CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Monday, November 13, 2017

Mr. Harry Mason

Re: **Harry Mason VS.**
Sewerage & Water Board
Docket Number: 8661

Dear Mr. Mason:

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 - 11/13/2017 - 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

Doddie K. Smith
Chief, Management Services Division

cc: Bruce H. Adams
James E. Thompson, III
Brendan M. Greene
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

HARRY MASON vs. SEWERAGE & WATER BOARD	DOCKET No.: 8661

I. INTRODUCTION

Appellant, Harry Mason, 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 Networks Maintenance Technician I for the S&WB and had permanent status as a classified employee.

On Wednesday, May 3, 2017, 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 render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

The S&WB suspended Appellant for five days effective March 6-10, 2017. (H.E. Exh. 1). The reason for Appellant's five-day suspension was his involvement in a "preventable accident." Specifically, the S&WB alleged that Appellant was involved in an automobile accident on August 24, 2016. The S&WB classified the cause of the accident as "unsafe backing." Under S&WB's Policy #60 (Accident Review Board), such an accident constituted a "Class II offense." The S&WB also alleged that Appellant had been involved in an earlier offense. As a result of Appellant's August 24th accident, and his prior offense, the S&WB's Accident Review Board (hereinafter "ARB") recommended that Appellant receive a five-day suspension.

B. August 24, 2016

The facts underlying the instant appeal are largely undisputed. On August 24, 2016, Appellant was hauling construction material to a S&WB work-site using a S&WB dump truck. At some point during the day, Appellant was backing up the truck when a chain dangling off of the rear of the truck struck a car causing minor damage. (Tr. at 14:10-19). Appellant immediately reported the accident to one of his supervisors who relocated to the accident scene. Per S&WB protocol, Appellant underwent a drug and alcohol screening, both of which came back negative.

The earlier event referenced in Appellant's disciplinary letter occurred on May 18, 2016. (S&WB 3). On that day, Appellant was operating a bobcat at the direction of one of his supervisors. The ground on which Appellant operated the bobcat was saturated, and in the process of excavating the site, the bobcat damaged a fence. Appellant did not believe that he was responsible for the damage to the fence because it should have been obvious to his supervisor that the ground was "too wet."

C. Policy #60

The S&WB promulgated Policy #60 and established a formal ARB on November 9, 2016. (S&WB Exh. 1). The purpose of the policy was to, "set forth the rules and guidelines of the [ARB] whereby vehicular and non-vehicular accidents will be reviewed and corrective action taken, in order to reduce accidents and associated costs, and improve safety." (S&WB Exh. 1). Prior to November 9, 2016, the S&WB had a general practice of reviewing accidents but did not have an explicit, written policy governing the type of corrective action employees faced if found responsible for an accident. (Tr. at 26:1-25).

Under Policy #60, a Class I accident is a preventable accident – for which the employee is partly or wholly responsible – that results in minor property damage and no personal injury. (S&WB Exh. 1). A Class II accident is similar to a Class I accident except that, in a Class II accident, there is severe property damage or serious injury. *Id.*

On February 14, 2017, the ARB convened to consider Appellant's accidents. The ARB deemed the May 2016 accident to be a Class I offense and issued Appellant a written warning and assigned him to a defensive driving course. (S&WB Exh. 3). The August 24, 2016 accident, however, was a Class II offense according to the ARB. (H.E. Exh. 1). And, because the ARB viewed the August 24th accident as Appellant's "second offense" it recommended that the S&WB suspend Appellant for five days. The Executive Director agreed with the recommendation and issued the five-day suspension.

The record does not contain any guidance as to why the ARB viewed the August 24th accident as a Class II offense. According to Policy #60, a Class II accident involves "severe property damage or serious injuries." Appellant testified that the damage to the resident's car was cosmetic and consisted of some scratches to the car's front bumper. The other complicating factor

to the August 24th accident is that there was no police report or other evidence introduced by the S&WB to establish that Appellant was actually responsible for the accident. Appellant's supervisor completed an accident report in which he stated that the black mustang damaged in the accident, "had the right of way," but this is hearsay evidence without corroboration. Appellant was the only witness who had actual knowledge of what happened on August 24th and claimed that he may have seen the car, but did not account for the chain hanging off the back of his truck and the chain scratched the car's bumper. (Tr. at 14:10-19). Thus, it is only Appellant's candid account of the accident that establishes anything resembling fault.

At the time of the accident, Appellant had been working for the S&WB since 2011. During his previous five years, he had not received any discipline or corrective action.

