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DIRECTOR OF PERSONNEL

Wednesday, January 30, 2019

Mr. Frank Bivens III

Re: **Frank Bivens III VS.  
Sewerage & Water Board  
Docket Number: 8780**

Dear Mr. Bivens:

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 - 1/30/2019 - 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,

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

Doddie K. Smith  
Chief, Management Services Division

cc: Ghassan Korban  
Ashley Ian Smith  
Jay Ginsberg  
file

**CIVIL SERVICE COMMISSION**

**CITY OF NEW ORLEANS**

FRANK BIVENS, Appellant,  vs.  SEWERAGE & WATER BOARD, Appointing Authority.	DOCKET No.: 8780
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**I. INTRODUCTION**

Appellant, Frank Bivens, 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 Management Development Specialist I for the S&WB and had permanent status as a classified employee.

On Wednesday, June 6, 2018, 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 DENY the appeal and render the following judgment.

## II. FACTUAL BACKGROUND

### A. Alleged Misconduct

On March 15, 2018, the S&WB issued Appellant a letter of reprimand due to Appellant's "excessive tardiness in violation of Sewerage & Water Board Policy #20." (H.E. Exh. 1). Specifically, the S&WB alleged that Appellant had reported late to work on numerous occasions between January 8, 2018 and March 14, 2018. *Id.* According to the S&WB's Time and Attendance Policy – in evidence as "S&WB Exhibit 2" and referred to hereinafter as "the Policy" – any failure to report to work on time, at the start of a normally scheduled work day, constitutes "tardiness." (S&WB Exh. 2). The Policy goes on to establish that:

Employees must clock/sign-in no earlier than seven (7) minutes before their normal starting time and must clock/sign-out no later than seven (7) minutes after their normal quitting time (or as directed in departmental guidelines). Exceptions to this procedure must be approved in advance (e.g. overtime authorized by the Deputy Director) by the employee's supervisor or supervisor's designee. Employees who report to work later than seven (7) minutes will be docked annual leave to cover the time not worked in increments of fifteen (15) minutes. Examples of clock/sign-in or out infractions include:

- 1) Failure to clock/sign-in or clock/sign-out at the beginning and/or end of their assigned shift.
- 2) Failure to clock/sign-in or clock/sign-out promptly after their lunch break.
- 3) Clocking/Signing in or out early (or late) without prior approval.

*Id.*

### C. Appellant's Attendance and Tardiness

The Parties are largely in agreement regarding the material facts of this appeal. Appellant stipulated that he arrived late to work on the days listed in the letter of reprimand. (Tr. at 5:9-6:3). Further, he acknowledged that his timesheets accurately reflect his arrival time and establish that he reported to his assignment late on twenty-nine occasions during the relevant period of time. *Id.* at 8:18-9:6.

Notably, Appellant works in the S&WB's human resource department and is responsible for developing policies and administering the S&WB's performance management system. *Id.* at 10:21-11:3. The S&WB hired Appellant in 2015 as a Management Development Analyst II and promoted him to his current position in November 2016. *Id.* at 11:7-20. During his employment, Appellant received a generally positive performance evaluation with the exception of a "needs improvement" rating in the category of "Dependability." (S&WB Exh. 5). Such a rating indicates that an employee is "frequently tardy or absent." *Id.* On June 30, 2017, Appellant received a "counseling form" for being "habitually tardy for work." (S&WB Exh. 3A). Based upon the supporting documentation, Appellant was often more than thirty minutes late to his assignment. Appellant's supervisor, Veronica Washington, frequently counseled Appellant about his tardiness and advised him that it was unacceptable. (Tr. at 21:5-14, 57:1-8). Ultimately, Appellant agreed that his supervisors had placed him on notice that his tardiness was an issue. *Id.* at 29:22-30:6.

