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CITY CIVIL SERVICE COMMISSION

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DIRECTOR OF PERSONNEL

Thursday, December 01, 2016

Mr. Alex Smith

Re: **Alex Smith VS.**
Department of Parks & Parkways
Docket Number: 8337

Dear Mr. Smith:

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 - 12/1/2016 - 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 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: Ann McDonald
Elizabeth S. Robins
Victor Papai
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

ALEX SMITH vs. DEPARTMENT OF PARKS & PARKWAYS	DOCKET No.: 8337
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I. INTRODUCTION

Appellant, Alex Smith, 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 Department of Parks & Parkways for City of New Orleans, (hereinafter "DPP") does not allege that the instant appeal is procedurally deficient. Therefore, the Commission's analysis will be limited to whether or not DPP disciplined Appellant for sufficient cause. The undersigned Commissioners have reviewed the transcript of the appeal hearings that occurred on October 21, 2014 as well as the exhibits accepted into the record by the hearing examiner. After reviewing such testimony and evidence, we render the following decision and judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

Appellant, was a permanent, classified employee at all times relevant to the instant appeal. DPP suspended Appellant for four hours effective June 10, 2014 based upon an allegation that Appellant left a work area without the authorization of his supervisor on May 15, 2014. (H.E. Exh. 1). DPP further alleged that Appellant was insubordinate in responding to a supervisor's inquiry into Appellant's departure from the work site. *Id.*

First to testify on behalf of DPP was Charles Barnes. Mr. Barnes served as a “supervisor II” within the DPP during the relevant period of time. (Tr. at 8:21-23). According to Mr. Barnes, he was supervising a group of employees, including Appellant, who were doing grounds keeping work on May 15, 2014. During the course of his supervision, Mr. Barnes noticed that Appellant was not operating his assigned piece of equipment. *Id.* at 9:9-15. The operator/foreman of the work site, Mr. Lloyd Sikes, did not know where Appellant was so Mr. Barnes decided to wait at the location until Appellant returned. *Id.* at 9:15-19. Approximately thirty minutes later, Appellant returned to the work site from the direction of a nearby Walmart. *Id.* at 9:19-10:2.

When Appellant returned, Mr. Barnes asked him why he had not informed Mr. Sikes that he was leaving the work site. Appellant allegedly responded to Mr. Barnes’s question with an obscenity-laced tirade. *Id.* at 10:4-15. Appellant also claimed that he had notified Mr. Sikes that he had to go to the bathroom, but this was inconsistent with what Mr. Sikes had told Mr. Barnes earlier. *Id.* at 15:6-12. Mr. Barnes then notified Appellant that he would be sending Appellant home for the day and that Appellant would not be allowed to finish his shift. *Id.* at 10:16-18. Moments later, another supervisor arrived at the work site to drive Appellant back to the DPP yard.

Mr. Barnes stated that DPP policy required an employee, like Appellant, to notify the operator/foreman if the employee needed to leave the work site for any reason. *Id.* at 12:9-13. However, the primary reason that Mr. Barnes sent Appellant home for the day was Appellant’s inappropriate and unprofessional response to Mr. Barnes.

Michael D’Anastasio, section manager for DPP, testified next and stated that he had experience working with both Appellant and Mr. Barnes. Mr. D’Anastasio recalled the incident in which Mr. Barnes had reported Appellant’s inappropriate behavior on May 15, 2014. As a result of Mr. Barnes’s report, Mr. D’Anastasio found Mr. Barnes’s action in sending Appellant home

prior to the end of a shift to be appropriate as “standard practice.” *Id.* at 19:2-7. According to Mr. D’Anastasio, DPP maintains a “zero tolerance” policy regarding the use of profanity in the workplace. On cross-examination, Mr. D’Anastasio acknowledged that Appellant also brought the incident to his attention and claimed that Mr. Barnes was the aggressor. However, Mr. D’Anastasio found Mr. Barnes and Mr. Sikes more credible. *Id.* at 20:17-21:5.

