



CITY OF NEW ORLEANS

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Tuesday, September 27, 2016

Belhia V. Martin
1100 Poydras St. Suite 2900
New Orleans, LA 70163

Re: **Brionne Ruth VS.
Sewerage & Water Board
Docket Number: 8342**

Dear Ms. Martin:

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 - 9/27/2016 - 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, 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: Cedric S. Grant
Yolanda Grinstead
Jim Mullaly
Brionne Ruth

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

BRIONNE RUTH vs. SEWERAGE & WATER BOARD	DOCKET No.: 8342
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I. INTRODUCTION

Appellant, Brionne Ruth, brings the instant appeal challenging discipline imposed by the Sewerage & Water Board for the City of New Orleans (hereinafter “S&WB” or “Appointing Authority”). At all times relevant to the matter now before the Commission, Appellant was a classified employee with permanent status and worked as an Office Assistant II for the Appointing Authority.

II. FACTUAL BACKGROUND

The S&WB terminated Appellant’s employment on August 8, 2014 based upon an alleged incident between Appellant and a S&WB customer that occurred on July 14, 2014. (H.E. Exh. 1). According to the S&WB, Appellant was “engaged in a heated verbal altercation with a customer” during which Appellant used profanity and pushed a co-worker who had tried to prevent Appellant from leaving Appellant’s work station to pursue the customer. *Id.* The S&WB further alleged that Appellant “exhibited hostile behavior in the presence of a customer that was being assisted by representatives and [other] customers that were waiting to be seen.” *Id.*

A. S&WB Customer Service

The S&WB hired Appellant on or about April 1, 2013 as an Office Assistant Trainee. Appellant worked at the S&WB's headquarters on 625 St. Joseph Street and processed walk-in customer transactions. (Tr. at 10:25-11:23). Shortly after she was hired, Appellant received a list of expectations for employees acting in a customer service capacity. (S&WB Exh. 3). Among these expectations were:

- Treat all customers and co-workers with courtesy and respect.
- Always speak in a calm tone of voice with fellow employees and customers.
- Display professionalism, and act professionally at all times.
- Maintain calm under pressure.
- Only have hair colors found naturally on humans.¹

Id. Appellant acknowledged that she was aware of the above expectations.

The physical space occupied by Appellant during her tenure with the S&WB was located in the first floor of the S&WB facility. There are four stations resembling bank teller windows, and at each station and a S&WB employee is available to addresses customer issues. S&WB employees interact with customers through a thick pane of protective glass and communicate through grates installed in the glass. Typically, there is a member of the S&WB security team present at the entrance to the building and a uniformed NOPD Officer assigned to the floor. (Tr. at 13:13-14:1).

¹ The Commission includes this last item as an example of the detailed approach apparently taken by the S&WB in developing its expectations. Absent from these expectations is guidance on when it is appropriate for a cashier to leave his/her work station.

During the period of time in question, the S&WB collected not only the fees associated with water and sewerage service, but also sanitation services. *Id.* at 21:4-12. And, a common question posed by S&WB customers who came to the St. Joseph Street location pertained to the relationship between the sanitation charges and the water/sewerage charges contained within a bill. *Id.* at 22:19-23:1.

B. July 14, 2014

Appellant acknowledges that she had a confrontation with a customer on July 14, 2014. According to Appellant, the confrontation began when the customer approached Appellant's station in an agitated state. *Id.* at 31:10-12. The customer brusquely tossed her bill under the glass towards Appellant, and when Appellant asked the customer what assistance she required, the customer replied in a flippant manner, "I just gave you my bill, what do you think." *Id.* at 34:24-35:4. The customer then asked why she had to pay for trash collection when she did not have a garbage can. When Appellant instructed the customer on the process for either requesting a new garbage can or reporting one stolen, the customer became confrontational and cursed at Appellant. *Id.* at 35:8-36:17. Appellant also claims that the customer threatened to physically harm her. *Id.* at 38:6-13. Appellant acknowledges that another cashier, Janae Smothers, was seated in an adjacent station while Appellant was interacting with the irate customer.

