



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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ANDREW MONTEVERDE

Friday, November 3, 2023

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Ms. Stephanie Dovalina
700 Camp St., Ste 105
New Orleans, LA 70119

Re: **Varrick Dyer VS.
Department of Fire
Docket Number: 9415**

Dear Ms. Dovalina:

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 - 11/3/2023 - 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
Kristen A. Lee
Imtiaz A. Siddiqui
Varrick Dyer

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**VARRICK DYER,
Appellant**

Docket No. 9415

v.

**DEPARTMENT OF FIRE,
Appointing Authority**

DECISION

Appellant, Varrick Dyer, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from the November 9, 2022, written reprimand imposed by the Department of Fire. (Ex. HE-1). At all relevant times, Appellant had permanent status as a Fire Captain. (Ex. HE-1; 2/27/23 Tr. at 246). A Hearing Examiner, appointed by the Commission, presided over a hearing on February 27, 2023, and May 2, 2023. 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 Hearing Examiner's report dated August 11, 2023, and controlling Louisiana law.

For the reasons set forth below, Captain Dyer's appeal is DENIED.

I. FACTUAL BACKGROUND

On February 20, 2022, Captain Jason Martin criticized Captain Dyer for failing to leave the fire truck during a working fire on Tulane Avenue. (2/27/23 Tr. at 115). Captain Martin stated, "it would be nice if you would get out of the pump and help us" or words to that effect. (2/27/23 Tr. at 55, 115). Captain Martin then used the radio to instruct Captain Dyer to report to the incident commander. (2/27/23 Tr. at 37, 116). Because Captain Martin was not the incident commander,

he lacked the authority to make this order. *See Martin v. Dep't of Fire*, No. 9371 (Civil Service Commission 12/2/22).¹ The Superintendent of Fire imposed a written reprimand for Captain Martin's inappropriate use of the radio, including leading Captain Dyer to believe the incident commander had issued the order on the radio. *Id.*

After Captain Dyer spoke to the incident commander, who informed him he had not called him on the radio, Captain Dyer asked Captain Martin on the radio where Engine 16 was going. (2/27/23 Tr. at 16, 249). Captain Martin informed him Engine 16 was going to Station 2 quarters to take a Covid test, and Captain Dyer said he would meet him there. (Tr. at 11, 16). Captain Dyer then went to Station 2 and confronted Captain Martin. (2/27/23 Tr. at 17). Captain Martin was in the kitchen of the station, and Captain Dyer cornered him. (2/27/23 Tr. at 74). Witnesses testified Captain Dyer yelled and cursed at Captain Martin and had his finger in Captain Martin's face. (2/27/23 Tr. at 17, 44, 82, 90). According to Operator John-Avery Blood, Captain Dyer said, "You worry about your fucking crew." (2/27/23 Tr. at 102). Firefighters separated the two captains, and District Chief Salvaggio then instructed everyone to leave the station. (2/27/23 Tr. at 56).

The Department of Fire provided notice of the investigation to Captain Dyer dated February 28, 2022, which read as follows:

This is to notify you that the department is initiating an investigation into an incident involving you in a matter which occurred on (date) 2/20/2022. Specifically, Incident #08919 a Working Fire on Tulane ave. resulting in an altercation over the radio and at Station 2.

(Ex. NOFD-1). Captain Dyer signed this notice on March 3, 2022. (Ex. NOFD-1). Attached to the notice was a "Documentation of Disciplinary Action," which stated that the reason for the disciplinary action was "RR-25 'Threats or acts of physical violence against the public, or other

¹ The Commission denied Captain Martin's appeal of discipline based on his radio communication with Captain Dyer. *Martin v. Dep't of Fire*, No. 9371 (Civil Service Commission 12/2/22).

members is strictly prohibited.” (Ex. NOFD-1). The penalty for this rule violation includes termination of employment. (Ex. NOFD-3, 2/27/23 Tr. at 218). Captain Dyer also signed this document, which is dated March 3, 2022. (Ex. NOFD-1).

Following the disciplinary hearing, Deputy Chief White stated in the Disciplinary Hearing Summary that no witnesses stated in any of the special reports that Captain Dyer threatened to harm Captain Martin. (Ex. NOFD-2). Chief White recommended a written reprimand for unprofessional conduct, and Superintendent Nelson reduced the rule violation to Rule 21, requiring members to be courteous and respectful and to refrain from using profane language. (Ex. NOFD-2; Ex. HE-1). Superintendent Nelson imposed discipline of a written reprimand. (Ex. HE-1).

II. ANALYSIS

A. Firefighter Bill of Rights, La. R.S. 33:2181

As a threshold issue, New Orleans Fire Department’s discipline of Captain Dyer must comply with the Firefighter Bill of Rights, La. R.S. 33:2181 *et seq.* The Firefighter Bill of Rights applies to a “fire employee,” defined as “any person employed in the fire department of any municipality . . . under investigation with a view to possible disciplinary action, demotion, or dismissal.” La. R.S. § 33:2181(A)(1). Any discipline imposed without strict compliance with the minimum standards is an absolute nullity. La. R.S. § 33:2181(C). The Firefighter Bill of Rights contains a notice provision: “Prior to commencing a formal investigation of a fire employee, the appointing authority shall notify the employee in writing of the nature of the investigation, of the identity and authority of the person conducting the investigation, and of *the specific charges or violations being investigated.*” La. R.S. 33:2181(B)(1) (emphasis added). As for the applicability of the Firefighter Bill of Rights in general, the statute provides that “[w]henver a fire employee is under investigation, the following minimum standards shall apply.” La. R.S. 33:2181(B).