Mr. Timothy Lavelle was the chief of operations for the DPP at all times relevant to the instant appeal and is familiar with the circumstances that led to Appellant’s suspension through reports he received from Mr. D’Anastasio. *Id.* at 23:1-7. Mr. Lavelle testified that DPP supervisors make every effort to accommodate any needs an employee may have to use the restroom or take a water break but stated that an employee must notify a supervisor when he/she will be off of a route. And, when a supervisor inquires as to the whereabouts of an employee, that employee is responsible for responding in a professional and appropriate manner. *Id.* at 24:8-21. Based upon questions from the Hearing Examiner, Mr. Lavelle clarified that the DPP viewed Appellant’s action of leaving the work site without authorization to be part of the justification for the four-hour suspension. *Id.* at 28:8-13.

Appellant took the stand on his own behalf and presented his version of the events of May 15, 2014. According to Appellant, he left his job site in order to use the restroom at the nearby Walmart. When he returned to the job site, Appellant alleged that Mr. Barnes “talked to [him] like a dog” and that Mr. Barnes referred to him as a “nigga.” *Id.* at 32:5-7, 15-18. Appellant further alleged that Mr. Barnes treated others in a similar manner.

III. LEGAL STANDARD

An appointing authority may only discipline a permanent classified employee if there exists sufficient cause for such discipline. La. Con. Art. X, § 8(A). If an employee believes that his/her

discipline is not supported by 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

DPP alleged that Appellant left work without authorization and then was insubordinate when his supervisor confronted about him about his absence. In support of this allegation, DPP introduced the testimony of Mr. Barnes as an eye witness to this alleged misconduct. Appellant denied engaging in any misconduct and asserted that Mr. Barnes escalated the situation by using a racial slur and generally acting in a confrontational manner. There was no other testimony or evidence offered by either Party, and the Commission is left with the task of weighing the credibility of Mr. Barnes’s testimony versus Appellant’s. We are persuaded by the recommendation of our hearing examiner regarding his assessment of Mr. Barnes demeanor and

affect during testimony versus Appellant's. Therefore, we find that Mr. Barnes to be more credible than Appellant. Such a finding leads us to the conclusion that the Appointing Authority has met its burden in establishing that Appellant engaged in the misconduct identified in the disciplinary letter in evidence as "Hearing Examiner Exhibit 1."

B. Impairment of Efficient Operation of Appointing Authority

Despite Mr. D'Anastasio's claim that the DPP has a "zero tolerance" policy regarding the use of profanity in the work place, based upon previous sworn testimony by supervisors, DPP appears to tolerate a certain level of profanity in the workplace. However, public and profanity laced responses to reasonable questions posed by supervisors rises above the level of typical "shop talk."

The Commission notes that the interaction between Appellant and Mr. Barnes occurred in public while the DPP work crew was performing necessary upkeep. This reflects poorly on both the DPP and City workers in general. Furthermore, DPP supervisors must be able to account for members of work crews at all times. Therefore, it is reasonable for a supervisor to question an employee when he/she returns from an unannounced and unauthorized absence, regardless of how long that absence was. Appellant's absence and subsequent reaction to Mr. Barnes's reasonable questions impaired the efficient operation of the DPP. Thus, the DPP has satisfied its burden of proof at this stage of our analysis.

C. Discipline Commensurate with Offense

In conducting its analysis, the Commission must determine if the Appellant's four-hour suspension 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

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976, 978 (citing *Staehe v. Dept. of Police*, 98–0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

A four-hour suspension is a very low level of discipline when considering the broad spectrum of personnel actions authorized by our Rules. Clearly, all appointing authorities have an interest in deterring any form of workplace violence or harassment. It is easy to envision a scenario in which a profanity-laced tirade escalates into a physical altercation. By deterring such confrontations in the future, DPP protects its employees and sets clear expectations. Given the totality of the circumstances before us, we find that a four-hour suspension was commensurate with Appellant’s misconduct.

V. CONCLUSION

Based upon the foregoing, the Commission hereby DENIES Appellant’s appeal.

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Signatures appear on the following page.

A. Smith
No. 8337

Judgment rendered this 30 th day of November, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

11/15/16

DATE



JOSEPH S. CLARK, COMMISSIONER

11/30/16

DATE



RONALD McCLAIN, VICE-CHAIRMAN

11/15/16

DATE