



CITY OF NEW ORLEANS

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Friday, August 4, 2023

Brett J. Prendergast
4603 S. Carrollton Avenue
New Orleans, La. 70119

Re: **Zepporah Edmonds VS.
Department of Public Works
Docket Number: 8444, 8467, 8485**

Dear Mr. Prendergast:

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 - 8/4/2023 - 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, 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: Sarah McLaughlin Porteous, Int
William R. H. Goforth
Zepporah Edmonds

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**ZEPPORIAH EDMONDS,
Appellant,**

vs.

DOCKET NOS.: 8444, 8467 & 8485

**DEPARTMENT OF PUBLIC WORKS,
Appointing Authority.**

DECISION AND ORDERS ON MOTION FOR CRIMINAL CONTEMPT

I. SUMMARY OF DECISION AND ORDERS

Before the New Orleans Civil Service Commission (“Commission”) is the Commission’s Motion For Criminal Contempt brought against the City of New Orleans Department of Public Works (“DPW”), a juridical person, and Sarah Porteous, Director of the DPW since September 2022. The DPW and Director Porteous, an unclassified employee, are legally and collectively recognized as the Appointing Authority for Ms. Edmonds, a classified City of New Orleans employee for the past 39 years. The Motion is brought pursuant to Rule II, sections 8.4 and 8.5 of the Rules of the Civil Service Commission, which Rules the Appointing Authority is legally bound to follow.

Rule II, section 8.4 (h) provides that a contempt of the Commission is “Failure of any person to comply with any order or directive of the Commission unless otherwise stayed by a Court of proper jurisdiction or unless within the time limits for such compliance provided by applicable rule or law.” Rule II, section 8.5 (d) states: “If a person charged with contempt is found guilty, the Commission shall render an order reciting the facts constituting the contempt, adjudging the person charged with the contempt guilty thereof, and specifying the punishment imposed pursuant to Article X, § 11 of the Louisiana Constitution.” That Article sets forth: “[w]illful violation of any provision of this Part shall be a misdemeanor punishable by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both.”

In contrast to a Motion For Civil Contempt which is brought to vindicate a victim’s rights, a Motion For Criminal Contempt is brought to vindicate the dignity of a judicial or quasi-judicial body whose respect, public trust, and authority are under attack due to a party’s willful failure to comply with its legally issued Rules and Orders.

The Court in *United States v. Gregg*, 612 F. 2d 43, 51 (2d. Cir. 1979) provided the following statement from Judge Learned Hand in *American Surety Co. of New York v. Sullivan*, 7

F. 2d. 605 (2d. Cir. 1925) as to what willful means: “The word ‘willful,’ even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.”

As the below clearly evidences, there is no reasonable doubt that the Appointing Authority willfully failed to comply with Civil Service Commission Rule II, section 11.1, when they intentionally refused to take “immediate” action to pay Ms. Edmonds: (1) the \$4309.50 attorney’s fees ordered by the Commission on May 5, 2022, (Joint Exhibit 7), and (2) the \$429 attorney’s fees ordered by the Commission on November 4, 2022. (Joint Exhibit 9). Rule II, section 11.1 states in pertinent part: “In all appeals to the Commission under these Rules wherein a final judgment has been rendered by either the Commission, the Court of Appeal, Fourth Circuit, or the Louisiana State Supreme Court, **immediate steps shall be taken by the City to fully comply with the judgment.**” (emphasis added).

This is most likely the first time in its history that the Commission has filed a Motion For Criminal Contempt against an Appointing Authority. Unfortunately, due to the Appointing Authority’s continued willful actions and non-actions, as set forth herein, justice dictated that this Motion be filed.

Both of the 2022 Orders directing the Appointing Authority to pay attorney’s fees to Ms. Edmonds were issued pursuant to Civil Service Commission Rule II, section 11.4 which states: “In the event that the reinstatement ordered in Section 10.1 is not fully accomplished within forty-five (45) days from the date the judgment becomes final, on application from the employee or his legal counsel, **the Commission may assess appropriate attorney's fees for services occasioned by the City's failure to comply with provisions of this Section in a timely manner.** (adopted December 11, 1986, effective January 1, 1987).” (emphasis added). The Appointing Authority did not appeal either of the two 2022 awards of attorney’s fees at issue herein.

All parties had a full and fair opportunity to brief all pertinent issues applicable to this Motion before and after the evidentiary hearing held on June 23, 2023, plus supplement the record with additional exhibits and submit proposed Findings of Fact and Conclusions of Law. The Commission had issued its May 5, 2022, and November 4, 2022, Orders of attorney’s fees, because the Appointing Authority unreasonably failed for over three years to comply with the Commission’s March 20, 2019, Order (Joint Exhibit 3) regarding action directed by the Louisiana Fourth Circuit Court of Appeal to be taken as to Ms. Edmonds’s employment status. See *Edmonds v. Dept. of Public Works*, 2018-0203 (La. App. 4 Cir. 12/5/18), 260 So. 3d 784.

