



LATOYA CANTRELL
MAYOR

CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
SUITE 900 – 1340 POYDRAS ST.
NEW ORLEANS LA 70112
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON

STEPHEN CAPUTO
CLIFTON J. MOORE, JR.
BRITTNEY RICHARDSON

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Wednesday, January 30, 2019

Mr. Archie Gerhold

Re: **Archie Gerhold VS.**
Department of Fire
Docket Number: 8774

Dear Mr. Gerhold:

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: Timothy McConnell
Elizabeth S. Robins
Brendan M. Greene
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

ARCHIE GERHOLD, Appellant, vs. DEPARTMENT OF FIRE, Appointing Authority.	DOCKET No.: 8774
--	------------------

I. INTRODUCTION

Appellant, Archie Gerhold, 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 Department of Fire for the City of New Orleans, (hereinafter the “NOFD”) does not allege that the instant appeal is procedurally deficient. Similarly, Appellant stipulated that NOFD’s investigation conformed to the procedural requirements of Louisiana Revised Statute § 33:2181. Therefore, the Commission’s analysis will be limited to whether or not NOFD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Firefighter for NOFD and had permanent status as a classified employee.

On May 23, 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 February 22, 2018, NOFD issued Appellant discipline in the form of a six-hour suspension for violating NOFD rules. (H.E. Exh. 1). The specific NOFD rules at issue are:

- Article 5 Section 2.28: Members shall be governed by the customary and reasonable rules of proper behavior and shall not commit any act that brings reproach upon themselves or the Department;
- Article 5 Section 2.32: Members shall be courteous and respectful when dealing with each other or the public. Members shall not use threatening, abrasive, or insulting language; and
- CAO Policy Memorandum 83:¹ City Employees should not post any defamatory, libelous, vulgar, obscene, abusive, profane, threatening, racially and ethnically hateful, or otherwise offensive or illegal information or material.

Id. According to the disciplinary notice, Appellant violated the above-cited rules when he confronted a civilian (identified hereinafter as “Mr. Robinson”) with whom he had been engaging in a heated discussion over social media. NOFD further alleged that Appellant’s social media exchange with the civilian contained “threatening, abrasive and insulting language” and escalated the dispute in a manner that brought reproach upon Appellant and NOFD. *Id.*

B. October 11, 2017

On October 11, 2017, Appellant was working at NOFD Engine House 15 located at 1211 Arabella Street in New Orleans. At some point during the day, Appellant began commenting on a social media conversation thread started by an acquaintance of Appellant. (Tr. at 92:2-12). The initial conversation pertained to players in the National Football League kneeling in protest during the national anthem. (App. Exh. 3). Mr. Robinson – who was also on the social media conversation thread – took issue with Appellant’s perspective on the players’ protest and began posting his own

¹ This policy applied to firefighters through Article 7, Section 1.1 of NOFD rules and regulations.

comments. (App. Exhs. 2, 3). The discussion between Mr. Robinson and Appellant devolved into a series of insults and provocations. At one point, Mr. Robinson targeted Appellant with a post that read:

You'll find out how I can handle my own. Why wait til tomorrow? Seems like you got time now. Nothing between us but Air and opportunity. Whatcha say?

(App. Exh. 2).²

According to Appellant, Mr. Robinson's reference to "tomorrow" pertained to a party being thrown by a mutual friend that both Mr. Robinson and Appellant initially planned on attending. Appellant stated that he told Mr. Robinson that he would talk to him at the party, "Not to fight, because I'm the type of person, I pride myself on, if I say something I'm gonna be a man. I'm gonna say it to your face." (Tr. at 102:4-15). Appellant's post regarding "tomorrow" is not in the record because Appellant deleted several posts due to his embarrassment over their contents. (Tr. at 95:16-25).

Another exchange between Appellant and Mr. Robinson included the following posts:

Appellant: Lol pompous tough guy!! U know if u were so smart or tough u wouldn't have to tell people! U are walking proof that common since ain't common! Toe to toe on your key board.
😁😁

Mr. Robinson: I didn't tell you how smart I was, you brought it up. I'm not gonna deny the truth though. Don't box with me, your arms are too short!

