CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Monday, July 3, 2017

Mr. Muhammad Yungai

Re: **Muhammad Yungai VS.**
Sewerage & Water Board
Docket Number: 8591

Dear Mr. Yungai:

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 - 7/3/2017 - 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 must conform to the deadlines established by the Commission's Rules and Article X, Sec.12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Cedric S. Grant
George R. Simno III
Jay Ginsberg
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

MUHAMMAD YUNGAI vs. SEWERAGE & WATER BOARD	DOCKET No.: 8591

I. INTRODUCTION

Appellant, Muhammad Yungai, 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 S&WB disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as an Environmental Enforcement Technician II for the S&WB and had permanent status as a classified employee.

On Wednesday, January 25, 2017 a hearing examiner appointed by the Commission convened an appeal hearing related to the above-captioned matter. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner's report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

The S&WB suspended Appellant for thirty days effective October 31, 2016 through November 29, 2016. (H.E. Exh. 1). The reason for Appellant's thirty-day suspension was his alleged violation of S&WB Policy #34 – Vehicular Accident Procedure (hereinafter "Policy 34"), and Policy #11 – Worker's Compensation Procedure (hereinafter "Policy 11"). *Id.* The S&WB promulgated Policy 34 on or about December 1, 1994 to address the proper procedures for S&WB employees involved in accidents while on duty. (S&WB Exh. 6). Policy 34 provides that:

> If [an employee] fail[s] to report an accident, and no valid reason can be determined for [the employee's] failure to report the accident, then [the employee's] supervisor will recommend that [the employee] receive thirty (30) days leave without pay (LWOP) at minimum, with more serious disciplinary action possible, in accordance with Policy Memorandum #11.

Id. Policy 34 does not define "accident" but does contemplate a situation where a S&WB vehicle sustains "minor damage." *Id.*

The S&WB published Policy 11 on or about March 28, 1992 as the "New Worker's Compensation Procedure." (S&WB Exh. 7). Policy 11 requires that, "[w]hen an accident and/or injury occurs during an employee's regular working hours, [an] employee should notify his/her supervisor immediately." *Id.* Contained within Policy 11 is also a mandate that employees involved in accidents submit to a substance abuse test: "In no case shall [an] employee be permitted to wait more than twenty-four (24) hours from the time of the accident's occurrence before presenting himself/herself for drug/alcohol testing." *Id.* Like Policy 34, Policy 11 contains a section regarding an employee's failure to promptly report an accident:

> If any Sewerage and Water Board employee fails to immediately report an accident or injury as set forth above, his/her supervisor shall promptly examine the circumstances, and shall determine whether the employee was for any valid reason

> unable to report the accident promptly. If the employee is found to have no valid reason for his/her failure to report the accident promptly he/she shall be awarded at minimum, a thirty (30) day suspension, with more severe disciplinary action possible.

Id. There is no definition of "accident" in Policy 11, but there is a clear distinction between injury and accident and the Policy requires an employee to report both. *Id.*

B. June 30, 2016

The facts related to the underlying appeal are largely undisputed. As an Environmental Enforcement Technician II, Appellant was responsible for inspecting locations throughout the City to ensure compliance with various state, federal and local regulations. (Tr. at 8:2-12). On June 30, 2016, Appellant was working with S&WB contractors at the Lane Street Pumping Station to address issues with automatic sampling equipment. *Id.* at 12:3-5, 14:12-16. Appellant was operating a S&WB pick-up truck (vehicle #132) at the time. (H.E. Exh. 1). As Appellant was maneuvering the vehicle around the pumping station, he backed up into the concrete base of a lighting fixture. (Tr. at 14:19-25). As a result of the contact between the truck and concrete base, vehicle #132 sustained minor damage to the rear bumper and tailgate. (S&WB Exh. 1). The vehicle was fully operational after the contact.

