



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
CLIFTON J. MOORE, JR. VICE-
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BRITTNEY RICHARDSON
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LISA M. HUDSON
DIRECTOR OF PERSONNEL

Wednesday, July 31, 2019

Mr. Jason Miller

Re: **Jason Miller VS.
Sewerage & Water Board
Docket Number: 8846**

Dear Mr. Miller:

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,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Ghassan Korban
Ashley Ian Smith
Jay Ginsberg
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

JASON MILLER, Appellant, vs. SEWERAGE AND WATER BOARD, Appointing Authority.	DOCKET No.: 8846
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I. INTRODUCTION

Appellant, Jason Miller, 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 City of New Orleans, (hereinafter “S&WB” or “Appointing Authority) issued Appellant discipline in the form of a letter of reprimand.

At all times relevant to the instant appeal, Appellant served as a Pumping Plant Operator for the S&WB and had permanent status as a classified employee. A referee appointed by the Commission presided over one day of hearing. 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

The S&WB issued Appellant a letter of reprimand based upon an allegation that Appellant failed to timely complete an assignment. (H.E. Exh. 1). Specifically, the S&WB alleged that, on September 12, 2018, Appellant's supervisor, Kenneth McGuire, directed Appellant to remove grass and other vegetation from a fence. On the morning of September 13, 2018, Mr. McGuire noticed that the task had not been completed and reiterated the instruction. *Id.* Then, on September 14, 2018, Mr. McGuire discovered that the grass had not been removed. The S&WB asserts that Appellant's failure to complete the removal of the grass in a timely manner constituted insubordination. *Id.*

B. Insubordination Allegation

The Parties generally agreed upon the material facts underlying the instant appeal. The pumping station that served as the backdrop for Appellant's reprimand is Pumping Station #3 located near the intersection of North Broad Street and A P Tureaud Avenue. (Tr. at 8:9-14). The S&WB assigned personnel to staff Pumping Station #3 in three, eight-hour shifts, 7:00 a.m. – 3:00 p.m., 3:00 p.m. – 11:00 p.m., and 11:00 p.m. to 7:00 a.m. *Id.* at 12:20-13:3. Appellant worked on the 7:00-3:00 shift during the period of time relevant to the instant appeal.

As a Pumping Plant Operator, Appellant is/was responsible for the general operation and upkeep of Pumping Station #3 (including its grounds and equipment) during his shift as well as the training and supervision of any Utility Plant Worker assigned to the station. *Id.* at 13:18-14:6. On or about September 12, 2018, the S&WB's Drainage and Pumping Supervisor, Gerald Tilton, observed excessive grass and vegetation growing around a "cantenary screen" on the grounds of Pumping Station #3. The vegetation could have prevented equipment within the station from

operating properly and was generally unsightly. *Id.* at 18:19-19:14, 21:4-18. After observing the overgrown grass, Mr. Tilton contacted Kenneth McGuire, an Assistant Drainage Plant Supervisor responsible for Pumping Station #3, and asked that he arrange for the overgrown grass to be removed. *Id.* at 21:4-18. Mr. Tilton estimated that the task of removing the vegetation from around the screens would have taken about an hour. *Id.* at 34:10-15.

After receiving the instruction from Mr. Tilton to have the vegetation removed from Pumping Station #3, Mr. McGuire contacted Appellant and directed him to remove the grass. *Id.* at 37:22-38:1. Mr. McGuire gave Appellant the assignment at approximately 2:30 p.m. on September 12th, about a half-an-hour prior to the end of Appellant's shift. *Id.* at 38:1-7. Even though he had issued Appellant the instruction close to the end of the shift, Mr. McGuire expected Appellant to at least begin working on the removal of the grass on the 12th. *Id.* at 38:13-19. Mr. McGuire assumed that Appellant would give the assignment to Brandy George, the Utility Plant Worker assigned to Pumping Station #3. *Id.* at 38:24-39:6.

The following day, September 13th, Mr. McGuire went by Pumping Station #3 to drop off some supplies and noticed that the grass had not been removed. *Id.* at 39:17-21. Mr. McGuire spoke with Appellant about the grass and again directed him to have it removed. Appellant acknowledged Mr. McGuire's instruction and stated that he would do it. *Id.* at 41:5-9. Later that same day (approximately 3:00 p.m.) Mr. McGuire called Pumping Station #3 to check on the status of the grass removal. At that time, Appellant informed Mr. McGuire that the grass had not yet been removed and complained about having to complete the task when employees from other shifts should have done so. *Id.* at 43:3-44:5. On the morning of September 14th, Mr. McGuire again called Pumping Station #3 and spoke with Appellant regarding removal of the grass. Appellant stated that the grass had not been removed and that he did not intend on completing the assigned

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task. (H.E. Exh. 1; Tr. at 75:22-25). Appellant did eventually complete the grass removal on September 14th. (Tr. at 46:17-24).

