



CITY OF NEW ORLEANS

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MAYOR

Wednesday, February 28, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Peggy Poche VS.
Office of Police Secondary Employ
Docket Number: 8575**

Dear Mr. Hessler:

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 - 2/28/2018 - 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: John L. Salomone, Jr
Elizabeth S. Robins
Brendan M. Greene
Peggy Poche

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

PEGGY POCHE vs. OFFICE OF POLICE SECONDARY EMPLOYMENT	DOCKET No.: 8575
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I. INTRODUCTION

Appellant, Peggy Poche, 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 Office of Police Secondary Employment for City of New Orleans, (hereinafter “OPSE” or “Appointing Authority”) suspended Appellant for five days after substantiating allegations that Appellant engaged in misconduct. The Commission’s analysis will address whether or not OPSE had sufficient cause to issue the five-day suspension. At all times relevant to the instant appeal, Appellant served as an Analyst for OPSE and had permanent status as a classified employee.

On August 15, 2017, a referee appointed by the Commission presided a hearing during which both Parties had an opportunity to present evidence. The referee then prepared a report containing factual findings and a recommended disposition. 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 render the following judgment.

II. FACTUAL BACKGROUND

OPSE is an entity within the City of New Orleans responsible for coordinating and tracking when and where New Orleans Police Officers work “paid details.” (Tr. at 60:8-12). Companies, private individuals, schools and a variety of other entities contact OPSE in order to secure the presence of an off-duty Police Officer at a specific location and time. The nature of the detail varies, sometimes the request is for a reoccurring police presence and sometimes the request will be for a single event. OPSE posts the request or “detail” in its online system known as the “ISE System.” Eligible NOPD Officers have access to the ISE System and can sign up for the detail through an online interface.

A. Alleged Misconduct

OPSE alleged that Appellant engaged in “grossly insubordinate and disruptive behavior” on August 12, 2016. (H.E. Exh. 1). OPSE identified two distinct actions that constitute the alleged disruptive and insubordinate behavior. First, OPSE claimed that Appellant confronted her supervisor regarding an entry the supervisor had made in the ISE System. During the confrontation, Appellant requested that her supervisor remove the entry and her supervisor refused. Nevertheless, Appellant “refused to accept” her supervisor’s response and insisted that the supervisor remove the entry. *Id.*

The second incident of insubordinate and disruptive behavior occurred when Appellant printed a screen shot of her supervisors ISE System entry and allegedly wrote a “grossly disrespectful” reference to her supervisor. *Id.*

B. August 12, 2016

During the relevant period of time, Appellant was responsible for coordinating details related to traffic work and second lines. (Tr. at 103:24-104:4). From August 1, 2016 through

approximately August 7, 2016, Appellant was out of the office on an approved annual leave.¹ While Appellant was out of the office, two other OPSE employees assumed her responsibilities. *Id.* at 14:24-15:2. At some point during Appellant's vacation, an entity requested coverage for an event and the two OPSE employees responsible for coordinating coverage failed to assign a Police Officer to the event. This was referred to in the record as a "missed shift." *Id.* at 15:2-7.

Appellant's supervisor at the time, Eric Duchesneau, discovered the missed shift during an audit of the ISE System and made a notation within the system indicating a missed shift. (OPSE Exh. 2). The notation was standard practice and aided OPSE staff in responding to concerns from customers and from external auditors. (Tr. at 61:4-15). When Appellant returned from her vacation, she observed the notation in the ISE System and initiated a discussion with Mr. Duchesneau about removing the notation. (OPSE Exh. 2). Appellant's concern was two-fold. She was primarily concerned that the notation, in isolation, would reflect poorly on Appellant's performance and would be used by Mr. Duchesneau as a negative element in Appellant's evaluation. (Tr. at 131:20-132:10, 134:2-11). Appellant was also concerned that the notation could be used as a negative mark against the two employees that were responsible for covering Appellant's duties.

Mr. Duchesneau clearly communicated that he would not remove or modify the note, but assured Appellant that the ISE System note would not be used to "get anyone in trouble." (OPSE Exh. 2). Mr. Duchesneau described his interaction with Appellant regarding the ISE System entry as a "discussion." *Id.* Yet, he did believe that it was inappropriate for Appellant to continue to ask him to remove the note. Appellant made a screen shot of the ISE System showing Mr.

¹ The exact dates of Appellant's vacation were not contained in the record.

Duchesneau's "missed shift" entry and made several hand written notes in order to memorialize Mr. Duchesneau's assurances regarding the impact of the entry. *Id.* at 138:21-139:2.

Mr. Duchesneau observed Appellant writing something on the screen shot she had printed and became curious about the content of her writing. (*See* OPSE Exh. 2). So curious in fact, that he followed Appellant to the employee break room and demanded that Appellant produce the screen shot. His justification for demanding Appellant produce the screen shot with handwritten notes was that her notes were "city property" because Appellant had created them during work hours. *Id.* Eventually, Appellant did hand over the screen shot with her notes which read as follows:

Mumbles to Terry @ copy machine – [illegible] I was on vacation this day – asked him to remove this note – Said he will not. – Note not meant for any [particular] person's fault. – Noted, Sherlock. * I asked him to remove to give a break to L & M.

OPSE Exh. 1.

Upon reading the note, Mr. Duchesneau became extremely angry. This anger was a product of Mr. Duchesneau interpretation of the "Noted, Sherlock" portion of the letter as being directed at him. (Tr. at 20:19-22). According to Mr. Duchesneau, Appellant's use of the term "Sherlock" was an unambiguous insult directed at Mr. Duchesneau.

