



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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CITY CIVIL SERVICE COMMISSION

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MAYOR

Wednesday, August 1, 2018

LISA M. HUDSON  
DIRECTOR OF PERSONNEL

Mr. Marshall Powell

Re: **Marshall Powell VS.  
Sewerage & Water Board  
Docket Number: 8686**

Dear Mr. Powell:

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 - 8/1/2018 - 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,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith  
Chief, Management Services Division

cc: Jade Brown-Russell  
James E. Thompson, III  
Jay Ginsberg  
file

**CIVIL SERVICE COMMISSION**

**CITY OF NEW ORLEANS**

MARSHALL POWELL  vs.  SEWERAGE & WATER BOARD	DOCKET No.: 8686
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**I. INTRODUCTION**

Appellant, Marshall Powell, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1. The Appointing Authority, the Sewerage and Water Board for the City of New Orleans, (hereinafter the “S&WB”) does not allege that the instant appeal is procedurally deficient. Therefore, the Commission’s analysis will be limited to whether or not the S&WB disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Networks Maintenance Technician I for the S&WB and had permanent status as a classified employee.

On Wednesday, August 2, 2017, a hearing examiner appointed by the Commission convened an appeal hearing related to the above-captioned matter. 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 render the following judgment.

## II. FACTUAL BACKGROUND

### A. Alleged Misconduct

The S&WB suspended Appellant for three days effective June 19-21, 2017. (S&WB Exh. 4). The reason for Appellant's three-day suspension was his involvement in a "preventable accident." Specifically, the S&WB alleged that Appellant was involved in an automobile accident on July 23, 2016. On June 13, 2017, the S&WB's Accident Review Board (hereinafter "ARB") convened a hearing to address the July 23rd accident. *Id.* As a result of the hearing, the ARB classified the cause of the accident as a "Class I offense – disregard sign or signal." *Id.* The S&WB also introduced evidence that, on May 27, 2016 Appellant received a "letter of warning" regarding an accident that occurred on March 31, 2016. (S&WB Exh. 1). The S&WB classified the March 31st accident as a failure to drive defensively. Additionally, the letter informed Appellant that any additional offense within one year could result in discipline including a suspension between three and ten days or dismissal. *Id.*

### B. July 23, 2016

At all times relevant to the instant appeal, Appellant occupied the classification of Networks Maintenance Technician 2. (Tr. at 26:10-20). In that capacity, Appellant operated S&WB vehicles and performed maintenance work in the field. *Id.* On July 23, 2016, Appellant operating a S&WB dump truck and hauling construction material from a central S&WB location to a job site. *Id.* at 27:13-25. At approximately 3:00 p.m. Appellant was traveling westbound on Florida Avenue approaching the Florida Avenue Bridge. (S&WB Exh. 5). As Appellant approached the bridge, he failed to realize that the traffic arm was in the down position indicating that the bridge was closed to vehicular traffic. (Tr. at 27:25-28:4). When he finally did realize that the traffic arm was down, Appellant applied the brakes but was unable to bring the dump truck

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to a complete stop prior to making contact with the arm. *Id.* at 28:1-9. After striking the arm, Appellant pulled the dump truck to the side of the road and waited for law enforcement personnel.

Appellant claimed that the damage done to the traffic arm was superficial and that there was no damage to the S&WB's dump truck. *Id.* at 28:6-11. In the police report generated connection with the accident, an NOPD Officer indicated that the traffic control arm had scratches and missing reflectors. (S&WB Exh. 5). The report further indicated that the traffic control arm had been "knocked into an open position, rendering it inoperable." *Id.* Finally, the report notes that there was surveillance footage of the incident that showed Appellant's vehicle approaching the traffic control arm. According to the report, the arm was in the "down" position when Appellant was approximately 100 feet away.

