CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Wednesday, August 1, 2018

Katherine Z. Crouch
2372 St. Claude Avenue, Suite 224
New Orleans, LA

Re: **Donald Theodore VS.**
Sewerage & Water Board
Docket Number: 8663

Dear Ms. Crouch:

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, 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
Chief, Management Services Division

cc: Jade Brown-Russell
Darryl Harrison
Jay Ginsberg
Donald Theodore

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DONALD THEODORE vs. SEWERAGE & WATER BOARD	DOCKET No.: 8663

I. INTRODUCTION

Appellant, Donald Theodore, 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 Sewerage and Water Board for the City of New Orleans, (hereinafter the "S&WB") did not have sufficient cause to terminate his employment. Appellant further alleges that the manner in which the S&WB terminated his employment violated his due process protections guaranteed by the Commission's Rules, Louisiana State Constitution and United States Constitution. The Commission's analysis will first address Appellant's procedural argument and then turn to the question of sufficient cause. At all times relevant to the instant appeal, Appellant served as a Networks Senior Maintenance Technician II for the S&WB and had permanent status as a classified employee.

On Monday, December 4, 2017, a referee appointed by the Commission presided over an appeal hearing during which both Parties had an opportunity to call witnesses and present evidence. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing, as well as the referee's report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

The S&WB terminated Appellant's employment effective Monday, March 6, 2017. (H.E. Exh. 1). The reason for Appellant's termination was his alleged violation of S&WB Policy #49 – Surplus Property, and Policy #74 – Inventory Control. *Id.* Appellant allegedly violated Policies #49 and #74 when he "improperly disposed of SWB property and sold the property for personal gain." *Id.* The S&WB further alleged that Civil Service Rule IX, Section 1 mandated disciplinary action because Appellant's actions constituted an action to "the prejudice of the [classified] service."

Policy #49, promulgated by the S&WB in 1983, established the process through which the S&WB disposes of "surplus property." (DT Exh. 2).[1] Under Policy 49, each department within the S&WB reports the "amount, description, model number, serial number and condition" of the surplus property so that such property may be catalogued and included in a sealed bidding process or public auction. *Id.* Policy 49 also contains specific steps related to record-keeping in order for the S&WB to maintain an accurate accounting of what surplus property is sold.

Policy #74, adopted by the S&WB in 1988, attempts to "increase cost effectiveness by controlling the issuance and return of Board property." (DT Exh. 3). There are several forms attached to Policy #74 that appear to pertain to Personal Protective Equipment and items typically assigned serial numbers. In February 2017, the S&WB promulgated a substantially revised Policy #75 "to set policy and procedures that assure accurate inventory data." (D.T. Exh. 5). Per the revised policy, a "reportable inventory item is any tangible item having a useful life of more than

[1] The Commission notes that the Parties and Hearing Examiner referred to exhibits introduced by Appellant as "DT Exhibit 1" etcetera. In order to avoid confusion, the Commission shall continue such reference in this decision.

one year and a value of $7.00 or more for tools, material and stationary." *Id.* The revised policy also contains a very detailed process through which warehouse personnel and supervisors track and mark all S&WB property. *Id.*

B. Sale of Scrap Metal and S&WB Policies

As with prior cases involving identical allegations, many of the underlying facts are not in dispute. The Commission does point out, however, that the Appellant developed the factual record in the instant appeal in a far more detailed manner than others.

On or about December 2016, William A. Bonney, the Deputy Inspector General for Investigations, initiated an investigation into S&WB employees who were selling scrap metal to local scrap yards. (Tr. at 9:19-10:6). Mr. Bonney began his investigation by comparing a list of S&WB employees to a database that tracked the names of individuals selling scrap metal to local scrap yards. *Id.* at 10:10-25. In total, Mr. Bonney found approximately sixty instances where a S&WB employee had sold some amount of metal to a scrap yard. *Id.* at 26:7-10. From that number, the Office of the Inspector General (hereinafter "OIG"), focused on twenty S&WB employees who appeared to have sold the most "red brass." *Id.* at 26:11-15. Appellant was one of the twenty employees.

Appellant began working for the S&WB on July 3, 1995 as a laborer and rose through the ranks of the Networks Division to become a Networks Senior Maintenance Technician II. (H.E. Exh. 1). As a Senior Maintenance Technician II, Appellant was responsible for the supervision of several other employees. He began his work day by reporting to the S&WB facility located at 2900 Peoples Avenue where he would receive his work orders. He would then determine the equipment and materials needed to complete the work order and requisition such equipment and materials from the warehouse. (Tr. at 195:20-196:25).

