CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
SUITE 900 – 1340 POYDRAS ST.
NEW ORLEANS LA 70112
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Wednesday, July 31, 2019

Mr. Darrin Johnson

Re: **Darrin Johnson VS.**
Recreation Department
Docket Number: 8830

Dear Mr. Johnson:

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 - 7/31/2019 - 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, 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Larry Barabino
Elizabeth S. Robins
Alexandra Mora
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DARRIN JOHNSON, Appellant, vs. DEPARTMENT OF RECREATION, Appointing Authority	DOCKET No.: 8830

I. INTRODUCTION

Appellant, Darrin Johnson, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1. In his appeal, Appellant alleges that the Appointing Authority, the New Orleans Department of Recreation, (hereinafter "NORD"), did not have sufficient cause to issue him discipline. NORD does not allege that the instant appeal is procedurally deficient.

At all times relevant to the instant appeal, Appellant served as a Recreation Site Facilitator for NORD and had permanent status as a classified employee.

A referee, appointed by the Commission, presided over an appeal hearing. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner's report. Based upon our review, we hereby DENIES the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NORD alleges that Appellant engaged in unprofessional conduct and sexual harassment that violated established City policies. (H.E. Exh. 1). As a result of the allegations, NORD placed Appellant on an unpaid emergency suspension and subsequently terminated his employment. *Id.* The City policies at issue are CAO[1] Policy Memorandum # 83(R) – Standards of Behavior, and CAO Policy Memorandum # 141(R) – Sexual Harassment. Policy While NORD did not cite to a specific provision of Policy # 141(R) in Appellant's termination notice, stated "purpose" of Policy # 141(R) is:

> The City of New Orleans is committed to providing a workplace that is free from sexual harassment. In implementing and enforcing a Sexual Harassment policy, we hereby define workplace harassment, prohibit it in all forms, assign the appropriate disciplinary actions for any violations of this policy, and provide procedures for lodging complaints of conduct that violate this policy and the investigation of sexual harassment complaints.

(NORD Exh. 4).

The definition of "sexual harassment" established by Policy # 141(R) relevant to the instant dispute is "unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature…when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." *Id.* And, included in Policy # 141(R)'s examples of sexual harassment are, "sexual comments, sexual emails and/or text messages." *Id.*

Appellant's termination notice does not specify the conduct Appellant perpetrated that allegedly violated Policy # 141(R) other than to reference "allegations of sexual harassment."

[1] "Chief Administrative Officer" for the City of New Orleans. The Parties did not dispute that CAO policies apply to classified employees within NORD.

(H.E. Exh. 1). The notice informing Appellant of his pre-termination hearing, however, does provide some limited details about what conduct allegedly perpetrated by Appellant violated Policy # 141(R). NORD specifically alleged that Appellant engaged in "sexual comments, sexual emails and/or text messages." (NORD Exh. 7).

Policy # 83(R) requires that an employee be "courteous, civil, and respectful." Appellant allegedly violated Policy # 83(R) on April 28, 2018 and May 1, 2018. (NORD Exh. 7). According to the pre-termination notice, on May 1st, Appellant spoke to a co-worker, [redacted] in an aggressive and disrespectful manner after being questioned about the April 28th incident and poked Ms. [redacted] twice in the shoulder. (NORD Exhs. 6, 7).

B. Alleged Harassment

Appellant began working for NORD in May or June of 2009 as a "Recreation Site Facilitator I;" a position Appellant continued to hold until his termination in May 2018. (Tr. at 8:10-15, 24:1-23).[2] In early 2018, NORD hired [redacted] as a Recreation Site Facilitator I. *Id.* at 24:24-25:1. Appellant and Ms. [redacted] occasionally worked together coordinating track meets held on NORD properties. *Id.* at 25:2-5.

Courtney Bagneris, Assistant Chief Administrative Officer for the City of New Orleans, was responsible for the initial investigation into Appellant's alleged sexual harassment. In the course of her investigation, Ms. Bagneris interviewed Ms. [redacted] Based upon that interview, Ms. Bagneris understood that Ms. [redacted] was making two separate complaints of sexual harassment perpetrated by Appellant. *Id.* at 39:25-40:8. The first involved Appellant's request to

[2] NORD spent a portion of the appeal hearing soliciting testimony from Appellant regarding his place of residence and introduced into evidence documents regarding Appellant's domicile. The Commission agrees with the Hearing Examiner that this line of questioning was not germane to any underlying discipline and had very little, if any, probative value as to Appellant's credibility. As such, the Commission does not give any weight to the testimony or evidence relating to Appellant's domicile.

