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DIRECTOR OF PERSONNEL

Friday, April 01, 2016

Mr. Elbert Cobbins

Re: **Elbert Cobbins VS.
Sewerage & Water Board
Docket Number: 8324**

Dear Mr. Cobbins:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 4/1/2016 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Cedric S. Grant
Yolanda Grinstead
Victor Papai
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

ELBERT COBBINS	
vs.	DOCKET NO.: 8324
SEWERAGE AND WATER BOARD	

I. INTRODUCTION

Appellant, Elbert Cobbins, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1. The Appointing Authority, the Sewerage and Water Board for the City of New Orleans, (hereinafter the “S&WB”) does not allege that the instant appeal is procedurally deficient. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause. According to a letter issued to Appellant by the S&WB, Appellant’s suspension was due to his making an unauthorized stop during his shift (3 days) and for being loud and using profanity towards a supervisor (2 days). (H.E. Exh. 1).

II. FACTUAL BACKGROUND

Appellant, a permanent employee in the classified service, has been with the S&WB for twenty-three years; at the time of the alleged events that led to his discipline, he was working as a truck driver. (Tr. at 9:14-19).¹ The truck that Appellant drove was a “barricade truck” with an assigned number of 401, and his route covered all of uptown New

¹ Appellant testified that in his twenty-three years with the S&WB, he had never received discipline or been in “trouble.” Tr. at 15:19-22. The S&WB did not present any testimony of evidence to contradict this statement.

Orleans. *Id.* at 9:19-10:4. On or about Friday, June 27, 2014, Appellant began his shift by picking up truck 401. At some point in time during his shift, Appellant stopped at S&WB headquarters located at 625 St. Joseph Street, New Orleans. *Id.* at 11:11-14. The reason that Appellant stopped at the St. Joseph location was to take his medication and use the restroom. *Id.* at 11:11-17. While Appellant acknowledged that he did not notify any of his supervisors that he was stopping, the Commission adopts the Hearing Examiner's factual finding that St. Joseph Street was on Appellant's route. *Id.* at 12:18-13:4, 44:9-13.

The S&WB has a policy against employees making unauthorized stops during the course of a shift. The purpose of this policy was to discourage employees from going "off route" and to "prevent people from being where they are not supposed to be." *Id.* at 37:12-19. However, the S&WB did not consistently apply this policy; for example, employees were not expected to report bathroom stops at the S&WB's Carrolton facility. *Id.* at 38:1-39:6. The "mandatory" penalty for a violation of the S&WB's unauthorized stop policy is a three-day suspension, regardless of the reason for the stop or an employee's work history.

After Appellant had taken his medication and used the restroom, he encountered Kenneth Webster, a supervisor with the S&WB. *Id.* at 14:8-13. Both Appellant and Mr. Webster agree that Mr. Webster asked Appellant to move truck 401 from the customer parking lot of the St. Joseph Street facility. *Id.* at 14:8-11, 22:10-16. The accounts as to what happened after Mr. Webster made this request differ greatly. Appellant testified that he simply said "Brah (sic), go ahead downstairs with all that foolishness." *Id.* at 14:11-13. In contrast, Mr. Webster alleges that Appellant used "very vulgar language" in response to the request and told Mr. Webster to "get the F out of [Appellant's] face," and called Mr. Webster a "bitch." *Id.* at 22:19-22.

III. POSITION OF PARTIES

A. Appointing Authority

The S&WB takes the position that there was sufficient cause to discipline Appellant under Rule IX, §1.1 because Appellant violated the unauthorized stop policy and addressed a supervisor using inappropriate language. The S&WB further alleges that the policy regarding unauthorized stops is necessary to the efficient operation of the S&WB because it deters employees from being off route. Further, the S&WB asserts that it has a “zero tolerance policy” regarding the use of profanity towards supervisors.

B. Appellant

Appellant represented himself during the course of the hearing, and admitted that he did make an unauthorized stop during the course of his shift on June 27, 2014. However, Appellant asserts that, in his twenty-three years of employment with the S&WB, he has never had to notify a supervisor that he was using the restroom. Further, Appellant states that, because the St. Joseph St. location as not “off route” he was not anywhere he was not supposed to be.

IV. STANDARD

It is well-settled that, in an appeal before the Commission, the appointing authority has the burden of proving, by a preponderance of the evidence: 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, we must then determine if that discipline “was commensurate with the infraction.” *Abbott v. New Orleans Police Dep't*, 2014-

0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)).

