



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

REV. KEVIN W. WILDES, S.J.,
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MAYOR

Tuesday, June 03, 2014

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **James Neyrey VS.
Department of Police
Docket Number: 8003**

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 - 6/3/2014 - 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 blue ink that reads "Germaine Bartholomew".

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Victor Papai
Jay Ginsberg
James Neyrey

JAMES NEYREY

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 8003

James Neyrey (“Appellant”) is employed by the Department of Police (“Appointing Authority”) as a Police Officer with permanent status. The Appellant received a two day suspension for violation of the Appointing Authority’s internal regulation concerning Instructions from an Authoritative Source. The second paragraph of the Appointing Authority’s May 9, 2012 disciplinary letter provides the factual basis for the disciplinary action:

This investigation determined that on September 7, 2011, 11:30 am, you solicited checks made payable to cash for motorcycle escort details from three National Football League teams. In your administrative statement you admitted and acknowledged soliciting checks made payable to cash via the emails to the NFL franchise representatives. As such, you violated Rule 4: Performance of Duty, paragraph 2 – Instructions from an Authoritative Source to wit: Chapter 22.8 paragraph 37, and General Order 828.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on April 11, 2013. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

The Appellant admits that he solicited checks made payable to cash. He contends that the Appointing Authority failed to consider the facts that he presented in mitigation or to explain his conduct. Specifically, as reflected by the record, evidence that the Appellant was instructed to solicit checks made out to cash by his supervisors for the

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purpose of allowing for the timely payment of amounts owed for services provided by motorcycle escorts to various NFL teams competing against the New Orleans Saints.

The only witness for the Appointing Authority was Asst. Supt. Darryl Albert who testified regarding the penalty assessed against the Appellant.¹ Asst. Supt. Darryl Albert testified that he conducted the pre-disciplinary hearing and recommended a two day suspension to the Appointing Authority. Asst. Supt. Albert stated that he relied upon the Appointing Authority's disciplinary guidelines when making his recommendation and that the action recommended was within those guidelines.

He also explained that the rule prohibiting cash payments for details was promulgated to assure that all payments were properly documented and to deter circumvention of the policies regarding paid details. According to Asst. Supt. Albert, cash payments are more difficult to track and link to the individual that actually performed the work.

All of the Appellant's witnesses worked together in the Traffic Division. The Traffic Division provided motorcycle escort services for various entities on a rotating basis. The entity requesting escort services paid for the services directly employing the referred individuals. During the relevant period, the Appellant was the traffic desk officer maintaining the books for escort services, assuring that the work was equitably distributed among the escorts. Specifically, the Appellant determined the personnel that were needed and communicated the labor costs to the employing entities.

¹ The parties agreed to accept the testimony from a prior case stipulating that the testimony would be the same. *See David Tregre v. Police Case No. 8030*

Regarding the NFL, the team representatives were without authority to issue checks at the time of the event. Consequently, to assure that the referred escorts were paid timely, an escort's pay was calculated in advance and communicated to the teams' home offices. Because it was not possible to determine in advance of the event the actual identity of the escort, the teams issued the checks to cash for delivery at the event. The Appellant kept track of the escorts, delivered the checks to the individuals that worked the escorts, and maintained records to assure that the proper person was paid the proper amount for the work performed.

However, prior to the 2011 football season, the Appointing Authority instructed all personnel by email dated May 16, 2011, to cease accepting checks made to cash in payment for details. The consistent testimony of all witnesses, including the Appellant, Sgt. Gerald Young, Sgt. Andrew Palumbo, and Officer Michael Tecon, was that Lt. Melvin Howard made the decision to continue receiving checks made to cash from NFL teams during the 2011 football season. According to the testimony of Sgts. Gerald Young and Andrew Palumbo, Lt. Howard instructed them to keep things as they were and to continue accepting checks made out to cash until he received clarification. He advised them that he would get back to them once he had clarification.² Apparently, Lt. Howard never got back to anyone, and the practice continued until the time of the internal investigation that resulted in the Appellant's suspension.³

LEGAL PRECEPTS

² There is no issue that the motivation for continuing to accept checks made to cash was for good faith reasons. Lt. Howard wanted to make sure his subordinates were paid within a reasonable period of time, which could not be guaranteed if payment was delayed until after an event took place.

³ Lt. Howard has since retired and was not called as a witness by either party.

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide independently, based on the facts presented, whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters, v. Department of Police of New Orleans, supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

CONCLUSION

The Appointing Authority has failed to establish by preponderance of evidence that it disciplined the Appellant for cause. The credible testimony of the Appellant, Sgt. Andrew Palumbo (his immediate supervisor), Sgt. Gerald Young, and Officer Michael

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Tecon confirmed that the Appellant was following the instructions issued by the Traffic Division's Commander, Lt. Melvin Howard, that he was to accept checks made out to cash, unless the NFL team was able to issue a check per escort to each officer upon arrival for the motorcycle escort. The Appointing Authority abused its discretion by ignoring the fact that the Appellant was clearly following the instructions of his supervisors. The responsibility for failing to follow instructions from an authoritative source was with Lt. Howard, who knowingly disregarded the order and relieved his subordinates of responsibility by informing them that he would take care of it. It was not unreasonable for the Appellant to accept his commander's assurances and continue following an otherwise accepted past practice.

- Considering the foregoing, the Appellant's appeal is GRANTED. The Appointing

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Authority is ordered to pay the Appellant two days of back pay, costs and emoluments of employment.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 3rd DAY OF
June, 2014.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION


MICHELLE D. CRAIG, COMMISSIONER

CONCUR:


JOSEPH S. CLARK, COMMISSIONER


REV. KEVIN W. WILDES, S.J., CHAIRMAN