



CITY OF NEW ORLEANS

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Tuesday, September 27, 2016

Marc L. Frischhertz
1130 St. Charles Avenue
New Orleans, La 70130

Re: **Terrie Doyle VS.
Sewerage & Water Board
Docket Number: 8511**

Dear Mr Frischheretz:

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
James E. Thompson, III
Brendan M. Greene
Terrie Doyle

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

TERRIE DOYLE vs. SEWERAGE & WATER BOARD	DOCKET No.: 8511
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I. INTRODUCTION

Appellant, Terrie Doyle, brings the instant appeal challenging written reprimands and a suspension 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 Trainee for the Appointing Authority.

II. FACTUAL BACKGROUND

A. S&WB’s Attendance Policy

Appellant’s discipline resulted from her alleged violation of the S&WB’s attendance policy. That policy establishes a progressive discipline track for employees who are frequently late and/or absent. (S&WB Exh. 2). The following is a list of offenses and the discipline that accompanies each offense in accordance with the applicable S&WB policy:

- a. First unexcused absence = verbal reprimand
- b. Second through fourth unexcused absence within six months of the first = written reprimand.
- c. Three written reprimands in a six month period = formal written reprimand.

T. Doyle
No. 8511

- d. Unexcused absence within six months of a formal written reprimand = 3-day suspension.
- e. Unexcused absence within six months of a 3-day suspension = 5-day suspension.
- f. Unexcused absence within six months of a 5-day suspension = recommendation for dismissal.

Id. at 13-14. Based upon the Commission's knowledge of attendance policies in place at other appointing authorities throughout the City, the S&WB's policy is among the most lenient.

The S&WB defines an "unexcused absence" as "any working day, or part of a working day, that an employee is absent from work and has not requested and been granted one of the [types of leave] in accordance with this [attendance] policy." *Id.* at 12. One of the types of leave provided for under the S&WB's policy is sick leave. Under the S&WB's sick leave policy, "[e]mployees reporting ill must clearly identify the nature of the illness and their plans for dealing with the illness...." *Id.* at 6. Natika Vassel, a utilities service manager for the S&WB, acknowledged that Appellant's absences related to illness during the relevant period of time were not "unexcused." (Tr. at 61:21-25).

B. Appellant's "Reprimands"

As a preliminary matter, the S&WB argues that the reprimands that issued to Appellant were not actually "letters of reprimand" as defined by our Rules. Our Rules define "letters of reprimand" as:

[A]n early step in a progressive disciplinary system. It points out job performance areas that need improvement. It may be used to support additional disciplinary steps and, as such, is kept in a centralized personnel file to be referred to as needed. This characteristic distinguishes it from other documentation, such as a documentation of oral counseling, which is not kept centrally.

Rule I, ¶ 43.

The S&WB's policy states that "a copy [of the written reprimand] should be sent to the Personnel Dept[artment] to be filed in the employee's record." The Commission finds that the

T. Doyle
No. 8511

written reprimands issued by the S&WB to Appellant were letters of reprimand as defined by our Rules and therefore constituted discipline subject to appeal.¹ Further, the “verbal reprimand” issued to Appellant on March 3, 2016 also fits our definition of “letter of reprimand.” First, it was written not verbal. (S&WB Exh. 5). Second, it purports to be copied to Appellant’s “personnel file” which is maintained by the S&WB’s HR department. (Tr. at 37:21-38:9).

The Commission briefly summarizes the facts leading to each reprimand issued by the S&WB in the matter now before us:

1. Verbal Reprimand – Issued March 3, 2016: Appellant was thirty-four minutes late on Wednesday, March 2, 2016. (S&WB Exh. 5).
2. First Written Reprimand – Issued March 3, 2016: Appellant was sixty-one minutes late on Thursday, March 3, 2016. (S&WB Exh. 4).
3. Second Written Reprimand – Issued March 7, 2016: Appellant was fifteen minutes late on Friday, March 4, 2016. (S&WB Exh. 6).
4. Third Written Reprimand – Issued March 15, 2016: Appellant was fourteen minutes late on Monday, March 14, 2016. (S&WB Exh. 7).
5. Formal Written Reprimand – Issued March 16, 2016: Appellant had amassed four reprimands well within a six-month period. (S&WB Exh. 10).

B. Appellant’s 3-Day Suspension

Through Ms. Vassel, Appellant introduced a letter purportedly from a physician who was treating Appellant for kidney stones. (App. Exh. 1). Ms. Vassel acknowledged receiving this letter on or about March 22, 2016. (Tr. at 65:21-66:3, 66:5-9.) However, according to Ms. Vassel, she had doubts as to the authenticity of the document. As a result, she contacted Tulane Center for Women’s Health and attempted to determine if the letter was authentic. According to Ms. Vassel, the Tulane Center for Women’s Health would neither confirm nor deny Appellant’s status

¹ Though not binding upon the Commission, one of the supervisors within S&WB’s personnel department testified that she understood written reprimands to be discipline. (Tr. at 62:14-18).

T. Doyle
No. 8511

as a patient. *Id.* at 67:5-13, 17-21. Based on the record before us, there were no other actions taken by the S&WB to challenge the authenticity of the document. The Commission notes that the privacy right belongs to the patient, in this case, Appellant. If the S&WB truly had concerns as to the authenticity of the letter, it could have directed Appellant to waive privacy to the limited extent necessary to determine if Appellant was actually seen by a medical professional on the dates in question. They did not. As a result, we find that Appellant was under the care of a physician for kidney stones and missed work as a result of her ailment on March 16 – March 18, 2016.

