



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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RUTH WHITE DAVIS

Tuesday, January 4, 2022

AMY TREPAGNIER  
DIRECTOR OF PERSONNEL

Robein, Urann, Spencer, Picard & Cangemi  
Ms. Paula Bruner  
2540 Severn Ave. Suite 400  
Metairie, LA 70002

Re: **Crescent City Lodge #2, Fraternal Order of  
Police Inc., New Orleans Fire Fighters  
Association, IAFF Local 632  
Docket Number: 9181**

Dear Ms. Bruner:

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 - 1/4/2022 - 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, 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: Donovan Livaccari  
Elizabeth S. Robins  
file

**MINUTE ENTRY FROM DECEMBER 13, 2021, MEETING**

**RE: CRESCENT CITY LODGE #2, FRATERNAL ORDER OF POLICE, INC., AND NEW ORLEANS FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 632, REQUEST FOR INVESTIGATION AS TO EMERGENCY PAY**

**ON REMAND FROM THE FOURTH CIRCUIT COURT OF APPEAL**

**I. INTRODUCTION**

This matter is on remand from the Fourth Circuit Court of Appeal following the Court's February 27, 2021, decision and a full evidentiary hearing on July 15, 2021, as ordered by the Court.

The underlying March 25, 2020, request for investigation concerns the application of the Commission's Rule VIII, § 11.1, authorizing emergency pay, to the City's limited operations during the stay-at-home order necessitated by coronavirus pandemic (March 23, 2020 to May 16, 2020). This rule bases eligibility for emergency pay for essential employees on two criteria: (1) "[w]hen the Mayor of New Orleans declares an official emergency," and (2) when the Mayor of New Orleans "orders that only 'essential' employees report to work and that all 'non-essential' employees remain away from work." Rule VIII, § 11.1. Police officers and fire fighters seek emergency pay for reporting to work in person when other employees either worked remotely or received civil leave. The determination of whether the fire fighters and police officers requesting the investigation are entitled to emergency pay turns on the meaning of "report to work."

**II. PROCEDURAL HISTORY**

By letter dated March 25, 2020, the Fraternal Order of Police (FOP) requested emergency pay on behalf of its members for hours worked during the Covid-19 emergency and asked that its request be considered by the Civil Service Commission. (R. at 35-36). On May 13, 2020, the FOP submitted a memorandum, and specifically requested an investigation under La. Const., art. X, §

12/13/21 ME  
FOP/NOFF REQUEST FOR INVESTIGATION  
EMERGENCY PAY

10. (R. at 24). On May 14, 2020, the City of New Orleans submitted a response to the request from the Fraternal Order of Police for emergency pay. (R. at 18). On May 22, 2020, the New Orleans Firefighters Association (NOFF) joined with the FOP in seeking emergency pay for its members. (R. at 12). The Commission placed the item on its business agenda,<sup>1</sup> and the Commission heard the matter at a special meeting on May 26, 2020. (R. at 8). On July 2, 2020, the Commission issued a minute entry reflecting its application of its rule on emergency pay. (R. at 8). The Commission applied its rule on emergency pay, determining that the term “report to work” includes working remotely, so that no emergency pay was due to the fire fighters and police officers. (R. at 10). The Commission granted the FOP and NOFF’s motion for appeal on August 6, 2020. (R. at 2-3).

On February 17, 2021, the Fourth Circuit Court of Appeal reversed and remanded the Commission’s decision on the request for investigation. *Crescent City Lodge #2, Fraternal Order of Police, Inc., et al. v. New Orleans Civil Service Commission*, No. 2020-CA-0411 (La. App. 4 Cir. 2/17/21). The Fourth Circuit instructed the Commission to conduct a full evidentiary hearing on whether the term “report to work” includes working remotely, as the Commission initially decided. *Id.* at 4. The Fourth Circuit specifically instructed the Commission to conduct a hearing focusing on “who were the critical employees were directed to ‘report to work’ as of March 23, 2020 in person.” *Id.* at 4. “If a finding is made that those employees are essential employees, then Rule IV, § 11.1 applies.” *Id.* at 4.

