



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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Tuesday, May 30, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Ms. Hester R. Hilliard, Esq.
2100 Rev. Richard Wilson Dr. Suite 7
Kenner, LA 70062

Re: **Darren Brisco VS.
Sewerage & Water Board
Docket Number: 8442**

Dear Ms. Hilliard:

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 - 5/30/2017 - 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
Jim Mullaly
Darren Brisco

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DARREN BRISCO vs. SEWERAGE & WATER BOARD	DOCKET No.: 8442
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I. INTRODUCTION

Appellant, Darren Brisco, 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 Laborer for the S&WB and had permanent status as a classified employee.

Due to various scheduling issues, the hearing in this matter spanned five days: December 15, 2015; March 8, 2016, March 15, 2016; April 28, 2016, and July 28, 2016. 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

On or about March 11, 2015, the S&WB's Equal Opportunity Office (hereinafter "EEO") received a complaint that Appellant had harassed a fellow employee. (H.E. Exh. 1). Following an investigation, the S&WB terminated Appellant's employment on August 15, 2015 due to allegations that Appellant had violated the S&WB's "Workplace Harassment Policy #87." *Id.* As an aggravating factor justifying Appellant's termination, the S&WB noted that Appellant had received a five-day suspension for insubordination on or about March 19, 2015. *Id.*

The S&WB's Workplace Harassment Policy cited in Appellant's dismissal letter states that the S&WB endeavors to "maintain a working environment free of harassment or discrimination of any type, including that which may relate in any way to an individual's race, color, gender, sexual orientation, age, religion, national origin, disability, or any other protected status. Accordingly, the [S&WB] will not tolerate any offensive, intimidating or hostile conduct." (S&WB Exh. 1).

The Policy goes on to provide specific examples of prohibited conduct, including:

- All types of sexual harassment, including creating or perpetuating a hostile work environment;
- Verbal, physical or visual harassment, sexual or racial slurs, joking or 'kidding' that is uninvited, unwanted or offensive to another person;
- Threatening or profane language towards others;
- Creating a working environment that is intimidating, hostile or offensive or adversely affects an employee's work performance because of sexually explicit photographs or other materials, unwelcomed or unwanted conversations, suggestions, comments, slurs, requests, demands, jokes, physical contact or attention.

Id.

The Policy also contains a warning that any employee who violated the Policy is “subject to immediate disciplinary action which, in the case of employees, supervisors, or managers, may include dismissal.” *Id.* Contained within the Policy is a section entitled “Zero Tolerance Policy: Workplace Violence.” This section indicates that, “verbal, physical or visual intimidation or harassment by anyone will not be tolerated,” and “violations of this policy may lead to disciplinary or legal action.” *Id.*

B. March 6, 2015

On March 6, 2015, Appellant reported to the S&WB’s facility located at 2900 Peoples Avenue, New Orleans at approximately 7:00 a.m. (Tr. 3-8-2016 at 14:1-4). After checking in, Appellant stood in a hallway and talked with a male co-worker about a mutual friend who was opening a bar. *Id.* at 14:4-8. At some point in time after Appellant began speaking with his co-worker, Ms. Lakesha Davis, another S&WB employee, walked by the two men. The Parties dispute what occurred next.

According to Appellant, Ms. Davis asked Appellant “what the fuck [are you] looking at?” as she passed the two men. *Id.* at 14:11-12. Shortly thereafter, Ms. Davis returned and allegedly informed Appellant “‘cause you don’t know who the fuck you messing with ‘cause I’ll put a sexual harassment charge on you.” *Id.* at 14:12-16. To which Appellant replied, “no, you don’t know who you messing with.” *Id.* at 14:16-18. Appellant then spoke with his zone manager, Matthew McAcy (who goes by “Mark”), and Appellant proceeded to share his version of the encounter summarized above. He also told his supervisor that he “had the right to look where [he] wanted to look.” *Id.* at 24:23-24.

