg had do "do a few things" before submitting to the test, Appellant curiously fails to mention that Captain Legg was in charge of the day shift on April 18, 2004 and that Chief Fuller did not think it was unusual for Captain Legg to take care of a few things as the Captain on duty before leaving his post to go take the drug test (Transcript p. 90 & 91). Captain Legg never asked Chief Fuller not to go with him for the few minutes in question and Chief Fuller never asked to accompany Captain Legg.

Chronologically, Captain Legg then went on to work for an additional four days,

despite the allegation by the City of Huntington that exigent circumstances, which Chief Fuller defined as "an emergency, something urgent, you have to take action to prevent further damage or loss of property and life," (Transcript p. 79) existed to require the Appellee to submit to a reasonable suspicion drug test and despite the serious allegation that Captain Legg was abusing drugs and/or alcohol while on duty. Subsequently, on April 22, 2004, Captain Legg was suspended without pay pending termination by Appellant, Mayor David A. Felinton, once the initial report from Captain Legg's urine specimen was returned from the testing facility to the City of Huntington, W.Va., with the result "Substituted - Refusal to Test." This, despite the fact that Appellee's reconfirmation test results from the split urine sample were not received by the City of Huntington, W.Va., until May 6, 2004.

Also on April 22, 2004, Chief Fuller mailed a letter to Captain Legg advising him of his right to a hearing pursuant to §8-14A-3 of W.Va. Code, as amended, which hearing was held on July 14, 2004, and at which hearing the internal review board determined that the removing officer did not prove exigent circumstances existed to have Captain Legg submit to a reasonable suspicion drug test pursuant to Policy 19-J of the City of Huntington, W.Va.'s, General Policy and Procedure Manual, and which internal hearing board further held there was no evidence that Captain Legg tampered with or altered his urine specimen. Appellee would note here that Appellant implies in its Brief that this internal hearing board

is not objective as it is comprised of three of Captain Legg's "fellow firefighters" on page 4 of its Statement of the Case, however, Appellee would note that Captain Legg does not hand pick who hears his case and that it is not uncommon for the internal hearing board to recommend a fellow firefighter be disciplined or even terminated as the internal hearing board did immediately prior to Captain Legg's hearing in the case of Gary Turner who the internal hearing board recommended be terminated.

While Appellant goes on in its Statement of the Case to detail the testimony of the EMSI employee, Randy Pauley, Appellant fails to mention that Mr. Pauley never testified to seeing anything out of the ordinary on the day of the test. He testified that there was nothing evident after checking Captain Legg's pockets, glove pouch, etc. that would indicate Appellee had anyway to tamper with his urine screen (Transcript p. 118 & 119). Mr. Pauley goes on to testify that there have been procedural deviations in the method of collection of urine samples in the past and that there is a human factor involved in such collection (Transcript p. 124). Appellant also makes a point of telling this Court in its Statement of the Case that Captain Legg's urine sample was "very clear" (Transcript p. 113), however, Appellant glaringly omits the further testimony from Mr. Pauley that a clear urine sample is not a specific indicator that the sample has been substituted or adulterated, either way, and that there are clear specimens that are collected and go through the process just fine so Captain Legg's clear specimen was not unusual to that extent. (Transcript p. 113

& 114). Appellant also omits the important testimony from Mr. Pauley that the urine sample provided by Captain Legg had no flakes or other visible foreign substance in it (Transcript 122) and the sample he submitted was the proper temperature between 90 and 100 degrees Fahrenheit (Transcript p. 123) and other than the fact that Captain Legg's urine specimen was "a little clear" (which Mr. Pauley had already testified was not unusual) everything about Captain Legg's sample appeared okay. (Transcript p. 123, Emphasis added).

Regarding Dr. Raba's testimony as set forth in Appellant's Statement of the Case, while Dr. Raba did testify that the sample he tested had characteristics of water and not human urine, Appellant omits Dr. Raba's critical testimony that he was not present when the sample was collected; he didn't know what procedure was followed in collecting this specific sample; he didn't know if there is running water in the sample collection room; he did not know if the sample was split in front of Captain Legg or at a later time, etc. and; Appellant also omits Dr. Raba's testimony that he was "not certain he could answer" why the two different labs had different creatinine levels reported on allegedly the same urine sample supplied by Captain Legg(Transcript p. 25 & 26).