Since the factual and legal history pertinent to Ms. Edmonds's disciplinary disputes with her Appointing Authority are well-established, the Commission will not repeat them herein. Instead, the Commission refers anyone interested in that history to review the above referred to 2018 Fourth Circuit *Edmonds* decision, the parties' pre-June 23, 2023 Hearing Memoranda, and the parties' Proposed Findings of Fact and Conclusions of Law.

The Commission serves a crucial role in regard to the administration of justice in New Orleans for classified employees. In its quasi-judicial capacity, as the Louisiana Fourth Circuit Court of Appeal stated in *Hellmers v. Department of Fire*, 2019-0420 (La. App. 4 Cir. 10/30/19), 2019 WL 5607426, *writ denied*, 347 So. 3d 875 (La. 2/26/20), the Commission has been constitutionally granted "exclusive jurisdiction over classified civil service employer-employee disputes that are employment related." Article X, section 10 (A) (4) of the Louisiana Constitution states in pertinent part: "Rules adopted {by the Commission} pursuant hereto shall have the effect of law and be published and made available to the public."

To ensure and maintain the public's trust and confidence regarding actions taken by the Commission, its Rules and Orders are entitled to the utmost respect and dignity from all parties and must be immediately complied with by the City/Appointing Authority, as required by Commission Rule II, section 11.1. There is no exception in section 11.1 for a Commission's award of attorney's fees. If the Commission's Rules and Orders can simply be disregarded and not complied with as the City/Appointing Authority wishes, then the public's trust and confidence in the Commission and respect for its Rules and Orders are greatly diminished; thus, adversely affecting and significantly obstructing the overall administration of justice in New Orleans for classified employees.

Today, the City/Appointing Authority is willfully not complying with two Commission's attorney's fee awards in wrongfully contending that those awards had to go on the City's money damages, decades old unpaid judgment list ("State Court List") with hundreds of other unpaid settlements and judgments. Tomorrow, it may be a Commission's back pay Order that the Law Department/Appointing Authority unilaterally decides to put on the State Court List as opposed to paying immediately as Rule II, section 11.1 mandates.

In defense of their non-compliance, the Appointing Authority contends: (1) it would be unlawful for them to comply with those Orders without a special funding appropriation from the City Council, which has not been received; (2) for the years 2022 and 2023, the City Council has appropriated no funds to the DPW for the purpose of paying money judgments against the DPW; (3)

the Commission's 2022 Orders are money damage awards, the same as any money damages or attorney's fee award issued by a state district court, and thus, in the absence of a special appropriation from the City Council, the Orders went on the State Court List; (4) Article XII, section 10 (c) of the Louisiana Constitution prohibits the Commission from forcing them to comply with the 2022 Orders; and (5) the Commission cannot hold Director Porteous, an unclassified employee, guilty of criminal contempt, even when she is acting as the Appointing Authority for Ms. Edmonds, a classified employee.

The Appointing Authority is clearly wrong when they argue that it would be unlawful to pay the two outstanding 2022 attorney's fee awards without a special appropriation from the City Council. The City has repeatedly, customarily, and consistently paid the Commission's awards of attorney's fees to classified employees for years without there ever being any special appropriation from the City Council. If one were to accept the Appointing Authority's present position, it would mean that all of the City's past payments of Commission's awards of attorney's fees in the absence of a special appropriation from the City Council were unlawful.

Importantly, the Appointing Authority paid Ms. Edmonds the first two attorney's fee awards, issued on May 10, 2018 (Joint Exhibit 1), and on December 18, 2018 (Joint Exhibit 2), from its normal operating budget, as it would employee wages and any emolument of employment. The Appointing Authority claims that those payments made in May 2018 and April 2019 were unlawful, made in error, and without the Law Department's consultation, knowledge or input. (p. 25, June 23, 2023 Hearing transcript and AA Exhibit 4).

However, as the below facts clearly show, the Law Department was aware of both the May and December 2018 attorney's fee awards and the subsequent payment of at least the May 2018 award without ever voicing any concern whatsoever at the time that the fees could not be lawfully paid unless there was a special appropriation from the City Council.

In addition, as shown in *Johnston v. Department of Police*, 97-2748 (La. App. 4th Cir. 5/29/98), 715 So. 2d 12; *Christoffer v. Dep't of Fire*, 98-2408 (La. 5/18/99), 734 So. 2d 629; and *Perry v. Dep't of Law*, 2017-0609 (La. App. 4 Cir. 1/31/18), 238 So. 3d 592, the City, from as far back as 1997, has paid other similarly situated classified employees their Commission ordered attorney's fees without ever receiving any special appropriation from the City Council.