Following its March 22, 2021, regular meeting, the Commission complied with the Fourth Circuit decision by ordering an evidentiary hearing and directing the parties to address the factual issues in the Court’s decision at the hearing. A hearing officer conducted this hearing on May 20,

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<sup>1</sup> The Commission’s agenda for the May 26, 2020, special meeting is publicly available at the following website: <https://www.nola.gov/getattachment/Civil-Service/Commission/Meetings/2020/5-26-2020-12-00-00-AM/May-26,-2020-Civil-Service-Comm-Agenda.pdf/>

2021, and July 15, 2021, and the parties had the opportunity to present evidence, including the testimony of witnesses. The Commission requested briefs from the parties and oral argument on the issue.

The Commissioners have reviewed the record on appeal, the transcripts of the hearing, all exhibits at the hearing (including the stipulation of the parties), the post-hearing briefs of the parties, and oral argument at the December 13, 2021, meeting of the Commission.

### III. FACTUAL BACKGROUND

The Mayor declared a State of Emergency on March 11, 2020, because of the serious threat to the public health posed by Covid-19. (Jt. Ex. 10; Stipulation 4 (5/20/21 Tr. at 16)). On March 15, 2020, the CAO directed all department heads to prepare two lists: (1) essential personnel,<sup>2</sup> and (2) personnel who were able to work remotely. (Jt. Exs. 1(a) and 1(b)). The CAO specifically instructed the department heads to make the essential personnel designations “as it relates to the City’s COVID-19 response.” (Jt. Ex. 1(a) at 2). The City defined “remote eligible” as “an employee who has been deemed by their appointing authority as being able to complete core functions of their work from an approved worksite other than the location from which the employee normally works.” (Jt. Ex. 1(b)). Three thousand one hundred eighty eight (3,188) employees were designated as essential, and 809 employees were designated as non-essential. (7/15/21 Tr. at 41). Three thousand three hundred sixty four (3,364) employees were designated as non-remote eligible, and 633 employees were designated remote-eligible. (7/15/21 Tr. at 41).

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<sup>2</sup> In its brief, the City refers to “reserve” employees. The City requested a change to Rule VIII, § 11.1 on January 25, 2021, in order to create this new category of employees who could be activated to essential status (and to eliminate the designation “non-essential”). <https://www.nola.gov/getattachment/Civil-Service/Commission/Meetings/2021/1-25-2021-10-00-00-AM/Approved-minutes.pdf>. The Commission declined to change its rule because of this pending litigation. *Id.* CAO Policies use this term (Stipulations 20-21 (5/20/21 Tr. at 21); Jt. Exs. 4-5). Therefore, the Commission will treat all reserve employees as non-essential employees for purposes of this request for investigation.

On March 16, 2020, the Mayor ordered the cancelation of all public and private gatherings. (Jt. Ex. 13). On March 17, 2020, the CAO notified the Personnel Director that the City was reducing, suspending, and/or closing City departmental operations, as needed. (R. at 9; Ex. C-1). The CAO further stated in his memo to the Personnel Director that “[e]mployees who are ineligible for remote work are and have either been instructed by their appointing authority not to report to work or who have been quarantined and/or placed in isolation by the Louisiana Department of Health are being placed on Civil Leave pursuant to Civil Service Rule VIII, Section 4.1(h).” (R. at 9; Ex. C-1). Therefore, employees who were unable to work remotely or physically report to work began receiving full pay.

On March 20, 2020, the City Health Department directed all residents to stay at home except for essential activities. (Stipulation 7 (5/20/21 Tr. at 18); Jt. Ex. 14). On March 20, 2020, Stephanie Hennings, in the Chief Administrative Officer’s office, requested by email that all department heads provide a list of “critical” and “non-critical” employees. (Jt. Ex. 2). Ms. Hennings defined critical employees as “staff that would be absolutely necessary to perform City services in a **limited** capacity.” (Jt. Ex. 2). This list was introduced as Joint Exhibit 6. Three thousand two hundred seventy one employees (3,271) were designated as critical, and 726 were designated as non-critical. (7/15/21 Tr. at 40).

On March 22, 2020, the State of Louisiana issued a “Stay at Home” order. (Jt. Ex. 3; Stipulation 8 (5/20/21 Tr. at 18)). By memo dated March 22, 2020, the Chief Administrative Officer (CAO) informed department heads that the City of New Orleans would “transition to ‘limited operations.’” (Jt. Ex. 3 (Circular Memorandum 20-07)). The CAO directed all department heads to allow all remote-eligible employees to work remotely and to place all non-remote-eligible

12/13/21 ME  
FOP/NOFF REQUEST FOR INVESTIGATION  
EMERGENCY PAY

non-critical employees on civil leave. (R. at 28-29; Jt. Ex. 3). The CAO instructed department heads to allow only critical employees to continue to report to work in person. (R. at 29; Jt. Ex. 3).