Approximately two months after the accident, Appellant and his supervisor, Scott Finney, were talking when Mr. Finney noticed the damage to vehicle #132. (Tr. 16:15-21). Appellant admitted that he had "bumped" a light pole while he was working with contractors. *Id.* at 16:21-25. As a result, Mr. Finney and the director of environmental affairs had Appellant complete an accident report. Appellant submitted a statement with his accident report in which he admitted to not reporting the accident but claimed that that he "did not think that the incident rose to the level of being considered an accident as in a collision or wreck." (S&WB Exh. 5). Appellant went on

to write that the vehicle remained fully operational and sustained what Appellant considered, "minor cosmetic damage." *Id.*

Soon after submitting his accident report, Appellant participated in a pre-disciplinary hearing. Ultimately, the summary of the incident was sent to Ms. Sharon Judkins, Deputy Director of Administration for the S&WB. Among Ms. Judkins's responsibilities are addressing employee discipline and making recommendations to the S&WB's Executive Director. After reviewing the evidence, Ms. Judkins recommended that Appellant receive a thirty-day suspension. Ms. Judkins believed that such a serious penalty was warranted because the S&WB had established consequences for employees who fail to follow procedures. (Tr. at 29:17-20). Furthermore, when employees fail to report accidents, the S&WB cannot:

> [D]eal with potential liability, deal with injuries to our employees, deal with the injuries to our resources or vehicles or trucks or what have you. Because that's something we really have to manage in order to keep the day-to-day operations going.

Id. at 30:1-8. S&WB Executive Director Cedric Grant accepted Ms. Judkins's recommendation and issued Appellant a thirty-day suspension. (H.E. Exh. 1).

During his testimony, Appellant maintained his belief that the minor damage that resulted from the contact between the light fixture and vehicle #132 did not rise to the level of an accident and certainly did not warrant a thirty-day suspension. In response to a question posed by the hearing examiner, Appellant stated that he had been employed by the S&WB between 1988 and 2000 and returned again in 2012. (Tr. at 24:8-10). And, prior to the instant matter, Appellant had never received a suspension from the S&WB. *Id.* at 24:17-19. Despite Appellant's otherwise unblemished disciplinary record, S&WB Policies 34 and 11 mandated a minimum thirty-day suspension.

III. LEGAL STANDARD

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline without sufficient cause, he/she may bring an appeal before this Commission. *Id.* It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, an 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 in which the appointing authority is engaged. *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, it 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)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

IV. ANALYSIS

A. Occurrence of the Complained of Activities

There is no dispute that Appellant failed to timely report the damage to vehicle #132 in violation of Policy 34 and Policy 11. In response to his supervisor's request for a statement, Appellant wrote the following:

> I did not think to report [the damage to vehicle #132] because I simply did not think that the incident rose to the level of being considered an accident as in a collision or wreck. I was in an isolated area which is at least a half a mile form a public roadway (Almonaster Road). No one else was involved and I merely bumped into

> this stanchion and put what I considered a minor dent in the bumper. The vehicle remained fully operational and sustained what I considered only minor cosmetic damage. I have always been a good steward of Sewerage and Water Board property and would never consider failure to report a real accident.

(S&WB Exh. 5).

The Commission accepts as genuine Appellant's belief that the contact with the light stanchion that caused minor damage to vehicle #132 did not constitute an accident. However, Policy 34 appears to specifically contemplate as accidents situations in which there are no personal injuries or significant property damage. (S&WB Exh. 6). Similarly, Policy 11 requires S&WB to report "accidents and/or injuries." (S&WB Exh. 7). Therefore, Appellant's earnest belief does not excuse his actions but does establish that his violation was unintentional.

Based upon the foregoing, the Commission finds that the S&WB has established that Appellant violated Policy 34 and Policy 11.

B. Impact on the S&WB's Efficient Operations

The Commission acknowledges that supervisors within the S&WB need to be cognizant of any damage to equipment or injuries to employees. Such damage and injuries have the potential to negatively impact the ability of supervisors to efficiently allocate resources. However, based upon Appellant's testimony, neither he nor the vehicle "missed" any time. Thus, the actual impact is Appellant's failure to adhere to the S&WB's policy regarding an employee's obligation to report an accident while on duty.