Until the Law Department placed the Commission's May and November 2022 Orders on the State Court List as #503 and #507, shortly before the Hearing on June 23, 2023, the City had

never placed a Commission's award of attorney's fees on that List. (pp. 109, 134, June 23, 2023 Hearing transcript).

In June 2022, the Commission asked the Appointing Authority and the Law Department to produce even one example, other than the 2022 Orders at issue, of a Commission's award of attorney's fees: (1) where the City/any appointing authority asked the City Council for a special appropriation to pay same, or (2) where the City/any appointing authority ever placed same on the State Court List. The Appointing Authority's counsel stated at that Hearing that he was unaware of the 2018 and 2019 payments of attorney's fees to Ms. Edmonds, but that the precedent of such prior payments might "change" the City's approach to the 2022 Orders. (Exhibit Commission 4 at 26:02, 31:20, 33:00).

That request for any example of a Commission's attorney's fee award being paid only after a special appropriation or the award being placed on the State Court List was reiterated by the Commission at the June 23, 2023 Hearing. Despite over one year to do that Commission requested research, the City/Appointing Authority has come up totally empty in that it cannot provide even as of today a single example whatsoever of a Commission's award of attorney's fees paid only after a special appropriation from the City Council or a Commission's award of attorney's fees going on the State Court List. (pp. 20-23, June 23, 2023, Hearing transcript).

The Louisiana Fourth Circuit Court of Appeal has spoken to the special nature of an award of attorney's fees from the Commission, a constitutionally created entity with exclusive jurisdiction over employment disputes involving classified employees. In *Johnston v. Department of Police*, 97-2748 (La. App. 4th Cir. 5/29/98), 715 So. 2d 12, 15, the Fourth Circuit stated: "Courts have held that an award of attorney's fees may be part of an order restoring backpay to a classified employee. See *Reimer v. Medical Center of Louisiana at New Orleans*, 95-2799 (La. App. 4th Cir. 1/29/97), 688 So. 2d 165, 169; *Greenleaf v. DHH, Metropolitan Developmental Center*, 594 So. 2d 418 (La. App. 1st Cir. 1991), *writ denied*, 596 So. 2d 196 (La. 1992)."

The Appointing Authority has not been able to cite a single case in support of their erroneous position that a Commission's award of attorney's fees is the same as a state district court award of money damages or attorney's fees. In their Opposition to this Motion, the Appointing Authority specifically refers to the Judgment Fund established by the City Council in 2019 for addressing unpaid settlements and judgments that are on the State Court List. City Code Section 70-415.272 states: "Notwithstanding any law to the contrary, **for legal judgments rendered against the City of New Orleans resulting from state court orders**, a fund shall be maintained,

the minimum annual balance of which shall be \$2,000,000.00 on January 1 of each fiscal year. **This fund shall be dedicated solely to assisting in the payment of legal judgments rendered against the city by state courts.** The fund shall be **funded by revenues received from state court judgments rendered in favor of the city**, excluding those relative to payment of taxes and fees; and proceeds of insurance settlements in favor of the City of New Orleans for liability and/or damages, excluding replacement costs and reimbursements; and supplemented by available revenues as needed to maintain the required balance as provided herein.

Expenditures from the fund shall be made through appropriations to the law department for the purpose of **paying legal court judgments** issued against the city, to be expended in a manner according to policy set by the law department and recorded properly for this purpose and use.” (emphasis added).

The Fund specifically refers to legal judgments rendered against the city **by state courts**. The Fund is dedicated solely to address **state court judgments** and is funded by **state court judgments**. The Commission is a quasi-judicial body, but it is definitely not a state court. Unquestionably, this Fund by its own language does not apply to a Commission’s award of attorney’s fees, which is not the same as a state court judgment against the City awarding a party money damages or attorney’s fees. The Fund and the State Court List pertain only to judgments issued by state courts. The Commission’s 2022 May and November Orders should never have been placed on that List.

Whether a Commission’s award of attorney’s fees is characterized as an emolument of employment, as the DPW apparently did in 2018 and 2019 when the attorney’s fees were paid to Ms. Edmonds through the normal payroll system, or as equitable relief granted to make the adversely affected classified employee whole, the fact remains that a Commission’s award of attorney’s fees to a classified employee is definitely not the same as a money damages or attorney’s fees award rendered by a state court.

The Commission has constitutionally created power and authority over an unclassified employee when she acts as the Appointing Authority for a classified employee. If that were not the case, the Appointing Authority could always hide behind this unclassified shield and refuse to comply with whatever Commission’s issued Order or Rule she did not agree with, without facing any consequences whatsoever and without justice being served as to the classified employee.