Next, chronologically, Appellee timely appealed the decision of the Firefighter's Civil Service Commission to the Circuit Court of Cabell County, West Virginia and on July 14, 2005, Judge John L. Cummings entered an Order finding that the Order of the Appellant Commission that exigent circumstances existed to request a reasonable suspicion test of

Captain Legg on April 18, 2004, was clearly wrong in light of the probative evidence developed on the record. Judge Cummings further held that, based on the finding of the Appellant Commission that the members of the Commission were unable to conclude that the urine sample as submitted by the Appellee was tampered with, adulterated or what even happened to it, that Captain Legg did not refuse to test under Policy 19-J and his termination pursuant to said policy by Appellant, City of Huntington, was inappropriate and the February 17, 2005 Order of the Commission finding that Captain Legg violated Policy 19-J by refusing to test was arbitrary, capricious and an abuse of discretion given the Commission's specific finding to the contrary as contained on the record.

Subsequently, this Honorable Court voted 3 -2 to accept the Appeal of the City of Huntington from the aforesaid July 14, 2005 ruling of the Honorable John L. Cummings of the Cabell County, Wet Virginia Circuit Court, and on April 3, 2006, counsel for the Appellee received the Brief of the Appellant.

ARGUMENT

PROPOSITION OF LAW NO. 1

1. The Circuit Court of Cabell County, West Virginia was correct in holding that Appellant, City of Huntington, failed to prove exigent circumstances existed to request Appellee submit to a "reasonable suspicion" test under Policy 19-J of the City of Huntington, W.Va.'s, General Policy and Procedure Manual in light of the probative evidence developed on the record.

Appellee successfully argued below, and argues now, that exigent circumstances did not exist so as to allow Appellant, City of Huntington, to request a reasonable suspicion drug test of the Appellee on April 18, 2004 pursuant to Policy 19-J of Defendant's General Policy and Procedure Manual which states:

"Reasonable suspicion for requiring an employee to submit to drug and/or alcohol testing shall be deemed to exist when an employee manifests physical or behavioral symptoms or reactions commonly attributed to the use of controlled substances or alcohol. Such employee conduct must be witnessed by at least one supervisor trained in compliance with the City's Drug-Free Workplace Policy. Should a supervisor observe such symptoms or reaction, the employee must submit to testing."

Appellant, City of Huntington, does not deny that City of Huntington Fire Chief, Greg Fuller, admitted on the record developed in this case that he failed to observe the Appellee manifest any physical or behavioral symptoms or reactions that could be attributed to the use of a controlled substance on the morning of April 18, 2004 as Captain Legg did not report to work under the influence of alcohol and/or drugs, which this Court has previously held would, in and of itself, constitute exigent circumstances under §8-14A-2(5) of the W.Va. Code, as amended, to request a reasonable suspicion drug test as cited by this Court in City of Huntington v. Darrell G. Black, 187 W.Va. 675, 412 S.E.2d 58 (1992). In following this Court's decision in Black, in order to require reasonable suspicion drug testing under Policy 19-J, Chief Fuller, or at least one supervisor (Deputy Chief) would had to have observed Captain Legg manifest physical or behavioral symptoms or reactions commonly attributed to the use of controlled substances or alcohol. Chief Fuller never

testified he observed any symptoms or reactions commonly attributed to the use of controlled substances or alcohol on April 18, 2004, so exigent circumstances for a reasonable suspicion test could not exist from the unannounced visit by Chief Fuller on that date.

Accordingly, it is clear that exigent circumstances did not exist to request a reasonable suspicion drug test on April 18, 2004 and the ruling by the Circuit Court that the Commission's finding to the contrary was clearly wrong in light of the probative evidence developed on the record should not be overturned as the Final Order of the Civil Service Commission was clearly against the preponderance of the evidence standard of review as cited by this Court in Alden v. Harpers Ferry Police Civil Service Commission, 209 W.Va. 83, 543 S.E. 2d 364 (2001).

Because Appellant, City of Huntington, W.Va., does not dispute that Chief Fuller never observed such symptoms on the day he requested Captain Legg to undergo a reasonable suspicion test, Appellant argues that it was a "pattern of behavior" that gave Chief Fuller reasonable suspicion to request Captain Legg to submit to a surprise drug test under Policy 19-J on April 18, 2004. This argument by the Appellant is flawed for several reasons.