Appellant: Dude, at the very least you're not even entertaining! My arms are plenty long enough tough guy

(App. Exh. 2).

² Like many others who use social media, Appellant and Mr. Robinson are seldom troubled by grammar and spelling in their posts. For the sake of the reader and the Commission's sanity, the social media comments are reproduced in this opinion without the traditional "(sic)" to indicate a misspelling or syntax error in the original.

Appellant also repeated Mr. Robinson's comment "air and opportunity" but claimed that he did so because he found the original comment "comical." (Tr. at 101:22-102:3). At some point in time during the social media spat between Appellant and Mr. Robinson, Appellant posted the address of Engine House 15. (Tr. at 20:10-24). Appellant did not deny posting the address of Engine House 15 but suggested that his assignment – Engine House 15 – was "public knowledge." Captain Richard Condon, who supervised Appellant at all times relevant to the instant appeal, observed that there are three different platoons at thirty different fire stations in New Orleans, so it was unlikely that Mr. Robinson would have been able to find Appellant's assigned place or work or know that Appellant was on-duty during their online dispute. (*See tr.* at 32:22-25).

Because Appellant deleted some of his posts, some of Mr. Robinson's posts appear to be out of context. For example, at one point, presumably after Appellant posted the address of Engine House 15, Mr. Robinson directed the following lewd and offensive posts at Appellant:

Mr. Robinson: and don't be a pussy calling for back up, police or pulling out a gun
cause you definitely don't want this stress if you do.

Mr. Robinson: Trust me I know the firehouse. Know a whole lot of firefighters.
And that's why I said don't pussy out.

(App. Exh. 3).

Eventually, Mr. Robinson did show up at Engine House 15 and posted a message to Appellant, "hey sweetie I'm outside. Lets talk about that opportunity!" and then posted a picture of Engine House 15. (App. Exh. 2). When Appellant learned that Mr. Robinson had arrived at Engine House 15 he left the upstairs quarters and "ran" out of the front of the building. (Tr. at 13:4-7). Capt. Condon, who was on the phone with his wife at the time, observed Appellant come downstairs and rush outside. When he investigated Appellant's actions, he claimed he saw Appellant and Mr. Robinson "posturing and charging" towards one another. *Id.* at 14:2-15.

A. Gerhold
No. 8774

Appellant claimed that he viewed the situation as an “active shooter” scenario and left the Engine House based upon his understanding of the recommended protocol in such a scenario. *Id.* at 106:20-107:23. He then claimed that he felt his best chance to defend himself was to be outside rather than in the Engine House. Both Appellant and Capt. Condon testified that they asked fellow firefighters to call the police. NOPD eventually responded to Engine House 15 and separated Appellant and Mr. Robinson. After a brief discussion with those present, NOPD Officers determined that there was no cause to arrest anyone and characterized the matter as a “non-incident.” *Id.* at 21:23-22:9.

Capt. Condon claimed that he did not immediately report the confrontation between Appellant and Mr. Robinson up his chain of command because Appellant agreed to seek help through the Employee Assistance Program (referred to in the record as “EAP”). *Id.* at 23:10-21. NOFD did not initiate formal charges against Appellant for the October 11th incident until after Mr. Robinson filed a formal complaint. *Id.* at 23:22-24:4. Due to his failure to immediately report the incident, Capt. Condon faced allegations of misconduct as well. *Id.* at 24:4-5.

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,

A. Gerhold
No. 8774

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

As a preliminary matter, the Commission observes that the record is incomplete. Appellant admitted to deleting “embarrassing” posts and there are clearly portions of the on-line dispute missing. Nevertheless, the portions of the dispute in the record are embarrassing for both Mr. Robinson and Appellant. In fact, given the juvenile and antagonistic nature of Appellant’s posts, the Commission is greatly concerned with what would constitute a post so embarrassing as to warrant deletion in Appellant’s eyes.