The discussion between Appellant and Mr. Duchesneau regarding the screen shot and "Sherlock" note quickly escalated into a heated back-and-forth. *Id.* at 38:13-18. At one point, the dispute got so loud that it drew the attention of OPSE Director John Salomone. Mr. Salomone chastised both Appellant and Mr. Duchesneau about engaging in a loud argument in front of other OPSE personnel. He directed both employees to return to their respective work areas and indicated that he would speak to them about the incident at a later time.

Mr. Salomone testified that, when he reviewed the notes Appellant had made, he believed that they were a reference to Mr. Duchesneau because Appellant had previously written the word “asshole” on a yellow “sticky” note. (Tr. at 67:12-25). Mr. Salomone discovered the note when it fell out of Appellant’s belongings after a meeting. He believed that the earlier note was a reference to Mr. Duchesneau. As a result of his review and past experience, Mr. Salomone characterized Appellant’s actions as “gross insubordination” and pursued a five-day suspension. On cross-examination, Mr. Salomone acknowledged that Appellant’s initial concern regarding the ISE System “missed shift” entry was a valid one given that such entries may be used in an employee’s evaluation. *Id.* at 77:7-18.

For her part, Appellant denied that she was referring to Mr. Duchesneau when writing “Sherlock.” Instead, Appellant insisted that the note was for her own edification and intended to serve as a personal reminder that Mr. Duchesneau had assured her that the ISE System entry would not be used to “get anyone in trouble.” *Id.* at 135:22-136:3. Appellant further claimed that it was Mr. Duchesneau who was upset and using a loud voice during their interaction of the “Sherlock” note. Appellant testified that she was trying to calm the situation by apologizing and assuring Mr. Duchesneau that the note was not directed at him. *Id.* at 143:25-144:2.

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

Because OPSE alleges that Appellant engaged in two separate instances of insubordinate and disrespectful behavior, the Commission will address each in turn.

1. Discussion with Mr. Duchesneau Regarding ISE System Entry

The facts pertaining to this first alleged instance of misconduct are not in dispute. There is no question that OPSE staff failed to assign an NOPD officer to an announced event resulting in a “missed shift.” Consistent with OPSE practice, Mr. Duchesneau made an entry in the OPSE System documenting the missed shift. Appellant was not responsible for the error, but was concerned about Mr. Duchesneau’s entry in the ISE System. Appellant’s concern was justified given that such an entry could have been used by a supervisor when it came time to evaluate Appellant’s performance. Mr. Duchesneau assured Appellant that the ISE System entry would not be used to get anyone “in trouble.” The interaction between Appellant and Mr. Duchesneau about the ISE System entry may have been tense at times, but the undersigned Commissioners do not

believe that either individual was disruptive or disrespectful. Mr. Duchesneau himself characterized this first interaction as a “discussion” rather than an “argument.”

The undersigned Commissioners find that OPSE has failed to establish that Appellant’s interaction with Mr. Duchesneau regarding the ISE System entry rose to the level of “gross insubordination” or “disrespectful” conduct.

2. “Noted, Sherlock”

The undersigned Commissioners are even less impressed with OPSE’s claim that Appellant’s handwritten note on a screen shot constituted “gross insubordination.” Appellant’s decision to make a contemporaneous note regarding an assurance from her direct supervisor that an error memorialized in OPSE’s primary database would not be used against Appellant was a reasonable measure. The Commission would go so far as to say that Appellant’s action was a prudent one given the poor relationship she had with Mr. Duchesneau.

Appellant made no attempt to publish her note and actively tried to keep it from Mr. Duchesneau. It was Mr. Duchesneau who decided that he needed to see what Appellant had written on the screen shot. We agree with the hearing examiner that Mr. Duchesneau’s excuse for wanting to see the note (it constituted employee work product) was a razor thin pretext for instigating a confrontation over an issue that had been closed. The loud and disruptive back-and-forth between Appellant and Mr. Duchesneau was entirely the result of Mr. Duchesneau’s insatiable curiosity about Appellant’s personal note. Mr. Duchesneau himself admits – in writing – to being so upset about the incident that his memory of the event is unreliable.

Even if the Commission did agree with OPSE that Appellant’s “Note, Sherlock” comment was a reference to Mr. Duchesneau, we would not have found that it constituted “gross insubordination.” The Commission does not doubt that Mr. Duchesneau found the comment

offensive. This is a subjective measure based upon Mr. Duchesneau's own personality and experiences. However, there must also be an objective measure in the Commission's analysis. We do not find that another similarly situated supervisor would have reacted as Mr. Duchesneau did. In fact, we would hope that supervisors have the experience and training necessary to deal with sarcastic comments regarding their management.

Based upon the record before us, the undersigned Commissioners do not find that OPSE has met its burden in establishing that Appellant engaged in "grossly insubordinate" or "disrespectful" behavior.

V. CONCLUSION

For the reasons established above, the Commission hereby GRANTS Appellant's appeal. The Appointing Authority shall remit to Appellant all back pay and emoluments related to her five-day suspension.

P. Poche
No. 8575

Judgment rendered this 28th day of February, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



CLIFTON MOORE, JR. COMMISSIONER

2/19/18

DATE

CONCUR



MICHELLE D. CRAIG, CHAIRPERSON

2/27/2018

DATE



TANIA TETLOW, COMMISSIONER

2/20/18

DATE