Article X, section 10 (A)(1)(a) of the Louisiana Constitution states: “Each commission is vested with broad and general rulemaking and subpoena powers for the administration and

regulation of the classified service, including the power to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, compensation and disbursements to employees, and other personnel matters and transactions; to adopt a uniform pay and classification plan; **to require an appointing authority** to institute an employee training and safety program; **and generally to accomplish the objectives and purposes of the merit system of civil service as herein established.** It may make recommendations with respect to employee training and safety.” (emphasis added). That constitutional provision is essentially copied in the City’s Home Rule Charter, Article 8-103 (2)(i). Moreover, as another example of its intended authority over the appointing authority, the Commission has the power to direct the appointing authority to take dismissal action against an employee under the Home Rule Charter. See Articles 8-103 (2) (g) and 8-113 (3) of the Charter.

If Appointing Authority Porteous is not legally obligated to comply with the Commission’s Orders and cannot be held in criminal contempt for her willful noncompliance with same, the Commission would be unable to fulfill its constitutionally and city recognized duty “to accomplish the objectives and purposes of the merit system of civil service.”

II. THE DPW IS A JURIDICAL “PERSON” FOR THE PURPOSES OF COMMISSION RULE II, SECTIONS 8.4 AND 8.5.

As indicated above, Commission Rule II, section 8.4 (h) essentially provides that “any person” that fails to comply timely with any order or directive of the Commission may be charged with contempt. If the person charged with contempt is found guilty of the offense, Rule II, section 8.5 (d) requires the Commission to render “an order reciting the facts constituting the contempt, adjudging the person charged with the contempt guilty thereof, and specifying the punishment imposed pursuant to Article X, §11 of the Louisiana Constitution.”

Article 24 of the Louisiana Civil Code sets forth in pertinent part: “There are two kinds of persons: natural persons and **juridical persons.**” (emphasis added). In *Downtown Development District of the City of New Orleans v. City of New Orleans*, 272 So. 3d 917 (La. App. 4th Cir. 2019), the Louisiana Fourth Circuit Court of Appeal held that the Downtown Development District was a separate juridical person from the City of New Orleans. In *Hellmers v. Department of Fire*, 2019-0420 (La. App. 4th Cir. 10/30/19), 2019 WL 5607426, *writ denied*, 347 So. 3d 875 (La. 2/26/20), the Fourth Circuit stated that the NOFD was a juridical person.

The DPW is a juridical person for the purposes of Commission Rule II, sections 8.4 and 8.5. The DPW acts in its legal juridical person capacity as the Appointing Authority for Ms. Edmonds, along with Director Porteous.

III. THE COMMISSION HAS THE POWER AND AUTHORITY TO HOLD DIRECTOR PORTEOUS, THE APPOINTING AUTHORITY FOR MS. EDMONDS, IN CRIMINAL CONTEMPT.

In employment related disciplinary matters coming before the Commission, the Appointing Authority is always the adverse party versus the classified employee at issue. In the present matter, both the DPW and Director Porteous are the Appointing Authority for Ms. Edmonds. As the Louisiana Constitution dictates, the Commission's Rules and Orders carry the force of Louisiana law relative to the Appointing Authority and classified employees. That includes Rule II, sections 8.4 and 8.5 regarding the Commission's power to hold the Appointing Authority, including Director Porteous, in criminal contempt for willful failure to comply with its legally issued May and November 2022 Orders.

As indicated above, Article X, section 10 (A) (1)(a) of the Louisiana Constitution specifically speaks to the power which the Commission has, and must have, over an Appointing Authority in order to exercise effectively its exclusive jurisdiction over employment related disputes involving classified employees. If Director Porteous can willfully disregard the Commission's May and November 2022 Orders simply because of her individual unclassified status, and escape criminal contempt for her willful actions, the Commission's Rules and Orders then become nothing more than meaningless pieces of paper and the entire constitutionally created justice system for classified employees breaks down.

In support of her position, Director Porteous cites *Investigation of Lauricella*, 546 So. 2d 207, 211 (La. App. 1 Cir. 1989), *writ denied sub nom. In re Lauricella*, 548 So. 2d 330 (La. 1989). In *Lauricella*, the unclassified employee at issue was not an appointing authority responsible for compliance with Commission issued Orders in disciplinary appeals involving classified employees. That is a significant distinguishing fact from our present case where Director Porteous is being held in criminal contempt in her capacity as the Appointing Authority for Ms. Edmonds.

Therefore, *Lauricella* does not support Director Porteous's contention that she can avoid criminal contempt just because she is an unclassified employee. The Commission has the legal power to overturn or reduce discipline imposed by an Appointing Authority. That legally conferred authority over the Appointing Authority is crucial to the Commission's overall role in ensuring justice for all parties.