V. ANALYSIS

A. The Board Has Established the Occurrence of the Complained of Activity

i. Appellant was in technical violation of the S&WB's policy regarding unauthorized stops

There is no dispute that, on June 27, 2014, the S&WB had in place a policy that required employees to report to a supervisor whenever they made an “unauthorized stop.” Appellant stated that he was aware of this policy and that on June 27, 2014, he did in fact make an unauthorized stop during his shift to use the restroom and take his medication. There is also no dispute that the St. Joseph Street location was on Appellant’s route and he was not “off route” as a result of his unauthorized stop. Therefore, the S&WB has satisfied the first prong of the three-part analysis regarding Appellant’s discipline related to the unauthorized stop.

ii. Appellant used inappropriate and unprofessional language towards a supervisor on June 27, 2014.

The Parties do not dispute that Mr. Webster engaged Appellant in a discussion on June 27th and during the course of that discussion, asked Appellant to move truck 401. As a preliminary matter, the response Appellant admits making to Mr. Webster, his supervisor, was inappropriate. Appellant had parked truck 401 in the customer parking lot of St. Joseph Street and the S&WB had a reasoned policy that prohibited employees from parking in that area. For reasons known only to Appellant, Mr. Webster’s request prompted an emotional an inappropriate response from Appellant. The Commission finds it more likely than not that Appellant used more colorful language than that to which he admits. Furthermore, Appellant was unable to establish any reason for Mr. Webster to fabricate his account of the conversation, such as it was.

As a result, the S&WB has satisfied the first prong of the three-prong analysis as to the discipline issued to Appellant due to his use of profanity in the workplace.

B. Did Appellant's Misconduct Impair the Efficiency of the S&WB?

i. Appellant's technical violation of the S&WB's unauthorized stop policy did not impair the efficiency of the S&WB

The Commission notes that the S&WB made no attempt to introduce the alleged policy or a copy of the one Appellant allegedly signed. Therefore, the Commission must rely on the testimony of Mr. Johnny Jones and Appellant as to the content, purpose and enforcement of this policy. The stated purpose of the S&WB's policy regarding unauthorized stops is to deter employees from going off route. For most employees, the St. Joseph Street location is off route and the S&WB became aware of a practice by several employees to congregate at the St. Joseph Street location on Fridays. Because of this problem, the S&WB instituted the policy that serves as the foundation for Appellant's three-day suspension. The S&WB's own witness admits that the policy is not uniformly enforced and that the true targets of the policy were those employees who were "off route." As a result of this holding, the S&WB has failed to satisfy the second prong of the three-prong analysis related to Appellant's three-day suspension for making an unauthorized stop.

ii. Appellant's inappropriate and unprofessional interaction with his supervisor did impair the efficiency of the S&WB

There can be no serious challenge to the proposition that employees, especially those in public service, must maintain a high standard of professionalism when on duty. Further, a supervisor must be able to manage and direct those employees he or she supervises. Subordinate employees have a responsibility to efficiently and respectfully carry out directives unless those directives are unnecessarily dangerous or unlawful. Mr. Webster made a reasonable request of

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Appellant to move truck 401 from the customer parking lot at St. Joseph Street. There was no evidence, and Appellant does not allege, that Mr. Webster made this request in an inappropriate or confrontational manner. Appellant responded to this request with offensive and inappropriate language. Such action necessarily impairs the ability of the S&WB to faithfully execute its functions and must be strongly discouraged.

C. Appellant's Two-Day Suspension Was Commensurate With His Offense

Since the Appointing Authority has established that Appellant addressed his supervisor using profanity and that such conduct compromised the efficient operation of the Department, the Commission now turns to whether or not a two-day suspension is the appropriate level of discipline for such misconduct. In conducting its analysis, the Commission must determine if the Appellants' termination was "commensurate with the dereliction;" otherwise, the discipline would be "arbitrary and capricious." *Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (citing *Staehle v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

Mr. Jones stated that the S&WB has a "zero tolerance" policy when it comes to the use of profanity in the work place. In order to enforce this policy, it is reasonable that violations of this policy result in substantial discipline. The Commission finds that a two-day suspension is a substantial form of discipline, especially for an employee with no prior disciplinary record, and such discipline is commensurate with Appellant's use of profanity towards Mr. Webster.

V. CONCLUSION

Upon considering the testimony and evidence submitted in connection with the instant appeal, the Commission finds that there was sufficient cause to discipline Appellant for two days for using profanity towards his supervisor. However, the Commission finds that there was not

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sufficient cause to discipline Appellant for his technical violation of the S&WB's policy regarding unauthorized stops. Therefore, the appeal is DENIED INPART and GRANTED in part. The Appellant's two-day suspension shall remain and the S&WB shall remove all records of the three-day suspension from Appellant's records and restore to Appellant all back pay and emoluments related to those three days.

Judgment rendered this 30th day of March, 2016

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



JOSEPH S. CLARK, COMMISSIONER

3/30/2016

DATE

CONCUR



MICHELLE D. CRAIG, CHAIRPERSON

3/8/2014

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

3/28/2014

DATE