All commissioned police officers are designated as essential, and these officers reported to work in person during the limited operations period. (7/15/21 Tr. at 213-14). Sgt. Willie Jenkins, III, who reported to the First District, testified that his concern about reporting to work in person was exposure to Covid, and he and his spouse contracted Covid. (7/15/21 Tr. at 215, 219). According to counsel for FOP, Mark Hall, a police officer who relocated homeless individuals to hotels while on duty, died from Covid. (R. at 26).

Fire Captain Aaron Mischler testified that firefighters are designated as essential during an emergency. (7/15/21 Tr. at 222). Capt. Mischler testified that “we show up in person on the front lines. We interact with the public. We’re unable to work remotely from home, so we mitigate all emergencies in the City just as we would on normal workdays.” (7/15/21 Tr. at 222). Capt. Mischler testified about the heightened risk of Covid exposure to firefighters caused by the continued contact with the public, being housed together at fire stations for 24-hour shifts, and the inability to socially distance in fire trucks. (7/15/21 Tr. at 228-29). “[T]here was no way to social distance when you’re assessing a patient or rescuing a victim . . . You have to be next to that person and you will be exposed to whatever they have.” (7/15/21 Tr. at 245). Capt. Mischler also noted that firefighters received a “limited amount of PPE.” (7/15/21 Tr. at 228). Capt. Mischler tested positive for Covid on March 10, 2020, and his spouse also contracted Covid when caring for him. (7/15/21 Tr. at 229). In order to avoid similar transmission to family members with underlying health conditions or children, some firefighters did not return home. (7/15/21 Tr. at 230). Capt. Mischler testified that, unlike a hurricane, when firefighters could ensure the safety of their family

members by evacuation, “[t]here was no way to keep your family – get them out of harm’s way.” (7/15/21 Tr. at 233).

On April 7, 2020, Fire Chief Timothy McConnell forwarded a message from the New Orleans Emergency Medical Service Response team acknowledging that “[a]t this time, the assumption is that every member of the New Orleans Public Safety has been exposed to COVID.” (7/15/21 Tr. at 232; FF/FOP Ex. 16).

At the July 15, 2021, hearing, Chad Brown, Chief of Staff for the Chief Administrative Officer, testified about the limited operations period. (7/15/21 Tr. at 10). The CAO is responsible for all City departments under mayoral control. (7/15/21 Tr. at 11-12). As for the classification of the employees who reported to work in person, Brown testified that critical employees were not required to report to work in person. (7/15/21 Tr. at 28). Brown further testified that remote-eligible employees did not necessarily work remotely during the entire time period of the stay-at-home order. (Tr. at 38). Individual appointing authorities made the decision about which employees, if any, were required to report to work in person. (Tr. at 43-44).

The City did not keep comprehensive records of the identity or number of employees reported to work in person during the relevant time period. (Stipulation 18 (5/20/21 Tr. at 20); 7/15/21 Tr. at 41). Individual departments are the source of this information. (7/15/21 Tr. at 41-42). For example, according to the documents, nine Equipment Maintenance Division employees were designated as non-essential, critical, and non-remote-eligible. (Jt. Ex. 6 at 12). Under CAO Circular Memorandum 20-07 (Jt. Ex. 3), because they were non-remote-eligible and critical, these employees were required to report to work in person. Looking solely to the designations, according to the City, in total, 133 employees were designated as non-essential and critical. (Jt. Ex. 6; City’s Post-Hearing Memorandum at 9).

Representatives from several departments testified at the hearing about the requirements and practices of the members of their department. All but two of employees of the City Planning Commission were designated as non-essential and critical, but, generally, the entire department worked remotely. (7/15/21 Tr. at 142-44; Jt. Ex. 6 at 6-7; FF/FOP Ex. 3). Robert Rivers of the City Planning Commission testified that he and Joseph Colon did work in person on a regular basis, as it was safe and practical. (7/15/21 Tr. at 153-54). Another employee, Larry Massey, also came into the office occasionally. (7/15/21 Tr. at 155-56).

On May 17, 2020, some non-essential non-remote-eligible employees returned to work. (R. at 19). From March 23, 2020, until May 17, 2020, the City of New Orleans did not provide emergency pay to employees who were required to report to work.