IV. **IN 2018 AND 2019, THE APPOINTING AUTHORITY PAID MS. EDMONDS THE COMMISSION'S TWO PRIOR ORDERED AWARDS OF ATTORNEY'S FEES WITHOUT ANY SPECIAL APPROPRIATION FROM THE CITY COUNCIL.**

Based upon what they were told by the Law Department, the Appointing Authority contends that it would be unlawful to pay Ms. Edmonds the outstanding May and November 2022 attorney's fee awards without a special appropriation from the City Council. In the absence of such an appropriation, the attorney's fee awards went on the City's State Court List, as if they were an unpaid money damages award or attorney's fees award issued by a state court. From a factual standpoint, this present position willfully flies directly in the face of what Ms. Edmonds's Appointing Authority actually did in both May 2018 and April 2019 regarding the two prior attorney's fee awards for Ms. Edmonds.

More specifically, the DPW paid Ms. Edmonds through its normal payroll system the Commission Ordered May 10, 2018, attorney's fees of \$227.50 (Joint Exhibit 1) in her paycheck for the pay period ending on May 19, 2018 (Commission Exhibit 3), and paid Ms. Edmonds the Commission Ordered December 18, 2018, attorney's fees of \$585 (Joint Exhibit 2) in her paycheck for the pay period ending on April 20, 2019. (Commission Exhibit 3). Thus, the two prior attorney's fee payments to Ms. Edmonds in 2018 and 2019 were made through the DPW's normal payroll system, as the DPW would make any payment to Ms. Edmonds of wages or any emolument of her employment. There was no request whatsoever made by the Appointing Authority at any time for any special appropriation from the City Council before those two attorney's fee awards were fully paid by the Appointing Authority out of the DPW's normal operating budget.

The Appointing Authority now contends that the 2018 and 2019 attorney's fee award payments to Ms. Edmonds were illegally made, in error, by the DPW without the Law Department's consultation, knowledge or input. (p. 25, June 23, 2023, Hearing transcript and AA Exhibit 4). However, the facts presented below paint a totally different picture.

First, as Joint Exhibit 1 shows, the Law Department through Assistant City Attorney Elizabeth Robins was directly copied on the Commission's Order issued on May 10, 2018. Subsequent thereto, the Appointing Authority was never directed by the Law Department to not pay those attorney's fees without a special appropriation from the City Council and Ms. Edmonds's lawyer was never told that such a payment would be unlawful. To the contrary, what is most telling is the May 31, 2018, email exchange (Commission Exhibit 2) between Ms. Edmonds's lawyer (Brett Prendergast) and Deputy City Attorney (Corwin St. Raymond) as to the Appointing Authority's payment of the May 10, 2018, award of attorney's fees:

*“Corwin, Since the Commission has issued its order from the February meeting, would you please advise as to when my client will be receiving the **attorney’s fees** which were awarded. Thanks, Brett.”* (emphasis added).

*“Do you have a copy of the signed order? I don’t recall receiving a copy. **I would be happy to forward to DPW as they would be responsible for this payment.** Corwin St. Raymond”* (emphasis added).

*“Corwin, I just received an e-mail from my client indicating that she received the **attorney’s fees** as an addition to her regular paycheck so DPW is good on compliance with the Order. I wanted to let you know as soon as possible before you wasted any time trying to track it down. Brett”* (emphasis added).

As the above facts show, the Law Department was clearly aware (Joint Exhibit 1) of the May 10, 2018, attorney’s fee award and knew on May 31, 2018, of the DPW’s payment of those attorney’s fees. Deputy City Attorney St. Raymond never raised any objection to the Appointing Authority paying the attorney’s fees when he says in reference to the Commission’s attorney’s fee award: **“I would be happy to forward to DPW as they would be responsible for this payment.”** (emphasis added).

On December 18, 2018, the Commission issued its second attorney’s fee award in favor of Ms. Edmonds and against the Appointing Authority. In April 2019, that second attorney’s fee award was paid in full to Ms. Edmonds by the Appointing Authority through the DPW’s normal payroll system, just as it had done in May 2018 regarding the first attorney’s fee award. The April 2019 payment occurred 11 months after Deputy City Attorney St. Raymond had knowledge of and never objected to or raised any question whatsoever as to a payment of a Commission’s ordered attorney’s fees award being “unlawful” without a special appropriation from the City Council.

The Law Department had first-hand knowledge of the Commission’s Order dated December 18, 2018, in that Deputy City Attorney St. Raymond was copied on the communication from the Civil Service Department to all counsel. (Supplemental Joint Exhibit 2). The Appointing Authority has produced nothing to indicate that Deputy City Attorney St. Raymond or anyone in the Law Department told the DPW or Ms. Edmonds’s lawyer, prior to the DPW’s April 2019 payment of the second award of attorney’s fees, that such a payment would be unlawful without a special appropriation from the City Council.

