



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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MAYOR

Tuesday, September 27, 2016

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Deril Valdery

Re: **Deril Valdery VS.
Sewerage & Water Board
Docket Number: 8437**

Dear Valdery:

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, 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: Cedric S. Grant
George R. Simno III
Jim Mullaly
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DERIL VALDERY vs. SEWERAGE & WATER BOARD	DOCKET NOs.: 8437
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I. INTRODUCTION

Appellant, Deril Valdery, brings the instant appeal challenging a three-day suspension issued by the Sewerage and 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 a Networks Technician I for the Appointing Authority.

II. FACTUAL BACKGROUND

The S&WB alleged that Appellant was insubordinate on Monday, May 11, 2015 when he failed to excavate a work site using a backhoe and instead ordered his crew to perform the excavation by hand. (Tr. at 6:22-7:1). The S&WB further alleged that when a fellow S&WB employee approached Appellant about the excavation work, Appellant used profanity in violation of the S&WB’s work place harassment policy. *Id.* at 7:2-6.

The work site in question was 44 Neron Place in the Carrollton neighborhood of New Orleans, and the foreman for the job was Jamar Hill. *Id.* at 8:16-23. On the day in question, Appellant was operating machinery and Mr. Hill was responsible for directing work at the site. The crew was addressing an “inlet leak,” and in order to assess the nature/extent of the leak, it was

necessary for the crew to excavate the site. Mr. Hill instructed the Appellant to dig into the ground. (Tr. 9:22-10:1). According to Appellant, Mr. Hill's instructions did not include specifics as to how Mr. Hill expected the digging to be performed. *Id.* at 10:2-4.

In response to Mr. Hill's instructions, Appellant began digging "in the dirt" and moved toward a meter box located near the site. During this process, Appellant inquired as to whether Mr. Hill had examined the meter box in order to determine the origin of the leak. *Id.* at 10:16-20. Mr. Hill indicated that he had not made that determination and went on to state that, according to the information provided by the property owner, the leak was under the sidewalk. Mr. Hill then allegedly told Appellant to break up and dig under the sidewalk in order to locate the leak. *Id.* at 10:21-24. Appellant testified that he complied with this directive and, when he began to dig at the site, used a small mechanical excavator. *Id.* at 11:8-15. Ultimately, the crew established that the leak originated at the meter box, not under the sidewalk.

After determining the source of the leak, Appellant informed Mr. Hill that, in Appellant's opinion, it was not necessary to rip up the sidewalk. *Id.* at 10:25-11:3, 12:5-10. According to Appellant, when he confronted Mr. Hill about the unnecessary excavation performed at the site, Mr. Hill allegedly responded by stating that, since he was the foreman, he could direct Appellant to dig up the sidewalk, or words to that effect. *Id.* at 12:7-13. Appellant believes that, his discipline was the result of his confronting Mr. Hill about the crew's performance of unnecessary work.

Mr. Hill testified to a very different version of events. According to Mr. Hill, Appellant reported to the work site, but did not take the excavator/back hoe off of the S&WB truck. Instead, Appellant stated that the assignment was "stupid." *Id.* at 20:8-20. Eventually, Appellant did assist the crew in digging out the work site by hand, but at no time used any equipment. *Id.* at 21:7-15. Mr. Hill did not recall having the sidewalk excavated or removed.

Mr. Hill further testified that, not only did Appellant refuse to comply with instructions, he used profanity towards Mr. Hill including the phrase “fuck you.” *Id.* at 22:4-11. Hakeem Richard, another member of the work crew who worked on the Neron Place job with Appellant and Mr. Hill, supported Mr. Hill’s testimony that Appellant used profanity towards Mr. Hill on the date of the incident. *Id.* 25:13-23. However, Mr. Richard contradicted Mr. Hill’s testimony regarding the use of equipment at the Neron Place work site. According to Mr. Richard, Appellant did use a backhoe. *Id.* at 27:20-24.

III. LEGAL STANDARD

Employees in the classified service may only be disciplined 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 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

1. Insubordination

The S&WB's case against Appellant with respect to the allegation of insubordination depends upon it establishing that Appellant did not adhere to Mr. Hill's directions on May 11, 2015. Specifically, the S&WB must show, by a preponderance of the evidence, that Appellant did not use a backhoe as Mr. Hill directed. Mr. Hill testified that Appellant did not use a backhoe. But, according to both Appellant and Mr. Richard, Appellant did use a backhoe at the Neron Place work site on May 11, 2015. Given that the S&WB's only witness to the alleged insubordination was contradicted by two other witnesses, including one called by the S&WB, the Commission finds that the S&WB has failed to carry its burden with respect to the allegation that Appellant was insubordinate.

