



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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MAYOR

Thursday, March 1, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Dale E. Williams
212 Park Place
Convington, LA 70433

Re: **Jeffrey Kelly VS.
Sewerage & Water Board
Docket Number: 8668**

Dear Mr Williams:

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 - 3/1/2018 - 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: Bruce H. Adams
James E. Thompson, III
Jay Ginsberg
Jeffrey Kelly

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

JEFFREY KELLY vs. SEWERAGE & WATER BOARD	DOCKET No.: 8668
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I. INTRODUCTION

Appellant, Jeffrey Kelly, 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 a Networks Senior Maintenance Technician I for the S&WB and had permanent status as a classified employee.

On Tuesday, July 11, 2017, a referee appointed by the Commission presided over an appeal hearing during which both Parties had an opportunity to call witnesses and present evidence. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing, as well as the referee’s report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

The S&WB terminated Appellant's employment effective Monday, March 6, 2017. (H.E. Exh. 1). The reason for Appellant's termination was his alleged violation of S&WB Policy #49 – Surplus Property, and Policy #74 – Inventory Control. *Id.* Appellant allegedly violated Policies #49 and #74 through his “involvement with selling lead, brass and other material belonging to the S&WB” and keeping the proceeds of such sales. *Id.*

Policy 49 establishes the process through which the S&WB disposes of surplus property. (S&WB Exh. 5). Under Policy 49, each department within the S&WB reports the “amount, description, model number, serial number and condition” of the surplus property so that such property may be catalogued and included in a sealed bidding process or public auction. *Id.* The S&WB keeps the proceeds of the sale of surplus property and dedicates it to other operating expenses. Policy 49 also contains specific steps related to record-keeping in order for the S&WB to maintain an accurate accounting of what surplus property is sold.

B. Appellant's Work History and Sale of S&WB Property

Most of facts related to the underlying appeal are largely undisputed. At all times relevant to the instant appeal, Appellant worked as a Networks Senior Maintenance Technician I in the S&WB's Networks Department. (H.E. Exh. 1). Appellant's responsibilities included the operation of excavating equipment in and around underground utilities maintained by the S&WB. (Tr. at 73:1-6).

On or about December 2, 2016 investigators with the Office of the Inspector General (“OIG”) conducted an interview with Appellant in connection with an investigation into the unauthorized sale of S&WB property by S&WB employees. (S&WB Exh. 2). The OIG initiated

its investigation after receiving reports that S&WB employees were selling brass at local scrap metal yards. (Tr. at 34:20-35:4). According to a report generated by the OIG, Appellant initially denied selling any S&WB scrap metal but later eventually did admit to selling “old brass” he had saved from various S&WB work sites. (S&WB Exh. 2). Receipts produced by the OIG investigators purport to show numerous sales by Appellant of “Red Brass,” “Lead,” “Yellow Brass,” and “Dirty Brass” totaling \$263.30 for 209 pounds of scrap metal. *Id.*

According to the OIG’s summary of the interview with Appellant, Appellant claimed to be aware of the “S&WB recycling policy in 2013” and signed an acknowledgement presented to him by a supervisor around that time. *Id.* Following the termination of several S&WB employees (including Appellant) for selling scrap metal retrieved from S&WB work sites, the S&WB reissued its policy prohibiting such sales. (Tr. at 68:20-69:4).

Ronald Doucette, the S&WB’s Deputy Director of Security, presided over a pre-termination meeting during which he presented Appellant with the OIG’s findings that are in evidence as “S&WB Exhibit 2.” *Id.* at 62:1-11. According to Mr. Doucette, Appellant did not respond to the allegations contained in the pre-termination letter. *Id.* at 63:3-5. On cross-examination, Mr. Doucette acknowledged that Appellant had notified the S&WB that he had retained counsel and asked that the start of the pre-termination meeting be delayed to accommodate the arrival of his attorney. *Id.* at 65:3-10. Mr. Doucette indicated that the “presiding officer” did wait about “ten or fifteen minutes” and then chose to begin. *Id.* at 65:6-10, 21-25.

Appellant had a different recollection of the pre-termination hearing. First, Appellant acknowledged receipt of the pre-termination notice, but claimed that he did not understand what the allegations against him were. *Id.* at 79:16-18. He went on to state that he informed the members of the S&WB’s administrative team that he was not aware of any policy in place regarding scrap

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metal except for one that was put in place in September 2016. *Id.* at 80:14-18. Appellant denied being aware of any policy regarding recycling S&WB scrap metal and clarified that there was an incident in 2013 when a S&WB employee was terminated for selling new brass from the S&WB warehouse. *Id.* at 81:8-18. Appellant distinguished this event from his actions selling scrap brass recovered from S&WB work sites.

Part of Appellant's regular job responsibilities included the excavation and replacement of old pipelines and brass fittings. *Id.* at 74:4-6. During the course of his testimony, Appellant stated that, when he first began working for the S&WB in May 1995, he did not receive any formal training regarding S&WB policies. (Tr. at 72:23-74:12). According to Appellant, it was regular and accepted practice for S&WB employees to collect old scrap metal excavated from S&WB job sites and sell such scrap metal. *Id.* at 74:22-75:5. Appellant further testified that he had attempted to return used scrap metal to a central S&WB location but that he was unable to do so. In support of this contention, Appellant claimed that a former supervisor, Wayne Collins, informed workers in the field that the S&WB was not accepting old brass from job sites. *Id.* at 75:23-76:7. Appellant strenuously denied that he ever sold "red" or new brass for scrap. Instead, he would clean the old brass he recovered from S&WB job sites so the scrap yard would classify it as "red" and pay Appellant more for it. On cross-examination, Appellant acknowledged that the scrap metal he sold had value and was not his property. *Id.* at 86:15-18.