#### IV. LEGAL ANALYSIS

Civil service rules have the effect of law. La. Const. art. 10, §10(A)(4) (“Rules adopted pursuant hereto shall have the effect of law and be published and made available to the public.”) Civil Service rules are construed according to the rules of interpretation relative to legislation in general. *Sanders v. Dep’t of Health & Human Res.*, 388 So. 2d 768, 770 (La. 1980). “Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it.” *David v. Our Lady of the Lake Hosp., Inc.*, 2002-2675 (La. 7/2/03), 849 So. 2d 38, 46 (quoting *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 217, 40 S.Ct. 139, 140, 64 L.Ed. 229 (1920)). “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.” La. C.C. art. 9. “The words of a law must be given their generally prevailing meaning.” La. C.C. art.



11. “If application of a clear and unambiguous statute does not lead to absurd results, the law shall be applied as written; no further interpretation may be made in search of the intent of the legislature.” *David*, 849 So. 2d at 46 (quoting *Cleco Evangeline, LLC v. Louisiana Tax Commission*, 2001–2162, p. 5 (La.4/3/02), 813 So.2d 351, 354).

“When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.” La. C.C. art. 12. “[W]hen the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. Moreover, when the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.” *Red Stick Studio Dev., L.L.C. v. State ex rel. Dep't of Econ. Dev.*, 2010-0193 (La. 1/19/11), 56 So. 3d 181, 188 (quoting *M.J. Farms, Ltd. v. Exxon Mobil Corp.* 2007–2371, p. 13 (La.7/1/08), 998 So.2d 16, 27). “[W]hen the language of a law is susceptible of different meanings it must be interpreted as having the meaning that best conforms to the purpose of the law, and the meaning of ambiguous words must be sought by examination of the context in which they occur and the text of the law as a whole.” *Doe v. Louisiana Bd. of Ethics*, 2012-1169 (La. App. 4 Cir. 3/13/13), 112 So. 3d 339, 346, *writ denied*, 2013-0782 (La. 8/30/13), 120 So. 3d 265. “[O]ur interpretation of the meaning of a statute should be guided by the jurisprudential rule that we not impute a meaning which would lead to an absurd result.” *Lewis v. Miller*, 2002-0667 (La. App. 4 Cir. 8/21/02), 826 So. 2d 628, 630.

The rules at issue provide as follows:

**Rule VIII, Section 11 – OFFICIAL EMERGENCY LEAVE**

11.1 When the Mayor of New Orleans declares an official emergency and orders that only “**essential**” employees report to work and that all “**non-essential**” employees remain away from work, such non-essential employees will be granted official emergency leave. Essential employees working under these

circumstances may be eligible for special compensation as provided in Rule IV, Section 11.

(emphasis added).

**Rule VIII, Section 4.1(h) – CIVIL LEAVE**

4.1(h) When an appointing authority reduces, suspends or closes its operations due to concerns about the health and safety of the public or its employees, it may direct employees **not to report to work**. In advance of such reduction, suspension or closure, the appointing authority shall send written notice to the Personnel Director. To the extent practicable, the appointing authority should adjust the work schedules of those employees affected by the reduction, suspension or closure in order to allow the employee to make up the hours he or she was not able to work during the work period. However, if such rescheduling is not practicable, the appointing authority shall allow the employees time off without loss of pay. Such allowance will be subject to the review of the Personnel Director.

(emphasis added).

**A. The term “report to work” is unambiguous and includes working remotely**

The determination of whether employees physically reporting to work are entitled to emergency pay depends on whether the clear and unambiguous term “report to work” includes working remotely. There is no dispute that employees who were non-critical and unable to work remotely were ordered not to report to work. Because the City notified the Personnel Director that it intended to grant civil leave under Rule VIII, §4.1(h) to employees unable to work remotely (and who were instructed not to report to the worksite), appointing authorities “reduce[d], suspend[ed], or close[d] operations,” and directed at least *some* employees not to report to work. Therefore, the civil leave requirements were met, and the Mayor instructed some employees not to report to work. The remaining issue is whether employees who were instructed to work remotely were also instructed not to report to work. As opposed to employees on civil leave (who were unable to perform their jobs remotely), the Commission finds that employees working remotely were

reporting to work. Any other construction requires the Commission to consider employees ordered by their departments to work remotely as absent from work.

