



CITY OF NEW ORLEANS

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MAYOR

Tuesday, July 10, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Alvin Porter

Re: **Alvin Porter VS.
Sewerage & Water Board
Docket Number: 8684**

Dear Mr. Porter:

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 - 7/10/2018 - 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

ALVIN PORTER vs. SEWERAGE & WATER BOARD	DOCKET No.: 8684
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I. INTRODUCTION

Appellant, Alvin Porter, 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 issue him a letter of reprimand. At all times relevant to the instant appeal, Appellant served as a Management Development Supervisor I for the S&WB and had permanent status as a classified employee.

On Tuesday, August 1, 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 issued Appellant a letter of reprimand on June 7, 2017. (S&WB Exh. 1). The stated reason for the letter of reprimand was Appellant's alleged "neglect of job duties." *Id.* Specifically, the S&WB alleged that Appellant had failed to do a "thorough job" of documenting information he had received from two contractors performing work for the S&WB. *Id.* As a result of his failure, Appellant was allegedly "derelict in his duties to the subcontractor." *Id.* The S&WB viewed Appellant's actions as an indication that he was "unable or unwilling to perform" his duties in a satisfactory manner.¹ Thus, pursuant to Civil Service Rule IX, Section 1.1, it instituted corrective action against Appellant in the form of a letter of reprimand.

B. Appellant's Job Duties

At all times relevant to the instant appeal, Appellant served as a Management Development Supervisor I within the S&WB's Economically Disadvantaged Business Program (hereinafter "EDBP"). (Tr. at 8:24-9:9). Employees within the EDBP are responsible for monitoring contracts between the S&WB and various contractors to ensure compliance with the S&WB's standards and policies. EDBP staff also work with S&WB contractors to identify and advocate for disadvantaged business entities (hereinafter "DBEs"). At the time of the underlying incidents, Appellant supervised three employees within the EDBP and his primary responsibility was to monitor contracts and ensure compliance with DBE participation standards. *Id.* at 11:11-12:7.

C. Conflict Between S&WB Contractors

At some point in April 2017, Appellant became aware of a dispute between Plant-N-Power Boiler Services (a primary contractor with the S&WB hereinafter referred to as "PNP") and

¹ The S&WB did not cite to a specific internal policy and instead relied upon Civil Service Rule IX in issuing discipline.

Affordable Trucking Company (a DBE sub-contractor with PNP hereinafter referred to as “ATCO”). (Tr. at 15:9-17:7). The underlying contract pertained to a “grey water” project and ATCO employees were responsible for the delivery and assembly of scaffolding. *Id.* at 22:13-18.

ATCO’s president and chief operating officer was Russell Kelly. Mr. Kelly brought two issues to Appellant’s attention. *Id.* at 22:22-23:9. First, Mr. Kelly alleged that PNP had failed to adhere to an agreed upon payment schedule. That schedule allegedly called on PNP to remit payment to ATCO within ten days of any invoice. Mr. Kelly’s second complaint was that PNP had assigned ATCO employees to work at different work-sites apart from S&WB projects without Mr. Kelly’s approval or knowledge. To make matters worse, Mr. Kelly alleged that PNP had misrepresented the amount of time ATCO employees worked on S&WB projects in time records submitted to the S&WB. As a result, Mr. Kelly alleged that PNP was asking him to submit fraudulent timesheets related to work performed by ATCO employees. *Id.* The record contains a series of emails between Mr. Kelly and PNP employees regarding this dispute that range from mildly confrontational to heated and insulting. (S&WB Exh. 2).

Upon learning of the dispute, Appellant reached out to PNP’s project manager and asked for an update regarding Mr. Kelly’s claims. (Tr. at 25:13-26:3). Appellant also requested that the parties forward to him copies of any invoices that were in dispute. (S&WB Exh. 2). In doing so, Appellant observed that the S&WB had not yet received or paid invoices submitted to the S&WB from PNP for the period of time covered by Mr. Kelly’s claims. *Id.* The reason that Appellant made this observation was his understanding of the S&WB’s authority to enforce payments to subcontractors. Per Appellant’s understanding, the S&WB could mandate payment to subcontractors within fifteen days of the S&WB’s payment to the primary contractor. Appellant believed that the S&WB could not mandate that PNP remit payment to ATCO before the S&WB

paid PNP. (Tr. at 26:18-22). He also believed that the agreement cited by Mr. Kelly calling for PNP to remit payment to ATCO within ten days of ATCO's invoice was a verbal "gentleman's agreement." *Id.* at 26:8-24.

Via email, Appellant requested that PNP clarify the payment issue and provide additional information regarding the work performed by ATCO employees. (S&WB Exh. 2). In response, PNP's project manager acknowledged that there was an "oversight" regarding the tracking of ATCO employee time. In order to remedy the oversight, however, PNP needed Mr. Kelly's cooperation in revising time sheets for re-submission. *Id.* Appellant then again requested documentation from PNP and PNP agreed to submit all challenged time sheets with revisions. *Id.* This exchange took place via email on May 2, 2017. Unfortunately, Appellant was unable to resolve the dispute via email and scheduled a meeting on May 11, 2017 to provide both ATCO and PNP with an opportunity to address the EDBP. Appellant invited Valerie Rivers, Deputy Director of Logistics to the May 11th meeting. Ms. Rivers supervised the EDBP at the time.

