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DIRECTOR OF PERSONNEL

Tuesday, September 20, 2016

Mr. Keith Mars

Re: **Keith Mars VS.
Department of Sanitation
Docket Number: 8513**

Dear Mr. Mars:

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 - 9/20/2016 - 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 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 blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Cynthia Sylvain-Lear
Elizabeth S. Robins
Brendan M. Greene
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

KEITH MARS vs. DEPARTMENT OF SANITATION	DOCKET No.: 8513
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I. INTRODUCTION

Appellant, Keith Mars, brings the instant appeal challenging a three-day effectuated by the New Orleans Department of Sanitation (hereinafter “Appointing Authority”). At all times relevant to the matter now before the Commission, Appellant was a classified employee with permanent status and worked as an Equipment Operator II for the Appointing Authority.

II. FACTUAL BACKGROUND

On March 29, 2016, Appellant was operating a street sweeper vehicle owned by the Appointing Authority. A street sweeping operation typically involved three vehicles, a water truck that loosens debris with jets of water, a street sweeper equipped with brooms and a vacuum and a dump truck that follows behind and empties the sweeper’s receptacle. Appellant’s route on March 29th was in Algiers. It was a sunny spring morning and the road conditions were “fair.” (A.A. Exh. 2). At approximately 7:00 a.m., while he was operating his sweeper on Holiday Road, Appellant realized that the sweeper needed to be emptied and requested a dump truck so that the contents of the sweeper could be emptied.

While waiting for the dump truck, Appellant stopped the sweeper and activated the sweepers emergency lights located on the top and rear of the vehicle. (Tr. at 79:4-7). The

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portion of Holiday Drive in question has three lanes of traffic in each direction separated by neutral ground. In each direction there is also a bike lane and shoulder (referred to by witnesses for the Appointing Authority as a “gutter bottom”). (A.A. Exhs. 1A-E). Appellant stopped the sweeper in the far right lane of the road with a portion of the sweeper in the bike path while waiting for the dump truck. (A.A. Exh. 1E). Appellant testified that he viewed his surroundings prior to stopping his vehicle but acknowledged that there was nothing preventing him from pulling the sweeper over to the gutter bottom while waiting for the dump truck. Shortly after Appellant brought his sweeper to a stop, another vehicle turned onto Holiday Drive and struck the sweeper’s left side. When members of the New Orleans Police Department (“NOPD”) arrived on scene, they issued the driver of the other vehicle a citation for violating traffic laws. As a result of the accident, the sweeper operated by Appellant sustained moderate damage that necessitated repairs.

Following the accident, the Appointing Authority alleged that Appellant failed to “operate [the street sweeper] in the safest possible manner” when he stopped in a lane of traffic to wait for the dump truck and suspended Appellant for three days. (H.E. Exh. 1). Raymond Toefield (Public Works Supervisor), Terry Fournier (Public Works Supervisor III), and Cynthia Sylvain-Lear (Department of Sanitation Director) each testified that employees who operate vehicles for the Appointing Authority undergo thorough training when it comes to the safe operation of such vehicles. Mr. Toefield stated that, prior to the accident, he had instructed Appellant not to leave the sweeper in a lane of traffic. (Tr. at 29:20-30:1). And, Mr. Fournier asserted that he informed all drivers, including Appellant, that they should not leave Department vehicles in lanes of traffic. *Id.* at 42:10-18. Ms. Sylvain-Lear summarized the general focus

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safety of briefings provided to employees who operate Appointing Authority vehicles in the following manner:

But we also sweep driving lanes, if there is debris in those driving lanes. And again that's why there is so much conversation about the safe operation of the equipment. And being aware of traffic and flows of traffic. So, you know, if you are operating and you've got traffic even behind you [] can pull over and let some of that traffic [bleed] off if you will and then continue on. So there are lots of conversations about safety.

Tr. at 68:24-69:11.

III. LEGAL STANDARD

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued 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 Commission finds that the Appointing Authority has rightfully set the bar high for its employees when it comes to the safe operation of vehicles.¹ In the instant appeal, there is evidence that Appellant could have pulled the sweeper over into the “gutter bottom” or shoulder of Holiday drive. Had he done so, the other driver may have avoided striking Appellant’s sweeper. Thus, based upon the record before us, it is clear that the Appellant did not operate the street sweeper in the “safest possible manner.” However, we find that there is a continuum of unsafe operation.

Clearly, there are occasions when Appointing Authority employees must operate vehicles in lanes of traffic. When they do, they must be hyper-aware of their surroundings and drive defensively. Here, while Appellant failed to operate his sweeper in the “safest possible manner,” there was ample room for other vehicles to pass him, it was a bright and sunny morning, the road was dry, Appellant had operated the sweeper’s emergency lights, and the sweeper was stationary.

B. Impairment of Efficient Operation of Appointing Authority

There is no dispute that the accident rendered the sweeper inoperable for a certain period of time and, as a result, the Appointing Authority was unable to use a valuable piece of equipment in the execution of its street cleaning service. For the Commission, this begs the question, who was responsible for the accident. In conducting its analysis under this second part of the Commission’s three stage process, the Commission borrows from tort law to determine if it is more likely than not that the Appellant’s misconduct – failing to operate his sweeper “in the

¹ Both Ms. Sylvain-Lear and Mr. Fournier expressed concern over the fact that Appellant had backed the sweeper down Holiday Drive in order to pick up debris instead of driving around the block. Given that the Appointing Authority disciplined Appellant for “stopping” his vehicle in an allegedly inappropriate location, this testimony is irrelevant.

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safest possible manner” – impaired the efficient operation of the Appointing Authority. The theory of contributory negligence is one that courts frequently use to assign responsibility for an injury and in some cases reduce the award to an injured party.

Appellant contributed to the accident by failing to pull his sweeper all the way over to the gutter bottom. However, as we have noted above, there was no traffic on the road at the time of the accident, the street was in “fair” condition, it was a bright and sunny morning, there were two full lanes where other vehicles could pass the sweeper, and Appellant had activated the sweeper’s emergency lights. Most importantly, the Appointing Authority acknowledges that the other driver violated traffic laws and *NOPD issued a citation for those violations.* Therefore, the Commission finds that it is more likely than not that it was the other driver’s actions and reckless operation of his own vehicle that caused the accident and thus impaired the efficient operation of the Appointing Authority rather than the Appellant’s failure to move the sweeper over into the gutter bottom. As a result, the Appointing Authority has failed to establish, by a preponderance of the evidence, that Appellant’s misconduct impaired the efficient operation of the Appointing Authority.

V. CONCLUSION

Based upon the foregoing, the Commission hereby GRANTS Appellant’s appeal. The Appointing Authority shall rescind the three-day suspension and remit to Appellant all back pay and emoluments related to the suspension.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE

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Judgment rendered this 20th day of Sept., 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

9/14/2016

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

9/19/16

DATE



TANIA TETLOW, COMMISSIONER

9/1/16

DATE