In his July 1, 2022, letter to the Commission (AA Exhibit 4), Assistant City Attorney William Goforth provided a history of the prior two attorney’s fee awards, yet he never mentions

Deputy City Attorney St. Raymond's very important May 31, 2018, communication with Ms. Edmonds's lawyer. That communication and the other facts presented herein clearly negate the Appointing Authority's continued, erroneous statement that the May 2018 and April 2019 attorney's fee payments were made without the Law Department's consultation, knowledge or input. (p. 25, June 23, 2023 Hearing transcript and AA Exhibit 4).

V. **THE CITY'S CUSTOM AND PRACTICE FOR YEARS HAS BEEN TO PAY COMMISSION ORDERED AWARDS OF ATTORNEY'S FEES WITHOUT ANY SPECIAL APPROPRIATION FROM THE CITY COUNCIL AND THE CITY HAS NEVER PLACED A COMMISSION'S AWARD OF ATTORNEY'S FEES ON ITS STATE COURT LIST.**

The City has no written policy as to what judgments or orders are placed on its State Court List. (p. 110, June 23, 2023 Hearing transcript). What goes on that List is purely within the discretion of the Law Department.

Article 3 of the Louisiana Civil Code sets forth: "Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation."

What has been the City's custom and practice for years in regard to the Commission's awards of attorney's fees? Has the custom and practice been to treat the Commission's awards of attorney's fees the same as a money damages or attorney's fee award from a state court and place them on the State Court List as it now contends? (p. 115, June 23, 2023 Hearing transcript). Or has the City/applicable appointing authority customarily paid those awards of attorney's fees without ever receiving a special appropriation from the City Council? Has the City ever set forth, prior to now, that a payment of a Commission's ordered attorney's fees is unlawful without a special appropriation from the City Council? Has the City ever placed a Commission's award of attorney's fees on the State Court List, other than just very recently in regard to the Commission's May and November 2022 Orders?

The factual record developed in this matter unquestionably establishes that the City's custom and practice for "a long time" (Civil Code Article 3) has been to pay the Commission's awards of attorney's fees without any special appropriation from the City Council. Moreover, the City had never previously placed a Commission's award of attorney's fees on the State Court List.

The Commission rarely awards attorney's fees against the appointing authority. However, published decisions indicate that the City/applicable appointing authority has consistently paid those fees without first obtaining a special appropriation from the City Council. In *Christoffer v. Dep't of Fire*, 98-2408 (La. 5/18/99), 734 So. 2d 629, the NOFD paid the Commission's award of attorney's

fees in the ordinary course of business. Counsel for Christoffer testified that the City paid the awarded attorney's fees without any special appropriation from the City Council and without ever placing the award on the State Court List. (pp. 88-89, June 23, 2023 Hearing transcript). The Louisiana Supreme Court noted in *Christoffer*, 734 So. 2d at 630, that the City Attorney appeared [on April 24, 1997] and indicated that Christoffer had been reinstated and would receive his back pay **and attorney's fees within two weeks.**" (emphasis added).

The Law Department also paid the Commission's awarded attorney's fees in 2018 in the amount of \$12,269.25 to counsel for classified employee, Lucille Perry, after the attorney's fees were increased by the Fourth Circuit in the reported decision of *Perry v. Dep't of Law*, 2017-0609 (La. App. 4 Cir. 1/31/18), 238 So. 3d 592. (Commission Exhibit 5). This check, payable to counsel for Lucille Perry, is dated April 24, 2018, and the transmittal letter states that the "City's check for attorney fees" is enclosed. (Commission Exhibit 5).

Given the consistent custom and practice of the City going back to at least 1997, the obvious question arises as to why now, after all these years, did the City/Appointing Authority refuse to pay the outstanding 2022 attorney's fees? Director Porteous's testimony offers some insight into answering this question. The Law Department told her that, if she paid Ms. Edmonds the two 2022 attorney's fee awards, "the City could be subject to paying everything else on the Judgment List." (p. 86, June 23, 2023 Hearing transcript).

The Law Department's concern over what might or might not happen if it were to have the Appointing Authority comply with Commission Rule Article II, Section 11.1 and pay the May and November 2022 attorney's fee awards is no justification whatsoever for the Appointing Authority's willful noncompliance with the Commission's Orders.

VI. A COMMISSION'S AWARD OF ATTORNEY'S FEES IS TOTALLY DIFFERENT FROM A MONEY DAMAGES OR ATTORNEY'S FEE AWARD ISSUED BY A STATE COURT.

The City's own consistent, past custom and practice regarding the payment of the Commission's awards of attorney's fees in this Edmonds case and in other reported cases discussed herein establish that the City never viewed a Commission's award of attorney's fees the same as a money damages or attorney's fees award issued by a state court. Prior to the Commission's 2022 issued Orders at focus herein, the City/applicable appointing authority never requested a special appropriation from the City Council before paying the attorney's fees award AND never placed the Commission's award of attorney fees on the City's State Court List.