As a result of Appellant's absence on March 18, 2016, Ms. Vassel issued her a fourth written reprimand and scheduled Appellant to attend a pre-disciplinary hearing. (S&WB Exh. 8). But for the issuance of a fourth written reprimand, the S&WB would not have issued Appellant a three-day suspension. (Tr. at 75:2-7). On cross-examination, Appellant asked Ms. Vassel why the S&WB did not discipline Appellant for Appellant's absences on the 16th and 17th of March. Ms. Vassel responded "because [Appellant] was sick." (Tr. at 63:25-64:1). Yet, the documentation produced by Appellant indicates that Appellant was seen by a physician on March 16th and would not be able to return to work until March 22nd. (App. Exh. 1).

III. LEGAL STANDARD

Appointing authorities may only discipline employees who have achieved permanent status in the classified service 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

T. Doyle
No. 8511

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 Complaind of Activities*

The S&WB issued the reprimands and three-day suspension Appellant based upon an allegation that Appellant violated the S&WB’s attendance policy. Our analysis begins with the “verbal reprimand” issued on March 3, 2016. (S&WB Exh. 5). According to the reprimand, Appellant arrived thirty-four minutes after her scheduled reporting time on March 2, 2016. *Id.* Appellant did not introduce any evidence that calls into question her arrival time indicated on the reprimand. Therefore, the Commission finds that the Appellant violated the S&WB attendance policy when she reported late to her assignment on March 2, 2016.

In fact, Appellant did not challenge the underlying factual allegations contained in the “First” through the “Third” written reprimands. Rather, Appellant challenge appears to be based upon a claim that other, similarly situated employees did not receive the same level of discipline for the very similar patterns of attendance. Based upon the record before us, we find that Appellant violated S&WB policy when she reported late to her assignment on March 3, 7, and 15.

The remaining question is whether or not Appellant's absence on Monday, March 18, 2016 constituted a violation of the S&WB's attendance policy. According to that policy, an employee must notify his/her supervisor of the nature of the illness and the employee's "plans for dealing with the illness." (S&WB Exh. 2 at 6). If the employee sees a doctor in connection with the illness, the employee "should" complete a form and return it to the S&WB's medical department.

In the instant appeal, Appellant sent her supervisor an email dated March 16, 2016 along with a rather graphic image of one of the kidney stones Appellant allegedly passed. (App. Exh. 2). The subject of the email is "Absent on March 16, 2016." *Id.* In the email, Appellant claims that "[p]resenting a doctors' slip isn't a problem." Shortly thereafter, Appellant produced a doctor's note confirming that Appellant was a patient at Tulane Medical Center, was seen on March 16, 2016 and would return to work on Monday, March 22, 2016. (App. Exh. 1). There is no evidence or testimony in the record that distinguishes Appellant's absences on March 16, 17, 2016 (which were excused) with her absence on March 18, 2016 (which was unexcused).

Based upon the S&WB's very regimented approach as it pertains to progressive discipline, a three-day suspension must be premised upon a subsequent unexcused absence following a "Third" written reprimand. In the matter now before the Commission, Appellant's absence on March 18, 2016 was not "unexcused." Therefore, the Commission finds that Appellant did not violate the S&WB's sick leave policy related to her absences on March 16, 17, and 18, 2016.

B. Impairment of Efficient Operation of Appointing Authority

It is axiomatic that when an employee is late the productivity and effective operations of the employer suffer. Appellant served as an Office Assistant Trainee. Part of her responsibilities involved coordinating a calendar of events and training activities for S&WB staff. During Appellant's frequent instances of tardiness, other employees had to take on additional

T. Doyle
No. 8511

responsibilities. Further, when a co-worker is habitually late to work, the morale of other employees suffers. Therefore, the Commission finds that the S&WB has established that Appellant's tardiness adversely impacted the efficient operation of the S&WB's personnel department.

C. Discipline Commensurate with Offense

In conducting its analysis at this stage, the Commission must determine if Appellant's reprimands and suspension were "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).

As observed above, the Commission finds that the S&WB's attendance policy is a lenient one. Appellant has benefited from this lenient policy by being late to her assignment on four separate occasions - *within the span of a month* – and only receiving written reprimands. This despite being warned of her unacceptable attendance patterns via letter on February 26, 2016. Ms. Vassel even offered Appellant an alternative work schedule to accommodate any logistical challenges preventing Appellant from reporting to work on time. The Commission finds that the discipline issued to Appellant on March 2, 3, 7 and 15, 2016 were commensurate with her offense. The Commission strongly advises Appellant to report to work at the designated time or face further discipline up to and including termination.

V. CONCLUSION

Based upon the foregoing, the Commission hereby GRANTS IN PART and DENIES IN PART Appellant's appeal. The S&WB shall remit to Appellant all back pay and emoluments related to the three-day suspension that was the subject of the instant appeal. Further, the S&WB

T. Doyle
No. 8511

shall expunge any record of the suspension from Appellant's record. However, the reprimands marked as Sewerage & Water Board Exhibits 4, 5, 6 and 7 shall remain on Appellant's records. Additionally, the Commission holds that the S&WB may rely upon these reprimands in issuing any future discipline to Appellant.

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T. Doyle
No. 8511

Judgment rendered this 27 th day of Sept, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

9/26/2014

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

9/19/16

DATE



JOESPH CLARK, COMMISSIONER

9/26/14

DATE