

CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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Monday, August 17, 2015

Mr. Clarence Roby
3701 Canal Street, Suite U
New Orleans, LA 70119

Re: **Jerome Alexander VS.
Department of Public Works
Docket Number: 7694**


Dear Mr. Roby:

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 - 8/17/2015 - 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 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: Mark D. Jernigan, P.E.
Victor Papai
Jay Ginsberg
Jerome Alexander

file

JEROME ALEXANDER

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF PUBLIC WORKS

NO. 7694

Jerome Alexander (“Appellant”) was at all relevant times employed by the Department of Public Works (“Appointing Authority”) as an Auto Facilities Specialist with permanent status. The Appellant received a five day suspension for (paraphrasing) allegedly violating the Appointing Authority’s internal regulations concerning maintaining standards of service, following orders, and operating tow equipment. The Appointing Authority found that the Appellant’s work performance was unsatisfactory on three separate occasions. Further, regarding the penalty, the Appointing Authority asserts in the disciplinary letter that the discipline is based on the suspension period on the Department of Public Works’ Progressive Discipline Policy.

The instances giving rise to the disciplinary action, as reflected in the disciplinary letter and summarized by the Hearing Officer, are: (1) that on Tuesday, September 15, 2009, it was discovered that the Appellant had failed to charge his Department issued cell phone and to notify his supervisor of said failure in direct violation of the Tow Unit’s daily operating procedures; (2) that on October 7, 2009, the Appellant, negligently operating his tow truck, caused, what is characterized as, major damage to the vehicle he was attempting to tow; and (3) that on October 20, 2009, the Appellant operated his tow truck in a reckless manner causing a citizen to jump out of the way to avoid being struck.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The testimony presented at the hearing was transcribed by a court reporter. The three

undersigned members of the Civil Service Commission have reviewed a copy of the transcript.

TESTIMONY OF ALFRED COLEMAN

Mr. Alfred Coleman was the overall field supervisor at the time, and therefore supervised the Appellant. Mr. Coleman testified that the Appointing Authority had had problems with the Appellant and his driving abilities in the past and had given him many warnings. Regarding the September 15, 2009 incident, Mr. Coleman testified that the Department has a policy where the Department issued cell phones, which at that time were used to put in all the information on the vehicle that they tow on the street and that also had GPS on them. Therefore, it was required of all drivers to make certain that their phones are charged when they arrive to work and, if there are any problems at all with the phone, they are to notify their supervisor before their tour of duty. The reason for this requirement, Mr. Coleman testified, is that the phones were used for transmission to communications dispatchers and to track each driver through GPS function. In essence, a driver could not function properly without the use of the cell phone. In this case the Appellant had already started his tour of duty without a properly charged cell phone and had not notified his supervisor that he had a problem with the cell phone, in direct violation of the Department's policy.

With regard to the October 7, 2009 incident it was uncontested that the Appellant caused damage to a vehicle by backing into it. Lastly, with regard to the October 20, 2009 incident, Mr. Coleman testified that a citizen was claiming that Mr. Alexander abruptly backed up to his vehicle, nearly striking him with the tow truck.

TESTIMONY OF ALTON JONES

Mr. Alton Jones was an Auto Facility Supervisor assigned to the tow yard on Claiborne Avenue. On September 15, 2009, Mr. Jones was in charge of making sure that all of the communication equipment in the Department functioned properly and was being maintained properly, including the cell phones and GPS system. On that particular day, Mr. Jones testified that he was looking at all of the officers and the field personnel, monitoring their whereabouts, seeing how all systems were working, and noticed that Mr. Alexander's phone was not tracking on that particular day. Mr. Jones testified that, upon further investigation, the Appellant admitted to him that he had not charged his phone as was required by Departmental policy. Further, Mr. Jones determined that the Appellant had failed to notify a supervisor that his phone was not sufficiently charged; also in direct violation of Departmental policy.

TESTIMONY OF DESMOND HENDERSON

Mr. Desmond Henderson was an Auto Facility Supervisor One. With regard to the October 7, 2009 incident, Mr. Henderson testified that when he came to work that day he was confronted with a citizen who wanted to make a damage claim for damage to his vehicle caused by the Appellant. Mr. Henderson testified that upon inspection of the citizen's car, he could see where the boom of the tow truck hit under the under carriage of the car. He testified that when he inquired about the incident with the Appellant, the Appellant admitted that when he backed up the tow truck, the street was uneven and that caused the boom to go up into the bumper of the citizen's car and damage it. Mr. Henderson testified that the citizen's bumper was cracked, behind the bumper was bent,

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and the metal behind the bumper was also bent. Mr. Henderson testified that it is important for a tow truck operator to assess whether the ground is even prior to backing up to the vehicle to be towed. Mr. Henderson testified that he approved the citizen's damage claim.