Ms. [redacted] for "sexy pictures" and the second involved an interaction between Ms. [redacted] and Appellant at a bar after work hours. *Id.* at 40:2-8.

Both incidents occurred in January of 2018. (Tr. at 40:15-16; NORD Exh. 9). The record establishes that on January 1, 2018 at 6:22 p.m., Appellant sent Ms. [redacted] a text requesting "sexy pictures." (NORD Exh. 9). The request is part of a larger text "conversation" in which Appellant and Ms. [redacted] appear to be making plans to meet. *Id.* In response to Appellant's request, Ms. [redacted] sent Appellant a picture of a full figured woman in a bikini. *Id.* Appellant's response was "LOL, you look very nice." *Id.* Ms. [redacted] then texted Appellant at 6:34 p.m., "I'm bout to get dressed so I can meet you." *Id.*

At some point in time after this text exchange, Appellant and Ms. [redacted] met at a bar in Algiers after work. (Tr. at 40:12-19). Ms. [redacted] had met Appellant after work hours on four previous occasions and had sought out Appellant's input on where "people hang out." *Id.* at 41:1-11; 144:25-145:10. On this occasion, Ms. [redacted] claimed that Appellant became intoxicated and began speaking in a sexually suggestive way to both Ms. [redacted] and a female friend that had accompanied her to the bar. (NORD Exh. 5). Apparently offended by Appellant's conduct, Ms. [redacted] friend left the bar. Ms. [redacted] accompanied her friend to the bar's parking lot but returned to the bar where Appellant's conduct allegedly did not improve. *Id.* at 42:25-43:6. When Ms. [redacted] decided to leave the bar, Appellant allegedly followed her out to the parking lot where he touched her breasts. *Id.* at 43:6-8.

There were no other incidents in the record between Appellant and Ms. [redacted] until April 28, 2018. On that date, Appellant and Ms. [redacted] were working with other NORD employees at a track meet held at NORD's Harrell Playground facility. During the meet, Appellant approached Ms. [redacted] and confronted her about errors on a printed sheet related to event

participants. (NORD Exh. 8). Appellant was allegedly rude during his interaction with Ms. [redacted] and another NORD employee, Keith Johnson, apparently took issue with Appellant's tone and confronted Appellant. As a result of the verbal confrontation between Appellant and Mr. Johnson, NORD collected statements from employees at the meet on May 1, 2018.

Debra Calderon, NORD's HR Manager, collected the employees' statements. And, during the course of collecting statements Ms. Calderon became aware of Ms. [redacted] concerns regarding Appellant's actions in January. (Tr. at 85:6-13). In addition to providing a statement to Ms. Calderon, Ms. [redacted] sent an email to her supervisor, Yolanda Brown. In her email, Ms. [redacted] wrote about "prior incidents" with Appellant and complained about Appellant's text requesting a "sexy picture" and his alleged inappropriate touching of her breasts in January 2018. (NORD Exh. 8). Ms. [redacted] wrote that she did not report Appellant's behavior previously because Appellant's actions occurred "after work hours." *Id.* Ms. [redacted] wrote that Appellant's behavior had gotten worse since the January 18, 2018 incident at the bar.

In an April 30, 2018 email from Ms. Brown to Shonnda Smith, Ms. Brown suggested that Ms. [redacted] had complained about Appellant's behavior in the past. (NORD Exh. 8). Ms. Brown's email suggests that the January incident when Appellant allegedly touched Ms. [redacted] her breasts represented the turning point in their relationship and led Ms. [redacted] to avoid interactions with Appellant on and off duty. *Id.*[3] There is nothing in the record regarding any earlier complaints by Ms. [redacted] about Appellant's conduct. In fact, in response to Ms. Brown's email, Ms. Smith wrote that she was not aware of any concerns Ms. [redacted] had regarding Appellant's behavior. *Id.*

[3] Ms. Brown's email represents "totem" hearsay as it is Ms. Brown's out of court statement that recounts Ms. [redacted] out of court statement. As such, the Commission gives very little weight to the assertions of fact contained in the email.