After the customer threatened her, Appellant stated that she stood up from her station and attempted to use a phone located in a different part of the floor to call for assistance. Appellant claims that she did not use the phone that was at her station because she did not want to remain in close proximity to the customer and continue to be the target of threats and obscenities. *Id.* at 38:14-21. Appellant denies raising her voice or cursing during the course of her interaction with the customer.

When Appellant reached the phone, she attempted to contact Teaka Terry, a supervisor, but there was no answer. *Id.* at 44:19-45:1. It was at this point in the incident that Appellant states she spoke to the NOPD Officer assigned to the first floor. Appellant offered conflicting accounts as to what she told the Officer. First, Appellant stated that the Officer asked if Appellant was “ok,” to which Appellant allegedly answered “yes, I just called for a supervisor.” Yet, in the statement she submitted with her appeal, Appellant wrote that the Officer asked Appellant “what happened.”

The S&WB contracts with a private firm, Crescent Guardian, to provide security at the St. Joseph Street location. Curley Jackson Dempsey is the head of the security team assigned to the S&WB’s headquarters and was working on June 14, 2014 from 6:00 a.m. until 2:00 p.m. *Id.* at 63:12-17. Ms. Dempsey testified that she was generally stationed at a desk in the first floor lobby of St. Joseph Street and could observe S&WB customers as they were transacting business. *Id.* at 64:7-13. On July 14th, Ms. Dempsey heard a cashier – later identified as Ms. Smothers - say something to the effect that the cashier believed that Appellant was attempting to enter the area of the lobby where customers congregated in order to fight a customer. *Id.* at 67:2-6. Ms. Dempsey then observed the Appellant leave the customer service area and enter the “cashier part.” *Id.* at 67:24-68:4. Ms. Dempsey remained at the security station while an NOPD Officer approached Appellant. On cross-examination, Ms. Dempsey acknowledged that, 1) the only loud voice she heard on July 14th was Ms. Smothers, and 2) when Ms. Dempsey observed Appellant, Appellant was close to a phone. *Id.* at 71:19-72:4, 72:19-20.

Natasha Fortner Simon is/was a cashier supervisor for the S&WB assigned to St. Joseph St.; she was working on July 14, 2014 during the incident in question. *Id.* at 75:6-17. Ms. Simon testified that she heard a customer using a loud voice while in the first floor lobby of St. Joseph Street and then observed Appellant standing by a phone. *Id.* 79:13-19. On cross-examination, Ms.

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Simon acknowledged that the customer was “screaming and cursing.” *Id.* at 85:14-18. Ms. Simon testified that she later spoke with the customer with whom Appellant had interacted and on the basis of her conversation with the customer, believed that Appellant did not adhere to the S&WB’s expectations for customer service employees contained in what is in the record as S&WB Exhibit 3. *Id.* at 81:10-19.

Ms. Antoinette Jenkins is/was the customer service administrative manager for the S&WB assigned to St. Joseph Street location. (Tr. at 87:15-21). Ms. Jenkins supervised the customer service area at St. Joseph Street and monitored employees’ compliance with S&WB policies and expectations. Ms. Jacqueline Shine is/was the customer service director for the S&WB and supervised Ms. Jenkins. Ms. Shine became aware of the incident between Appellant and the customer when the NOPD Officer approached her. After speaking to the Officer, Ms. Shine proceeded to Ms. Jenkins’s office where Ms. Jenkins was in the process of interviewing the customer; Ms. Shine sat in on the rest of the interview. *Id.* at 97:15-98:5. As a result of the interview with the customer, both Ms. Jenkins and Ms. Shine agreed that Appellant should go home for the day. *Id.* at 98:11-20.

