

**ANTHONY AVERY,
Appellant/Employee**

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v.

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Appeal of Termination

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**NEWTON COUNTY RECREATION
COMMISSION,
Appellee/Employer**

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FINAL DECISION

This decision shall serve as the final decision of the Hearing Officer in the above styled matter regarding Appellant Anthony Avery's appeal of his termination of employment by the Newton County Recreation Commission (the "NCRC"). A hearing was conducted on this matter on March 9, 2018 wherein the Hearing Officer received sworn testimony, evidentiary exhibits, and received argument from counsel for Mr. Avery and counsel for the Newton County Recreation Commission.

STANDARD OF REVIEW

The burden of proof applicable in this matter requires the appellant, Mr. Avery, to establish by a preponderance of the evidence that the adverse action in question:

- (1) Does not substantially comply with sound management principles and is not consistent with the policies and procedures of Newton County;
- (2) That the factual basis upon which the adverse action was taken is not true and correct or was substantially inaccurate in all relevant and material respects; and,
- (3) That the adverse action is not reasonable, given the severity of the offense.

The Hearing Officer must deliberate upon the record of evidence developed at the hearing and either confirm or rescind the adverse action in question. The Hearing Officer is not authorized to substitute an alternative form of discipline. The Hearing Officer may reverse decisions of

management if he finds the appellant has met his burden of proving any of the three criteria set forth above.

ALLEGED BASIS OF TERMINATION

The NCRC alleged seven (7) policy violations in support of their decision to terminate the employment of Mr. Avery. The violations consisted of the following:

- (1) Negligence in Performance of Actions – Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(b).
- (2) Inefficiency in Performing Assigned Duties - Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(c).
- (3) Inability or Unfitness to Perform Assigned Duties - Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(d).
- (4) Insubordination - Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(e).
- (5) Misconduct - Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(f).
- (6) Conduct Reflecting Discredit on the County or Department - Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(h).
- (7) Careless, Negligent or Improper Use of County Property or Equipment - Rules and Regulations of the Newton County Civil Service System, Paragraph 10.200(k).

DISCUSSION OF EVIDENCE

The evidence presented at the hearing establishes that Mr. Avery began working for the NCRC in 1995¹ and prior to assuming the position of Director in 2013, he worked as the Assistant

¹ In 1995 this organization was known as the Covington-Newton County Recreation Commission. The NCRC was created by resolution on June 15, 1999.

Director. The Resolution creating the NCRC vests the commission with the power to appoint or designate a director and other employees as it deems are needed. The NCRC interviewed and promoted Mr. Avery to the director position in April of 2013. Employees of the NCRC are governed by both NCRC policies and Newton County Government policies. Mr. Avery was governed by the Newton County civil service policy because his hire date was prior to May 1, 2006.

Around October 2017 Stan Edwards, a Newton County Commissioner, sent an email to a NCRC member that contained a list of issues regarding the NCRC and the job performance of Mr. Avery. This email was forwarded to Mr. Danny Stone, the chair of the NCRC at that time.² After receiving the email containing the list of issues Mr. Stone then met with Mr. Avery and Keyra Fray³ on November 1, 2017. At this November 1, 2017 meeting Mr. Avery was presented with the list of issues from the email and those issues were discussed with Mr. Avery. Mr. Avery asked if his job was in jeopardy during this meeting and was informed that Mr. Stone was only one member of the NCRC so he could not answer that question.

On November 8, 2017 the NCRC had a called meeting to discuss the list of issues with the full board. Mr. Avery was invited to attend this meeting and he did attend. Mr. Avery did not provide any documentation at this meeting regarding the allegations contained on the list. He did address the board. It was discovered that many of the issues raised in the list involved practices that were in effect prior to Mr. Avery becoming the Director. Some of these practices violated NCRC policy. Mr. Stone testified that he was not aware that the prior director had been allowing some of these policy violations to occur. However, some other members of the NCRC board were apparently aware of the prior Director's practices. Thereafter, and at the urging of Mr. Avery,

² Mr. Stone resigned his position on the NCRC in January 2018.

³ Ms. Fray is with the Newton County Human Resources Department

members of the NCRC interviewed twelve employees to discuss Mr. Avery and the allegations contained in the list. These interviews occurred on November 15 and 16, 2017. On November 27, 2017 the NCRC convened another meeting to further address the allegations against Mr. Avery. At this meeting Mr. Stone informed the NCRC that Mr. Avery was a civil service employee and that he had some constitutional protections to his employment. Mr. Stone also recommended that the NCRC place Mr. Avery on a Performance Improvement Plan ("PIP") that Mr. Stone had prepared. A member of the NCRC then moved to terminate Mr. Avery from his employment and the vote to terminate Mr. Avery was unanimous with Mr. Stone abstaining.

