



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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LATOYA CANTRELL
MAYOR

Tuesday, February 26, 2019

Mr. Charles Holmes

Re: **Charles Holmes VS.
Municipal Yacht Harbor
Docket Number: 8707**

Dear Mr. Holmes:

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 - 2/26/2019 - 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, 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,

A handwritten signature in cursive script that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Taylor J. Casey
Elizabeth S. Robins
Ramona D. Washington
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

<p>CHARLES HOLMES, Appellant,</p> <p>vs.</p> <p>MUNICIPAL YACHT HARBOR, Appointing Authority.</p>	<p>DOCKET No.: 8707</p>
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I. INTRODUCTION

Appellant, Charles Holmes, 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 Municipal Yacht Harbor for City of New Orleans, (hereinafter “MYH”) terminated Appellant after substantiating allegations of misconduct against Appellant.

At all times relevant to the instant appeal, Appellant served as a Grounds Patrol Officer for the MYH and had permanent status as a classified employee. A referee appointed by the Commission presided over one day of hearing on November 1, 2017. 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 DENY the appeal and render the following judgment. Commissioner Stephen Caputo dissents and assigns reasons.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

On August 27, 2017, the MYH issued Appellant a notice of termination. The cause for termination expressed in the notice was Appellant's false claim that he had been absent from work because of civil jury duty. (H.E. Exh. 1). Specifically, the notice alleged that Appellant had claimed to have attended civil jury duty on the following dates: August 4, 7, 9, 14, 2017. *Id.* The notice also indicated that Appellant initially claimed that he attended jury duty on August 11, 2017 but later changed his reason for being absent to an illness. *Id.* After an investigation, the MYH determined that Appellant's claim that he attended jury duty on the dates listed above was false.

B. Appellant's Absences

Wayne Bloom, an Accountant II with the MYH, served as the de facto office and property manager for the MYH during all times relevant to the instant appeal. (Tr. at 13:11-19). Mr. Bloom reported directly to MYH Executive Director Taylor Casey who had supervisory authority over the two other employees at the MYH, including Appellant. *Id.* at 14:7-15.

At some point prior to August 4, 2017, Appellant informed Mr. Bloom that he had been issued a jury duty summons for August 4, 2017. *Id.* at 14:25-15:4. In response to this notification, Mr. Bloom and Mr. Casey requested that Appellant produce the jury summons. *Id.* at 15:5-8. Appellant did not immediately produce any documentation related to his alleged jury summons, but was absent from work on Friday, August 4, 2017. The following Monday – August 7, 2017 – Appellant did not show up to work until approximately 3:00 p.m. *Id.* at 16:2-10. When he arrived at work, Appellant approached Mr. Bloom and indicated that he had been at jury duty that day and the previous Friday, was “really tired,” and requested to take the rest of the day off. *Id.* at 16:14-21. Appellant also produced a jury summons on August 7, 2017 that is in evidence as “MYH

Exhibit 1.” Upon receipt of the jury summons produced by Appellant, Mr. Bloom asked Appellant if the court provided him with an attendance schedule. Appellant indicated that he had not received a schedule. Mr. Bloom, who was familiar with the jury duty process having recently served jury duty, became suspicious of Appellant’s representations. *Id.* at 18:22-19:6. The jury summons form itself indicated that August 4, 2017 was not the date of possible jury service but only the date on which the potential juror would receive “instructions including the dates [the potential juror] will need to be available for Jury Duty.” (MYH Exh. 1).

Appellant reported to work on August 8th but did not provide any evidence that he had attended jury duty on August 4th or 7th. According to Mr. Bloom, Appellant indicated that he would be attending jury duty on Wednesday, August 9th. *Id.* at 20:3-9. Acting on his suspicions, Mr. Bloom called the phone number listed on the initial summons form produced by Appellant. After entering Appellant’s information, an automated message indicated that Appellant needed to report to jury duty on September 11, 2017. *Id.* at 20:10-21:14. Mr. Bloom then called another number provided in the automated message and spoke with a Civil District Court employee who indicated that Appellant was a “no show” on August 4th. *Id.* at 22:21-23:1. Mr. Bloom requested something in writing from the court documenting Appellant’s attendance (or lack thereof) at jury duty. In response, Mr. Bloom received an email from the Judicial Administrator of the Orleans Parish Civil District Court, Ms. Traci Dias. (MYH Exh. 2). In her email, Ms. Dias wrote that Appellant did not report to the court on August 4 or fill out the requisite juror questionnaire. Further, Ms. Dias confirmed that Appellant was neither required to (nor did he) “show up to serve jury service” on the week of August 7, 2017. *Id.* Ms. Dias also wrote that the court’s records indicated that Appellant had contacted the automated system on three occasions to verify that the next date he would have to report to the court for jury duty was September 11, 2017. *Id.* In fact,

it was Mr. Bloom, using the juror number on Appellant's summons, who accessed the court's automated system on the dates and times indicated in Ms. Dias's letter. (Tr. at 28:18-21).