Appellant's original starting time with the S&WB was 8:00 a.m., but Appellant subsequently requested – and was granted – permission to report to work at 8:30 a.m. *Id.* at 12:4-13:15. Based upon Appellant's understanding of the attendance policy (a policy he helped draft) there was a five-minute "grace period" that allowed employees to report to their assignment up to five minutes after the official start of their shift without being "tardy." *Id.* at 24:7-9. According to Appellant, the five-minute grace period is not memorialized in a policy, but is a long-standing practice within certain departments at the S&WB. *Id.* at 26:1-8. Ms. Washington testified that she was not aware of a five-minute "grace period." *Id.* at 76:25-77:5, 83:16-84:3. When shown a draft employee handbook, Ms. Washington testified that she would not approve the addition of a grace period in a final version. *Id.* at 91:6-17. And Appellant acknowledged that Ms. Washington never mentioned the existence of a "grace period" during her interactions with him. *Id.* at 99:18-25.

During his testimony, Appellant appeared to suggest that the portion of the Policy that required the deduction of annual leave from employees who are more than seven-minutes late was a type of grace period. Yet, he acknowledged that his annual leave was never “docked” and further admitted that the Policy did not preclude disciplinary action in addition to the reduction in annual leave.

Appellant further testified that Ms. Washington permitted employees in Appellant’s department to arrive late, but asked that they call in and indicate an anticipated arrival time. *Id.* at 19:6-12. Yet, Appellant claimed that he was not sure whether simply reporting tardiness would “absolve” an employee of any misconduct related to a late arrival. *Id.* at 19:13-21. Appellant argued that, in his experience, the S&WB does not issue tardiness-related discipline to employees exempt from overtime requirements of the Fair Labor Standards Act (“FLSA”). *Id.* at 98:1-9. Instead, supervisors have simply required such employees stay later in order to complete assignments.

Throughout his testimony, Appellant asserted that the Policy was simply a “guide” and that supervisors in various departments had the discretion to modify portions of the Policy. Ms. Washington agreed with this general assertion but noted that the Policy would be in full force and effect unless a department had a specific policy that would “supersede” the S&WB’s general policy. *Id.* 92:19-93:8. According to Ms. Washington, the S&WB’s human resources department did not have a separate attendance policy that would have superseded the S&WB’s general policy. *Id.* at 94:9-20.

Ms. Washington testified that she recommended that the S&WB issue Appellant a suspension rather than a letter of reprimand because counseling did not appear to have any impact on Appellant’s behavior. *Id.* at 59:23-60:9.

Appellant testified that the primary reason for his frequent tardiness is his inability to find reasonably-priced parking close to the S&WB's St. Joseph Street headquarters.

### 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

Appellant admitted that he reported late to his assignment on approximately twenty-nine occasions between January 1, 2018 and March 15, 2018. Paradoxically, Appellant asserts that he was not sure whether his frequent tardiness constituted misconduct or a violation of the S&WB's

Policy. The Commission found Appellant's testimony on this front to be puzzling given Appellant's role in the development and administration of HR policies and procedures. In any event, Ms. Washington's counselling sessions should have put Appellant on notice that his frequent tardiness was in fact misconduct (albeit relatively minor misconduct). And, Appellant's reliance on a five-minute "grace period" fails in light of the fact that; 1) no written policy appears to be in place, and 2) Appellant had already received written counseling regarding his tardiness.<sup>1</sup>

The Commission agrees with the S&WB that the provision in the policy that calls for the deduction of annual leave in fifteen minute increments when an employee is more than seven minutes late is not a "grace period." Instead, it is a commonly-used deterrent intended to dissuade FLSA non-exempt employees from taking unfair advantage of their salaried status. Further, nothing in the Policy precludes the S&WB from taking disciplinary action in addition to the annual leave deduction.

Finally, the undersigned Commissioners do not believe that Appellant has provided a compelling reason for his frequent tardiness. While the availability of reasonably-priced parking is a challenging issue for many of us who live and work in the CBD, it does not warrant an exception to reasonable attendance requirements. Therefore, we find that the S&WB has established that Appellant violated the Policy as alleged in the letter of reprimand.