Following the termination of Mr. Avery, the NCRC was informed by Newton County Human Resources and the County Attorney that they did not follow the correct procedure regarding the termination of Mr. Avery. Mr. Stone and Newton County Commission Chairman Marcello Banes both testified that there were procedural issues with the termination of Mr. Avery but neither witness elaborated on those issues. Newton County Human Resources then provided Mr. Avery with a pre-deprivation hearing on December 7, 2017 wherein Mr. Avery was allowed an opportunity to respond to the allegations made against him by the NCRC. At this meeting, Mr. Avery was placed on paid administrative leave pending a review of the matters pertaining to his dismissal. On January 30, 2018 the NCRC provided Mr. Avery with correspondence informing him that he was dismissed from employment with the NCRC effective January 30, 2018. Mr. Avery properly appealed that final decision to terminate his employment.

One of the allegations of policy violation regards the policy on unpaid account balances. Mr. Stone alleged that Mr. Avery directed an employee (Ms. Tammy Cheek) to write off approximately \$4,880.00 from accounts that had past due balances. One of the accounts written off belonged to Mr. Avery's brother. The employee testified that she does not remember being

directed by Mr. Avery to charge off those accounts, but it was discussed in a meeting with Mr. Avery and others. The employee testified that she took it upon herself to complete the charge offs so it would be done when Mr. Avery asked her to complete the charge offs. Both Mr. Avery and Ms. Cheek testified that they did not follow the unpaid balance/fees policy. By his own admission, Mr. Avery did not follow the NCRC unpaid balance/fees policy and this evidence supports a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(b), negligence in performance of actions.

Another allegation of a policy violation was that Mr. Avery was insubordinate for failing to complete employee evaluations. Policy requires that evaluations be completed each year and Mr. Avery was directed by the NCRC to complete the evaluations for 2017 by the end of November of that year. Mr. Avery testified that he did not complete those evaluations as directed. This evidence supports a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(e), insubordination, for failing to comply with this directive.

It was also alleged that Mr. Avery failed to properly disburse new policies regarding Conflicts of Interest and Tournaments to his staff. Mr. Avery had informed Mr. Stone during the November 1 meeting that he had notified staff of these new policies. Mr. Avery testified that he informed the staff, but they were just not paying attention. Staff members Tammy Cheek and Greg Sullivan both testified that they were not made aware of these policies by Mr. Avery. A review of the notes of the employee interviews conducted by the NCRC also indicates that other employees were not made aware of these policies by Mr. Avery. This evidence supports a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(b), negligence in performance of actions, for failing to notify staff of the policies and paragraph 10.200(f),

misconduct, for being untruthful when he informed Mr. Stone he had disbursed the policies to the staff.

Another allegation of a policy violation was that Mr. Avery failed to exhibit sufficient leadership skills and that led to low morale and employees losing their belief in his ability to lead. There was no evidence to support the allegation that insufficient leadership led to low morale. The low morale in the department is attributed to other factors such as budget, pay issues, and workload. However, there is evidence that the NCRC and employees of the NCRC felt that Mr. Avery's leadership skills and practices were insufficient. Mr. Greg Sullivan testified that Mr. Avery had no leadership or vision and that he failed to conduct budget meetings for the last few years. Both Mr. Sullivan and Ms. Cheek testified that there is a lack of communication between the various departments of the NCRC. These sentiments were echoed in the notes of the employees interviewed by the NCRC as well. NCRC member Bill Cooper testified that Mr. Avery is ultimately responsible for any communication issues within his department as responsibility starts at the top. This evidence supports a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(c), inefficiency in performing assigned duties.

Another allegation of a policy violation was that Mr. Avery failed to tailor recreation programming to the wants and needs of citizens. The evidence on this issue was that Mr. Avery did start some new programs and reinstate some older programs. Also, the operating budget of the department is in very good shape. There was little evidence presented on programming that should have been brought to Newton County by Mr. Avery. There is insufficient evidence to support a finding that Mr. Avery failed to tailor recreation programming to the wants and needs of citizens.