**B. In the alternative, if the term “report to work” is ambiguous, the purpose and context of Rules IV and VII suggest the term includes employees working remotely.**

Even if this term were ambiguous, the Commission is entitled to deference when applying its own rules in a quasi-legislative/quasi-executive proceeding. *DeLarge v. Dep’t of Finance*, 94-1684, p. 6 (La. App. 4 Cir. 3/27/96), 672 So. 2d 1025, 1029.

Further, looking to the purpose of Rule VIII and Rule IV, “report to work” does not mean reporting to work in person. *Red Stick Studio Dev., L.L.C.* 56 So. 3d at 188. Absent from this emergency caused by a pandemic was an instruction from the City that all non-essential employees remain away from work. Under Rule VIII, § 4.1(h), civil leave was thus not triggered for all non-essential employees. Emergency pay compensates essential personnel for working when non-essential employees are not working. Because some non-essential employees were working remotely, the emergency pay provision is not triggered.

The context provided by Rule IV also leads to the conclusion that “report to work” includes working remotely. La. C.C. art. 12. Under Rule IV, § 11.1, the end of the period of emergency pay is when “the Mayor announces the state of emergency has ended or an announcement is made that City offices are open for business and employees are to report to work, whichever comes first.” The attendance of only essential employees is related to the shutdown of regular City operations. The reason only essential employees report to work is that regular City business has closed, so the City only needs employees to do the work that cannot wait until regular operations resume. The record reflects that the City never shut down operations during this emergency.

Last, a construction of “report to work” that excludes employees working remotely would lead to an absurd result. *Lewis*, 826 So. 2d at 630. As the City argues, on a scheduled work day, a City employee either reports to work, takes paid leave, or is placed on leave without pay. (City’s Post-Hearing Memorandum at 11). No Civil Service Rule recognizes a status in which an employee is working but does not report to work. If employees directed to work remotely are not reporting to work, then what is their status?

**C. The requirement of Rule VIII, § 11.1 that only essential employees are ordered to report to work is not met.**

Under the requirements of Rule VIII, Section 11, Emergency Pay is due when *only* essential employees are ordered to report to work. The Mayor never ordered only essential employees to report to work. (7/15/21 Tr. at 31). The Fourth Circuit Court of Appeal instructed the Commission to investigate fully whether critical employees were ordered to report to work in person, and if so, whether those critical employees were essential. The City’s records of the department heads’ classification of the employees considered in conjunction with the instructions from the CAO reflect that the critical designation was not synonymous with the essential designation. Most telling is that *non-essential/critical* employees were required to report to work under the City’s policy.

Critical employees who were not eligible to work remotely were required to report to work in person, but not all these employees were essential. Critical employees who were eligible to work remotely were still allowed to work in person. Therefore, whether critical employees were required to report to work in person turned on whether the employee could perform his or her job remotely.

Looking to the designations, according to the City, in total, 133 employees were designated as non-essential and critical (Jt. Ex. 6) and were required to report to work under CAO

Memorandum 20-07 (Jt. Ex. 3). (City's Post-Hearing Memorandum at 9). For example, according to the documents, nine Equipment Maintenance Division employees were designated as non-essential, critical, and non-remote-eligible. (Jt. Ex. 6 at 12). Under CAO Circular Memorandum 20-07 (Jt. Ex. 3), because they were non-remote-eligible and critical, these employees were required to report to work. Conversely, in the City Planning Department, all but two employees were critical, non-essential, and remote-eligible. (7/15/21 Tr. at 142-44; Jt. Ex. 6 at 6-7; FF/FOP Ex. 3). None of these employees was required to report in person. (7/15/21 Tr. at 144). The practices of this department show that critical employees worked remotely, so that critical status did not require reporting in person to work. Therefore, considered as a whole, this data undermines the assertion that critical was the same as essential. Critical employees required to report in person were not essential. Because of the unique circumstances of this emergency, *non-essential employees* were required to report in person to work.

## V. CONCLUSION

For the reasons stated herein, the unions' request for emergency pay is denied.

  
Brittney Richardson (Dec 31, 2021 15:13 CST)

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BRITTNEY RICHARDSON, CHAIRPERSON

  
J. H. Korn (Dec 13, 2021 15:53 CST)

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JOHN KORN, VICE-CHAIRPERSON

  
Mark C. Surprenant (Dec 13, 2021 16:42 CST)

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MARK SURPRENANT, COMMISSIONER

  
Ruth Davis (Dec 16, 2021 20:09 CST)

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RUTH DAVIS, COMMISSIONER