On March 31, 2015, Appellant sold 272 pounds of scrap metal – including 21 pounds of yellow brass and 204 pounds of red brass – to Uptown Recycling for $348.00. (S&WB Exh. 1). When investigators from the OIG interviewed Appellant regarding the sale of scrap metal, Appellant acknowledged that he had excavated the scrap metal while working at S&WB work sites. (S&WB Exh. 3). OIG investigators also asked Appellant whether or not he was aware of the S&WB's policy regarding "recyclable materials." Appellant denied having any knowledge of such a policy prior to November 2016. *Id.*[2] During his testimony, Appellant claimed that he kept track of the materials he excavated on the back of his work orders, but that his supervisors had never provided him with instructions as to what to do with recovered scrap metal. (Tr. at 201:10-25).

The S&WB hired Ronald Doucette as its Deputy Director of Security in November 2015. When asked about the process for collecting and storing scrap metal before 2016, Mr. Doucette testified that there was "supposed" to be a process wherein employees returned scrap metal to the warehouse. (Tr. at 92:19-24). Yet, during an interview with OIG investigators in June 2016, Mr. Doucette stated that the S&WB had only "recently" initiated a collection process for scrap metals "in the wake of the OIG investigation." (DT Exh. 12). Mr. Doucette further indicated that the S&WB would, through the recently implemented collection process, sell the collected scrap metal. *Id.* This casts doubt upon any claim that there was a collection and auction process for recovered scrap metal prior to the OIG's investigation.

The OIG investigators also interviewed Alden Aramburo who was the S&WB Warehouse Manager during all times relevant to the instant appeal. (DT Exh. 13; Tr. at 159:24-160:13). Mr. Aramburo has extensive experience as a storekeeper, material stores supervisor and warehouse

[2] The OIG interview memorandum indicates that Appellant was absent from work from December 2015 to November 2016 due to a work-related injury.

manager and is familiar with the S&WB's processes for tracking S&WB property. (Tr. at 161:10-24, 164:6-13). Like Mr. Doucette, Mr. Aramburo told OIG investigators that the S&WB had only recently began collecting "metal items such as brass and aluminum" for later sale. (DT Exh. 13). Mr. Aramburo went on to tell investigators that it was the OIG's investigation that prompted the S&WB to adopt a process through which warehouse employees would collect and secure scrap metal. *Id.* This was consistent with the testimony Mr. Aramburo offered during Appellant's case-in-chief. He testified that it was "rare, if ever" that S&WB employees would return used brass to the warehouse. (Tr. at 172:19-173:4). In fact, prior to 2016, warehouse employees would not have known what to do with brass recovered from work sites and would have simply directed field personnel to put it in an unsecured bin designated for scrap metal. *Id.* at 174:5-15. And, as of May 2, 2016 – the date of the OIG's interview with Mr. Aramburo – the "warehouse" had yet to put in place a process to sell the scrap metals. (DT Exh. 13).

Johnny Jones, who retired from the S&WB as a Zone Manager in September 2017, testified as part of Appellant's case-in-chief. *Id.* at 108:7-18. At the time of his retirement, Mr. Jones supervised approximately forty people. *Id.* at 140:10-14. Mr. Jones began working as a laborer in 1992 and testified that he did not receive training regarding what to do with scrap metal excavated from S&WB work sites. *Id.* at 110:16-18. At some point in time after the OIG released its report regarding S&WB employees selling scrap metal, the S&WB leadership circulated a surplus property memorandum and asked all supervisors to ensure that employees received and reviewed the policy. *Id.* at 111:4-25, 128:17-24. After the S&WB circulated the policy in 2016, there was confusion among both warehouse employees and those in the field with respect to how to implement the policy. Mr. Jones testified that when employees under his supervision in the networks division began bringing scrap metal to the warehouse, employees at the warehouse would

refuse to receive it. *Id.* at 131:23-132:12. Eventually, the S&WB secured a dumpster for the scrap metal. *Id.* at 132:21-133:5.