First, Chief Fuller admitted under oath that he and Deputy Chief Beckett and Deputy Chief Provaznik investigated a number of issues surrounding Captain Legg, stating that the Department had previously looked into Appellee's sick leave but never put Captain Legg on notice that his use of sick leave was being investigated as far back as July, 2003 which

Appellee argues is a clear violation of his due process rights and his rights afforded to him as a firefighter under Civil Service law. Specifically, Chief Fuller stated on the record that Captain Legg had developed "a pattern of sick leave usage." (Transcript p. 71) Such a conclusion by Chief Fuller should have failed, however, as the record showed Captain Legg to have accumulated a total of only six unexcused absences over a period of nine months. (Transcript p. 64) The record goes on to show that Captain Legg testified that some of those unexcused sick days were used for Court dates related to his Ohio D.U.I. in September, 2002 (incorrectly indicated as September 2003 in the record) and for which Captain Legg had already been disciplined by the City of Huntington by docking him 12 hours pay for each infraction. The Circuit Court's ruling that the Commission's holding that there was a "pattern" of abuse of sick leave by the Appellee was clearly wrong in light of the probative evidence as six unexcused absences over a period of approximately nine months, some of which the City of Huntington knew were related to Appellee's D.U.I. in the State of Ohio, should not be overturned on Appeal as the Circuit Court rationally concluded that the unexcused sick leave taken by the Appellee was not excessive and, even if taken in the light most favorable to the Appellant, the Commission could not rationally establish a pattern of abuse of sick leave by the Appellee given the amount of time over which the six sick days were used, the reason known to the City of Huntington for at least some of those six sick days and Captain Legg's remaining balance in excess of 270 days of accumulated sick leave which had not been used as of the date of his suspension.

The further argument of the Appellant that, coupled with the alleged abuse of sick leave, exigent circumstances also existed to request a reasonable suspicion drug test due to Captain Legg's "nervousness, agitation and the irritability" and change in behavior. Appellant's argument in this respect must also fail as nowhere in the record does Chief Fuller testify that he observed symptoms consistent with the use of narcotics, which he testified he was trained to observe, (Transcript p. 86 - 93) and no witness called by the City testified that Appellee's behavior was consistent with the use of narcotics and Appellant's argument in its Petition for Appeal that Deputy Chief Beckett "suspected that Captain Legg was using illicit drugs" (Petition for Appeal page 12) is patently inaccurate as even a cursory review of Deputy Chief Beckett's testimony reveals that he **never** made such a statement and actually testified that, having already testified that he had received training with respect to detecting illicit drug use which could give rise to reasonable suspicion drug testing that, to "be honest with you, I thought there was maybe something wrong in his [Captain Legg's] personal life at home that had affected his actions" (Transcript p. 52). At no time does he testify that based on his training did he suspect Captain Legg to be using illegal drugs as argued by the Appellant. Further, Michael Giannini never testified that he observed behavior by Captain Legg consistent with the use of prohibited narcotics (Transcript p. 37 - 42); Brandi Giannini never testified that she observed behavior by Captain Legg consistent with the use of prohibited narcotics (Transcript p. 29 - 36); Deputy Chief Provaznik never testified that he observed behavior by Captain Legg consistent with

the use of prohibited narcotics (Transcript p. 64 - 66) and; even the E.M.S.I. employee called as a witness by the Appellant at the September 24, 2004 hearing before the Commission testified that Captain Legg did not exhibit any nervous behavior the very morning he was asked to provide a surprise urine sample (Transcript p. 119).

Appellee argues that such behavior as alleged by the Appellant, even if true, which Appellee denies, did not constitute exigent circumstances in requesting a reasonable suspicion test on April 18, 2004, as the removing officer admitted under oath that he had discussed Appellee's perceived change in behavior (not suspected drug or alcohol abuse in violation of Policy 19-J which he was trained to observe) with at least Deputy Chief Beckett, and possibly other Deputy Chiefs, on probably four or five occasions between July 2003 and April 18, 2004 without placing Captain Legg on notice that he was under investigation in violation of his due process rights and his civil service rights as a firefighter with the City of Huntington. For the Commission to hold otherwise was clearly wrong in light of the probative evidence developed on the record and, therefore, the Order of the Circuit Court should not be disturbed on appeal.