During her testimony, Ms. Davis offered a very different version of events. According to Ms. Davis, she reported to work on March 6, 2015 and observed Appellant as she walked past him

to use the restroom. *Id.* at 47:1-3. As she passed Appellant, Ms. Davis felt “some type of energy” from Appellant that caused Ms. Davis to stop and ask Appellant why he was looking at her “like this.” *Id.* at 47:10-14. She also asked Appellant, “what’s wrong with you?” *Id.* at 67:19-20. According to Ms. Davis, Appellant replied that he could look at her “how the fuck I want.” *Id.* at 47:14-15. Ms. Davis told Appellant that he could not look at her in the manner he was and asked Appellant who his supervisor was. Appellant told Ms. Davis that his supervisor was “Mark.” Prior to speaking with “Mark,” Ms. Davis sought out her own direct supervisor who accompanied Ms. Davis to an office where Ms. Davis heard Appellant repeat that he could look at Ms. Davis “how the fuck he want” and that he “don’t want you [referring to Ms. Davis] any fuckin way.” *Id.* at 47:17-23. Ms. Davis responded to Appellant’s comments by saying, “ain’t no such thing as you don’t want me, that’s not the case, you won’t tell me you gonna look at me how the fuck you want.” *Id.* at 61:22-62:4.

Later in her testimony, Ms. Davis stated that the manner in which Appellant was looking at her made her uncomfortable and also “created a hostile environment” for her. *Id.* at 52:22-25. She also felt intimidated by Appellant’s unwanted attention. *Id.* at 54:22-55:4. The size difference between Appellant and Ms. Davis contributed to her feeling uncomfortable and “stressed out.” *Id.* at 56:11-17. She also testified that she had previously experienced a similar situation with Appellant when she encountered him outside of work. At that time, when Ms. Davis asked Appellant why he was looking at her, he did not respond. *Id.* at 53:21-54:4.

Ms. Davis claimed that, due to Appellant’s harassing and intimidating behavior, she was not able to perform her job duties in a usual and efficient manner on the day in question. *Id.* at 76:14-20. However, in response to a question from the hearing examiner, Ms. Davis stated that

she did not believe Appellant should have been fired for his conduct and insisted that she was simply reporting the incident as it happened. *Id.* at 85:15-23.

On March 11, 2015, Ms. Davis approached Nicholas Lopez, who was the S&WB's interim EEO officer at the time. *Id.* at 88:25-89:4. According to Mr. Lopez, Ms. Davis appeared to be very distraught when he first encountered her and was crying. *Id.* at 90:10-13. Ms. Davis then informed Mr. Lopez that she wished to lodge a complaint against a fellow co-worker. *Id.* at 90:14-20. Following his interview with Ms. Davis, Mr. Lopez reviewed Appellant's personnel file and noted that Appellant had been suspended for five days and been transferred from another unit. Mr. Lopez then attempted to speak with several individuals who may have witnessed the interaction between Appellant and Ms. Davis, but none of the employees wanted to cooperate with the investigation. *Id.* at 96:10-12. Approximately six days after receiving Ms. Davis's complaint, Mr. Lopez spoke with Appellant regarding the March 6th incident and gave Appellant an opportunity to present his version of events. During the course of Mr. Lopez's interview with Appellant, he established that Appellant was familiar with his accuser. *Id.* at 103:20-104:2.

After completing his investigation, Mr. Lopez concluded that Appellant had violated subsection (f) of the S&WB's Workplace Harassment Policy. *Id.* at 107:22-25. Specifically, Mr. Lopez believed that Appellant's actions created a hostile, intimidating or offensive working environment. *Id.* at 108:3-23. In reaching this conclusion, Mr. Lopez accepted Ms. Davis's version of events over Appellant's. When pressed as to why Ms. Davis waited five days to bring a complaint to the S&WB EEO officer, Mr. Lopez stated that Ms. Davis had initially contacted her direct supervisor with the concern, but due to an intervening weekend, Ms. Davis and her supervisor did not immediately come to the EEO. *Id.* at 114:14-18.

As a result of finding a violation of the Workplace Harassment Policy, Mr. Lopez recommended that the S&WB suspend Appellant for ten days. *Id.* at 125:17-21.

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

The Commission’s analysis at this first step depends upon whether or not we accept Ms. Davis’s version of events or Appellant’s. The Parties have not made the Commission’s analysis any easier due to the fact that several potential eye-witnesses, including Ms. Gaynell Smith, Mr.

Nicky Hunter, and Mr. Mark McAvy, did not present testimony. Either Party could have subpoenaed these witnesses, and the record would have greatly benefitted from their input.