Mr. Jones testified that, while the S&WB had a process in place for the sale of used equipment and vehicles, there was no process in place for auctioning off old brass excavated from S&WB work sites. *Id.* at 138:12-139:7. This is consistent with Mr. Aramburo's testimony during which he stated that the S&WB had recently begun collecting brass at the warehouse, but had yet to sell any of it. *Id.* at 166:22-167:3. Mr. Aramburo clarified that, in his experience, the "surplus property" referenced in Policy #49 did not refer to brass taken out of the ground. *Id.* at 164:6-13.

The OIG's investigation clearly prompted the S&WB to make changes in the way in which it tracked inventory and material recovered from work sites. Prior to the investigation, there were two unsecured dumpsters located at the S&WB's central warehouse. One dumpster was for trash and another was for scrap metal. *Id.* at 187:18-188:3. Warehouse personnel did not monitor the scrap metal dumpster and there was no process in place to track what employees placed in either dumpster.

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. Appellant's Procedural Argument

On January 26, 2017, the S&WB issued Appellant a pre-termination notice form that listed "Committing an act to the prejudice of the organization and for violation of Sewerage & Water Board Policy #49 – Surplus Property, including inappropriate use/disposition of SWB property." (DT Exh. 10). Appellant acknowledged receipt of the hearing notice, but did not appear at the hearing. Instead, Appellant reported to the S&WB's administrative offices on the day of the hearing (February 2, 2017) with a typed letter indicating that he did not realize that the hearing was mandatory. (DT Exh. 17). Appellant stated that he did not believe that the meeting was mandatory because he had just been released from the hospital. (Tr. at 212:13-23). The S&WB was not under any obligation to reschedule the termination hearing, but appears to have done so. Appellant did not appear at the rescheduled disciplinary hearing and members of the management team who presided over the hearing recommended that the S&WB terminate Appellant's employment.

Appellant argues that, by failing to ensure Appellant's presence at the pre-termination hearing, the S&WB violated his due process rights and the law. The Commission disagrees. The

S&WB afforded Appellant an opportunity to attend a pre-termination hearing on February 2, 2017. It had no reason to believe that Appellant would be unable to attend. And, Appellant waited until after the scheduled hearing time to indicate that he had been unable to attend the meeting due to a medical issue. The S&WB rescheduled the pre-termination hearing for February 17, 2017. It is possible that it sent notice of the revised hearing date to Appellant's former Canyon Drive address, but Commission has recognized that it is the employee's obligation to update an appointing authority as to his address. The record is silent as to how, if at all, Appellant notified the S&WB of his change in address. The Commission also observes that Appellant, recognizing the seriousness of his situation, should have been more active in pursuing information related to the rescheduled hearing.

The Commission does not find that the S&WB's actions regarding Appellant's pre-termination hearing violated Appellant's due process rights.

B. Prior Commission Decisions

There have been at least two prior cases tried before the Commission's hearing examiners under similar sets of facts. *See Kelly v. Sewerage and Water Board*, C.S. no. 8668 (March 1, 2018); *Campbell v. Sewerage and Water Board*, C.S. no. 8659 (August 23, 2017). The instant appeal, however, represents the most complete and detailed record to date.

In *Kelly*, the S&WB alleged that an employee violated the same policies at issue here. In his defense, the terminated employee claimed that a former supervisor informed employees that the S&WB was not collecting old brass from job sites. *Kelly, supra* at p. 4. Unfortunately, the former supervisor did not testify and neither the hearing examiner nor the Commission found the hearsay evidence competent. The Commission lamented the fact that the supervisor did not testify and observed that, "the record would have benefited from [the supervisor's] testimony. This is

especially true given that the Hearing Examiner expressed concerns regarding [the employee's] credibility." *Id.* at 8. In *Campbell*, the Appellant was pro se and did not call any witnesses as part of his case-in-chief.

In the matter now before us, Johnny Jones (a management-level employee) and Alden Aramburo (a supervisor at the S&WB's central warehouse), testified, without contradiction, that the S&WB did not have a process in place for the collection of scrap metal until 2016. Mr. Aramburo confirmed that the only receptacle available for scrap metal was an unsecured dumpster that some employees used and others did not. Mr. Jones testified that S&WB staff at the central warehouse would refuse to accept scrap metal. The record in both *Campbell* and *Kelly* would have benefited from the testimony of these two S&WB employees.