Appellant argues in its Brief that this Court's holding in In Re Queen, 196 W. Va. 442, 473 S.E. 2d 483 (1996), requires the reviewing Court to look to the Commission's action to determine whether the record reveals that a substantial and rational basis exists for its decision. In the instant case, Judge Cummings was correct in ruling that a rational basis does not exist for the Commission's Order given the uncontroverted fact that the President

of the Commission, after consulting with his fellow Commissioner's in private, stated the Commission did not receive evidence at the hearing sufficient to conclude the Appellee tampered with his urine sample. For the Commission to make such a statement and finding on the record and then sign off on an Order prepared and submitted by Appellant's attorney with the language set forth on page 13 of Appellant's Brief that "The Commission finds that the accused officer [Captain Legg], by substituting his urine sample as testified to by Dr. Raba, has engaged in conduct [that would obstruct the proper administration of the test]" is the quintessential definition of arbitrary when the Commission specifically found "we don't know whether it [Captain Legg's urine sample] was adulterated or what happened to it." (Transcript p. 194 & 195).

For Appellant to argue on page 14 of its Brief that "the only conclusion that can be reached is that Captain Legg substituted or tampered with his urine screen" is contrary to the fact, not argument of counsel, that the Commission specifically stated that it was unable to say Captain Legg tampered with his urine sample.

Appellant also argues in its Brief that the testimony of Brandi Giannini gave the Chief exigent circumstances to request a reasonable suspicion drug test under Policy 19-J. In support of this position, Appellant argues that, due to the safety sensitive nature of firefighting, Chief Fuller had a duty and obligation to request Captain Legg to submit to a reasonable suspicion drug test as exigent circumstances existed from the third party civilian complaint of Brandi Giannini and Chief Fuller testified he thought he this was an

urgent situation and that he had an emergency on his hands (Transcript p. 88) after the April 14, 2004 meeting with Deputy Chief Beckett. Appellee argues that Judge Cummings was correct in ruling that, were the City's argument valid that the statement by Brandi Giannini to Deputy Chief Beckett presented Chief Fuller with an urgent and emergency situation giving rise to exigent circumstances to test the Appellee, then Chief Fuller and the City of Huntington would not have waited four days to request that Captain Legg take a reasonable suspicion drug test under Policy 19-J as, due to the very argument of the City regarding the safety sensitive nature of firefighting, it makes no sense that the City would not, and did not, call Captain Legg in on Wednesday, April 14, 2004, Thursday, April 15, 2004, Friday, April 16, 2004 or Saturday, April 17, 2004, to take a reasonable suspicion drug test so as to protect the public, fellow firefighters and City property as Chief Fuller testified he thought he had an emergency on his hands after the April 14, 2004 meeting. Appellant argues that the four day delay in requesting a reasonable suspicion drug test was due to Captain Legg not being scheduled to work until Sunday, April 18, 2004. This argument is flawed, however, as it is not uncommon for firefighters to trade shifts and Captain Legg could very easily have traded shifts with a fellow Captain, or covered for a sick Captain, during that four day lag in requesting a reasonable suspicion test after Chief Fuller testified he had an emergency on his hands.

Further, had Captain Legg been called in on Wednesday, April 14, 2004, the City would presumably not have had to make special arrangements to have E.M.S.I. open the

testing facility at 7:00 a.m. on Sunday, April 18, 2004, as to wait four days after receiving a third party civilian complaint before requesting an emergency, reasonable suspicion drug test due to exigent circumstances and then returning the Appellee to work for several more days prior to suspension is contrary to the City of Huntington's own safety/emergency circumstances argument and such ruling by the Commission was clearly wrong in light of the probative evidence developed on the record.

Based upon the foregoing argument, the Circuit Court of Cabell County, West Virginia was correct in ruling that the City of Huntington did not establish exigent circumstances existed under Policy 19-J to require the Appellee to submit to reasonable suspicion drug testing on April 18, 2004 and the Order of Appellant, The City of Huntington, West Virginia Firefighter's Civil Service Commission finding that exigent circumstances existed to allow the City to demand a reasonable suspicion drug test four days after Chief Fuller testified he thought he had an emergency on his hands is clearly wrong in light of the probative evidence developed in the record and is otherwise arbitrary and capricious.

While Appellant cites Twigg v. Hercules Corp., 185 W.Va. 155, 406 S.E. 2d 52 (1990) in support of its argument that drug testing should be upheld where an employee's job responsibility involves public safety and where the employer has a good faith basis to request such a test, the Appellant has not met that burden as evidenced by the foregoing arguments and the Circuit Court of Cabell County was correct in ruling that the decision

of the Appellant Commission should be overturned for the reasons aforesaid.