It was alleged that Mr. Avery failed to comply with the Newton County policy regarding the use of personal vehicles. That policy requires the use of a county owned vehicle when one is

available. If one is not available, then an employee may use a personal vehicle and seek mileage reimbursement. If a county vehicle is available and an employee elects to use their personal vehicle then the mileage reimbursement is not available to that employee. The policy also requires that employees utilize the most economical method of transportation. The allegations regarding this policy violation are that Mr. Avery used his personal vehicle for County business on a regular basis, even when a county vehicle was available, and was reimbursed on average \$300 per month for mileage. Mr. Stone testified to these facts and indicated that based on his interviews with other employees that a county vehicle was generally available for Mr. Avery to use. Ms. Cheek and Mr. Sullivan also testified that county vehicles were generally available for use by Mr. Avery. During Mr. Avery's testimony he stated that he did use his personal vehicle for county business travel and that many times a NCRC maintenance truck would be available, but he would choose to drive his personal vehicle in case maintenance needed that truck. However, Mr. Avery also testified that there were five maintenance employees and six maintenance trucks. The evidence shows that Mr. Avery could have driven a county vehicle for county business but chose to drive a personal vehicle instead. In these instances, Mr. Avery would not be eligible for a mileage reimbursement but sought and received mileage reimbursements anyway. This evidence supports a finding that Mr. Avery violated the county's vehicle use policy.

In addition to Mr. Avery's mileage reimbursements there was evidence presented that Mr. Horace Stroud drove his personal vehicle to Gulfport Mississippi on at least two occasions when a county van was available for his use (once in 2017 and once in 2016). Mr. Stroud received mileage reimbursements, approved by Mr. Avery, for these two trips. When Mr. Avery was initially confronted with this accusation he stated that Mr. Stroud drove a van to the tournament in 2017. Mr. Stone then pulled the mileage reimbursement records and discovered the Mr. Stroud

drove his personal vehicle to the tournament in 2017. He confronted Mr. Avery with this record and Mr. Avery stated he was confused, that it was the previous year that Mr. Stroud drove the county van. However, Mr. Stone had also pulled the records for 2016 and discovered that Mr. Stroud drove his personal vehicle to the Gulfport tournament in 2016 as well. Mr. Avery testified that when he was asked about Mr. Stroud driving his personal vehicle to Gulfport that he was unclear on which year they were discussing. Mr. Avery further testified that when he stated that Mr. Stroud drove the county van to Gulfport he was referring to a different year than those years referred to by Mr. Stone. There was no evidence presented that identified a specific year that Mr. Stroud drove a county van to Gulfport, only evidence that he drove his personal vehicle in 2016 and 2017 and received mileage reimbursements for those years. The evidence presented shows that county vans are available for the Gulfport trip. Mr. Stone testified that he believed that Mr. Avery was being dishonest with him regarding the statements that Mr. Stroud drove a county van to the Gulfport tournament. The record does not reflect any evidence that Mr. Avery admitted that Mr. Stroud drove his personal vehicle some years and the county van other years. Rather, the record reflects that when questioned on this issue, Mr. Avery denied Mr. Stroud drove his personal vehicle. Mr. Avery never volunteered or otherwise informed Mr. Stone that Mr. Stroud had in fact driven his personal vehicle in recent years before Mr. Stone confronted Mr. Avery with the reimbursement records. This evidence supports a finding that Mr. Avery was not truthful when initially confronted about Mr. Stroud's personal vehicle use for these Gulfport trips.

On the issue of violation of the county vehicle use policy there was also evidence presented that Mr. Avery contracted with a commercial bus line to provide a 55-passenger bus for travel to Louisiana for a tournament. The cost of this contract was \$5800.00. Mr. Stone testified that only 8 persons rode this bus to Louisiana. The families that utilized the bus for transport paid \$300 in

reimbursement to the County for the bus transportation. Mr. Avery testified that due to the number of families that indicated they needed bus transportation he obtained the 55-passenger bus for the trip. These families also indicated they would reimburse the county a portion of the cost. After the bus contract was obtained, some families backed out of utilizing the bus for transportation. The evidence was not clear on how many people initially stated they would need bus transportation. However, there was no evidence to controvert the testimony that initially there was enough interest to justify utilizing a bus and that number decreased after the contract was entered. The record evidence is insufficient to find that a violation of the county vehicle policy occurred as a result of Mr. Avery contracting to use the bus for transportation.

However, the evidence does support a finding that Mr. Avery violated the county vehicle use policy by utilizing his personal vehicle and obtaining mileage reimbursement when a county vehicle was available and for allowing Mr. Stroud to obtain mileage reimbursement for driving a personal vehicle to Gulfport when county vans were available. This evidence supports a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(b), negligence in performance of actions. The evidence that Mr. Avery was dishonest regarding Mr. Stroud's vehicle usage supports a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(e), insubordination. This evidence could also support a finding that Mr. Avery violated Newton County Rules and Regulations paragraph 10.200(f), misconduct.

