



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION
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Friday, December 8, 2023

Mr. Louis Robein
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: **Eric Bourgeois VS.
Department of Fire
Docket Number: 9451**

Dear Mr. Robein:

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 - 12/8/2023 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, 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, 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,

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

Doddie K. Smith
Chief, Management Services Division

cc: Roman Nelson
Max V. Camp
Imtiaz A. Siddiqui
Eric Bourgeois
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**ERIC BOURGEOIS,
Appellant**

Docket No. 9451

v.

**DEPARTMENT OF FIRE,
Appointing Authority**

DECISION

Appellant, Eric Bourgeois, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his demotion on February 17, 2023. (Ex. HE-1). At all relevant times, Appellant had permanent status as an Operator. (Ex. HE-1; Tr. at 7). A Hearing Examiner, appointed by the Commission, presided over a hearing on June 1, 2023. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the post-hearing briefs from the parties, the Hearing Examiner's report dated November 7, 2023, and controlling Louisiana law.

For the reasons set forth below, Operator Bourgeois's appeal is DENIED.

I. FACTUAL BACKGROUND

While off-duty, Operator Bourgeois backed his vehicle into another vehicle on August 12, 2022, and he was arrested following his refusal to take the breathalyzer test. (Tr. at 8-9). On August 22, 2022, Operator Bourgeois informed NOFD he was arrested via a special report, and NOFD issued a Notice of Investigation to Operator Bourgeois on the same date for driving under the

influence. (Ex. NOFD-1; Ex. NOFD-6). In his special report, Operator Bourgeois informed NOFD, “I have a court date Oct 20.2022. My drivers liscence [sic] should be reinstated any day now according to my attorney.” (Ex. NOFD-6). Superintendent Roman Nelson testified that Operator Bourgeois informed NOFD on August 22, 2022, that his license was suspended. (Tr. at 50). Also on August 22, 2022, Operator Bourgeois also requested a 30-day extension of his disciplinary hearing “pending the outcome of my court date which is October 20, 2022.” (Ex. NOFD-9).

Because an Operator’s job duties include driving a fire truck, while the criminal charges were pending between August of 2022 and January of 2023, Operator Bourgeois worked as a Firefighter or acting Captain. (Tr. at 30). NOFD compensated Operator Bourgeois as an Operator during this period of time, and he worked his normal shifts. (Tr. at 32).

The State of Louisiana suspended Operator Bourgeois’s driver’s license on January 28, 2023, three days after the conclusion of Orleans Parish criminal proceedings against him. (Tr. at 28). Operator Bourgeois pled guilty to reckless operation of a vehicle on January 25, 2023. (Tr. at 10; Ex. NOFD-2, NOFD-8(b)).

NOFD held a pre-disciplinary hearing on February 9, 2023, and demoted Operator Bourgeois on February 17, 2023, to Firefighter “for the duration of your suspended license.” (Ex. HE-1). NOFD reinstated Operator Bourgeois to Operator on May 8, 2023. (Tr. at 40).

Although Operator Bourgeois informed NOFD that his license was suspended, at the NOFD pre-disciplinary hearing and the hearing of this matter, Operator Bourgeois claimed his license never should have been suspended. (Tr. at 143, 154; Ex. NOFD-7).

II. ANALYSIS

A. Firefighter Bill of Rights, La. R.S. 33:2181

As a threshold issue, any discipline of Operator Bourgeois by the Department of Fire must comply with the Firefighter Bill of Rights, La. R.S. 33:2181 *et seq.* The Firefighter Bill of Rights applies to a “fire employee,” defined as “any person employed in the fire department of any municipality . . . under investigation with a view to possible disciplinary action, demotion, or dismissal.” La. R.S. 33:2181(A)(1). Any discipline imposed without strict compliance with the minimum standards is an absolute nullity. La. R.S. § 33:2181(C). “Any investigation of a fire employee which is conducted pursuant to this Subpart shall be completed within sixty days, including the conducting of any pre-disciplinary hearing or conference.” La. R.S. 33:2186(A). “Nothing contained in this Section shall be construed to prohibit the fire employee under investigation and the appointing authority from entering into a written agreement extending the investigation for up to an additional sixty days.” La. R.S. 33:2186(C).

Even with the extension requested by Operator Bourgeois on August 22, 2022, NOFD’s investigation exceeded the maximum 120 days. Superintendent Nelson testified that NOFD deferred discipline in order for the criminal proceedings to conclude. (Tr. at 113-14). Criminal charges were pending against Operator Bourgeois from August 12, 2022, until January 25, 2023. Therefore, if the 60 or 120-day time limit of La. R.S. 33:2186(C) is tolled while criminal proceedings are ongoing, then NOFD’s February 17, 2023, discipline complies with the time limitations of the Firefighter Bill of Rights.