In *Kelly*, the Commission observed that "there should be no need for a policy that prohibits S&WB employees from personally profiting from the sale of S&WB property." And, while the Commission still believes that this is a sound conclusion, it does not address the scenario in which there is no procedure or training in place regarding the collection and return of recovered scrap metal. Based upon the record, the S&WB did not have any standard procedure in place for the collection and sale of scrap metal other than to maintain a dumpster by the central warehouse. In both *Campbell* and *Kelly*, S&WB witnesses testified that there was a process in place to collect and sell brass recovered from S&WB work sites. In contrast, the Parties in the appeal now before us spent a great deal of time fleshing out this process and Appellant established that, as of March 2015, there was no such process. In fact, it was the OIG's investigation that prompted a revision and training regarding the inventory control policy.

The instant case is distinguishable from *Kelly* and *Campbell* because of the completeness of the record. The Commission also observes that the instant appeal represents the first time that

the OIG's interview memorandum of other S&WB personnel is part of the record. In prior cases, only the OIG's interview of the terminated employee was introduced.

C. Occurrence of Alleged Misconduct

The S&WB terminated Appellant for "improperly disposing" of S&WB property and selling that property for "personal gain." There is no dispute that, on March 31, 2015, Appellant sold brass and lead he recovered from S&WB job sites for $348. What is not clear from the record is what "proper disposal" meant in March 2015. Appellant, Mr. Jones and Mr. Aramburo testified about the S&WB's process – or lack thereof – for the recovery and sale of scrap material prior to the OIG's investigation. Both the Hearing Examiner and Commission found/find these witnesses credible. Based upon their testimony, and the record before us, we make the following findings of fact:

- The S&WB began collecting brass and aluminum for "scrap sale" in 2016. (DT Exhs. 12, 13).
- Prior to 2016, the S&WB did not have a process through which employees would collect used brass and aluminum recovered from job sites. (Tr. at 173:5-7, DT Exhs. 12, 13).
- Prior to 2016, the S&WB did not have a process through which it sold scrap brass and aluminum. (Tr. at 173:8-20).
- The S&WB initiated the process of collecting and storing scrap metal when the OIG advised that it was investigating S&WB employees who were selling scrap metal. (DT Exh. 13).
- Prior to 2016, employees at the warehouse would not receive or accept brass recovered from S&WB work sites for collection or storage. (Tr. at 132:5-20, 133:20-134:16).
- Prior to 2016, Appellant did not receive any training or policy memorandum regarding the proper disposal of brass recovered from S&WB work sites.[3]

[3] Mr. Doucette testified that employees had access to S&WB policies through an on-line portal. (Tr. at 49:15-20). In order to get access to this portal, however, employees needed an email address and password. *Id.* at 50:4-15. During his tenure with the S&WB, Appellant did not receive an email address or password and thus did not have access to the on-line employee portal. *Id.* at 202:7-14.

The Commission finds that the confusion that followed the S&WB's "reiteration" of thc surplus property policy to be telling. Staff in the field and the warehouse were confused as to how to properly handle, receive and securely store brass that field personnel were now turning in. (Tr. at 133:20-134:16). This supports testimony that, prior to 2016, there was no process in place.

The S&WB relies heavily on Policy #49 in pursuing discipline against Appellant, but Mr. Aramburo, who manages personnel and property at the S&WB's warehouse, testified that until 2016, the "surplus property" mentioned in Policy #49 did not refer to brass recovered from S&WB work sites. Further, S&WB employees did not use the forms associated with surplus property or inventory control to document brass recovered from work sites. Mr. Jones, who served as a supervisor in the Networks Division for over nine years, testified that he had no knowledge of the S&WB ever applying Policy #49 to recovered scrap metal. Finally, the S&WB did not have a process in place to auction off scrap metal prior to 2016. Mr. Doucette acknowledged this in his statement to the OIG. If there was no process in place, then it stands to reason that the S&WB had never applied the above-cited policies to the collection and sale of scrap metal.

Since the S&WB only recently began applying Policies #49 and #79 to brass recovered from S&WB work sites, the remaining justification for Appellant's termination is Civil Service Rule IX, Section 1. This Rule requires appointing authorities to take corrective action against an employee when the employee commits "any act to the prejudice of the [classified] service." In this case, the S&WB alleges that Appellant's sale of S&WB property for personal gain was a prejudicial act.