In his twenty-two years with the S&WB, Appellant has never received any discipline or attended a pre-disciplinary hearing other than the one he attended regarding the underlying allegations. *Id.* at 73:22-74:3.

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. Appellant's Procedural Argument

Appellant claimed that he was unable to fully respond to the allegations against him because the pre-termination hearing notice was vague and he was deprived of an opportunity to have his attorney present. The seminal case regarding the due process an appointing authority must afford a tenured civil servant prior to termination is *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In applying *Loudermill* to employees within

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the New Orleans civil service system, the Louisiana Court of Appeals for the Fourth Circuit has held that classified employees are “entitled to advance notice of the charges prior to the pre-termination hearing; and such notice ‘should fully describe the conduct complained of, setting forth the relevant dates and places and the names of witnesses against the employee to enable the employee to fully answer and prepare a defense.’” *Honore' v. Dep't of Pub. Works*, 2014-0986 (La.App. 4 Cir. 10/29/15, 11), 178 So.3d 1120, 1128, *writ denied sub nom. Honore v. Dep't of Pub. Works*, 2015-2161 (La. 1/25/16), 185 So.3d 749 (quoting *Williams v. Dept. of Property Management*, 02-1407, p. 4 (La. App. 4 Cir. 4/16/03), 846 So. 2d 102, 105).

In the matter now before the Commission, the S&WB issued Appellant a pre-termination notice form that listed “Committing an act to the prejudice of the organization ad for violation of Sewerage & Water Board Policy #49 – Surplus Property, including inappropriate use/disposition of SWB property.” (App. Exh. 1). This letter issued on January 27, 2017, about two months after Appellant had participated in an interview, conducted by the OIG, during which an OIG investigator asked Appellant a series of questions regarding the sale of scrap metal recovered from S&WB job sites. Bearing this in mind, Appellant’s claim that he did not understand the allegations against him was disingenuous at best. Given the course of events that led to the issuance of the pre-termination notice, the Commission finds that the notice contained a sufficient level of detail to allow Appellant to prepare an adequate response.

The Commission is troubled that the S&WB failed to extend Appellant’s attorney the courtesy of waiting five to ten minutes before starting the pre-termination hearing. Given that Appellant does not dispute the underlying allegation – selling used brass recovered from S&WB work sites – the Commission does not view the S&WB failure as depriving Appellant of due process.

B. Occurrence of the Complained of Activities

There is no dispute that Appellant sold approximately 209 lbs. of scrap metal to a recycling business for \$263.30. The Commission finds that Appellant was well aware that the materials he was recovering and collecting from S&WB construction sites had value. And, while S&WB employees may not have received regular training regarding the proper recovery, storage, reporting, disposal and accounting of surplus material, there should be no need for a policy that prohibits S&WB employees from personally profiting from the sale of S&WB property.

Based upon the foregoing, the Commission finds that the S&WB has established that Appellant violated Policy 49.

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

At a minimum, Appellant's actions deprived the S&WB of proceeds from the sale of 209 lbs. of brass. However, as Mr. Grant pointed out during his testimony, the scrap metal in question belonged to the S&WB and the sale of scrap metal serves to partially replenish the S&WB's "general fund." When S&WB employees personally profit from the sale of scrap metal pulled from public infrastructure projects, it erodes the confidence of the general public in the S&WB's ability to manage its limited resources. Mr. Grant also testified that Appellant's actions "brought discredit" to the S&WB through negative coverage in the media as a result of the IG's report. The Commission recognizes that there was ample media coverage of this event when the OIG published its report.

Based upon the foregoing, the Commission finds that the S&WB has established that Appellant's misconduct impaired the S&WB's efficient operations.

D. 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).

As noted by the Hearing Examiner, the Commission has considered several appeals with a similar fact pattern as the matter now before us. Yet this is the first case in which an appellant has alleged that he attempted to bring brass recovered from a work site to the S&WB's central warehouse and had that brass rejected by a supervisor within the S&WB. The record would have greatly benefitted from Mr. Collins's testimony. This is especially true given that the Hearing Examiner expressed concerns regarding Appellant's credibility. Unfortunately, Appellant chose not to call Mr. Collins as a witness.

We find that Appellant's primary motivation was personal gain. Every appointing authority, including the S&WB, has a responsibility to strongly deter the type of misconduct perpetrated by Appellant. City employees are often entrusted with expensive equipment, vehicles and materials paid for directly by City residents. In the vast majority of cases, City employees conduct themselves in an exemplary manner, but when they do not, appointing authorities must take appropriate disciplinary action.

Based upon the above findings, we hold that termination was an appropriate level of discipline for Appellant's misconduct.

V. CONCLUSION

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

Judgment rendered this 1st day of March, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Ronald L. McClain (Chair)
RON McCLAIN, VICE-CHAIRMAN

2/21/18
DATE

CONCUR

Tania Tetlow
TANIA TETLOW, COMMISSIONER

2/20/18
DATE

[Signature]
STEPHEN CAPUTO, COMMISSIONER

3/1/18
DATE