On May 1, 2018, while Debra Calderon was collecting statements from witnesses regarding the April 28th confrontation between Appellant and Mr. Johnson, a second confrontation occurred. Ms. Calderon testified that, in the course of collecting statements from Appellant about the April 28th incident, she asked Appellant about his actions in January 2018 towards Ms. [redacted], including the texts and inappropriate touching. *Id.* at 96:25-97:18. According to Ms. Calderon, Appellant got upset, claimed that he and Ms. [redacted] had gone out a couple of times and then left Ms. Calderon's office. (Tr. at 96:25-97:18; NORD Exh. 8).

According to an email Ms. [redacted] sent to Interim NORD Director Maya Wyche, on May 1, 2018 Appellant taunted her after he met with Ms. Calderon by intentionally mispronouncing her name, confronted her about her about the April 28th incident and stood over her with his "penal area facing her direction." (NORD Exh. 8). Ms. [redacted] then wrote that Appellant poked her in the shoulder twice saying that he and Ms. [redacted] were going to fight. *Id.* This incident allegedly occurred at around 5:00 p.m. on May 1, 2018 after Appellant had learned that Ms. [redacted] had made allegations of sexual harassment against him.

Ms. Calderon subsequently questioned Appellant about the May 1st incident. According to Ms. Calderon, Appellant admitted to confronting Ms. [redacted] on May 1st after meeting with Ms. Calderon. The confrontation consisted of Appellant claiming that Ms. [redacted] told NORD's personnel department that Appellant and Ms. [redacted] were going to fight. During his meeting with Ms. Calderon and during his testimony, Appellant denied touching or poking Ms. [redacted]. (NORD Exh. 8; Tr. at 154:19-155:12). Appellant did not, however, address the other allegation that he confronted Ms. [redacted] after meeting with Ms. Calderon to provide a statement about the April 28th incident.

As a result of the growing scope of the investigation and misconduct, Ms. Wyche sought assistance from the City Attorney's Office and the City's Human Resource department. Courtney Bagneris, Assistant Chief Administrative Officer, conducted an investigation into Ms. [redacted] allegations. (NORD Exh. 11). Ms. Bagneris first interviewed Ms. [redacted] who discussed the January 2018 text and alleged inappropriate touching by Appellant. *Id.* Ms. [redacted] also told Ms. Bagneris about the May 1st incident and again alleged that Appellant had "stood with his genital area in her face" and poked her in her shoulder twice. *Id.*

Ms. Bagneris next interviewed Appellant. According to Ms. Bagneris, Appellant lied about sending a text to Ms. [redacted] asking for "sexy pictures" and that Ms. Bagneris was able to contradict Appellant's account when Appellant volunteered to show Ms. Bagneris his phone. *Id.* Appellant denied that he had touched Ms. [redacted] breasts. It is not clear whether or not Ms. Bagneris asked Appellant about the May 1st incident.

Appellant took issue with Ms. Bagneris's version of events and claimed that he did not deny asking Ms. [redacted] to send him "sexy pictures" but rather denied asking Ms. [redacted] for "nude pictures." *Id.* at 26:20-24. According to Appellant, Ms. [redacted] would have been aware that he was asking her for a specific picture and his request to her was not inappropriate. *Id.* at 156:7-20. During his interview with Ms. Bagneris, Appellant volunteered to produce his cell phone in order to allow Ms. Bagneris to search for any offensive text messages. *Id.* at 27:5-11. When Ms. Bagneris reviewed Appellant's phone, she found his request for "sexy pictures" and Ms. [redacted] response. Ms. Bagneris believed that Appellant lied about the text and Appellant offered a very confusing explanation of the exchange. He claimed that he needed a definition of "sexy" and claimed to understand Ms. Bagneris's questions to relate to a request Appellant made for nude photos of Ms. [redacted] *Id.* at 156:12-18.