PROPOSITION OF LAW NO. 2

2. **The Circuit Court of Cabell County, West Virginia was correct in ruling that the Order as entered by Appellant, The City of Huntington, West Virginia Firefighter's Civil Service Commission finding that the Appellee refused to submit to a reasonable suspicion drug screen was arbitrary and capricious in light of the probative evidence developed on the record wherein the Commission determined they were unable to conclude that the urine sample as submitted by the Appellee was adulterated or what happened to it.**

Appellant argues that the City proved that the Appellee tampered with the drug screen obtained on April 18, 2004 and that Appellant, Mayor David A. Felinton, was justified in firing the Appellee for a "refusal to test" drug screen result pursuant to Policy 19-J of the City of Huntington's General Policy and Procedure Manual. This argument of the City must fail, however, as the Circuit Court of Cabell County was correct in finding that the February 17, 2005 Order as entered by the Appellant Commission was clearly arbitrary and capricious as the record shows that the Commission specifically found that the City could not, and did not, prove that Captain Legg tampered with the urine screen. Specifically, the Commission concluded that "we know that there is a human factor about these things [urine tests] and that mistakes can happen, but we don't know what

happened to this specimen that was given. We don't know whether it was adulterated or what happened to it" (Transcript p. 194 - 195, Emphasis added). Further, the Commission wanted to do "something a little bit unusual¹" and request an additional hair follicle sample be submitted by Captain Legg (Transcript p. 195) some 5 months after his April 18, 2004 urine screen which counsel for the Appellee asked to be allowed to discuss this "unusual" request with his client. After requesting time to discuss this request with the Appellee, the Commission then stated it would issue a decision based on the record unless /until the Appellee complied with the hair follicle test and the Commission reviewed the hair follicle test results. Clearly, the action of the Commission was a violation of Appellee's due process rights in that the request that he submit to a hair follicle test was improper and the implication from this unusual request was clear that if the Appellee passed the hair follicle test he would prevail in getting his job back; if not, he would be terminated.

As the Appellee submitted to the "reasonable suspicion" drug test requested by the Appellant and the Commission stated on the record they could not conclude the Appellee substituted his urine, the Circuit Court was correct in ruling that, based on the very finding of the Appellant Commission that they were unable to conclude that the urine sample as

This same Commission also did "something a little bit unusual" in the case of City of Huntington Firefighter, Gary Turner, the same month Appellee's case was heard wherein they recommended a 6 month suspension for Mr. Turner who admitted tampering with his urine screen which is wholly inconsistent with the Appellant's Order in the instant case upholding the termination of Captain Legg who denied he tampered with his urine screen and which urine screen in question the Commission stated on the record it could not determine was adulterated or what may have happened to it.

submitted by the Appellee was adulterated or what happened to it, the Appellee did not refuse to test under Policy 19-J and his termination by the Appellant, Mayor David A. Felinton, acting in his official capacity on behalf of Appellant, City of Huntington, for refusing to test pursuant to said policy was clearly arbitrary, capricious and an abuse of discretion given the Appellant Commission's finding to the contrary as contained in the record. Even assuming, *arguendo*, that the Appellant did establish exigent circumstances existed to request a reasonable suspicion drug test of the Appellee on April 18, 2004, Appellee submitted to said test and the Commission specifically found that they were not able to determine the Appellee, or any one else for that matter, tampered with or adulterated Appellee's urine sample. As such, the only logical conclusion that could be reached, and was reached by the Commission, was that the Appellee submitted the requested urine screen and that he did not tamper with it. To rule to the contrary in the Order drafted by counsel for the Appellant and signed by all three Commission members is "clearly erroneous, arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law" following the standard of review as previously stated by this Court in In Re Queen, supra, and Cabell County, West Virginia Circuit Court Judge John L. Cummings was correct in his Order overturning the decision of the Appellant based on this standard of review.