FINDINGS

The burden is on Mr. Avery, to establish by a preponderance of the evidence that the adverse action in question:

- (1) Does not substantially comply with sound management principles and is not consistent with the policies and procedures of Newton County;

- (2) That the factual basis upon which the adverse action was taken is not true and correct or was substantially inaccurate in all relevant and material respects; and,
- (3) That the adverse action is not reasonable, given the severity of the offense.

Additionally, the Hearing Officer must determine if the decision to terminate Mr. Avery is supported by the evidence, lies within the lawful discretion of management, and is consistent with Newton County past practice and recognized general management procedure, based on facts, circumstances, and the employee's previous record.

There was no evidence presented regarding sound or general management principles. However, the Hearing Officer can infer from the evidence that the complaint process, investigation, and termination of Mr. Avery complied with general management principles. The NCRC also had the authority to terminate Mr. Avery as such authority was granted to them in the enabling ordinance. The evidence showed that Mr. Avery did not have any prior discipline issues during his employment with the NCRC but the evidence also showed that Mr. Avery violated numerous policies which is what led to his termination. However, the evidence also established that the NCRC did not comply with the policy regarding termination of a civil service employee and therefore the termination of Mr. Avery was not consistent with policy. Mr. Avery has established by the preponderance of the evidence that his termination was not consistent with the policies and procedures of Newton County.

The Hearing Officer may reverse decisions of management if Mr. Avery meets his burden on any of the three criteria set forth above. Since Mr. Avery has met his burden as to criteria one, the Hearing Officer must determine if the failure to comply with the policies and procedures of Newton County in terminating Mr. Avery rise to a level that infringes on Mr. Avery's due process rights to his employment such that the decision to terminate him should be reversed.

Newton County Policy⁴, paragraphs 10.600 and 10.601, state that once adverse action against an employee is deemed appropriate, the employee is to receive written notification of that decision. The written notification must contain certain information outlined in the policy, to include the reasons for the adverse action. Upon receipt of the written notification the employee shall be allowed to explain, orally or in writing, any reasons that might excuse the conduct. Thereafter, the supervisor may choose to make the proposed disciplinary action final or may choose to lessen the disciplinary action based on the employee's response. Mr. Avery was not provided a written notification of his proposed termination. However, he was provided the email list of issues during the November 1, 2017 meeting and allowed an opportunity to respond⁵, but he was not notified that he was subject to termination at those meetings. The written notice that is required by policy to be provided to employees was not properly provided to Mr. Avery.

Mr. Avery's employment was governed by the Newton County Civil Service policy and therefore, he was entitled to due process in his termination proceedings. "Although due process entitles the public employee to a pre-termination hearing, the employer's failure to provide one is not a constitutional violation under the due process clause if the employer provides a later procedural remedy." Norris v. Henry County, 255 Ga. App. 718 (2002). Further, "the adequacy of due process is governed not by personnel manuals but by case law interpreting the federal and state constitutions, which only require that the employee (even if later) be notified and given an opportunity to be heard." Id. So long as "the requirements of due process are met, the employer's failure to follow all procedures in the manual does not [even] give rise to an action for breach of contract." Id. In this case, the legal requirements of due process have been met. Mr. Avery was

⁴ See Appellee Exhibit 1, the Newton County Policy applicable to the termination of Mr. Avery.

⁵ Mr. Avery was provided an opportunity to respond to this list during the November 1, 2017 meeting with Mr. Stone and HR and again at the November 8, 2017 meeting with the NCRC board.

provided notice and an opportunity to be heard. He was able to address the issues regarding his employment on November 1 and again on November 8 of 2017. He was also afforded an opportunity to be heard at this appeal proceeding. Since the requirements of due process have been met in this case, the failure of the NCRC to follow their procedures correctly does not give rise to a situation that would require the reversal of the termination. However, the NCRC is strongly encouraged to follow the correct procedure regarding employee discipline.

The burden is also on Mr. Avery to prove by a preponderance of the evidence that the factual basis upon which the adverse action was taken is not true and correct or was substantially inaccurate in all relevant and material aspects. The evidence presented, including admissions made by Mr. Avery, supports a finding that Mr. Avery failed to follow policy in numerous instances. The evidence was sufficient to show that Mr. Avery violated policies and that those violations were the reasons for his termination. Mr. Avery did not meet his burden in this instance.

Finally, the burden is on Mr. Avery to prove by a preponderance of the evidence that the adverse action is not reasonable, given the severity of the offense. As the Director, it was incumbent on Mr. Avery to provide proper leadership, comply with policy and follow the directives of the NCRC and the evidence shows that he did not. There was insufficient evidence presented to find that the adverse action was not reasonable.

The decision to terminate Mr. Avery is confirmed.

This ____ day of March, 2018.



E. Logan Butler
Designated Hearing Officer