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

As a preliminary matter, the Commission finds that Policy #60 is inapplicable to Appellant's alleged misconduct because it was not in place at the time of either of his accidents. Further, the S&WB did not introduce any evidence that suggests an alternative policy was in place and enforced prior to November 2016. Therefore, the Commission is left with the allegation that Appellant was operating a S&WB vehicle when he caused a preventable accident. For his part, Appellant acknowledged that he saw the black mustang in his rearview mirror when he began backing up, but he evidently failed to account for a chain that was hanging off of the back of the truck. The resulting damage was very minor in nature and the resident who owned the car did not deem the damage severe enough to wait around for a police report.

As a result of the foregoing, the Commission finds that Appellant was responsible for a preventable accident that caused very minor damage to a resident's vehicle.

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

The S&WB has a duty and obligation to ensure that its employees operate vehicles and equipment in a safe and professional manner. Not only do such vehicles and equipment represent a substantial outlay of resources, they are often extremely large, powerful machines capable of causing serious damage. Yet, the damage at issue here consisted of superficial scratches to the front bumper of a black mustang.

The Commission also acknowledges that, as a result of the August 24th accident, Appellant's supervisor had to relocate to the accident scene instead of attending to his normal duties. This represented an inconvenience to the S&WB and the supervisor. Finally, pursuant to S&WB policy, Appellant had to undergo mandatory drug and alcohol testing. This took him away from his normal responsibilities.

As a result of the foregoing, the Commission finds that Appellant's misconduct did have a minor, negative impact on the S&WB'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.

Additionally, the Commission's authority to "hear and decide" disciplinary cases "includes the authority to modify (reduce) as well as to reverse or affirm a penalty." *Whitaker v. New Orleans Police Dept.*, 863 So.2d 572, 576 (La.App. 4 Cir. 9/17/03)(citing La. Const. art. X, § 12; *Branighan v. Department of Police,* 362 So.2d 1221, 1223 (La.App. 4 Cir.1978)); *Bankston v. Dep't of Fire*, 2009-1016 (La.App. 4 Cir. 11/18/09, 10), 26 So.3d 815, 822 (an appointing authority's failure to properly consider mitigating circumstances rendered a ninety-day suspension arbitrary and capricious). However, the authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. *Id.* The Commission does not exercise this authority lightly. Yet, in the matter now before us, there is insufficient cause to support a five-day suspension.

As we noted previously, the S&WB adopted Policy #60 three months after Appellant's August 24th accident. Appellant had no notice or training on the new policy prior to its implementation and any deterrent established by the penalty matrix contained within the policy had no impact on Appellant's conduct. But, even if Policy #60 was in place, the undersigned Commissioners struggle to find justification for the ARB's classification of Appellant's August 24th accident as a "Class II" offense since such an offense requires "severe" property damage or "serious injury." Even under the strictest of standards, the damage Appellant caused on August 24th does not appear to fall under the S&WB's own definition of a Class II offense. The training that the S&WB provides to employees may address the distinctions between offenses, but Appellant did not have the advantage of this training on August 24, 2016.

Finally, we agree with the hearing examiner that the progressive discipline theory evident in the S&WB's policy depends upon corrective action having an impact on an employee's conduct. Here, the S&WB did not issue Appellant any discipline or corrective action between May 2016 and August 2016. And, under Policy #60, warnings and defensive driving courses are intended to prevent further accidents and reinforce the importance of safe driving. Since the corrective action for the May accident did not issue until February 2017, such action cannot serve as an appropriate aggravating factor.

As a result of the foregoing, we find that a five-day suspension is not commensurate with Appellant's offense. Instead, we find a one-day suspension would be consistent with Appellant's misconduct.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS-IN-PART and DENIES-IN-PART the Appellant's appeal. While the undersigned find that Appellant

engaged in the misconduct, such misconduct had a limited impact on the S&WB's efficient operations. Furthermore, the policy under which the S&WB issued the five-day suspension was not in place at the time of Appellant's August 24, 2016 accident. Therefore, we Order the S&WB to restore to Appellant four days of back pay and all emoluments related thereto. Furthermore, the S&WB shall rescind any record of the five-day suspension identified in Hearing Examiner Exhibit 1 and replace it with a one-day suspension.

Finally, the Commission recognizes that the S&WB has an interest in establishing an Accident Review Board and a progressive discipline policy when it comes to the safe operation of S&WB equipment and vehicles. And, for such a policy to be effective, it must include deterrents, such as suspensions, demotions and dismissals. Moving forward, Appellant is hereby on notice that subsequent offenses within two years of this judgment shall constitute a "third offense" under the S&WB's penalty matrix and may result in further discipline up to and including termination.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 13th day of November, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

STEPHEN CAPUTO, COMMISSIONER — DATE 11-13-17

CONCUR

CLIFTON MOORE, JR., COMMISSIONER — DATE 11/13/17

MICHELLE CRAIG, CHAIRPERSON — DATE 11/13/2017