After reviewing the evidence and testimony, the Commission finds that Mr. Robinson was the primary aggressor in the exchange. But such a finding does not let Appellant off the hook. Appellant’s posts represent a deliberate escalation of an on-line argument. His decision to post his current address was a clear provocation designed to call Mr. Robinson’s bluff regarding “air and opportunity.” It is possible, even likely, that Appellant doubted that Mr. Robinson would actually show up at Engine House 15. When Mr. Robinson arrived at Engine House 15, Appellant rushed downstairs to confront him. The Commission does not find Appellant’s claim that he was fleeing from Engine House 15 because he viewed the situation as an “active shooter” scenario to be

credible. Prior to providing testimony about an “active shooter,” Appellant stated that he prided himself on being a man, not a “Facebook tough guy” and confronting someone face to face. (Tr. at 102:4-15). Additionally, nothing in the record indicates that Appellant voiced an alleged concern about Mr. Robinson possibly being armed to any of his fellow firefighters or the NOPD officers who reported to the scene.

As a result of the foregoing, the Commission finds that Appellant’s actions on October 11th were insulting, abrasive, abusive, needlessly antagonistic, inappropriate, and in violation of NOFD rules. The Commission also finds that Appellant’s posting of his current location represented a provocation towards Mr. Robinson who was using threatening language. Further, the Commission finds that Mr. Robinson’s comment of “air and opportunity” was threatening in the context of his conversation with Appellant and Appellant’s decision to repost the comment was a reciprocal threat. Appellant may have genuinely believed he was standing up to Mr. Robinson, but that does not change the fact that he answered a threat with a threat. The Commission also notes that the record contains certain select postings from the exchange between Mr. Robinson and Appellant because Appellant deleted some embarrassing posts. Given the record before us, it is more likely than not that Appellant’s deleted posts contain further antagonistic and abrasive comments.

B. Impact on the NOFD’s Efficient Operations

Appellant deliberately provoked Mr. Robinson by posting Engine House 15 as Appellant’s current location. When Mr. Robinson acted upon Appellant’s provocation there was a brief but substantial disruption of the operations of Engine House 15. While Capt. Condon, Appellant and other firefighters were dealing with Mr. Robinson’s arrival, they were unable to respond to possible emergencies. While the disruption did not cause the firefighters at Engine House 15 to

miss a call for service, the fact that their availability was compromised did impact NOFD and the residents of New Orleans.

The gradually escalating aggression present in the posts between Appellant and Mr. Robinson cast both men in a negative light, but it was Appellant's goading of Mr. Robinson that was the primary disruption.

For the above stated reasons, the Commission finds that Appellant's actions on October 11, 2017 had an adverse impact on NOFD's efficient operations.

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.

NOFD has developed rules governing the conduct of firefighters and expect a "high standard" when it comes to firefighters' interactions with the public. Appellant agreed with the general proposition that it is appropriate to hold public servants to a higher standard of conduct than a typical employee in the private sector. Bearing that in mind, NOFD has an interest and responsibility to deter firefighters from acting in an unprofessional and confrontational manner when dealing with the public. Had Appellant not actively provoked Mr. Robinson through his on-line posts, it is unlikely that this matter would have ever seen the light of day. Unfortunately for Appellant and NOFD, an online argument devolved into a juvenile spitting contest between Appellant and Mr. Robinson. When Appellant escalated the dispute and posted his current location – Engine House 15 – he crossed the line into actionable misconduct. Generally, an appointing authority should refrain from policing an employee's social media posts. There are, however,

A. Gerhold
No. 8774

limited circumstances where an employee's on-line conduct impacts his/her ability to perform job duties in an effective and efficient manner.

V. CONCLUSION

Based upon the Commission's review of the record, we hereby DENY Appellant's appeal.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK.

SIGNATURES APPEAR ON THE FOLLOWING PAGE.

A. Gerhold
No. 8774

Judgment rendered this 30th day of January, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



BRITTNEY RICHARDSON, COMMISSIONER

1-15-2019
DATE

CONCUR



MICHELLE D. CRAIG, CHAIRPERSON

1/14/2019
DATE



STEPHEN CAPUTO, COMMISSIONER

1-18-2019
DATE