



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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Wednesday, December 1, 2021

Julio C. Baca
1211 21st
New Orleans, LA 70053

Re: **Michael Ebbs VS.
Department of Fire
Docket Number: 9217**

Dear Mr. Baca:

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 - 12/1/2021 - 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: Roman Nelson
William R. H. Goforth
Alexandra Mora
Michael Ebbs

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**MICHEAL EBBS,
Appellant**

Docket No. 9217

v.

**DEPARTMENT OF FIRE,
Appointing Authority**

DECISION

Appellant, Michael Ebbs, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his September 28, 2020, termination of employment. (Exhibits HE-1, HE-2). At all relevant times, Appellant had permanent status as a fire captain. (Tr. at 32, 270). A Hearing Examiner, appointed by the Commission, presided over a hearing on May 24, 2021. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the post-hearing memoranda submitted by the parties, the Hearing Examiner's Report dated October 27, 2021, the Hearing Examiner's Revised Report dated November 1, 2021 (following late submission of one party's post-hearing memorandum), and controlling Louisiana law.

For the reasons set forth below, Ebbs's appeal is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

The New Orleans Fire Department terminated the employment of Captain Michael Ebbs on September 28, 2020, for his failure to respond to two fires and his untruthfulness related to the reasons for his failure to respond to the fires on June 9, 2020, and June 14, 2020. (Exs. HE-1, HE-

2). As the fire captain on the second platoon, Ebbs had command over the firefighters and operator at Engine House 24. (Tr. at 32).

Captain Ebbs informed his superiors he did not direct the firefighters and equipment under his direction to the fire on June 9, 2020, because of a problem with the overhead door. (Tr. at 35, 48). The call came in for a fire at 6:30 AM, just before shift change. (Tr. at 33). Ebbs testified that he communicated via radio that Engine 24 was delayed. (Tr. at 40). In Ebbs's written special report dated June 11, 2020, he stated that the overhead door "push button malfunctioned" and "[p]er Communication, I told Communications that Engine 24 was being delayed." (Ex. NOFD-3).

NOFD offered the testimony of Firefighter David Smith, who was present and under the direction of Ebbs on June 9. (Tr. at 14-15). Smith testified Captain Ebbs informed him it was a "trash fire" and the personnel were not going. (Tr. at 14-15).

Wanda Newsome, the Deputy Chief of Fire Communications, testified that four engines, a ladder chief, a specialized rescue unit, and two chiefs were dispatched on June 9 at 6:26 AM. (Tr. at 133-34). All units within a five-minute response time are dispatched. (Tr. at 133). Chief Newsome testified the initial report was a train fire, but the fire was only a trash fire between the flood wall and the train tracks. (Tr. at 137). Engine 24 acknowledged the roll via radio, but Engine 24 failed to show up at the scene. (Tr. at 145; Ex. NOFD-1). Engine 24 was closest to the scene, but Engine 27 was the first to arrive at 6:37 AM. (Tr. at 134-37). Chief Newsome reviewed the audio recordings of all the channels during the relevant time period, and there was no communication with Engine 24 on the radio, other than the acknowledgement of the call and the return to in-service. (Tr. at 148).

District Chief Jon Bialas, the District Chief for the Third District on the First Platoon, testified that he responded to a train fire on June 9. (Tr. at 163-65). Chief Bialas was in charge of

the scene. (Tr. at 167). Chief Bialas testified that Engine 24 should have responded because the incident was reported as a train fire, which has the potential to grow if chemicals are present. (Tr. Chief Bialas reported this incident to Ebbs's chief, Shanks. (Tr. at 174).

Larry White, the Deputy Chief of Operations, testified that Ebbs informed White that the overhead door was not working properly. (Tr. at 184).

NOFD charged Ebbs on June 11, 2020, for the June 9, 2020, incident. (Tr. at 56; Ex. NOFD-2).