A Commission's award of attorney's fees is legally recognized and authorized under Commission Rule II, section 11.4. An attorney's fee award from the Commission is equitable relief, ancillary to and part of the Commission's decision making in regard to making a classified employee whole relative to the overturning or modification of discipline leveled against the classified employee by the applicable appointing authority. As the Fourth Circuit stated in *Johnson, supra*, a Commission's award of attorney's fees is not assessed as a sanction against the appointing authority, but "may be part of an order restoring backpay to a classified employee." *Id.* at 15.

The Commission has no power or authority to award money damage judgments. The Commission can only award equitable relief in classified employee appeals. *Akins v. Housing Authority of New Orleans*, 2003-1086 (La. App. 4 Cir. 9/10/03), 856 So. 2d 1220 (discussing Commission's subject matter jurisdiction over classified employee's overtime claim). "[T]he Civil Service Commission is powerless to render a money judgment." *Peete v. Scheib*, 156 So. 2d 280, 283 (La. App. 4 Cir. 1963), *writ refused*, 245 La. 90, 157 So. 2d 233. "[T]he CSC did not have power to render a money judgment." *Johnson v. Bd. of Supervisors of Louisiana State Univ. & Agr. & Mech. Coll.*, 45,105 (La. App. 2 Cir. 3/3/10), 32 So. 3d 1041, 1046. "For instance, the [State Civil Service Commission] has no subject matter jurisdiction over tort cases and cannot award general monetary damages." *Id.* "[T]he CSC cannot award general tort damages, such as for injury to reputation or an invasion of privacy." *Reimer v. Med. Ctr. of Louisiana at New Orleans*, 95-2799 (La. App. 4 Cir. 1/29/97), 688 So. 2d 165, 169.

Furthermore, as discussed above, the New Orleans City Council in 2019 established a Judgment Fund "dedicated solely to assisting in the **payment of legal judgments rendered against the city by state courts.**" (emphasis added). See Section 70-415.272 of the City Code. The Commission is not a state court. Commission awards do not belong on the State Court List. They are not even to be paid out of the Judgment Fund, since Commission's awards are issued by a quasi-judicial body, not by a state court.

The cases cited by the Appointing Authority on pages 6 and 7 of their Opposition Memorandum, in alleged support of their position that the Commission cannot force them to pay the 2022 attorney's fees at issue, all pertain to a judiciary's or a party's attempted enforcement of a money damages judgment against the state or a political subdivision. As set forth above, the Commission has no legal power to issue a money damages judgment. Its awards of attorney fees to Ms. Edmonds are

not money damages, but are equitable relief, provided to make her whole, given her employment disputes with the Appointing Authority.

In essence, the Appointing Authority's cited cases of *Newman Marchive P'ship, Inc. v. City of Shreveport*, 2007-1890 (La. 4/8/08), 979 So. 2d 1262; *Hoag v. State*, 2004-0857, p. 5 (La. 12/1/04), 889 So. 2d 1019, 1022); *Town of Sterlington v. Greater Ouachita Water Co.*, 52,482 (La. App. 2 Cir. 4/10/19), 268 So. 3d 1257, 1270, *writ denied*, 2019-00913 (La. 9/24/19), 279 So. 3d 386, and *writ denied*, 2019-00717 (La. 9/24/19), 279 So. 3d 931; and *Plaquemines Par. Gov't v. Hinkley*, 2019-0929 (La. App. 4 Cir. 4/22/20), *writ denied*, 2020-01191 (La. 1/26/21), 309 So. 3d 345 carry no controlling weight or authority as to the present matter before the Commission in that they all pertain to money damage awards.

VII. DIRECTOR PORTEOUS AND THE DPW ARE BOTH GUILTY OF CRIMINAL CONTEMPT.

Sarah Porteous became the Director of the DPW in September 2022. (p. 60, June 23, 2023, Hearing transcript). In that capacity, although she is an unclassified employee, Director Porteous is the Appointing Authority for Ms. Edmonds (pp. 81-82, June 23, 2023 Hearing transcript), a classified employee for 39 years. (p. 66, June 23, 2023 Hearing transcript). Director Porteous testified that she was aware that the DPW had paid on two prior occasions {May 2018, and April 2019} the Commission's Ordered awards of attorney's fees in favor of Ms. Edmonds (p. 64, June 23, 2023 Hearing transcript). She knew she had the authority to pay the Commission's Ordered 2022 attorney's fees to Ms. Edmonds. (p. 65, June 23, 2023 Hearing transcript). She had sufficient funds in her budget to do so. (p.65, June 23, 2023 Hearing transcript); She wanted to pay the outstanding attorney's fees. (p.66, June 23, 2023 Hearing transcript). But she did not do so because she was told by the Law Department that it would be illegal to pay the fees without a special appropriation from the City Council. (pp 66 and 81, June 23, 2023 Hearing transcript).