The Firefighter Bill of Rights provides that “[n]othing in this Section shall limit any investigation of alleged criminal activity.” La. R.S. 33:2186(C). Although no reported cases have applied this section to toll the time limit for investigations of firefighters, the Louisiana Supreme

Court has applied this language in the Police Bill of Rights to toll the time limit for investigations of police officers:

The language found in La. R.S. 40:2531 [the Police Officer Bill of Rights] provides that an investigation shall be initiated within fourteen days of a formal complaint and, *unless involving allegations of criminal activity*, must be completed within sixty days. Specifically, the statute provides: “[e]xcept as otherwise provided in this Paragraph, each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days ...” However, the statute further states, “ ... nothing in this Paragraph shall limit any investigation of alleged criminal activity.”

O'Hern v. Dep't of Police, 2013-1416 (La. 11/8/13), 131 So. 3d 29, 31. Because the Louisiana Supreme Court has construed the provision that “nothing in this Paragraph shall limit any investigation of alleged criminal activity” to toll the Police Officer Bill of Rights, the Commission gives the same effect to the same language in the Firefighter Bill of Rights. Therefore, the Commission finds that the time limit in La. R.S. 33:2186(A) was tolled while the criminal charges were pending against Operator Bourgeois. Therefore, NOFD’s investigation of Operator Bourgeois was timely under the Firefighter Bill of Rights.

B. Legal Standard for Commission’s Review of Discipline

“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep’t of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.* “Disciplinary action against a civil service employee will be deemed arbitrary and capricious

unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.” *Id.* “It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, 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 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 (quoting *Cure v. Dep’t of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094).

1. The Appointing Authority must show the discipline was commensurate with the infraction

The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for disciplining the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep’t*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *Abbott v. New Orleans Police Dep’t*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984). The appointing authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep’t of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

C. The Department of Fire has carried its burden of showing cause for the discipline of Operator Bourgeois

The Department of Fire has shown the occurrence of the complained-of activity. The New Orleans Police Department arrested Operator Bourgeois for driving under the influence of alcohol, and Operator Bourgeois pled guilty to reckless operation of a vehicle. Because he refused the breathalyzer, Operator Bourgeois believed (whether correctly or incorrectly) that his driver's license was suspended from August 22, 2022, to May 8, 2023, and he informed NOFD of the suspension of his license. Operator Bourgeois did not meet the minimum qualifications for the position of Operator for any period of time he lacked a driver's license. Civil Service Rule VI, section 3.3(a) provides that "[t]he failure of a regular employee to meet the minimum qualifications for the position to which he/she has been appointed is sufficient cause for that employee's dismissal or demotion."

Operator Bourgeois's conduct impaired the efficient operation of the Department of Fire. Operator Bourgeois was unable to perform the job duties of Operator with a suspended driver's license. Superintendent Nelson testified that firefighters are trained to drive the fire truck, but firefighters "are not trained and certified to the level that the apparatus operators are." (Tr. at 53). An Operator "has certifications as an apparatus operator in both pumping and operations and additional training beyond what a normal firefighter gets just being trained to drive the apparatus." (Tr. at 53). During the time period NOFD was under the impression Operator Bourgeois's driver's license was suspended, "someone else had to act as an operator or an operator had to work overtime." (Tr. at 52-53).

1. The penalty imposed by the Department of Fire is commensurate with the violation

Civil Service Rule VI, section 3.3(a) requires that “[a]ppointees must meet the Minimum Qualifications for the job.” “The failure of a regular employee to possess the minimum qualifications for the position to which he/she has been appointed is sufficient cause for the employee’s dismissal or demotion.” Civil Service Rule VI, § 3.3(a). Arguably, NOFD should have demoted Operator Bourgeois on August 22, 2022, under Civil Service Rule VI, section 3.3(a). However, NOFD paid Operator Bourgeois the same rate of pay and allowed him to work his normal shifts while the criminal charges were pending.

After the criminal proceedings concluded and Operator Bourgeois informed NOFD his driver’s license was suspended, NOFD demoted him. NOFD reinstated Bourgeois on May 8, 2023, when his driving privileges were restored. Therefore, because Operator Bourgeois informed NOFD he was not qualified for the position of Operator, NOFD demoted him until he regained the minimum qualification of a driver’s license. This penalty is commensurate with Operator Bourgeois’s violation.

Operator Bourgeois’s appeal is DENIED.

DATE: Dec 8, 2023

WRITER:


Brittney Richardson (Dec 5, 2023 16:48 CST)

BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:

J H Korn

J H Korn (Dec 5, 2023 16:51 CST)

JOHN KORN, VICE-CHAIRPERSON

Ruth White Davis

Ruth Davis (Dec 1, 2023 11:17 CST)

RUTH DAVIS, COMMISSIONER