On cross-examination, Mr. McGuire could not recall if September 12th was the first time he had instructed personnel at Pumping Station #3 to remove grass from equipment and/or grounds. Appellant introduced evidence a “log book entry” that Mr. McGuire issued an instruction to another pumping plant operator, Brian Iglus, regarding pulling grass off of a fence on September 6, 2012. (App. Exh. 2; Tr. at 53:25-54:14). In the log book entry for September 12, 2018, there is an indication that Ms. George did begin the assignment of grass removal at 2:35 p.m. (App. Exh. 3). However, Mr. McGuire could not see any significant change in the amount of grass on the screen/fence at Pumping Station #3 during his visit on September 13th and reissued his directive to have it all removed.

Appellant insisted that Mr. McGuire’s request was not fair and that other operators should have been responsible for the grass removal. Appellant noted that the operator on the second shift (3:00 p.m. – 11:00 p.m.) would have had ample opportunity to arrange for the removal of the grass but failed to do so. Appellant claimed that he informed the operator on the 3:00-11:00 shift that the grass had to be removed, but the second shift took no action. *Id.* at 88:17-89:4. Appellant also took issue with the manner in which Mr. McGuire spoke to him on September 13th when discussing the grass removal. According to Appellant, Mr. McGuire yelled at him about the grass and quickly left the facility. *Id.* at 81:24-82:8. Appellant gave a similar account of the phone call that occurred on the morning of September 14th when Mr. McGuire again checked on the status of the grass. *Id.* at 84:15-25.

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

For all relevant periods of time, Mr. McGuire was Appellant’s direct supervisor and had authority to issue Appellant directives related to the upkeep of Pumping Station #3. On September 12, 2018, Mr. McGuire issued Appellant an unambiguous instruction to remove vegetation from around fencing located on the station’s grounds. Appellant did not question Mr. McGuire about the nature of the instruction or indicate that he had any confusion about how to go about

accomplishing the task. Appellant did take steps to address Mr. McGuire's instructions by asking Ms. George, a Utility Plant Worker who reported to Appellant, to begin the grass removal. And, while Ms. George started the task, she did not complete it. When Mr. McGuire returned to Pumping Station #3 on September 13th, he was surprised and frustrated to see the grass still there. He again instructed Appellant to have it removed. Appellant was himself frustrated with the situation because he believed that personnel on the second shift (3:00-11:00) should have completed the work Ms. George had started.

On September 14th Appellant had still not completed a task that should have taken about an hour to complete. While the Commission recognizes that Appellant may have felt frustration that other personnel on other shifts did not take initiative with respect to the grass removal, the record establishes that Mr. McGuire gave the task to Appellant. It was thus Appellant's responsibility to ensure the task's completion.

Bearing the above in mind, the Commission finds that Appellant was insubordinate when he failed to ensure the prompt completion of an assignment given to him by a supervisor.

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

The S&WB asserted that any failure on the part of pumping plant operators to execute instructions from supervisors in a timely manner could adversely impact the operation of the pumping station. In the matter now before the Commission, Appellant's failure to ensure the prompt removal of vegetation around the pumping station could have impacted the station's operations. Additionally, the Commission notes that employees generally do not have discretion to ignore or otherwise disregard explicit directives issued by supervisors.

The Commission appreciates the fact that there were at least two other pumping plant operators who could have and should have taken the initiative to complete the removal of the

offending vegetation. Ultimately, however, it fell upon Appellant, as the original recipient of the instruction, to ensure prompt removal.

As a result of the foregoing, we find that Appellant's conduct had 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 *Staehle v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

A letter of reprimand represents the lowest level of discipline available to appointing authorities to address misconduct perpetrated by employees. In the matter now before the Commission, Appellant's repeated failure to ensure completion of an assignment explicitly given to him by a direct supervisor represented insubordination. While the Commission accepts Appellant's testimony that Mr. McGuire did not communicate in a respectful manner during subsequent interactions with Appellant, the undersigned also recognize that Mr. McGuire was rightly frustrated that Appellant had failed to complete a relatively simple task. Ultimately, Appellant bore the responsibility for completing the grass removal. While he could have delegated the task to other employees, as the plant operator, he should have ensured that the assigned task was complete.

Based upon the record before us, the Commission finds that a letter of reprimand was commensurate with Appellant's misconduct.


V. CONCLUSION

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

Judgment rendered this 31st day of July, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER


CLIFTON MOORE, Jr., VICE-CHAIRPERSON

7/29/19
DATE

CONCUR


JOHN H. KORN, COMMISSIONER

7/29/19
DATE


BRITTNEY RICHARDSON, COMMISSIONER

7-23-19
DATE