Appellant did not report to work on Wednesday, August 9th, but did come to work on Thursday the 10th. When Appellant arrived at work, Mr. Bloom again requested a copy of Appellant's jury duty schedule and Appellant again denied having such a schedule yet. *Id.* at 25:6-14. On August 15th, Appellant prepared a list of dates and times he claimed to have attended jury duty and one day he claimed to be sick. (MYH Exh. 4). According to Appellant's submission, he attended jury duty on August 4, 7, 9, and 14th and was out sick on August 11th. *Id.* Appellant's claims stood in stark contrast to the information Mr. Bloom had received from Ms. Dias.

Appellant specifically addressed the August 11th entry with Mr. Bloom. Prior to preparing the list of jury duty dates and times, Appellant had informed Mr. Bloom that he had attended jury duty on August 11th. On the 15th, however, Appellant's story changed and he claimed that he had been the victim of an attempted robbery on the evening of the 10th and was so shaken up he was unable to report for jury duty. (Tr. at 32:25-33:25). He then requested permission to use a sick day to cover his absence on the 11th.

Eventually, Appellant produced a document containing his jury duty schedule which is in evidence as "MYH Exhibit 3." According to the document, Appellant's scheduled jury duty was on September 11-15, and 18-22, 2017. (MYH Exh. 3). Based upon Appellant's initial representations, the MYH allowed Appellant to use "civil leave" for the days he claimed to have attended jury duty. (MYH Exh. 5). Within the New Orleans Civil Service System, a classified employee may use civil leave when attending jury duty as opposed to using accumulated sick and/or annual leave. Because the MYH initially relied on Appellant's representations, Appellant was paid for the time he claimed to be at jury duty. *Id.*

After collecting the information from Appellant and receiving the email from Ms. Dias, Mr. Casey and Mr. Bloom discussed the next course of action regarding Appellant's apparent misrepresentations. Ultimately, Mr. Casey initiated pre-termination proceedings based upon an allegation that Appellant had lied about serving jury duty on August 4, 7, 9 and 14th. During the pre-termination hearing, Appellant claimed that he was confused about the dates he attended jury duty because of over-the-counter medication he was taking for a bad cold. (Tr. at 79:19-80:2). Appellant also produced a letter on Ochsner letterhead indicating that Appellant had visited a medical professional on August 22, 2017 and should stay out of work until August 25, 2017. (MYH Exh. 6). Mr. Casey did not find the purported medical letter relevant to his investigation because it did not cover the period of time at issue. Based upon the information he had collected, Mr. Casey found that Appellant had intentionally misrepresented the dates of his jury duty and subsequently terminated Appellant's employment.

The Hearing Examiner accepted into evidence a statement offered by Appellant over the objection of the Appointing Authority. The statement, in evidence as "Appellant Exhibit 1" contains a series of claims and statements covering a wide range of subjects. Appellant chose not to testify and the statement submitted was obviously not subject to cross-examination. In his written statement, Appellant denied attending jury duty in August. (App. Exh. 1). He further claimed that he never reported to work on Monday, August 7, 2017 despite Mr. Bloom's testimony to the contrary. It was not until Monday, August 14, 2017 that Appellant allegedly realized that he did not obtain a jury duty schedule. Appellant believes that some of the confusion regarding his attendance was the product of over-the-counter cold medication he took. *Id.*

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

The MYH alleged that Appellant falsely claimed to be attending jury duty on August 4, 7, 9, and 14, 2017. In support of its case, the MYH called two witnesses, Mr. Bloom and Mr. Casey, who confirmed that Appellant represented that he had missed work on the dates in question because he was attending jury duty. The investigation into Appellant’s attendance began when Mr. Bloom became suspicious of the manner in which Appellant claimed to have attended jury

duty. After receiving confirmation from the Civil District Court that Appellant had not attended jury duty in August 2017, the MYH initiated disciplinary proceedings.

The Commission accepts the testimony of Mr. Bloom and Mr. Casey. Specifically, the Commission finds that, when Mr. Bloom confronted Appellant regarding the inconsistencies in his story about jury duty, Appellant attempted to shift his explanation to an illness and over-the-counter medication. Appellant also prepared a list of dates on which he purportedly attended jury duty and submitted the list to Mr. Bloom and Mr. Casey. During the appeal hearing, Appellant – based on cross-examination questions – attempted to establish that the list was either provided under duress or a forgery. Yet Mr. Bloom and Mr. Casey were largely consistent with their testimony and Appellant did not provide any evidence or testimony to rebut their claims.¹ Further, Appellant did not introduce any evidence that Mr. Bloom or Mr. Casey bore any ill will towards Appellant or were conspiring to end his employment.