The record shows that, in March 2015, had Appellant brought the brass he recovered back to the warehouse, employees at the warehouse would have refused to accept it. Appellant's other option would have been to put the brass in a dumpster designated for scrap metal. Once or twice

a month, a contractor for the S&WB collected the dumpster. It is not clear, however, if the S&WB paid the contractor for removing the scrap metal or vice versa. In any event, there was not a specific process in place for the collection of recovered brass. That begs the question, what was the proper procedure regarding brass recovered from S&WB work sites prior to 2016?

As indicated above, the Commission believes that there should be no need for an explicit policy that prohibits municipal employees from selling municipal property for personal gain. At the same time, the Commission struggles with several aspects of this case. From a field employee's perspective, the lack of any process or policy regarding brass recovered from work sites coupled with the appearance that the S&WB was simply throwing away scrap metal in a dumpster contributed to a great deal of ambiguity regarding the proper disposal of brass. At the end of the day, however, Appellant and his peers understood that the brass they recovered had value and should have inquired about the best way to dispose of it. While there was no process in place, it is highly unlikely that a supervisor would have told any employee that they could keep whatever they pulled from the ground, sell it and then pocket the proceeds.[4] The lack of any formal process for the recovery, storage, tracking, and sale of scrap brass mitigates Appellant's misconduct, but does not erase it.

Based upon the above findings of fact, the Commission finds that Appellant's sale of brass he recovered from S&WB work sites was an act to the prejudice of the classified service.

D. Impact on the S&WB's Efficient Operations

In prior cases, S&WB executive-level staff claimed that Policy #49 applied to recovered brass and that the S&WB had a regular process through which employees collected brass recovered

[4] The Commission observes that, had the S&WB allowed employees to keep the proceeds of such sales, it likely would have run afoul of the Louisiana Constitution's prohibition on gratuitous donations of public funds/property. (*See* La. Con. art. VII, § 14(A)).

from various work sites and auctioned off that brass according to policy. Based upon the record before us, it is clear that, **prior to 2016**, there was no process in place for the collection and auctioning off of brass recovered from S&WB work sites. At most, it appears that the scrap metal Appellant sold in March 2015 would have otherwise been placed in a scrap metal dumpster near the S&WB warehouse. That scrap metal then may or may not have been retrieved by a third party for an undetermined rate. Therefore, the Commission finds that the S&WB did not establish that Appellant's sale of scrap brass in 2015 had a negative financial impact on the S&WB.

The Commission is left with the general proposition that when employees take their employer's property without authorization, it compromises the employer's ability to budget appropriately and dedicate resources in an appropriate manner. In the instant appeal, it is not clear what the S&WB would have done with the material had Appellant brought it to the warehouse in 2015. Nevertheless, Appellant should have known better than to collect the brass, sell it and keep the proceeds.

The Commission finds that Appellant's actions had a minor, negative impact on the S&WB's efficient operations.

E. 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).

To the S&WB's credit, it recognized the deficiencies in its training and practices with respect to recyclable materials and put in place procedures to better address them. Prior to new

leadership taking over in 2015, there was a widespread practice of S&WB employees selling brass recovered from S&WB work sites. The OIG's investigation yielded approximately twenty S&WB employees for a finite period of time. The S&WB believed that, by issuing severe disciplinary sanctions against these twenty employees, it would set an example for the rest of the S&WB employees and demonstrate the new leadership's expectations moving forward.

Yet, the series of communications issued by S&WB leadership after the OIG's investigation stands in stark contrast to the utter lack of guidance and process prior to the investigation. Therefore, the Commission believes that it is appropriate to consider mitigating factors when determining the appropriate level of discipline.

One of those mitigating factors is Appellant's lengthy service with the Appointing Authority. At the time of his termination, Appellant had been a S&WB employee since 1993 and there is no record of any disciplinary infraction prior to the date of his misconduct. In fact, Appellant received evaluation ratings of at least "Exceeds Requirements" over the four years preceding his termination. Mr. Jones, who worked with Appellant for approximately six years, testified that Appellant was a dependable employee who often accepted difficult assignments. (Tr. 140:21-141:8).

An additional mitigating factor was that warehouse employees would refuse to accept scrap metal recovered from S&WB work sites. This suggests that the S&WB placed very little, if any, value on the material prior to the OIG's investigation.