Appellant returned to the S&WB’s St. Joseph Street location on July 25, 2014 to attend a pre-termination hearing. At the hearing, Appellant had an opportunity to present her version of the events. According to Ms. Jenkins and Ms. Shine, Appellant failed to produce any evidence that challenged or mitigated the allegations contained in the hearing notice. The S&WB then issued notice to Appellant on or about August 4, 2014 that her employment with the S&WB would terminate on August 8, 2014. (H.E. Exh. 1).

III. LEGAL STANDARD

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued without 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*

The S&WB based its decision to terminate Appellant’s employment on the following allegations:

- Appellant engaged in a heated verbal altercation with a customer and used profanity.
- Appellant abandoned her work station in an attempt to continue the confrontation/altercation in the lobby.

- Appellant physically pushed the co-worker who tried to stop Appellant from leaving Appellant's work station.
- Appellant exhibited hostile behavior in the presence of a customer that was being assisted by a representative and other customers waiting for service.

(H.E. Exh. 1).

The only witness with personal knowledge of Appellant's interaction with an angry customer on July 14, 2014 who testified at the appeal hearing was Appellant herself.

1. Engaging a customer in a heated conversation, using profanity, and exhibiting hostile behavior

Both Appellant and Ms. Simon testified that the customer was screaming and cursing at Appellant. (Tr. at 36:1-17, 85:14-18). However, Appellant testified that she did not raise her voice towards the customer and did not use any profanity. The S&WB did not introduce any evidence that contradicted Appellant's testimony other than vague assertions that, based on an interview with the customer, Appellant's supervisors believed that Appellant had failed to conduct herself in a professional and courteous manner.² As noted above, it is for the Commission to determine, based upon the facts presented by the Parties, whether or not there was sufficient cause to discipline Appellant. We are not bound by the decisions of Appellant's supervisors.

² As the hearing examiner observed, hearsay evidence is admissible in appeal hearings. However, the Commission must determine if such evidence is "competent" or "of the type a reasonable person would rely upon." *Taylor v. New Orleans Police Dep't*, 2000-1992 (La.App. 4 Cir. 12/12/01, 5); 804 So.2d 769, 773, *writ not considered*, 2002-0139 (La. 3/22/02); 811 So.2d 935. In *Taylor*, the hearsay at issue was in the form of sworn statements by NOPD Officers. In the matter now before us, the customer's account of Appellant's alleged misconduct is entirely hearsay, devoid of any specifics, and introduced through two witnesses who apparently did not write down the customer's account. Thus, the hearsay evidence at issue here is markedly different from the "competent" hearsay evidence found in *Taylor* and related cases. See e.g. *Johnson v. Dep't of Police*, 2008-0467 (La.App. 4 Cir. 12/10/08, 13); 2 So.3d 501, 510 (victim testimony supported by cell phone records, other eye witness accounts and NOPD Officer statements); *Broaden v. Dep't of Police*, 2003-1427 (La.App. 4 Cir. 1/14/04, 7); 866 So.2d 318, 322 (testimony of witness to domestic abuse introduced through officer who interviewed witness as part of an administrative investigation into employee misconduct); *Gant v. Dep't of Police*, 1999-1351 (La.App. 4 Cir. 1/5/00, 9); 750 So.2d 382, 387, *writ denied*, 2000-0688 (La. 4/20/00); 760 So.2d 1161 (deceased victim testimony introduced through NOPD Officer who interviewed the victim). Therefore, we are inclined to give the hearsay evidence in this matter little weight.

There is nothing in the record that establishes, by a preponderance of the evidence, that Appellant raised her voice to the customer, cursed at the customer or exhibited hostile behavior towards the customer. Therefore, the Commission finds that the S&WB failed to prove that Appellant engaged a customer in a “heated verbal altercation” as the only competent evidence in the record before us suggests that the profanity and aggression came only from the customer, not Appellant.