### **C. Policy #60**

The S&WB promulgated Policy #60 and established a formal ARB on November 9, 2016. (S&WB Exh. 1). The purpose of the policy was to, "set forth the rules and guidelines of the [ARB] whereby vehicular and non-vehicular accidents will be reviewed and corrective action taken, in order to reduce accidents and associated costs, and improve safety." (S&WB Exh. 1). Based upon prior cases, the Commission takes judicial notice that, prior to November 9, 2016, the S&WB had a general practice of reviewing accidents but did not have an explicit, written policy governing the type of corrective action employees faced if found responsible for an accident. (*Mason v. Sewerage and Water Board*, CS Ca. No. 8661 at p. 3).

Under Policy #60, a Class I accident is a preventable accident – for which the employee is partly or wholly responsible – that results in minor property damage and no personal injury. (S&WB Exh. 1). There is no dispute that when Appellant struck the traffic control arm he caused minor property damage.

### 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

As a preliminary matter, the Commission finds that Policy #60 is inapplicable to Appellant’s alleged misconduct because it was not in place at the time of either of his accidents. Further, the S&WB did not introduce any evidence that suggests an alternative policy was in place and enforced prior to November 2016. As in prior cases, the Commission is left with the allegation that Appellant was operating a S&WB vehicle when he caused a preventable accident.

For his part, Appellant acknowledged that he struck the traffic control arm because he had not noticed that it was down. Appellant did not claim that the dump truck was somehow deficient or that there was any impediment to him seeing the traffic control arm. In fact, the police report indicated that it was a clear day. Appellant's claim that the dump truck was difficult to stop because of its load is unavailing. As a Networks Maintenance Technician 2, Appellant is responsible for safely operating S&WB equipment and should have been aware that the load of construction material would impact the dump truck's operation.

As a result of the foregoing, the Commission finds that Appellant was responsible for a preventable accident that caused minor damage to public property.

#### **B. Impact on the S&WB's Efficient Operations**

The S&WB has a duty and obligation to ensure that its employees operate vehicles and equipment in a safe and professional manner. Not only do such vehicles and equipment represent a substantial outlay of resources, they are often extremely large, powerful machines capable of causing serious damage. The damage at issue in this case was minor, but represented the second incident in less than a year that Appellant had failed to brake in time.

The Commission also acknowledges that, as a result of the July 23rd accident, Appellant and the dump truck were out of service for an unspecified period of time. This represented an inconvenience to the S&WB. Finally, pursuant to S&WB policy, Appellant likely had to undergo mandatory drug and alcohol testing. This took him away from his normal responsibilities.

As a result of the foregoing, the Commission finds that Appellant's misconduct did have a minor, negative impact on the S&WB's efficient operations.

### **C. Was the Discipline Commensurate with Appellant's Offense**

“The Commission 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.” *Mitchell v. Dep't of Police*, 2009-0724 (La.App. 4 Cir. 3/17/10, 3), 34 So.3d 952, 953.

As we noted previously, the S&WB adopted Policy #60 four months after Appellant's July 23rd accident. Appellant had no notice or training on the new policy prior to its implementation and any deterrent established by the penalty matrix contained within the policy had no impact on Appellant's conduct. But, two months prior to his July 23rd accident, Appellant received a letter of warning regarding an earlier traffic accident. The warning explicitly indicated that any subsequent vehicle-based offense would result in discipline, including a three-day suspension. It should have come to no surprise to Appellant that the S&WB would issue a three-day suspension.

As a result of the foregoing, we find that a three-day suspension was commensurate with Appellant's offense.

### **V. CONCLUSION**

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant's appeal. Additionally, the Commission recognizes that the S&WB has an interest in establishing an Accident Review Board and a progressive discipline policy when it comes to the safe operation of S&WB equipment and vehicles. And, for such a policy to be effective, it must include deterrents, such as suspensions, demotions and dismissals. Moving forward, Appellant is hereby on notice that subsequent offenses within two years of this judgment shall constitute a “third offense” under the S&WB's penalty matrix and may result in further discipline up to and including termination.

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Judgment rendered this 15<sup>th</sup> day of August, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

  
CLIFTON MOORE, JR., COMMISSIONER

7-25-18  
DATE

CONCUR

  
RON McCLAIN, VICE-CHAIRPERSON

7-27-18  
DATE

  
MICHELLE CRAIG, CHAIRPERSON

7/9/2018  
DATE