Based upon the above findings, we hold that termination is an excessive level of discipline. Appellant's actions constitute serious misconduct, but his more than twenty-three years of good performance combined with a lack of any process for the collection and sale of recovered brass serve as mitigating factors. Therefore, we find that a sixty-day suspension commensurate with

Appellant's offense. The maximum disciplinary sanction in the Commission's rules, short of termination, is a 120-day suspension. Due to the above-mentioned mitigating factors, the undersigned do not believe that such a severe sanction is warranted. However, we believe that the nature of Appellant's misconduct and his failure to seek guidance with respect to the disposal of recovered brass is conduct that the S&WB must deter with serious discipline. In fact, the Commission emphasizes that the S&WB has taken appropriate measures to address the gaps in its policy related to scrap metal and had adopted a formal process for the collection and secure storage of recovered brass. Employees who violate these policies in the future should expect severe disciplinary sanctions up to and including termination.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS-IN-PART and DENIES-IN-PART Appellant's appeal. The Commission finds that termination was not commensurate with Appellant's offense due to, 1) the lack of any S&WB process for the collection and sale of recovered brass, and 2) Appellant's unblemished twenty-three-year career with the S&WB. The Commission hereby orders the S&WB to rescind Appellant's termination and replace it with a sixty-day suspension. The Commission further orders the S&WB to reinstate Appellant with all back pay and emoluments of employment with the exception of any compensation and emoluments Appellant would have earned during the sixty-day unpaid suspension.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 1st day of August, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

STEPHEN CAPUTO, COMMISSIONER — DATE 7-13-18

CONCUR

RON McCLAIN, VICE-CHAIRPERSON — DATE 7-21-18

DISSENT

CLIFTON MOORE, COMMISSIONER — DATE 7-25-18

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DONALD THEODORE vs. SEWERAGE & WATER BOARD	DOCKET No.: 8663

COMMISSIONER CLIFTON MOORE DISSENTS AND ASSIGNS REASONS

This case involves the termination of a twenty-three-year veteran of the S&WB – one who had an unblemished employment record – for engaging in conduct that was not only wide-spread but unregulated by supervisors at the S&WB. I recognize that the Commission has found sufficient cause to terminate employees in the past for engaging in similar conduct. But those cases were based upon incomplete records and misinformed witness statements.

There is no dispute that, prior to 2016, the policies cited by the S&WB as justification for Mr. Theodore's termination did not cover scrap metal recovered from S&WB worksites. In testimony unchallenged by those with actual knowledge of S&WB practices, a warehouse manager for the S&WB testified unequivocally that the policies upon which the S&WB relied in terminating Mr. Theodore applied to equipment, not scrap metal. The same warehouse manager also testified that, even if employees had brought scrap metal back to the warehouse, the warehouse staff would not have known what to do with it. As best as I can determine from the record, the process of disposing of scrap metal was the same as the disposal of any construction debris. Namely, bring it to a central S&WB yard and throw it in a dumpster. It was not until the S&WB revised its surplus property policy in 2016 – well after the events that led to Mr. Theodore's termination –

that there was a disposal process for scrap metal recovered from worksites. To Mr. Doucette's credit, he recognized the shortcomings of the existing policy and put into place revisions that provided for a specific recovery process and method of securing all returned scrap. Additionally, it is clear from my review of the testimony in this case that Mr. Theodore had no training on the proper disposal of scrap metal recovered from worksites.

While I respect the majority's opinion that Mr. Theodore should have realized that the scrap metal he was selling had value, I respectfully disagree. From Mr. Theodore's perspective, the S&WB did not value the scrap metal as it had no process for its collection or disposal. I cannot get past the fact that the S&WB's collection process for the collection and recovery of scrap metals was initiated only "in the wake of the OIG investigation." If anything, Mr. Theodore and his peers should have been retrained on this new process and advised that any violation could lead to discipline up to and including termination.

In preparing this dissent, it is not my intent to call into question the necessary processes put in place by the S&WB's leadership. They were confronted with a problem that was not of their making, and the majority rightly gives the S&WB credit for recognizing a problem and taking concrete steps to address it. But terminating a long-term employee for violating a non-existent policy was an extreme overreaction. I also believe that the sixty-day suspension instituted by the majority is excessive given the fact that; 1) there was no true impact on the efficient operations of the S&WB, 2) Mr. Theodore had no prior discipline and was, by all accounts, an exemplary employee for over twenty years, and 3) the S&WB instituted a process for the collection and storage of scrap metal only after the OIG investigation.

For the above-stated reasons I respectfully dissent from the majority. I do not believe that the S&WB had sufficient cause to issue any discipline in this matter.