TESTIMONY OF JORGE HERNANDEZ

Mr. Jorge Hernandez, a management analyst, participated in the investigation of the October 20, 2009 incident. Mr. Hernandez testified that on October 26th, a citizen came in wanting to file a complaint against Mr. Alexander. Mr. Henderson testified that the citizen complained that the Appellant backed his tow truck in the direction of his vehicle in an erratic manner, giving the citizen the impression that the Appellant was going to strike him with the tow truck. The citizen did not testify for the Appointing Authority. Mr. Hernandez expressed that the citizen was trying to avoid paying for the tow, despite admitting that he was parked illegally.

TESTIMONY OF JEROME ALEXANDER

The Appellant does not dispute that his phone was not sufficiently charged on September 15, 2009. He also does not dispute that he failed to notify a supervisor of the problem, and that the policy mandated a suspension. With regard to the October 7, 2009 incident, the Appellant likewise does not dispute that he backed the boom of his tow truck into the vehicle to be towed, causing damage. Rather, he testified that upon backing the tow truck, he struck a hole in the ground that had been filled with water causing the boom to strike the bumper of the tow vehicle. Appellant testified that he did

in fact exit his vehicle and survey the landscape prior to backing his tow truck. Appellant further testified that he did not notice that the water was filling a hole.

Regarding the October 20, 2009 incident, the Appellant testified that he saw the vehicle in violation and wrote the citation. He testified that as he began to unfold the boom and lower the boom (hooking the vehicle up to the tow truck), the owner ran out of the store and jumped on the back of the tow truck as if trying to prevent him from towing the vehicle. The Appellant testified that, after he yelled at the citizen to get off of the boom, the citizen did in fact get off the boom, ran, and jumped inside of his vehicle. By this time the vehicle had already been secured. The Appellant testified that the incident was witnessed by two NOPD Officers who asked to see the citation and, after verifying it, told him to proceed with the tow. The Appellant was not cited by the NOPD for reckless operation, nor any other offense. The Appellant testified that at no time did the citizen inform the police officers of his allegation that the Appellant drove at him recklessly. The Appellant denies that he ever drove recklessly.

LEGAL PRECEPTS

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the Appointing Authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide, independently from the facts presented, whether the Appointing Authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters, v. Department of Police of New Orleans, supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The Appointing Authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The Appointing Authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

CONCLUSION

The Appointing Authority has established by a preponderance of the evidence that the Appellant failed to properly maintain his cell phone on September 15, 2009, or to notify his supervisor of said failure in violation of Departmental policy. The Appointing Authority also met its burden in establishing that the conduct alleged impaired the efficient operation of the Department. Likewise, the Appointing Authority has established by a preponderance of the evidence that the Appellant caused the accident on October 7, 2009, which resulted in damage to a citizen's car in violation of Departmental policy, which impaired the efficient operation of the Department.

However, the Appointing Authority failed to establish by a preponderance of the evidence that the Appellant drove recklessly or in any manner inappropriately on October 20, 2009.

Considering the foregoing, the Appellant's appeal is GRANTED IN PART AND DENIED IN PART for the reasons set forth above. This creates, however, a conundrum vis-à-vis the modification of the discipline rendered in this case. In addition to deciding whether the Appointing Authority had good or lawful cause for taking the disciplinary action, we have a duty to decide whether the punishment is commensurate with the offense. *Walters v. Department of Police of City of New Orleans*, 454 So.2d 106 (La.1984).

As the disciplinary letter and testimony established, this appeal arises out of three separate investigations that were consolidated, and which resulted in a total of a five day suspension. However, the Appointing Authority did not present evidence as to the breakdown of the five day suspension – namely, which of the five days for which the Appellant was suspended corresponded to each of the three enumerated violations. Nor did the Appointing Authority present evidence as to why the punishment was commensurate with each enumerated offense. The Appointing Authority presented no evidence regarding any penalty schedule maintained by the Department, nor any other evidence used for determining the appropriate penalty for each enumerated offense.¹ However, the Appointing Authority did present the testimony of Mr. Coleman and Mr. Allen who testified that pursuant to the policy governing the charging of cell phones, an

¹ While the Appointing Authority suggested in the disciplinary letter that the discipline imposed was based upon its Progressive Discipline Policy, it offered no evidence in this regard whatsoever.

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employee found in violation of said policy would face a one-day suspension. The Appellant stipulated to having full knowledge of this policy.

Accordingly, based upon the fact that the Appointing Authority was able to prove that the Appellant failed to charge his cell phone and report said failure to his supervisor; for which said failure, based upon undisputed testimony, was punishable by a one day suspension, and based further on the fact that there exists no record evidence upon which to determine the appropriateness of any other penalty, the Appointing Authority is ordered to return to the Appellant four days of back pay and emoluments of employment.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 17th DAY OF August, 2015.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION



TANIA TETLOW, COMMISSIONER

CONCUR:



MICHELLE D. CRAIG, CHAIRMAN



RONALD P. MCCLAIN, COMMISSIONER