2. Abandoning Work Station to Continue Confrontation with Customer

Appellant acknowledged that she abandoned her work station, but claimed that she did so in order to remove herself physically from the verbal abuse leveled at her by a customer. Appellant further testified that she chose not to use the phone located at her work station because the customer was being very loud and aggressive. Ms. Dempsey stated that he heard one of Appellant’s fellow cashiers, Ms. Smothers, yell out to stop Appellant because Ms. Smothers believed that Appellant intended to enter the lobby and confront the customer.³

Given that Ms. Smothers did not testify, the Commission is unable to determine why Ms. Smothers believed Appellant intended to physically confront the customer in the lobby. Appellant denies pushing Ms. Smothers and stated that Ms. Smothers initiated the physical contact by placing her hands upon Appellant. Appellant claims to have asked Ms. Smothers to remove her hands and proceeded to use a phone located in the cashier’s office. (S&BW Exh. 1; Tr. at 44:7-23).

Ms. Smothers, a fellow cashier, was in a position to testify as to what she heard Appellant say on July 14th, but did not testify. Nor did the S&WB present the actual customer, which would

³ To the extent that the S&WB seeks to introduce Ms. Smothers’s requests for the truth of the matter asserted – that Appellant intended to fight the customer – such testimony would be layered hearsay that seeks to establish Appellant’s state of mind and intent. The Commission affords such testimony little weight. Alternatively, Ms. Smothers’s comments prompted action on the part of Ms. Dempsey and thus are not hearsay for the limited purpose of showing that Ms. Dempsey heard Ms. Smothers’s call for help and took action as a result.

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have been compelling evidence. Further, the NOPD Officer who spoke with Appellant on the day in question also did not testify. The S&WB chose to rely upon vague hearsay evidence. The Commission is particularly concerned that there is allegedly a video of the incident but the S&WB did not offer the video.⁴

The S&WB approached this matter as if the Appellant had the burden of proof to establish that she did not engage in the conduct alleged by the S&WB. Its case suffered as a result. In fact, Appellant did not have the burden of proving a negative, she only had to rebut the competent evidence submitted by the S&WB.

The duty of the Commission in deciding the disposition of appeals is clear:

The commission or board has a duty to independently decide, from the facts presented, whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction.

Morris v. City of Minden, 50,406 (La.App. 2 Cir. 3/2/16)(citing *Walters v. Dept. of Police of New Orleans*, 454 So.2d 106 (La. 1984); *City of Bossier City v. Vernon*, 12-0078 (La.10/16/12), 100 So.3d 301)(emphasis added). And, based upon the facts presented by the Parties, the Commission finds that the S&WB has failed to meet its burden with respect to the conduct attributed to Appellant. See *Stewart v. Sewerage & Water Bd.*, 2003-1301 (La.App. 4 Cir. 12/30/03, 5); 865 So.2d 209, 211. (In affirming the Commission's decision to vacate discipline issued to an employee found that: "The collective testimony, above all, indicates the cavalier manner in which this matter was handled by the appointing authority, and supports the decision of the Commission to reject the recommendation of the hearing examiner.")

⁴ Counsel for the S&WB coyly observed that he had the video but Appellant only subpoenaed the video for an earlier hearing date and did not reissue the subpoena. (Tr. at 94:7-11). The Commission likely would have been greatly aided in reaching its decision if the video was submitted. However, since it is not part of the record, the Commission is foreclosed from considering it.

V. CONCLUSION

Based upon the foregoing, the Commission hereby GRANTS Appellant's appeal. The S&WB shall reinstate Appellant and remit to her all back pay and emoluments related to her suspension and subsequent termination. Further, the S&WB shall expunge any record of the suspension and termination from Appellant's record.

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Judgment rendered this 27 th day of Sept., 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



JOSEPH S. CLARK, COMMISSIONER

9/26/16

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

9/19/16

DATE



TANIA TETLOW, COMMISSIONER

9/1/16

DATE