CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Wednesday, July 31, 2019

Mr. Percy Johnson

Re: **Percy Johnson VS.**
Department of Public Works
Docket Number: 8762

Dear Mr. Johnson:

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 - 7/31/2019 - 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,

Doddie K. Smith
Chief, Management Services Division

cc: Keith J. LaGrange, Jr.
Daniel T. Smith
Jay Ginsberg
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

PERCY JOHNSON, Appellant vs. DEPARTMENT OF PUBLIC WORKS, Appointing Authority.	DOCKET Nos.: 8762 c/w 8765

I. INTRODUCTION

Appellant, Percy Johnson, 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 New Orleans Department of public works, (hereinafter the "Appointing Authority" or "DPW") sought to dismiss this matter alleging that Appellant did not have a right to pursue an appeal. The employment action at issue is the DPW's denial to Appellant of certain overtime assignments. Via judgment that issued on September 6, 2018, the Commission denied the DPW's motion and found that the denial of overtime may constitute discipline if Appellant worked overtime assignments on a consistent basis. In issuing its decision, the Commission divided the instant appeal into two parts. The first part was to determine "the extent to which Appellant regularly and consistently worked overtime assignments in the twelve months preceding February 8, 2018." And, in the event that the record established that Appellant did regularly and consistently work overtime assignments during that period, the second part of the hearing would determine whether or not the

Appointing Authority had sufficient cause to prohibit Appellant from working overtime for the period of time in question.

A hearing examiner, appointed by the Commission, presided over a 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. For the reasons articulated below, we GRANT the appeal and the render the following judgment.

II. FACTUAL BACKGROUND

A. Appellant's Overtime Assignments

Appellant is an hourly employee for the DPW. During all times relevant to the instant appeal, Appellant worked in the DPW's sign shop located in the Maintenance Division of the DPW at 838 South Genois Street. (Tr. at 14:9-14). While working for the DPW's sign shop, Appellant was responsible for fabricating durable signs and notices directing residents and visitors regarding parking and traffic ordinances. Appellant was also responsible for putting the signs and notices in conspicuous places throughout the City. Due to Mardi Gras, concerts, local festivals or other events, Appellant and others in the sign shop may have very little time to fabricate and install signs. *Id.* at 14:1-15:5. Due to the nature of his job and unpredictable demands on the sign shop, Appellant worked a total of 1,924 regular hours and 1,025 hours of overtime in 2017. *Id.* at 12:15-13:10.

The sign shop supervisor, Darren Walker, was responsible for assigning sign shop personnel overtime. *Id.* at 30:18-31:4. Due to allegations of misconduct, the Mr. Walker prohibited Appellant from working any overtime assignments between February 7, 2018 and March 7, 2018. (DPW Exh. 6). The period of the overtime prohibition covered the 2018 Mardi

Gras Holiday, which represented the one of the sign shop's busiest time of year. (Tr. at 22:2-5). Further, had the prohibition not been in place, Appellant would have been assigned to work scheduled overtime. *Id.* at 21:19-22. The DPW's Human Resources representative acknowledged that the DPW's overtime prohibition had a significant "financial impact" upon Appellant. *Id.* at 22:6-8. For example, in February and March 2018, Appellant worked approximately nine hours of overtime. *Id.* at 34:18-25. Typically, members of DPW's sign-shop would work between 140 and 150 scheduled overtime hours during days leading up to Mardi Gras and the days immediately after. *Id.* at 62:6-25, 63:21-3, 65:1-4. According to one of Appellant's supervisors, the Mardi Gras season is a sign-shop employee's best opportunity to earn overtime. *Id.* at 66:22-67:1. Finally, employees in the sign shop are generally discouraged from **declining** overtime opportunities and have to opt out of overtime in writing in order to avoid working overtime; because of the urgency and timelines under which DPW often works during big events, employees are expected to work overtime. (DPW Exh. 4; Tr. at 79:16-24).

The Appointing Authority argues that Appellant still had the opportunity to work an equivalent amount of overtime in 2018 as he did in 2017. In support of this argument, the Appointing Authority noted that, as of October 30, 2018 Appellant had worked a total of 1,550 regular hours and 737 overtime hours and was on pace for about the same number of overtime hours as he worked in 2017. (Tr. at 17:23-18:8). The Appointing Authority also introduced a policy document that purported to inform DPW employees that overtime was not a guarantee. *Id.* at 36:12-23.

DPW's argument fails to take into account the uncontroverted testimony that employees in the sign shop were expected to work a significant amount of overtime each Mardi Gras season. By excluding Appellant from overtime opportunities, DPW imposed a severe economic sanction.

