



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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CITY CIVIL SERVICE COMMISSION  
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DIRECTOR OF PERSONNEL

Wednesday, December 28, 2022

Mr. Donovan A. Livaccari  
101 W. Robert E. Lee, Suite 402  
New Orleans, LA 70124

Re: **Dennis O'Brien VS.  
Sewerage & Water Board  
Docket Number: 9325**

Dear Mr. Livaccari:

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 - 12/28/2022 - 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 purple ink that reads "Stacie Joseph".

Stacie Joseph  
Management Services Division

cc: Ghassan Korban  
Ashley Ian Smith  
Jay Ginsberg  
Dennis O'Brien

file

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

**DENNIS O'BRIEN,  
Appellant**

**Docket No. 9325**

v.

**SEWERAGE & WATER BOARD,  
Appointing Authority**

**DECISION**

Appellant, Dennis O'Brien, 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 November 11, 2021, termination of employment. (Ex. HE-1). At all relevant times, Appellant had permanent status as a Plumbing Inspector II. (3/8/22 Tr. at 107-09; Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on March 8, 2022, and September 9, 2022. At this hearing, both parties had an opportunity to call witnesses and present evidence. Mr. O'Brien did not testify, and he did not appear at the September 9, 2022, hearing.

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 Hearing Examiner's report dated October 28, 2022, and controlling Louisiana law.

For the reasons set forth below, Mr. O'Brien's appeal is DENIED.

**I. FACTUAL BACKGROUND**

The Sewerage & Water Board issues plumbing permits. (9/9/22 Tr. at 11). As part of the permitting process, plumbing inspectors perform "thorough inspections of properties and plumbing installations inside the property or outside the property." (9/9/22 Tr. at 9). The purpose of a plumbing inspection is to "ensure that the plumbing of any given property is done in a way

that it meets code, requirements, health and safety.” (9/9/22 Tr. at 9). For new water and sewer service, after a visit by an inspector, the applicant submits the plumbing design for review by Sewerage & Water Board staff. (9/9/22 Tr. at 10). Then, an inspector ensures that the installation is done in accordance with the plans. (9/9/22 Tr. at 10). For existing construction, a party applies for a permit, and an inspector will visit the site. (9/9/22 Tr. at 10). The inspector may “provide some feedback.” (9/9/22 Tr. at 10) Then, the permitting process is the same as new applications for water and sewer service. (9/9/22 Tr. at 10-11).

As a plumbing inspector, Appellant’s job duties included plumbing inspections, investigations, and backflow inspections. (3/28/22 Tr. at 107). When not performing inspections, the Sewerage & Water Board instructed plumbing inspectors to drive in the City looking for plumbing work being performed without a permit. (3/28/22 Tr. at 112, 167). Before the Covid pandemic, the Sewerage & Water Board expected inspectors to report to the office and then to work in the field from 8:30-2:00 with a 30 minute lunch. (3/28/22 Tr. at 113). During the Covid pandemic, the Sewerage & Water Board instructed plumbing inspectors to be in the field from 7:00 to 3:30 with a 30 minute lunch. (3/28/22 Tr. at 167). The Sewerage & Water Board instructed the inspectors to work remotely and to turn in paperwork once per week. (3/28/22 Tr. at 165). This paperwork included reports with the address of the inspection, the date, the time, and notes of what the inspector observed. (3/28/22 Tr. at 157).

Mr. O’Brien’s neighbor made an anonymous complaint that “[O’Brien] leaves for work in his personal vehicle in the morning and he returns home in the board vehicle where he stays all day,” according to an internal Sewerage & Water Board email dated August 17, 2021. (Ex. Bd-1). Following the anonymous complaint from the neighbor that Mr. O’Brien was at home with his Sewerage & Water Board vehicle parked outside for excessive periods of time during the work

day, Sewerage & Water Board Security began an investigation. (Ex. Bd-1). Kurt Coulon, an investigator with the Sewerage & Water Board, testified that he received an email from the security manager, Alvin Flint, on August 17, 2021, asking him to investigate this complaint. (3/28/22 Tr. at 12-13; Ex. Bd-1).

In accordance with this instruction, Mr. Coulon and Mr. LeVasseur began surveillance of Appellant's residence. (3/28/22 Tr. at 14, 62). Mr. O'Brien was using vehicle 114, originally assigned to Henry Blancq, the Plumbing Supervisor. (3/28/22 Tr. at 14). Mr. Blancq allowed Appellant to use the vehicle while Mr. Blancq was working from home. (3/28/22 Tr. at 14). Mr. Coulon began his surveillance of Appellant's use of the truck and his location during work hours on August 17, 2021, and he and Mr. LaVasseur ended the surveillance of the truck and residence on August 26, 2021, after documenting a number of occasions that Appellant was at home during the time he claimed he was performing plumbing inspections in reports to the Sewerage & Water Board. (3/28/22 Tr. at 33; Ex. Bd.-2). Mr. Coulon prepared a chart of the dates and times the truck was observed at or near Appellant's residence.<sup>1</sup> (Ex. Bd-2 at DAS000044; Ex. Bd 3). The investigators also provided photographs of the location of the truck with date and time stamps for a number of the dates and times on the chart. (3/28/22 Tr. at 64; Ex. Bd-2 at DAS000037-43).