III. LEGAL STANDARD

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline 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

i. Violation of Policy 141(R)

Unfortunately, the instant appeal does not present the first time the Commission has had to address allegations of sexual harassment perpetrated by a classified employee. In other recent cases, the victims of the alleged sexual harassment testified during the course of the appeal hearing. *Rhett Charles v. Department of Police*, C.S. No. 8735 (Oct. 5, 2018); *Darren Brisco v. Sewerage*

& Water Board, C.S. No. 8442 (May 30, 2017); *Graylin Cass v. Sewerage & Water Board*, C.S. No. 8283 (Jan. 19, 2017). In each case, the Commission, through the work of the hearing examiner, was in a position to assess the credibility of the complainants. And, in each instance, the Commission found the complainants to be credible and upheld the discipline imposed by the appointing authority. *Id.*

Here, NORD made the decision not to call Ms. [redacted] or other NORD employees who may have witnessed Appellant's inappropriate conduct. Ms. [redacted] version of events came into the record through statements collected by NORD and the City's Human Resource Department. The Commission observes that hearsay evidence is admissible in administrative hearings, but such evidence must be competent. *Isaiah Shannon v. Department of Police*, C.S. No. 8368 (Dec. 20, 2017), aff'd *Shannon v. Dep't of Police*, 2018-0145 (La. App. 4 Cir. 9/19/18, 7); 255 So.3d 1251; *Corey Green v. Recreation Department*, C.S. No. 8244 (Aug. 18, 2016), aff'd *Green v. New Orleans Recreation Dev. Comm'n*, 2016-1122 (La.App. 4 Cir. 5/10/17, 21); 220 So.3d 165.

In *Shannon*, the New Orleans Police Department ("NOPD") terminated an officer who allegedly discharged his firearm at a fleeing suspect. During the course of the investigation into the officer's actions, NOPD collected statements from numerous eye witnesses. *Shannon, supra.* at p. 15. Yet, NOPD did not call any of the eye witnesses to testify during the course of the appeal hearing. The Commission held that the hearsay statements contained various inconsistencies that the Parties were unable to address during the course of the hearing. As a result, the Commission did not find the statements competent. *Id.* at pp. 17-18.

In *Green*, the Commission observed that:

> The Appointing Authority seeks to end [an employee's] career with the City of New Orleans with hearsay and circumstantial evidence. And, while hearsay is admissible

> in an administrative proceeding, the weight the Commission gives to such testimony depends upon its reliability and probative value. [The appellant's] testimony rebuts the hearsay testimony, and the Commission is inclined to give greater weight to testimony provided by a witness who is under oath and subject to cross-examination versus hearsay evidence that does not have such procedural safeguards.

Green, *supra* at p. 10.

In the matter now before the Commission, NORD (as it did in *Green*) made the strategic decision not to call any eye witnesses to Appellant's sexual harassment. The record establishes that Appellant and Ms. [redacted] were engaged in a text "conversation" on or about January 18, 2018. In the course of that conversation, the two arranged to meet "for a drink." At 6:22 p.m. Appellant asked Ms. [redacted] to "send [him] a sexy pictures (sic) of [her]." Ms. [redacted] obliged by sending Appellant a picture of a scantily clad, full figured woman. Based upon the rest of the text string, Appellant and Ms. [redacted] appeared to regard the photo as a joke and continued to make plans to meet later in the evening. Ms. [redacted] did not complain to anyone about the text until April 28, 2018. The meeting between Appellant and Ms. [redacted] on the 18th was the fifth time Appellant and Ms. [redacted] had met socially outside of work for drinks. The record establishes that Appellant and Ms. [redacted] were friendly with each other and on good terms until some point after the January 2018 texts.

Appellant explained his request for a "sexy picture" by talking about an earlier occasion when he and Ms. [redacted] had been together, having drinks at the Zulu Club. While having drinks, Ms. [redacted] and Appellant passed the time by looking through photo stored on their phones. Appellant came across a photo in which he believed Ms. [redacted] looked "very nice" and told Ms. [redacted] that she looked "very sexy" in the photo. And, when he asked for the sexy photo, Appellant believed that Ms. [redacted] would know the photo he was referencing. Clearly, there is more to Appellant's relationship with Ms. [redacted] than is contained in the record. It is possible

that Appellant's relationship with Ms. [redacted] eventually soured and Appellant reacted poorly to the change. Appellant's confrontational and aggressive interaction with Ms. [redacted] on April 28, 2018 could possibly be explained in this way, but that is pure speculation on the part of the Commission given the lack of evidence in the record.

