



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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JOHN H. KORN, VICE-CHAIRPERSON
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AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Thursday, December 7, 2023

Mr. Louis Robein
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: **Brian Mendelson VS.**
Department of Fire
Docket Number: 9493

Dear Mr. Robein:

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 - 12/7/2023 - 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
James M. Roquemore
Jay Ginsberg
f
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**BRIAN MENDELSON,
Appellant**

Docket No. 9493

v.

**DEPARTMENT OF FIRE,
Appointing Authority**

DECISION

Appellant, Brian Mendelson, 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 six-hour suspension imposed by the Department of Fire (NOFD) on August 14, 2023. (Ex. HE-1). At all relevant times, Appellant had permanent status as a Captain. (Ex. HE-1; Tr. at 8-9). A Hearing Examiner, appointed by the Commission, presided over a hearing on October 4, 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 post-hearing briefs from the parties, the Hearing Examiner's report dated October 27, 2023, and controlling Louisiana law.

For the reasons set forth below, Captain Mendelson's appeal is GRANTED.

I. FACTUAL BACKGROUND

NOFD informed Captain Mendelson on August 8, 2023, that it was suspending him for six hours for violating CAO Policy 109 and NOFD RR-5 by failing to report the loss of a flashlight. (Ex. HE-1). Rule 5 provides that "Members will comply with all policies set forth by the City of New Orleans," and has a presumptive penalty of a six-hour suspension. (Ex. NOFD-2). The

penalty range is a written reprimand to a 12-hour suspension. (Ex. NOFD-2). CAO Policy Memorandum 109 provides that “[t]he employe is responsible for immediately notifying the appointing authority or designated representative of any Assigned City Property that is lost, stolen, damaged, or malfunctioning.” (Ex. NOFD-3).

Captain Mendelson lost the flashlight provided by the City on February 18, 2023, but he failed to report the loss of the flashlight until June 15, 2023. (Tr. at 15). Captain Mendelson testified that the flashlight had been broken since 2017 or 2018, and Meril Juneau, a civilian employee who conducted compliance checks of equipment for NOFD, had instructed him to keep the broken flashlight on his person. (Tr. at 25). Mr. Juneau told Captain Mendelson that “we don’t have any replacements.” (Tr. at 25). Captain Mendelson testified he hung the flashlight on a carabiner on his bunker coat for a time, and then put it in his pocket. (Tr. at 26). At subsequent compliance checks, Captain Mendelson reiterated that the flashlight was broken. (Tr. at 73, 75). NOFD failed to provide a new flashlight until August 8, 2023, five or six years after it first had notice of Captain Mendelson’s need for a flashlight, and, in the interim, Captain Mendelson purchased one or two handheld flashlights and two helmet lights with his personal funds. (Tr. at 27).

Superintendent Nelson testified that “it makes absolutely no sense to me” why Mr. Juneau instructed Captain Mendelson to keep the broken flashlight on his person, and that Captain Mendelson could have kept the broken NOFD-issued flashlight in his locker. (Tr. at 61). Superintendent Nelson also testified that the problem with the flashlights was usually an issue with the battery packs, and that NOFD was able to get battery packs replaced under warranty and return the flashlights to service. (Tr. at 53,54).

II. ANALYSIS

A. 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).

B. The Department of Fire has failed to carry its burden of showing cause for the discipline of Captain Mendelson

The Department of Fire has shown the occurrence of the complained-of activity. Captain Mendelson delayed reporting the loss of the NOFD-supplied flashlight in violation of CAO Policy 109.

The Department of Fire has failed to show that Captain Mendelson's conduct impaired the efficient operation of the Department. Superintendent Nelson responded as follows to the question of how Captain Mendelson's delay in reporting the lost flashlight affected the efficient operation of the NOFD:

Well, I think it affects us in several ways. So, we're - this is not - this is not my property, this is city property. This is taxpayer purchased equipment. So, I think the transparency and accountability to the public on where the tax dollars go, and how then lost equipment, what happened, right, if for the transparency purposes and also for making sure that all of our firefighters have the proper equipment that they need to do their job.

(Tr. at 48-49).

Captain Mendelson's hand-carried NOFD-issued flashlight stopped working in 2017 or 2018. (Tr. at 27). He brought the inoperative flashlight to NOFD compliance inspections for at least four years. (Tr. at 23, 73, 75). A civilian employee issued replacement equipment if it was available. (Tr. at 25, 52). It is unclear from the hearing transcript if he or someone else ordered the equipment. By failing to repair or replace inoperable mandatory safety gear as soon as it had notice of the need, NOFD has undermined its position that Captain Mendelson's failure to report the loss prevented NOFD from ensuring he had the proper equipment to do his job. In fact, Captain Mendelson ensured he had the proper equipment by purchasing one or two other handheld flashlights and two helmet mounted lights using his own funds. (Tr. at 27, 28). Further illustrating the lack of priority NOFD placed on helping Captain Mendelson perform his job duties, NOFD instructed Captain Mendelson to carry a broken flashlight on his person, which he did from 2017 or 2018 until February of 2023. (Tr. at 25).

The undersigned Commissioners credit Captain Mendelson's testimony that (1) the flashlight was inoperable; (2) he reported the damage to the flashlight at yearly compliance checks;

(3) he lost the flashlight in February of 2023 at a fire; and (4) he reported the loss of the flashlight in June of 2023. Captain Mendelson had an inoperable flashlight for at least four years, and NOFD spent no taxpayer dollars to replace it until August of 2023. Based on these facts, NOFD has failed to carry its burden of showing any relationship between transparency, accountability, or use of public funds and Captain Mendelson's four-month delay in reporting the loss of the flashlight. Therefore, Captain Mendelson's late report did not affect the efficiency of the New Orleans Fire Department.

Captain Mendelson's appeal is GRANTED. NOFD shall reimburse Captain Mendelson for the six-hour suspension imposed on August 14, 2023, along with all emoluments of employment.

DATE: Dec 7, 2023

WRITER: *J H Korn*
J H Korn (Dec 6, 2023 10:07 CST)
JOHN KORN, VICE-CHAIRPERSON

CONCUR: *BR*
Brittney Richardson (Dec 6, 2023 13:04 CST)
BRITTNEY RICHARDSON, CHAIRPERSON

Ruth White Davis
Ruth Davis (Dec 6, 2023 09:14 CST)
RUTH DAVIS, COMMISSIONER