Ms. Rivers, who had been copied on some of the email exchanges between ATCO and PNP, was not impressed with what she perceived as Appellant's lack of preparation at the meeting. (Tr. at 34:9-35:13). She believed that Appellant should have taken a more active role in managing the dispute and performed field audits to address ATCO's allegations. *Id.* at 39:1-16. She emphasized that Appellant's job duties included a robust customer service role and she found Appellant lacking in this respect. *Id.* at 43:16-20. Specifically, Ms. Rivers observed that Appellant was surprised to learn that the payment agreement between ATCO and PNP that required payment to ATCO within ten days of an invoice was in writing. Appellant admitted that he was surprised to learn that the ten-day payment agreement had been reduced to writing. Yet, the reason for Appellant's confusion was that Mr. Kelly had previously represented that the agreement was

verbal. It was not until Appellant saw the invoices ATCO had submitted to PNP that he noted the phrase “net 10 terms.”² (Tr. at 63:8-64:5; App. Exh. “C”). Appellant testified that, prior to the May 11th meeting, Mr. Kelly had not provided him with the invoices from ATCO to PNP. From Appellant’s perspective, Mr. Kelly was attempting to use the dispute regarding his employees’ assignments as leverage to compel PNP’s payment of ATCO’s invoices.

During his testimony, Appellant acknowledged that Ms. Rivers had spoken to him in the past regarding his performance and his need to engage in a more cooperative manner with DBE subcontractors. Such counseling included an observation from Ms. Rivers that Appellant had the tendency to be “abrasive” towards participants in the EDBP. According to Appellant, it was Ms. Rivers’s prior counseling that prompted him to refrain from confronting Mr. Kelly about his failure to provide the ATCO invoices to him prior to the May 11th meeting. Apparently, ATCO had submitted the invoices, but sent them to S&WB procurement director Willie Mingo as opposed to Appellant. (Tr. at 69:7-70:6).

On May 12th, Appellant emailed PNP and observed that Mr. Kelly had initialed the disputed time sheets and had met the conditions required for payment. He then asked how much PNP owed ATCO and when ATCO could expect payment. PNP and ATCO then exchanged emails regarding the outstanding balance on ATCO’s invoices and apparently reached agreement on the amount. PNP then remitted payment to ATCO.³

² The Commission accepts Appellant’s representation that “net 10 terms” modified the payment method between ATCO and PNP originally established through a written agreement in evidence as part of “S&WB Exhibit 3.”

³ The animosity between PNP and ATCO apparently continued well after PNP paid ATCO’s invoices. There was no evidence that this continued animosity was the basis of any discipline issued to Appellant. Therefore the Commission does not find any communications between ATCO, PNP and/or S&WB personnel after May 12, 2017 to be relevant to the instant appeal.

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 Alleged Misconduct

The S&WB issued Appellant a letter of reprimand as a result of his alleged lack of preparation for the May 11th meeting and a failure to sufficiently advocate for ATCO as a DBE. The record reflects that the dispute between ATCO and PNP had two components; 1) payment of ATCO invoices in a timely manner, and 2) assignment of ATCO employees at non-S&WB work sites. At the time of the May 11th meeting, PNP had already acknowledged that there had been

“oversights” in its tracking of ATCO employee time. As a result, it had submitted corrected timesheets to Mr. Kelly at ATCO. This apparently addressed issue #2.

As for PNP’s payment to ATCO, Mr. Kelly refused to sign-off on the revised timesheets without payment from PNP. Based on his understanding of the agreement between PNP and ATCO, Appellant initially believed that there was no enforceable obligation on the part of PNP to pay an ATCO invoice within ten days of receipt. It was not until the May 11th meeting that Appellant became aware of a purchase order that altered the underlying obligation. The S&WB did not introduce any evidence to contradict Appellant’s claim that Mr. Kelly had originally described the ten-day payment requirement as a verbal “gentleman’s agreement.” Further, Ms. Rivers testified that she believed that Appellant had failed to sufficiently advocate for ATCO. It is not clear whether or not Ms. Rivers reviewed Appellant’s prior emails to PNP asking for further information. Based on these emails, it appears that PNP agreed to revise the disputed time sheets at Appellant’s prompting.

The S&WB introduced numerous emails through Ms. Rivers in an attempt to establish that Appellant had been derelict in his duties. But as the Hearing Examiner pointed out, the purchase orders that were the source of Appellant’s surprise at the May 11th meeting, were not among these documents. Appellant did look into whether or not the S&WB had paid PNP and determined that the invoices submitted by PNP as of April 2017 did not cover the relevant work or period of time.

Finally, the Commission recognizes that the relationship between ATCO and PNP had deteriorated over the course of several months. This made it difficult for Appellant to initiate an interactive dialogue. It did not, however, prevent Appellant from reaching out to PNP and actively pursuing a resolution to Mr. Kelly’s concerns. Based on the emails in the record and Appellant’s

testimony, it appears that he took appropriate steps in attempting to resolve the dispute between ATCO and PNP.

After a thorough review of the record and the Hearing Examiner's report, we find that the S&WB did not establish that Appellant was "derelict" in his duties to ATCO.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS Appellant's appeal. The S&WB shall rescind the letter of reprimand referenced in "Hearing Examiner Exhibit 1" and expunge any record of the letter of reprimand from Appellant's personnel file.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 10th day of July, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Tania Tetlow
TANIA TETLOW, COMMISSIONER

6/15/18
DATE

CONCUR

Michelle D. Craig
MICHELLE D. CRAIG, COMMISSIONER

6/4/18
DATE

Ronald P. McClain
RON McCLAIN, VICE-CHAIRPERSON

6/4/18
DATE