Although she faced this present, very serious criminal contempt motion, Director Porteous blindly took the advice of the Law Department in that she testified, in response to Commissioner Davis's question, that she never asked the Law Department specifically why it would be illegal for her to pay the Commission's Ordered May and November 2022 attorney's fee awards, as had been done in 2018 and 2019 by prior DPW Director Keith LaGrange. (pp.48 and 50, June 23, 2023 Hearing transcript). Commissioner Davis asked Director Porteous if the Law Department cited a specific law prohibiting these payments and she said "no." (p. 88, June 23, 2023 Hearing transcript).

Moreover, in response to Commissioner Moore's question, Director Porteous testified that, although she never conferred with a lawyer outside of the Law Department as to the alleged illegality of complying with the Commission's Orders by paying the fees, "I probably should." (p.84, June 23, 2023 Hearing transcript).

The Fourth Circuit held in *Streiffer v. Deltatech Construction, LLC*, 2019-0990 (La. App. 4 Cir. 3/25/20), 294 So. 2d 564, 576, that advice of counsel is not a defense to a charge of contempt: "We note that Deltatech's counsel's instruction not to appear [for a judgment debtor exam] is no defense to the contempt proceeding. *State ex rel. Collins v. Collins*, 237 La. 111, 110 So. 2d 545, 550 (1959) (observing that "[t]he fact that [the contemnors] acted on advice of counsel does not provide them with a legal excuse"); see also 17 C.J.S. Contempt § 64 (observing that "[t]he fact that a contemnor acted under the advice of counsel is generally no defense to a proceeding for contempt").

The Commission factually finds that Director Porteous's actions and non-actions beyond a reasonable doubt amount to a willful failure to comply with its May and November 2022, Orders. Director Porteous should have sought the advice of her own private lawyer as to what she should do in the face of the Commission's May and November awards of attorney's fees.

Although it is speculative to a certain extent, if she had retained her own lawyer to look into this matter, a minimal amount of due diligence investigation on the part of any lawyer would have most likely uncovered the facts presented herein as to both the City's prior unquestioned attorney's fee payments to Ms. Edmonds and to other classified employees over the years without any such attorney's fee award ever first receiving a special appropriation from the City Council. Any lawyer acting solely in Ms. Edmonds's best interests would have most likely raised serious questions as to Director Porteous's continued reliance on the Law Department's noncompliance instructions. In failing to seek outside legal advice, Director Porteous voluntarily and willfully decided to disregard the Commission's 2022 Orders at her own risk.

As for the DPW, it has also relied upon the advice of the Law Department in its willful noncompliance with the Commission's 2022 Orders. Instead of immediately complying with the Commission's March 2019 Order, entered in accordance with the 2018 directive from the Fourth Circuit Court of Appeal to reinstate Ms. Edmonds to her previous held position, it took the DPW three years to comply with that directive from the Fourth Circuit and the Commission. This unreasonable delay in compliance resulted in the Commission's May and November 2022 attorney's fee awards. The DPW had previously paid the Commission's May and December 2018

attorney's fee awards without any questions or concerns being raised by the Law Department before the payments were made.

As to the 2022 awards, there is no justified excuse whatsoever why the DPW decided to ignore what it had done before relative to Ms. Edmonds and years of precedent insofar as the City's customary payment of the Commission's issued attorney's fee awards without the need for any special appropriation from the City Council. In refusing to comply with the Commission's 2022 Orders, despite a compelling factual history indicating that those attorney's fees should have been paid immediately by the DPW in accordance with Commission Rule II, section 11.1, the DPW has willfully shown disrespect and disregard for the Commission, its Orders, and its applicable Rules.

VIII. ORDERS

For the reasons set forth above, IT IS ORDERED that: (1) the Appointing Authority, DPW and Director Porteous, are both found guilty of criminal contempt beyond a reasonable doubt in violation of Civil Service Commission Rule II, section 11.1, and (2) the DPW and Director Porteous are each fined \$500, in accordance with Article X, section 11 of the Louisiana Constitution, to be paid within 10 days from this date to the Department of Civil Service.

ORDERS entered this 4th day of August, 2023.

WRITER:

Mark Surprenant
Mark Surprenant (Aug 4, 2023 15:25 CDT)

MARK C. SURPRENANT, COMMISSIONER

CONCUR:

C. J. Moore
Clifton Moore Jr. (Aug 4, 2023 15:42 CDT)

CLIFTON J. MOORE, JR., COMMISSIONER

Ruth White Davis
Ruth Davis (Aug 4, 2023 15:35 CDT)

RUTH DAVIS, COMMISSIONER