Based upon the record before us, the Commission does not find that Appellant's January 2018 text to Ms. [redacted] asking for a "sexy photo" constituted sexual harassment. With respect to Appellant's alleged inappropriate touching of Ms. [redacted] breasts on January 28, 2018, there are a series of factors that weigh upon the Commission's assessment of this allegation as a violation of Policy # 141(R). First, Appellant denied the allegation while the only account of Ms. [redacted] version of events is hearsay. The Commission has outlined its concerns regarding hearsay evidence in cases such as this in the preceding paragraphs and neither the Commission nor the Hearing Examiner were in a position to assess the credibility of witnesses who did not testify. Second, Appellant testified that various medications require him to moderate his drinking which directly contradicts Ms. [redacted] hearsay statement regarding Appellant's drunken state. Third, the conduct at issue occurred after work hours and during a social interaction planed in advance by Ms. [redacted] and Appellant. This was the fifth such meeting between the two suggesting to the Commission that Ms. [redacted] and Appellant were engaged in a relationship was friendly and familiar. Finally, Ms. [redacted] did not call attention to Appellant's January conduct until April 28, 2018. This suggests that the relationship between Appellant and Ms. [redacted] had changed. After this possible change, Ms. [redacted] drew NORD's attention to Appellant's conduct and connected it to their prior social interactions. Given the totality of circumstances, the Commission finds that NORD has failed to establish that Appellant engaged in sexual harassment as defines by Policy #141(R).

Having made this finding, the Commission turns to a very troubling aspect of NORD's investigation and presentation of its case.

In placing Appellant on an emergency suspension and subsequently terminating Appellant's employment, NORD did not invoke Policy # 141(R)'s prohibition on retaliation. But, the Commission observes that Policy # 141(R) prohibits retaliation against "an employee who brings a complaint of harassment." Appellant's termination notice and notice of emergency suspension both allege that, after an investigator questioned Appellant about "the incident," Appellant angrily confronted Ms. [redacted] and poked her in the shoulder twice. (NORD Exhs. 6, 7). If substantiated, such conduct could violate Policy # 141(R)'s anti-retaliation provision.

The Commission struggles with the fact that "retaliation" is not used in any of the notices NORD issued to Appellant. Further, the word "retaliation" is referenced only once during the course of the instant appeal hearing. But, in the context in which retaliation arose, it appeared as if Ms. [redacted] felt like the negative treatment she received from Appellant was a response to her spurning his advances as opposed to her making a complaint of sexual harassment. (*See* tr. at 96:1-10).

To make a finding of retaliation in this matter, the Commission would effectively be adding an allegation of misconduct *sua sponte*. Civil Service Rule IX, Section 1.3 requires that, when issuing discipline, an appointing authority furnish to the employee receiving the discipline a statement, in writing, that sets forth the reasons for the discipline. In the disciplinary notice issued to Appellant, NORD cites to "unprofessional conduct" and "sexual harassment" not retaliation. NORD describes Appellant's confrontation of Ms. [redacted] on May 1, 2018 as a violation of Policy # 83(R). (NORD Exh. 6). The pre-termination notice to Appellant does suggest a connection between Appellant's May 1st confrontation of Ms. [redacted] and Ms. Calderon's questions, but

indicates that Ms. Calderon's questions were about "the incident" that occurred on April 28, 2018 at the Harrell Playground, not Ms. [redacted] allegations of sexual harassment. (NORD Exh. 7).

Appellant denied that he poked Ms. [redacted] but chose not to testify (or deny) the allegation that he confronted her about her allegations on May 1, 2018. As a result, the Commission finds that Appellant did confront Ms. [redacted] following his interview with Ms. Calderon. And, Ms. Calderon testified that she questioned Appellant about Ms. [redacted] allegations of sexual harassment. (Tr. at 96:25-97:18). Given the very close temporal proximity between Appellant's aggressive confrontation of Ms. [redacted] and Ms. [redacted] complaint of sexual harassment (according to Ms. Calderon, Appellant's confrontation of Ms. [redacted] came minutes after she informed him of the sexual harassment allegations), the Commission finds that it is likely that Appellant was in fact retaliating against Ms. [redacted] for making a sexual harassment complaint. Retaliation is very serious misconduct.