Finally, the Commission affords very little probative value to Appellant’s written statement. While Appellant was under no obligation to testify during the instant appeal hearing, the MYH introduced compelling evidence establishing sufficient cause for discipline. To counter such evidence, Appellant would have had to introduce evidence that was equally compelling. A written statement prepared in advance of the hearing does not constitute such evidence.² Obviously, a statement is not subject to cross-examination and cannot serve to undermine or rebut another witness’s sworn testimony. The Appointing Authority supported its case with two eye

¹ The only substantive inconsistency between Mr. Bloom’s testimony and Mr. Casey’s pertained to where Appellant was when he wrote his August jury duty schedule. Mr. Bloom testified that he believed Appellant filled in the date and times of his alleged jury duty in a separate room and Mr. Casey testified that Appellant entered the time in the presence of Mr. Casey and Mr. Bloom. Both men stated that Appellant himself entered the dates and times. Such a minor inconsistency does not serve to undermine either witnesses’ testimony.

² Appellant also introduced documents that purported to be screen shots of text messages. These screen shots were not authenticated by any witness under oath and do not appear relevant to the issue at hand. As a result, the Commission gives absolutely no weight to the screen shots.

witnesses who testified at length about Appellant's misconduct. There is nothing in the record that impeaches the testimony of Mr. Bloom or Mr. Casey.

As a result of the foregoing findings of fact, the Commission holds that the MYH has established that Appellant falsely claimed that he attended jury duty on the dates in question.

B. Impact on the MYH's Efficient Operations

As a Ground Patrol Officer, Appellant was responsible for patrolling MYH properties and ensuring that they were secure. (Tr. 58:18-59:2). On a basic level, MYH either had to rely upon a contractor to supplement the security services Appellant would normally supply or go without such services.

Further compromising the efficient operations of the MYH was Appellant's fraud. Had Mr. Bloom and Mr. Casey not looked into Appellant's claims, MYH would have paid Appellant for not showing up to work. The circumstances under which an appointing authority may pay a classified employee who does not report to work are very limited. They are "annual leave," "sick leave," and "civil leave." By claiming he attended jury duty, Appellant earned compensation to which he was not entitled.

As a result of the foregoing, we find that Appellant's conduct had an adverse impact on the efficient operations of the MYH.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's discipline 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).

Appellant has been an employee at the MYH for nineteen years. Prior to the conduct that precipitated his termination, Appellant had received minor forms of discipline unrelated to his attendance. Based upon his presentation, the Commission understands that Appellant feels that his length of service and relatively “clean” employment record serve as mitigating factors when the Commission considers whether termination is an appropriate level of discipline. Majority agree with the general proposition that a classified employee’s length of service and employment record are relevant considerations when determining whether or not a particular discipline is commensurate with an instance of misconduct. There is, however, some misconduct that is so serious as to overcome any potential mitigating factors.

During the course of the appeal hearing, there was reference to the term “payroll fraud.” This is a serious but apt description of Appellant’s conduct. As a seasoned classified employee, Appellant was well aware of the difference between sick leave, annual leave and civil leave. By claiming to be attending jury duty, Appellant was able to use civil leave as opposed to depleting his accumulated sick or annual leave. Appellant’s misconduct was founded in dishonesty, and his position as a grounds patrol officer exacerbated the severity of the offense. Since, as a grounds patrol officer, Appellant occupied a position of trust and was responsible for the security of MYH property and has unfettered access to most (if not all) of the property managed by MYH.

Based upon the record before us, we find that termination was commensurate with Appellant’s misconduct.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant’s appeal.

C. Holmes
No. 8707

Judgment rendered this 26th day of February, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



CLIFTON MOORE, Jr., COMMISSIONER

2/5/19

DATE

CONCUR



MICHELLE D. CRAIG, CHAIRPERSON

2/5/2019

DATE

DISSENT



STEPHEN CAPUTO, COMMISSIONER

2/25/19

DATE

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

<p>CHARLES HOLMES, Appellant,</p> <p>vs.</p> <p>MUNICIPAL YACHT HARBOR, Appointing Authority.</p>	<p>DOCKET No.: 8707</p>
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COMMISSIONER CAPUTO DISSENTS AND ASSIGNS REASONS

While I concur with the majority's findings with respect to the first two prongs of the sufficient cause analysis, I respectfully dissent from the conclusion that termination was commensurate with Appellant's offense.

As noted above, prior to his termination, Appellant had worked at the MYH for nineteen years with only two minor blemishes on his employment record. Further, there is no indication that the MYH had an issue with Appellant's performance. There is no question that Appellant's misconduct was serious and had a substantial impact on the efficient operations of the MYH, but I believe that Appellant's length of service constitutes a significant mitigating factor.

The Appointing Authority did not establish that discipline short of termination would not serve to correct Appellant's future conduct. Therefore, I find that a substantial suspension of thirty to sixty days and a final warning would be appropriate.