Mr. Coulon testified about the conflict between these dates and times and the forms submitted by Appellant documenting plumbing inspections, including inspections on August 17, August 18, August 19, and August 24. (3/28/22 Tr. at 18-32; Ex. Bd-2; Ex. Bd-3). Further, Appellant submitted documents reflecting that he was two different addresses performing inspections at the same time his vehicle was at or near his residence. (3/28/22 Tr. at 26, 30).

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<sup>1</sup> These dates and times include August 17, 2021, from 2:07 PM to 3:05 PM; August 18, 2021, from 8:22 AM to 2:03 PM; August 19, 2021, at 10:20 AM and 1:23 PM; August 24, 2021, from 10:00 AM to 10:45 AM, and August 25, 2021, at 9:57 AM.

Mr. Coulon interviewed Appellant's supervisors, who stated that O'Brien did not have permission to go home during the day. (3/28/22 Tr. at 36). Mr. Coulon also interviewed Appellant, who stated that another employee picked him up at his home drove him to plumbing inspections, but this employee failed to corroborate this claim. (3/28/22 Tr. at 38).

Appellant also used Sewerage & Water Board vehicle 114 during Hurricane Ida (August 31, 2021, to September 5, 2021), even though he was not an essential employee and did not have permission to use the vehicle. (3/28/22 Tr. at 35, 38).

On November 11, 2021, the Sewerage & Water Board terminated Appellant's employment for violating the Professional Conduct Policy, Company Vehicle Policy, Progressive Discipline Policy (including providing false statements to investigators), and Civil Service Rule IX, Maintaining Standards of Service. (Ex. HE-1). Civil Service Rule IX authorizes discipline up to termination if an employee "has committed any act to the prejudice of the service, or has omitted to perform any act it was his/her duty to perform."

## ANALYSIS

### **A. Legal Standard for Commission's Review of Discipline**

#### **1. The Appointing Authority must show cause for 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).

**2. 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 terminating 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”).

**a. Factors considered by Commission**

“In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee’s work record and previous disciplinary record.” *Matusoff v. Dep’t of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 Westlaw 2562940, *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313. The Commission considers the nature of the offense, the employee’s work ethic, prior disciplinary records, job evaluations, and any grievances filed by the employee.” *Honore v. Dep’t of Pub. Works*, 14-0986, pp. 8-9 (La. App. 4 Cir. 10/29/15), 178 So. 3d 1120, 1131, *writ denied*, 2015-2161 (La. 1/25/16), 185 So. 3d 749

**B. The Sewerage & Water Board has shown cause for the termination of Mr. O’Brien**

The Sewerage & Water Board has shown that Appellant failed to perform plumbing inspections because he was at his residence for excessive periods of time during working hours. Appellant’s failure to perform his job duties violates Civil Service Rule IX.

Appellant’s failure to perform his job impaired the efficient operation of the Sewerage & Water Board. The Sewerage & Water Board explained the purpose of plumbing inspections, including ensuring the health of the public, and Mr. O’Brien’s failure to perform these inspections could lead to unsanitary conditions for members of the public. (3/28/22 Tr. at 149). Michael Evans, the current Plumbing Supervisor, testified that if sewer hookups are crossed, the health of the public could be affected, including the possibility of dysentery and Legionnaires’ disease. (3/28/22 Tr. at 149). Members of the public failed to receive guidance or feedback from an inspector when Appellant failed to visit the site.

The Sewerage & Water Board has also shown that Mr. O'Brien used a Sewerage & Water Board vehicle during Hurricane Ida without permission. This conduct impairs the efficient operation of the Sewerage & Water Board, as Sewerage & Water Board property should be used for functions of the Sewerage & Water Board, not for personal purposes of an employee.

**C. The penalty is commensurate with the violation.**

The penalty of termination is appropriate for Mr. O'Brien's blatant failure to perform his job duties and his unauthorized use of the Sewerage & Water Board vehicle during Hurricane Ida. The Commission finds that the nature of the offense is egregious. In addition, the Commission notes that Mr. O'Brien failed to testify to offer any mitigating circumstances.

This the 28<sup>th</sup> day of December, 2022.

WRITER:

Ruth White Davis  
Ruth Davis (Dec 28, 2022 12:35 CST)

RUTH DAVIS, COMMISSIONER

CONCUR:

CJ Moore  
CJ MOORE (Dec 28, 2022 13:45 CST)

CLIFTON J. MOORE, JR., COMMISSIONER

J H Korn  
J H Korn (Dec 28, 2022 14:56 CST)

JOHN KORN, VICE-CHAIRPERSON