While not specifically invoked by NORD, the Commission finds that there is enough evidence in the record to establish that Appellant retaliated against Ms. [redacted] immediately after learning that Ms. [redacted] had made a complaint of sexual harassment against Appellant. Appellant's actions violated Section IV of Policy # 141(R)'s prohibition on retaliation.

ii. Policy # 83(R)

Policy # 83(R) requires that employees be courteous, civil and respectful. NORD alleged that Appellant violated this rule when he confronted Ms. [redacted] on April 28, 2018 at the track meet held at Herrell Playground and on May 1, 2018 when he again confronted Ms. [redacted] and also poked her twice in the shoulder.

Appellant did not contest NORD's allegation that he confronted Ms. [redacted] in a rude and unprofessional manner on April 28, 2018. Therefore, the Commission finds that Appellant did

violate Policy # 83(R) on April 28th. The Commission observes that Keith Johnson received a written reprimand for his role in the confrontation.

Appellant did not contest Ms. [redacted] written account that he confronted her in the late afternoon on May 1, 2018. He did, however, deny touching Ms. [redacted] As discussed in the preceding section, the Commission has found that Appellant's actions on May 1st constitute retaliation. And, while retaliation is certainly a failure to be courteous, civil and respectful, it does not constitute a separate and distinct offense. Therefore, the Commission finds that Appellant did not perpetrate and additional and/or different rule violation when he retaliated against Ms. [redacted] on May 1, 2018.

B. Impact on NORD's Efficient Operations

In prior decisions, the Commission has held that, when an employee becomes is the target of harassing or intimidating behavior, it is likely that his or her performance would suffer. There is also an adverse impact on others who may witness or become aware of the harassing or intimidating behavior. Such individuals may feel empowered to engage in similar conduct, or fail to report such conduct if they feel that no one will act on such reports. The failure to report offensive or harassing behavior compromises an appointing authority's ability to provide a safe and respectful work environment for employees.

While the Commission did not find that Appellant's alleged actions on January 18, 2018 constituted sexual harassment, the undersigned did find that his actions on May 1, 2018 were retaliatory in nature. By acting in a confrontational and angry manner towards an individual who had made a complaint against him, Appellant made a bad situation exponentially worse. Any retaliation has a chilling effect on other employees' willingness to bring complaints of sexual

harassment to supervisors. This is why any meaningful sexual harassment policy contains explicit prohibitions on retaliation.

In the instant matter, Appellant engaged in retaliation and in doing so violated Policy # 141 (R). As a result of the foregoing, we find that Appellant's conduct had an adverse impact on the efficient operations of NORD.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's discipline 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 976, 978 (citing *Staehle v. Dept. of Police,* 98–0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

The Commission is very concerned about the state of the record and the process through which NORD terminated Appellant and prosecuted the instant appeal. Nevertheless, the undersigned find that Appellant's conduct was extremely troubling and represented an escalation in aggression towards Appellant that culminated in retaliatory conduct in violation of clear City policies. The City has an obligation to create an environment in which employees feel comfortable bringing complaints about sexual harassment to supervisors and human resource personnel. While there was not enough in the record to establish that Appellant's initial off-duty interactions with Ms. [redacted] rose to the level of sexual harassment, something changed in their relationship to prompt Appellant to start acting aggressively towards here while at work. When Ms. [redacted] became concerned about Appellant's behavior and brought it to the attention of her supervisors, Appellant increased his confrontational actions. Even during his interview with Ms. Bagneris, Appellant reverted to acting in an aggressive and defensive manner.

If the City and NORD fail to react strongly to retaliation, employees may feel that reporting sexual harassment if futile. This not only compromises the work environment, but exposes the City to liability.

Bearing in mind the above findings of fact and law, the Commission holds that termination was commensurate with Appellant's aggressive, retaliatory conduct towards Ms. [redacted].

Given that the Commission has found that termination is the appropriate level of discipline for Appellant's retaliatory conduct, it will not address the appropriate penalty for his violation of Policy # 83(R) other than to observe that Mr. Johnson, who violated the same rule, received a written reprimand.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant's appeal.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 31st day of July, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Brittney Richardson
BRITTNEY RICHARDSON, COMMISSIONER

7-23-19
DATE

CONCUR

MICHELLE D. CRAIG, CHAIRPERSON

7-29-19
DATE

JOHN H. KORN, COMMISSIONER

7/29/19
DATE