On June 14, 2020, when his platoon should have relieved the platoon on duty at a working fire, Captain Ebbs reported that he was unable to respond because he suffered an injury when the overhead door fell on his foot. (Tr. at 52-53). Ebbs submitted a Special Report dated June 18, 2020. (Tr. at 69; Ex. NOFD-10). Ebbs stated that the overhead door "jolted and came down swiftly, causing me to fall backwards." (Ex. NOFD-10). Ebbs further stated that another firefighter, Robert Pitre, released the door that had Ebbs "pinned." (Ex. NOFD-10).

Terry Hardy, the Deputy Chief of Safety, testified that he was directed to investigate the problem with the overhead door. (Tr. at 199, 200-01). On July 6, Hardy obtained video footage of the doors to Fire Station 24 from June 9 and June 14 from the Realtime Crime Camera. (Tr. at 211). Eddie Williams, a Detective and Forensic Examiner, testified he enlarged and sharpened the video at the request of Superintendent of Fire Timothy McConnell. (Tr. at 121-22). Paul DeGrange, the Chief of Fire Prevention, then reviewed the footage from both dates and created a timeline tied to the time stamp of the video at the request of Superintendent McConnell. (Tr. at 70, 71, 77). The video from June 9 reflected that the engine never left the station. (Tr. at 77; Ex. NOFD-4). The video from June 14 failed to show that the overhead door fell on any individual, although the video showed that the door closed on a bucket a couple of times. (Tr. at 77-78; Ex.

NOFD-4). The Fire Department conducted an interview of Ebbs on July 15. (Tr. at 215; Ex. NOFD-13).

Former Superintendent of Fire Timothy McConnell, who did not testify in the Ebbs hearing, testified in a companion case, *Pitre v. Department of Fire*, Docket No. 9215 (New Orleans Civil Service Commission 10/4/21),¹ that only Ebbs (and not Pitre) was under investigation on July 8, 2020, for the June 14 incident, when Pitre received a Notification of Formal Investigation. (*Pitre* Tr. at 202 and Ex. NOFD-3 to *Pitre* hearing). NOFD provided a Notification of Formal Investigation to Ebbs on July 10, 2020, for the June 14, 2020, incident. (Tr. at 58; Ex. NOFD-12).

On August 10, 2020, Chief Hardy contacted Ebbs's attorney, Danielle Davis, about scheduling the pre-termination hearing for both incidents. (Tr. at 21). The hearing was originally scheduled for August 13, but Chief Hardy testified the date was an error because it was over a weekend. (Tr. at 226). On August 14, Chief Hardy informed Ms. Davis of the error via email and asked for Ebbs's availability for the hearing during the week of August 17-21. (Ex. NOFD-17). Ms. Davis responded on August 16 that counsel was not available during that week and asked for later dates. (Ex. NOFD-17). On August 21, the Appointing Authority's attorney, William Goforth, confirmed in an email to Ms. Davis that they had spoken by telephone, and that counsel for the NOFD and counsel for Ebbs would have a telephone conference on August 24 to set a date for the pre-termination hearing. (Ex. NOFD-17). On August 24, Mr. Goforth proposed September 2, 3, or 4 for the pre-termination hearing. (Ex. NOFD-17). On September 1, Mr. Goforth emailed Ms. Davis to inform her NOFD would schedule the hearing on September 3 or 4. (Ex. NOFD-17). Ms. Davis responded that she was no longer available on September 4. (Ex. NOFD-17). On September

¹ This case is currently on appeal before the Fourth Circuit Court of Appeal.

2, Ms. Davis requested that the pre-termination hearing be set between September 9 and 11. (Ex. NOFD-17). Counsel ultimately agreed to set the pre-termination hearing for September 11. (Ex. NOFD-17). On September 8, NOFD notified Ebbs of his pre-termination hearing, which occurred on September 11. (Tr. at 62, 65). Importantly, based on the evidence provided, at no time prior to or at the actual pre-termination hearing did the appellant assert that the investigation and/or potential discipline as to either the June 9 or June 14 incident was untimely given the legal requirements of the Firefighter Bill of Rights.