Captain Dyer has taken the position that the discipline is an absolute nullity because NOFD failed to give him notice that he was under investigation for a violation of Rule 21. (2/27/23 Tr. at 254-56). The Department of Fire informed Captain Dyer that he was under investigation for “an altercation over the radio and at Station 2.” (Ex. NOFD-1). Ultimately, Superintendent Nelson reduced the charge of “threats or acts of physical violence” under Rule 25 to a violation of Rule 21, which requires firefighters to be “courteous and respectful when dealing with each other and the public.” (Ex. HE-1). This rule also prohibits “threatening, insulting, indecent or profane language.” (Ex. HE-1).

Captain Dyer argues that he had notice only of a charge of threatening Captain Martin, not that his verbal altercation with Captain Martin violated the requirement that he be courteous and respectful. (2/27/23 Tr. at 256). The Department of Fire informed Captain Dyer that he was under investigation for the “altercation” at Station 2. (Ex. NOFD-1). This description of the investigation includes Captain Dyer’s use of profane language and his failure to exhibit courteous and respectful behavior. *Craft v. Benton Fire Dist. #4*, 52,578 (La. App. 2 Cir. 4/10/19), 268 So. 3d 384, 392, writ denied, 278 So. 3d 364. In *Craft*, the Fire Department terminated the District Chief’s employment, basing this termination on several acts, including Craft’s deactivation of the fire truck’s GPS to conceal his late-night visits to his romantic partner. *Id.* The Second Circuit held that Craft sufficient notice of the nature of the investigation and the allegations against him, when he was informed of an investigation of his use of a fire department vehicle during work hours to visit a romantic partner at her home, despite the absence of a specific allegation in the notice that he deactivated the GPS in the fire truck. *Id.* In the same way, the Department of Fire’s notice to Dyer that the Department was investigating the altercation at Station 2 was sufficient notice to Dyer that he used profane language and failed to exhibit courteous and respectful conduct toward

Captain Martin. Although the Department of Fire failed to give Captain Dyer specific notice of a violation of Rule 21, this rule's relationship to Rule 25 is analogous to a "lesser and included" offense in the criminal law context. *See* La. C. Crim. P. art. 815. Notice of a charge of "threats or acts of physical violence" necessarily includes a charge that a firefighter was not courteous or respectful. Thus, although the Department of Fire failed to inform Captain Dyer of a violation of Rule 21, the notice of a violation of Rule 25 necessarily put Captain Dyer on notice that his conduct was not courteous or respectful. Therefore, under the facts presented, including the reduction of the charge and the penalty, Captain Dyer had sufficient notice of a violation of Rule 21.

To the extent that Captain Dyer argues that the identification of Chief Ashburn as the investigator violated the Firefighter Bill of Rights based on Chief Ashburn's testimony that he did not conduct any investigation, in light of Chief Ashburn's collection of the special reports and the absence of any other investigation other than the pre-disciplinary hearing, the Commission rejects this argument. (5/2/23 Tr. at 14, 22-24).

B. Legal Standard for Commission's Review of Discipline

"Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A)." *Whitaker v. New Orleans Police Dep't*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep't of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). "Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged." *Id.* "The Appointing Authority has the burden of proving the impairment." *Id.* (citing La. Const., art. X, § 8(A)). "The appointing authority must prove its case by a preponderance of the evidence." *Id.* "Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient

operation” of the public service.” *Id.* “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).

1. The Appointing Authority must show the discipline was commensurate with the infraction

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 terminating the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep't*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *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 appointing authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

C. The Department of Fire has carried its burden of showing cause for the discipline of Captain Dyer

The Department of Fire has shown the occurrence of the complained-of activity. Based on the testimony of a number of firefighters, Captain Dyer confronted Captain Martin at Station 2 on February 20, 2022, yelling at Captain Martin and using profane language.

Captain Dyer's conduct impaired the efficient operation of the Department of Fire. As Superintendent Nelson testified, Captain Dyer disrupted the chain of command by having an altercation with another captain in the presence of subordinates. (2/27/23 Tr. at 201). Superintendent Nelson testified that "it's fine for two fire captains to have a disagreement or even an argument in private, not in front of their subordinates." (2/27/23 Tr. at 204).

1. The penalty imposed by the Department of Fire is commensurate with the violation

The presumptive penalty for a violation of Rule 21 is a 24-hour suspension, and the minimum penalty is a 12-hour suspension. (Ex. NOFD-3 at section 5.2). Superintendent Nelson reduced the penalty below the recommended minimum for a Level C violation to a written reprimand, the least severe type of discipline. (Ex. NOFD-3; 2/27/23 Tr. at 200). Superintendent Nelson suggested the reduction was appropriate because the verbal altercation occurred at a fire station with only firefighters present. (2/27/23 Tr. at 204). Therefore, because Superintendent Nelson imposed the minimum penalty under Civil Service Rule IX, section 1.1, the penalty is commensurate with the violation.

Captain Dyer's appeal is DENIED.

This the 3RD day of November, 2023.

WRITER:

J H Korn

J H Korn (Oct 26, 2023 21:33 CDT)

JOHN KORN, VICE-CHAIRPERSON

CONCUR:

B Richardson

Brittney Richardson (Nov 3, 2023 08:38 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

Ruth White Davis

Ruth Davis (Oct 26, 2023 17:12 CDT)

RUTH DAVIS, COMMISSIONER