Another impact of Appellant's failure to report his accident was that he avoided the need to subject himself to a drug/alcohol test. Policy 11 appears to specifically contemplate the possibility that an on-duty accident involving an employee could be the result of the influence of drugs or alcohol. As a public entity, the S&WB has a responsibility to residents and other

employees to ensure that all operators of equipment are free from the influence of drugs or alcohol. The Commission can envision a scenario in which an employee fails to report an accident in order to avoid the need to submit to a drug/alcohol test. Such misconduct must be strongly deterred through clear policies and discipline.

However, in the matter now before us, there was no testimony or evidence to suggest that Appellant had purposely failed to report the accident in order to avoid a drug test. In fact, Appellant claims that the drug test did not enter into his consideration because he neither drank nor took drugs. *Id.* at 57:4-10. Again, the apparent impact on the S&WB's efficient operations in relation to Policy 11 was Appellant's failure to submit to a drug/alcohol test within twenty-four hours after an accident. This is a genuine issue, but one that had a limited impact on the actual operations of the S&WB.

C. Was the Discipline Commensurate with Appellant's Offense

"The Commission has a duty to independently decide, from the facts presented, whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction." *Mitchell v. Dep't of Police*, 2009-0724 (La.App. 4 Cir. 3/17/10, 3), 34 So.3d 952, 953.

The Commission's authority to "hear and decide" disciplinary cases "includes the authority to modify (reduce) as well as to reverse or affirm a penalty." *Whitaker v. New Orleans Police Dept.*, 863 So.2d 572, 576 (La.App. 4 Cir. 9/17/03)(citing La. Const. art. X, § 12; *Branighan v. Department of Police,* 362 So.2d 1221, 1223 (La.App. 4 Cir.1978)); *Bankston v. Dep't of Fire*, 2009-1016 (La.App. 4 Cir. 11/18/09, 10), 26 So.3d 815, 822 (an appointing authority's failure to properly consider mitigating circumstances rendered a ninety-day suspension arbitrary and capricious). However, the authority to reduce a penalty can only be exercised if there is insufficient

cause for imposing the greater penalty. *Id.* The Commission does not exercise this authority lightly. Yet, in the matter now before us, there is insufficient cause to support a thirty-day suspension.

In *Whitaker supra*, the New Orleans Police Department terminated an officer with an "unblemished record" after substantiating allegations that the officer had operated a vehicle while intoxicated. *Id.* at 574. The Commission denied the officer's challenge to his termination and the officer pursued his appeal to the Fourth Circuit. The Fourth Circuit vacated the termination and acknowledged that the Police Department had established that the officer had violated an internal policy. The court also recognized that the Superintendent of Police had ample justification for developing a policy that punished officers who drink and drive. However, the court observed that the officer was "a four year veteran of the police department with an unblemished record," and may not have been aware of the policy or that it applied to the particular situation. *Id.* at 577.

Here, Appellant has a twenty-seven-year history as an employee with the S&WB. (Tr. at 24:8-10). During those twenty-seven years, Appellant never received so much as a letter of reprimand prior to the thirty-day suspension now at issue. *Id.* at 24:8-15. Yet, the S&WB's policy does not allow the S&WB to take into account an employee's entire employment record. It was also not clear that Appellant was aware of the policy or that the S&WB regularly conducted training with respect to an employee's obligation to report accidents, regardless of how apparently minor.

In *Bankston*, the New Orleans Fire Department (hereinafter "NOFD") suspended a firefighter for ninety (90) days after failing to report for duty after receiving notice of an emergency activation. *Bankston, supra* at 817. The firefighter acknowledged that he violated NOFD policy by failing to report for duty but cited family-related health issues and an inability to get past a state

police blockade. *Id.* at 818. NOFD found that the firefighter's violation of the emergency activation policy was not premeditated, but the NOFD Superintendent wanted to send a message that it was/is important for firefighters to report to work during an emergency situation. *Id.* at 819.