Based upon estimates provided by witnesses, Appellant would have worked more than 120 hours of overtime between February 7, 2018 and March 7, 2018. Interestingly, the ratio of Appellant's regular hours to overtime hours in 2017 was 1.88 regular hours for every 1 hour of overtime. At the time of the instant appeal hearing, in 2018, Appellant's ratio was 2.10 regular hours for every 1 hour of overtime. By adding in 100 hours of overtime Appellant would have worked during Mardi Gras 2018, the ratio would have been back to 1.85. This represents a significant financial sanction given that Appellant earned premium pay of 1.5x his regular hourly rate for all of his overtime hours.

Based upon the record before us the Commission finds that the deprivation of Appellant's overtime during the 2018 Mardi Gras season represented discipline. In fact, such deprivation constituted significant discipline since it was the equivalent of an unpaid suspension lasting 18.75 work days (or 3.5 weeks). Since the Commission has found that the deprivation of overtime was discipline, the undersigned will review the allegations that led to the discipline.

B. Alleged Misconduct

On February 7, 2018, Appellant received a verbal warning for knowingly giving his supervisor false information regarding whereabouts of his co-worker, Jacques Gleason. (DPW Exh. 6). Witnesses testified as to the facts that gave rise to the allegations against Appellant.

Donald Jones, the individual who delivered the warning, was a sign shop supervisor for DPW during all times relevant to the instant. (Tr. at 43:6-11, 44:2-10). On February 7, 2018, Mr. Jones supervised both Appellant and another sign shop employee, Jacques Gleason. *Id.* at 44:18-45:1. As a supervisor, Mr. Jones was responsible for issuing Appellant and Mr. Gleason assignment memos designating the area of the City in which they would operate. *Id.* at 45:25-46:8. Typically, Appellant and Mr. Gleason parked their personal vehicles at the DPW facility on

838 South Genois Street and then took a DPW vehicle out to the field to complete their assignments. On the afternoon of the 7th, Mr. Jones decided to check on the whereabouts of Appellant and Mr. Gleason after noticing that Mr. Gleason's personal vehicle was no longer parked at the DPW facility. *Id.* at 47:5-13. When Mr. Jones checked to ensure that Appellant and Mr. Gleason were in their assigned area on February 7th, he discovered that they were not. *Id.* at 47:2-3.

According to Mr. Jones, Appellant had been engaged in a pattern of behavior where he would drop Mr. Gleason off at the DPW facility, and Mr. Gleason would return to his residence thus avoiding work. *Id.* at 47:14-17. Mr. Jones directed Appellant to cease dropping Mr. Gleason off and Appellant allegedly refused Mr. Jones's direction. *Id.* at 47:17-20. After Appellant refused to comply, Mr. Jones claimed that he decided to use a GPS tracking device installed on Appellant's DPW vehicle to locate Appellant. When Mr. Jones used the GPS device to locate Appellant on February 7th, Appellant was alone. Mr. Jones testified that when he came upon Appellant, Appellant was "pulling into the back of a grocery store." *Id.* at 58:5-24. Mr. Jones offered contradictory testimony as to whether or not Appellant was in his assigned area. First, Mr. Jones admitted that he did not recall Appellant's specific assignment but indicated that such records are available. *Id.* at 45:2-8, 54:3-11. Later, Mr. Jones claimed that he did not believe that Appellant was in the right area based upon his work assignment. Mr. Jones asserted that Appellant wasted work time when he left his designated work sites in order to drop Mr. Gleason back at the DPW facility so that Mr. Gleason could leave.

During his interaction with Appellant on the 7th, Mr. Jones asked Appellant where Mr. Gleason was, and Appellant denied knowing. *Id.* at 48:1-3. Between ten and fifteen minutes later, Mr. Gleason reported back to the DPW facility and claimed that he was at lunch. *Id.* at 48:6-9.

Mr. Jones did not believe Mr. Gleason's claim was credible since Mr. Gleason was not with Appellant in the field. Mr. Jones testified that, between 1:45 and 2:20, Mr. Gleason should have been with Appellant in the DPW vehicle performing his daily responsibilities. *Id.* at 54:16-20. Mr. Jones alleged that, when Mr. Gleason left the DPW work site, Appellant should have notified supervisors at the sign shop. Appellant's failure to do so was allegedly misconduct.