2. Workplace Harassment

Even though the S&WB did not introduce it during the course of the appeal hearing, the Commission accepts that there was a Workplace Harassment Policy in effect at the time of Appellant's misconduct. Appellant acknowledged that he was aware of the policy and that the policy prohibited "verbal, or visual intimidation or harassment." (Tr. at 17:13-16). Although Appellant denies that he harassed Mr. Hill, the S&WB has established that Appellant did use the phrase "fuck you" towards Mr. Hill. And, while Mr. Hill did not testify that he felt intimidated by Appellant's inappropriate words, the Commission finds that they do constitute harassment.

B. Impairment of Efficient Operation of Appointing Authority

While Appellant directed the phrase “fuck you” towards Mr. Hill, his foreman, there was no testimony as to how the Appellant’s use of profanity towards Mr. Hill on May 11, 2015 impaired or impacted the efficient operation of the S&WB. Nevertheless, the duty of the Commission in deciding the disposition of appeals is clear:

The commission or board 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.

Morris v. City of Minden, 50,406 (La.App. 2 Cir. 3/2/16)(citing *Walters v. Dept. of Police of New Orleans*, 454 So.2d 106 (La.1984); *City of Bossier City v. Vernon*, 12–0078 (La.10/16/12), 100 So.3d 301)(emphasis added). And, the facts presented to the Commission show that Appellant directed a profanity towards his foreman. The Commission finds that, when an employee acts in a disrespectful and unprofessional manner towards a co-worker, there is an adverse impact on morale and the overall work environment. As a result, the Commission finds that Appellant’s conduct did adversely impact the efficient operation of the S&WB, albeit to a very minor degree.

C. Discipline Commensurate with Offense

In conducting its analysis at this stage, the Commission must determine if Appellant’s suspension 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).

Based upon the discipline notice issued to Appellant, it is clear that the S&WB relied both insubordination and harassment/intimidation to justify the three-day suspension. Since we have found that the S&WB failed to carry its burden with respect to the allegation of insubordination,

D. Valdery
No. 8437

we are left with determining what degree of discipline is appropriate based upon the misconduct the S&WB did establish. Namely, Appellant's single use of the phrase "fuck you" towards his foreman.

The S&WB did not introduce its Workplace Harassment Policy, so it is not clear whether such policy puts employees on notice that certain misconduct carries specific discipline. Additionally, since the record is devoid of any impact Appellant's inappropriate comment had on Mr. Hill or Appellant's co-workers, we cannot make an assessment based upon such evidence. In a prior decision recently affirmed by the Louisiana Court of Appeals for the Fourth Circuit, we reduced a five-day suspension to a one-day suspension when we held that an appointing authority failed to establish an appellant committed some of the misconduct alleged in the disciplinary letter. *Alexander v. Dep't of Pub. Works*, 2015-1153 (La.App. 4 Cir. 6/22/16). In affirming the Commission's decision, the Fourth Circuit in *Alexander* observed that the Commission did not have any evidence of a "penalty schedule, department guidelines for imposition of penalties based on potential offenses, or even a review of penalties previously imposed for enumerated offenses." *Id.* The same is true here.

Therefore, given that the S&WB did not establish that Appellant was insubordinate and that the misconduct alleged did not have a substantial adverse impact on the efficient operation of the Appointing Authority, the Commission finds that a three-day suspension is not commensurate with the misconduct in which Appellant engaged.

V. CONCLUSION

Based upon the foregoing, the Commission hereby GRANTS IN PART and DENIES IN PART Appellant's appeal. Appellant's suspension shall be reduced to a written reprimand. The S&WB shall remit to Appellant all back pay and emoluments related to the suspension vacated by our decision and amend his personnel record to reflect a written reprimand for using inappropriate language toward a co-worker.

Judgment rendered this 27 th day of Sept., 2016.

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No. 8437

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

9/14/2016

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

9/19/16

DATE



JOSEPH S. CLARK, COMMISSIONER

9/26/16

DATE