Mr. Lopez testified that Ms. Davis appeared upset and was crying when she approached him on March 11, 2015 to lodge a complaint against Appellant. The Commission appreciates that Ms. Davis made the formal complaint five days after the incident itself, but she did immediately contact her direct supervisor. That Ms. Davis would become upset five days later when recounting the events of March 6th is not surprising. Therefore, we find that Mr. Lopez's observations of Ms. Davis on March 11, 2015 lend credibility to Ms. Davis's account.

Likewise, Ms. Davis's belief that Appellant's actions did not warrant termination tends to lend credibility to her testimony. Had she simply wanted to exact some manner of retribution on Appellant for a perceived slight, she could have answered the hearing examiner's question in a far different manner. Therefore, the Commission concludes that Ms. Davis's version of the March 6th incident more credible than Appellant's.

Based upon the foregoing, the Commissioners find that the S&WB has established, by a preponderance of the evidence, that Appellant violated the S&WB's Workplace Harassment Policy. Specifically, we find that Appellant's actions constituted verbal, physical and visual intimidation and harassment that created a hostile work environment for Ms. Davis and other S&WB employees.

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

Ms. Davis testified that, due to Appellant's actions, she was unable to focus on her work and felt "jittery" for a period of time. The Commission finds that, when an employee becomes the victim of harassing or intimidating behavior, it is likely that his or her performance would suffer. There is also an adverse impact on others who may witness or become aware of the harassing or

intimidating behavior. Such individuals may feel empowered to engage in similar conduct, or fail to report such conduct if they feel that no one will act on such reports.

Cedric Grant, the Executive Director of the S&WB, testified that, because many employees work in close quarters, disrespectful conduct is not tolerated. (Tr. 7-28-2016 at 6:3-7). Mr. Grant also testified that harassing and intimidating behavior on the part of S&WB employees hinders the S&WB's ability to market itself as a desirable employer in the community. *Id.* at 9:6-12. Finally, Mr. Grant testified that employees at the S&WB engage in "very unsafe work" and must trust and respect each other. *Id.* at 10:12-17. The Commission finds that, when an employee harasses or intimidates another employee, he or she necessarily compromises the trust and respect of his or her victim.

Based upon the foregoing, the Commission finds that Appellant's misconduct did have an adverse impact on the efficient operations of the S&WB.

C. 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 *Staehele v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

Part of the S&WB's justification for Appellant's termination was the S&WB's "Zero Tolerance Policy" towards workplace harassment. The Commission is not bound by an appointing authority's "zero tolerance" policy and must make a fact-specific inquiry with respect to the appropriate level of discipline in each appeal. However, the existence of a "zero tolerance" policy does serve as an important piece of evidence when determining if the discipline at issue is

commensurate with the offense. Zero tolerance policies, when uniformly enforced, put employees on notice that the appointing authority views violations of the policy as serious misconduct.

In the matter now before us, Appellant was aware of the S&WB's zero tolerance policy regarding workplace harassment and was thus aware that any violation of that policy could result in discipline up to and including termination. (Tr. 3-8-2016 at 35:1-4). Yet, despite his awareness of the policy, Appellant chose to engage Ms. Davis in a heated and profanity-laced discussion. Then, when discussing his actions, Appellant, undaunted by the presence of two supervisors, continued to use profanity and directly address Ms. Davis in an aggressive manner.

In weighing the appropriateness of the discipline at issue, we recognize the S&WB's responsibility to ensure that its employees operate in an environment free from harassment and intimidation. And, through its Workplace Harassment Policy, the S&WB seeks to deter any harassing or intimidating behavior, sexual or otherwise. The Commission also credits Mr. Grant's testimony regarding the need to ensure that employees trust one another because the work they perform is often demanding and "unsafe."

Given the nature of Appellant's actions, and the S&WB's duty to provide a safe working environment free from harassment and intimidation, we find that termination was an appropriate level of discipline.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES the Appellant's appeal.

Judgment rendered this 30th day of May, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



TANIA TETLOW, CHAIRPERSON

5/26/2017

DATE



MICHELLE D. CRAIG, CHAIRPERSON

5/25/2017

DATE



STEPHEN CAPUTO, COMMISSIONER

5/25/2017

DATE