Appellant testified that, when Mr. Jones located him on February 7, 2018, he was stopped at a local fast food restaurant having lunch. (Tr. at 87:20-23). Appellant further testified that when Mr. Jones asked where Mr. Gleason was, Appellant told him that Mr. Gleason was at lunch. *Id.* at 87:16-18. Appellant denied that either he or Mr. Gleason had shirked their responsibilities for the day and claimed that there were seven pages of instructions detailing Appellant's duties for the day in question. *Id.* at 88:20-89:1. After finishing about half of the assignments, Appellant claimed that he and Mr. Gleason took a lunch break. *Id.* at 88:20-89:1. Appellant also clarified that when Mr. Jones located him at lunch, he was a block away from his assigned work location. *Id.* at 89:25-90:17.

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

Mr. Jones's vague testimony regarding Appellant's assignments on the 7th contrasts with Appellant's unequivocal description of his duties. When discussing his work duties, Appellant testified that he had worked through four "work memos" during the first part of his shift and decided to take lunch. According to Appellant, his primary work area on the 7th was up and down Jackson Avenue. After completing several tasks, Appellant went to lunch at the Burger King restaurant located near the intersections of Fourth Street and Claiborne Avenue. The Commission takes judicial notice that there is 0.3 miles between Fourth Street and the intersection of Jackson Avenue and Claiborne Avenue and 2.3 miles from the same intersection to the DPW's maintenance division building located at 838 South Genois Street. Such short distances do not establish that Appellant had strayed from his assigned work area. Appellant's typical work day was 6:00 a.m. to 2:30 p.m. Such a schedule provides Appellant with a thirty-minute unpaid lunch break. The evidence establishes that it was possible for Appellant to drop off Mr. Gleason for lunch and then proceed to the Burger King on Claiborne Avenue near Fourth Street and still have approximately ten minutes to order and eat lunch.

When Mr. Jones and Mr. Walker asked Appellant where Mr. Gleason was, Appellant responded, "at lunch." Mr. Gleason then reported back to the sign shop about ten minutes later. The DPW argues that Appellant should have kept closer tabs on his work partner, but the Commission assumes that Appellant and Mr. Gleason, as hourly employees under civil service rules and the Fair Labor Standards Act, are free to leave the worksite and engage in non-work-related activities for a period of at least thirty minutes every work day. The DPW failed to introduce any evidence or policy that established that Appellant was required to have specific knowledge of where his co-workers spent their lunch breaks.

Based upon the record before us, the Commission makes the following findings of fact and law:

1. The DPW prohibited Appellant from working any overtime hours between February 7, 2018 and March 7, 2018. This period of time included the Mardi Gras holiday.

2. Appellant, and employees in his division, consistently work a great deal of mandatory and non-mandatory overtime assignments during the Mardi Gras season. In the absence of his overtime prohibition, Appellant would have likely worked more than 100 hours of overtime.

3. Prohibiting Appellant from working overtime during the 2018 Mardi Gras season constituted involuntary time away from work and was thus discipline according to Civil Service Rule IX, Section 1.1.

4. By denying Appellant the opportunity to work overtime, Mr. Walker issued Appellant discipline that was the equivalent of an 18.75-day suspension.

5. Appellant's work day is eight hours with a one-half-hour unpaid lunch break. During the time in question, there were no requirements as to the time of day that Appellant was allowed to take his lunch break.

6. On February 7, 2018, Appellant's work assignment was to install temporary signs on Jackson Avenue. When Appellant's supervisor located Appellant around 1:15 p.m. on February 7th, Appellant was approximately 0.3 miles from his assigned work site at a fast food restaurant. Appellant's work partner, Mr. Gleason, was not with Appellant during lunch on February 7th.

7. Appellant told his supervisor that Mr. Gleason was at lunch.

8. There is no policy that requires DPW employees to have specific knowledge of co-workers who are on lunch breaks.

9. When Appellant returned to the DPW's sign shop located at 838 South Genois Street, Mr. Gleason arrived approximately ten minutes later.

10. Appellant did not engage in misconduct when he failed to keep track of Mr. Gleason's whereabouts while Mr. Gleason was on a lunch break.

Even assuming that Appellant's failure to keep tabs on Mr. Gleason was misconduct, it certainly would not have warranted a suspension in excess of three weeks.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the Appellant's appeal. The Appointing Authority shall remit to Appellant the equivalent of 18.75 days of compensation in order to make him whole. The Appointing Authority shall also remove any reference to the alleged verbal warning from Appellant's personnel file.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 31st day of July, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

JOHN H. KORN, COMMISSIONER — DATE 7/29/19

CONCUR

BRITTNEY RICHARDSON, COMMISSIONER — DATE 7-23-2019

MICHELLE D. CRAIG, CHAIRPERSON — DATE 6/24/2018