CONCLUSION

Based on the foregoing arguments, Appellee submits there was no rational basis for

the Appellant Commission to find that exigent circumstances existed to request the Appellee submit to a reasonable suspicion drug test four days after City of Huntington Fire Chief Greg Fuller felt he had an urgent, emergency situation on his hands. In fact, the City of Huntington was unable to prove at hearing before the Commission that exigent circumstances existed to request such a test as the Appellee was being investigated as far back as July, 2003 for an alleged change in behavior without notice to the Appellee that he was under investigation; the City did not establish a "pattern of sick leave" abuse as the only testimony developed at hearing indicated the Appellee used a total of only 6 sick days in the nine month period immediately prior to the reasonable suspicion drug test leaving the Appellee with over 270 days of unused sick leave; and none of the witnesses called to testify at hearing could attribute any alleged change in behavior to the use of narcotics or abuse of alcohol as required under Policy 19-J.

Further, Appellee's Due Process rights were violated by the Appellant, City of Huntington, by terminating the Appellee by letter dated January 24, 2005, conducting an exit interview and promoting a Lieutenant to replace the Appellee some three weeks prior to the Commission entering an Order upholding Appellee's termination, which action of the City of Huntington undoubtedly could have influenced the Order of the Commission.

Also, Appellant's argument in its conclusion of its Brief that Judge Cummings ruled that employees subject to a reasonable suspicion drug test must be tested the same day is incorrect. The Circuit Court did correctly hold in this specific case, however, based upon

the very testimony of Chief Fuller that lives and property were at risk, for the Appellant Commission to find that it was proper for the City to wait four days before requesting a reasonable suspicion test and then returning the employee (Appellee) to work for four more days before suspending him was clearly wrong in light of the evidence developed on the record. Accordingly, in no way did Judge Cummings "graft" a new requirement for "reasonable suspicion" testing, however, logic would dictate an employer not allow an employee to work for eight days after determining that exigent circumstances exist for the employer to require a reasonable suspicion drug screen when lives are in jeopardy.

Finally, perhaps most importantly, Appellee would again emphasize to this Honorable Court that the Firefighter's Civil Service Commission stated on the record that "we know that there is a human factor about these things [urine tests] and that mistakes can happen, but we don't know what happened to this specimen that was given. We don't know whether it was adulterated or what happened to it" (Transcript p. 194 - 195) and for said Commission to enter an Order finding that "the accused officer [Appellee], by substituting his urine sample as testified to by Dr. Raba, has engaged in such conduct" was clearly wrong, arbitrary, capricious and not supported in light of the probative evidence developed on the record and should not stand.

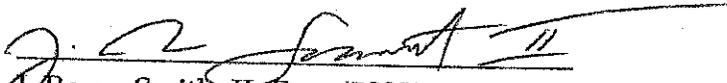
Accordingly, the Order of Cabell County Circuit Judge John L. Cummings that the February 17, 2005 Final Order entered by the Huntington, West Virginia Firefighter's Civil Service Commission was clearly wrong, an abuse of discretion, arbitrary and capricious

should stand as, notwithstanding the fact that Appellee and the Circuit Court did not believe exigent circumstances were proven at hearing so as to allow the Appellant to request a reasonable suspicion test of the Appellee, the Appellee did submit to the reasonable suspicion test and the Commission specifically found that we don't know what happened to this specimen that was given. We don't know whether it was adulterated or what happened to it" (Transcript p. 194 - 195 Emphasis Added). As such, the Circuit Court of Cabell County was justified in, and had a duty to given this Court's standard of review in the very cases cited by the Appellant, see In Re Prezkop, 154 W.Va. 759, 179 S.E. 2d 331 (1971) and In Re Queen, supra, to overturn the February 17, 2005 Final Order of the Huntington, W.Va. Firefighter's Civil Service Commission's terminating Captain Earl F. Legg, Jr., a 15 year decorated veteran Captain of the Huntington, West Virginia Fire Department and, accordingly, the Order of Judge Cummings should not be disturbed on appeal for the reasons aforesaid.

Respectfully Submitted:

CAPTAIN EARL F. LEGG, JR.

By Counsel:


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CERTIFICATE OF SERVICE

The Appellee, by his undersigned attorney, served the foregoing "BRIEF OF THE APPELLEE," upon Counsel for the Appellant, Mr. Scott McClure, Esq., by mailing a true and accurate copy of the same via United States Mail, 1st-class, postage pre-paid, this 3rd day of May, 2006, addressed as follows:

Mr. Scott McClure, Esquire c/o
Huntington City Attorney
City of Huntington, W. Va.
P.O. Box 1659
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J. ROGER SMITH, II, ESQ. (5837)