II. ANALYSIS

A. Firefighter Bill of Rights

Ebbs argues that the discipline in this case is an absolute nullity under the Firefighter Bill of Rights, La. R.S. 33:2182 *et seq.* This Louisiana statute requires that investigations of fire employees be completed within 60 days: “Any investigation of a fire employee which is conducted pursuant to this Subpart shall be completed within sixty days, including the conducting of any pre-disciplinary hearing or conference.” La. R.S. 33:2186(A). The fire employee and the Fire Department may agree in writing to extend the time for investigation for up to an additional 60 days: “Nothing contained in this Section shall be construed to prohibit the fire employee under investigation and the appointing authority from entering into a written agreement extending the investigation for up to an additional sixty days.” La. R.S. 33:2186(C). If the Fire Department fails to comply with the time limitations, then the discipline is an “absolute nullity.” La. R.S. 33:2181(C).

The undersigned Commissioners find that the Fire Department’s investigation of Ebbs for the June 8 incident began on June 11, when Ebbs was charged relative to the June 9 incident. Sixty days from June 11 is August 10. The termination based on the June 9 incident is an absolute nullity

in that the evidence indicates that the first date which the Fire Department had set for the pre-termination hearing was August 13, past the 60 day deadline. The record does not show any discussion whatsoever between the appellant and the Fire Department within the required 60 days as to a potential, mutually agreeable date for the pre-termination hearing, even if past the 60 day legally required deadline.

The undersigned Commissioners find that the Fire Department's investigation of Ebbs for the June 14 incident began at least as of July 8, as Superintendent McConnell testified in the companion *Pitre* case. Sixty days from July 8 is September 6. The evidence presented indicates that within the 60 day limit, Chief Hardy initially and then counsel for the Fire Department had several discussions with Ebbs's counsel about scheduling the pre-termination hearing for a date within the required 60 days. More specifically, Ebbs's counsel did not want the hearing scheduled during the week of August 17-21 or between September 2 and 4 (even though Ebbs's counsel originally indicated she was available on September 4). The evidence presented clearly shows that the Appointing Authority and Ebbs's counsel were clearly trying through their written communications to find a date for the hearing which would accommodate Ebbs and his lawyer from a scheduling standpoint. Ebbs's lawyer agreed in writing to have the hearing on September 11, thus by consent extending the deadline for the completion of the investigation until September 11. For Ebbs to now claim that the appointing authority missed the 60 day deadline when it and its lawyer were clearly trying to accommodate Ebbs and his lawyer is not an argument worthy of any merit given the evidence presented.

The undersigned Commissioners find that the evidence indicates the parties agreed in writing to extend the time for the investigation under La. R.S. 33:2186(C), at least insofar as the June 14 incident was concerned. As previously discussed above, the time for the investigation as

to the June 9 incident had expired prior to any applicable discussions between Ebbs and the Appointing Authority regarding setting a hearing date. There is nothing set forth in the law which allows for an enlargement of the time for the investigation after the 60 days have expired.

B. Cause for discipline

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending and terminating the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984).

The Fire Department carried its burden of proving that Ebbs was untruthful about his failure to report to the June 14 fire, as the video does not reflect that the overhead door fell on Ebbs's foot. Ebbs's failure to report to a fire and his untruthfulness impair the efficient operation of the Fire Department. Superintendent Nelson testified that the public depends on firefighters to respond when called. (Tr. at 251). In the same way, the Fire Department must be able to rely on the veracity of firefighters. (Tr. at 254). The penalty of termination regarding the June 14 incident is commensurate with the offense.

The appeal is GRANTED insofar the June 9 incident is concerned and is DENIED relative to the June 14 incident.

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This the 1st day of December, 2021

WRITER:

Mark C. Surprenant
Mark C. Surprenant (Nov 22, 2021 14:12 CST)

MARK SURPRENANT, COMMISSIONER

CONCUR:

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Brittney Richardson (Nov 30, 2021 08:02 CST)

BRITTNEY RICHARDSON, CHAIRPERSON

J H Korn
J H Korn (Nov 24, 2021 10:07 CST)

JOHN KORN, COMMISSIONER