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

Ms. Washington testified that Appellant's frequent tardiness had the potential to impact the morale of other employees within the S&WB's human resource department and sent a message that it was acceptable for employees to disregard workplace attendance rules. She stopped short

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<sup>1</sup> Appellant made reference to personnel documents that could have supported his claim that the HR department had an office policy allowing for a five-minute grace period. For reasons not addressed in the record, Appellant chose not to introduce such documents.

of asserting that Appellant's instances of tardiness had a tangible impact on the actual operations of the S&WB's human resources department. (*See* tr. at 77:14-19). Ms. Washington also testified that Appellant's tardiness does not impact the quality of his work. *Id.* at 79:2-5.

On the other hand, the written counseling Appellant received from Ms. Washington in June 2017 states that, "[t]ardiness for any reason is unacceptable and will not be tolerated." Even in the face of such an explicit direction from a supervisor, Appellant continued to arrive late to work. When subordinates disregard instructions from a supervisor, the chain of command is compromised as is the supervisor's ability to effectively manage his/her subordinates. This in turn has an adverse impact on the efficient operations of an appointing authority.

For the above stated reasons, the Commission finds that Appellant's habitual tardiness had an adverse impact on the efficient operations of the S&WB's HR department.

### **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.

The S&WB has adopted a progressive discipline approach with respect to violations of its time and attendance policy. Contrary to the testimony, the progressive discipline steps described in the Policy are very prescriptive and do not allow for much discretion on the part of a direct supervisor. For the first through third instances of tardiness, the Policy **requires** that the transgressing employee receive "immediate counseling." For the fourth and fifth tardiness, the employee **must** receive a letter of reprimand. And, the sixth incident of tardiness must result in the supervisor recommending a five-day suspension. Presumably, the appointing authority (as



opposed to the supervisor) has some discretion in actually issuing the suspension. A supervisor must recommend termination for any subsequent instances of tardiness. Importantly, the Policy does not characterize any incident of tardiness as “excused.” As we noted above, indicating that employees will be docked annual leave (in five minute increments) for reporting more than seven minutes late to work does not preclude further disciplinary action. Additionally, Appellant acknowledged that nothing Ms. Washington said or did led him to believe that she would excuse his tardiness. On the contrary, Ms. Washington’s counseling unambiguously indicated that Appellant’s tardiness would not be tolerated.

Here, it appears that the S&WB has been exceedingly lenient in issuing discipline to Appellant. Given the S&WB’s progressive discipline policy, the Commission would not have been surprised to see several reprimands and/or recommendations for suspension related to Appellant’s twenty-nine instances of tardiness. Instead, the S&WB has only issued Appellant a single letter of reprimand. The Commission recognizes that Appellant is a valued member of the S&WB’s human resources team and performs well when he is at work. At the same time, we accept the S&WB’s representations that allowing frequent tardiness to proceed without redirection could have a negative impact on the morale and day-to-day operation of a department. Presumably, the S&WB has taken the position that serious discipline is not warranted due to the relatively amorphous nature of the impact Appellant’s tardiness had on the S&WB’s human resources department. The undersigned Commissioners observe that a letter of reprimand represents the lowest form of discipline available to appointing authorities under our rules. Furthermore, we note that Appellant’s conduct had not improved even though his supervisor has counseled him on numerous occasions regarding the need to report to work on time.

As a result of the foregoing findings of fact and law, the Commission holds that a letter of reprimand in this case is commensurate with Appellant's habitual tardiness.

#### V. CONCLUSION

Based upon the Commission's review of the record, we hereby DENY Appellant's appeal. The letter of reprimand shall remain in Appellant's personnel file. Furthermore, the undersigned Commissioners strongly caution Appellant that this letter of reprimand represents a substantial step towards more serious discipline. Given the S&WB's time and attendance policy and progressive discipline principles, Appellant would be well served by modifying his daily routine to ensure he arrives to work on time. It would be unfortunate for both the S&WB and the City to lose such a valuable employee due to tardiness.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

F. Bivens  
No. 8780

Judgment rendered this 30<sup>th</sup> day of January, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

  
CLIFTON J. MOORE, Jr., COMMISSIONER

1-18-19  
DATE

CONCUR

  
MICHELLE D. CRAIG, CHAIRPERSON

1/14/2019  
DATE

  
STEPHEN CAPUTO, COMMISSIONER

1-18-2019  
DATE