The Commission sustained the firefighter's ninety-day suspension following an appeal hearing and the firefighter pursued an appeal before the Fourth Circuit. The Fourth Circuit reduced the suspension from ninety (90) days to thirty (30) days finding that NOFD failed to properly take into account the mitigating circumstances presented by the firefighter during the course of the appeal hearing. *Id.* at 822.

Due to the mandatory minimum penalty established by Policy 34 and Policy 11, the S&WB did not take into account numerous mitigating circumstances in the matter now before us. For example, the damage to vehicle #132 was of such a minor nature that, at the time of the appeal hearing (more than four months after learning of the damage), the S&WB had not yet repaired it. Appellant also was not injured in the course of the accident and did not miss any time. Further, Appellant had a long career free from any discipline before the June 30, 2016 accident. Finally, there was no evidence that employees received regular notice or training of the policies. No S&WB employee testified as to whether or not the policy was posted or if employees received regular training. The only indication in the record that Appellant even received Policy 34 or Policy 11 was in documents issued to Appellant immediately prior to his disciplinary hearing.

The Commission appreciates the S&WB's need to deter violations of policies and procedures. The undersigned also credit Ms. Judkins's testimony that unreported accidents and injuries have the potential to severely impact the S&WB's day-to-day operations. Finally, the S&WB's policy requiring any employee involved in an accident to submit to a drug/alcohol test is a prudent and reasonable requirement. Thus, we do not question the S&WB's decision to establish

Policies 34 and 11. However, the thirty-day minimum penalty fails to allow the S&WB to consider mitigating factors or an employee's entire employment record and sets the stage for arbitrary and capricious discipline.

The Commission has adopted rules requiring that all classified employees who operate equipment in the "ordinary scope of their employment" participate in substance abuse screening if the employee is involved in an on-the-job accident. (Rule V, § 9.13). The Rules define an "accident" as, "any occurrence which requires treatment by qualified medical personnel, causes injury or fatality, *produces damage to property or material*, or interrupts and/or terminates scheduled work assignments." (Rule V, § 9.13(a)(emphasis added)). Pursuant to the Rules, any refusal to participate in the substance abuse testing constitutes "presumptive evidence of [an] individual's ability to pass the substance abuse testing procedure." (Rule V, § 9.4, 9.4(a)-(k)). And, if an employee fails a drug screening, the Rules mandate that an appointing authority take disciplinary action up to an including termination. In issuing discipline, the appointing authority must take into account mitigating circumstances. (Rule V, § 9.15(a)-(k))

Given that the Commission's own rules require discipline in when an employee effectively fails a substance abuse test, we find that it is reasonable for the S&WB to issue substantial discipline when an employee avoids a mandated substance abuse screening. Even when such an employee does not have prior discipline. However, based upon the record before us, we find that the thirty-day suspension was not commensurate with Appellant's misconduct and did not include the consideration of mitigating factors. Therefore, we find that a fifteen-day (15) suspension is an appropriate penalty given the Commission's own rules and the Appellant's past excellent service and unintentional violation.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS-IN-PART and DENIES-IN-PART the Appellant's appeal. While the undersigned find that Appellant engaged in the misconduct alleged by the S&WB, such misconduct had a limited impact on the S&WB's efficient operations. Furthermore, the thirty-day suspension was not commensurate with Appellant's offense. Therefore, we Order the S&WB to restore to Appellant fifteen (15) days of back pay and all emoluments related thereto. Furthermore, the S&WB shall rescind any record of the thirty-day suspension identified in Hearing Examiner Exhibit 1 and replace it with a fifteen-day suspension.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 3rd day of July, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

Tania Tetlow
TANIA TETLOW, COMMISSIONER — 6-28-17 DATE

STEPHEN CAPUTO, COMMISSIONER — 6-26-17 DATE

Ronald P McClain
RONALD McCLAIN, COMMISSIONER — 6/26/17 DATE