CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Friday, April 01, 2016

Mr. Robinette Harris

Re: **Robinette Harris VS.**
Sewerage & Water Board
Docket Number: 8334

Dear Mr. Harris:

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 - 4/1/2016 - 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

Doddie K. Smith
Chief, Management Services Division

cc: Cedric S. Grant
Yolanda Grinstead
Victor Papai
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

ROBINETTE HARRIS vs. SEWERAGE AND WATER BOARD	DOCKET NO.: 8334

I. INTRODUCTION

Appellant, Robinette Harris, 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 Appellant was disciplined for sufficient cause. According to a letter issued to Appellant by the S&WB, Appellant's ten-day suspension was due to her violation of the S&WB's policy against workplace harassment. (S&WB Exh. 1). Specifically, the S&WB alleges that Appellant used social media to make "profanity laced comments against fellow employees." *Id.*

II. FACTUAL BACKGROUND

Appellant, a permanent employee in the classified service, has been with the S&WB for approximately six and a half years; at the time of the alleged events that led to her ten-day

suspension, Appellant was working as a meter reader. (Tr. at 12:21-25).[1] Appellant reported to Ms. Monique Chatters who is a meter-reading administrator who supervises approximately sixty-four other meter readers. Id. at 12:1-3, 29:11-19.

Appellant acknowledges that she maintains a Facebook account and regularly makes postings to that account. *Id.* at 14:22-23, 15:16-20. During the course of the instant appeal hearing, the S&WB introduced screen shots of Appellant's Facebook page. (Exhs. 2-3). While there was no timeline established by either Appellant of the S&WB, the Commission finds that Appellant made the Facebook postings in August of 2014. One of the postings is an animated character holding a fistful of what appear to be dollar bills; the caption of the photo reads "You see this shit?! This is what keeps me from swinging at bitches at my job." (Exh. 2). Appellant denies that the posting was in anyway connected to her job with the S&WB. However, one of the posts clearly reflects Appellant in her S&WB uniform. (S&WB Exh. 3).

There was no testimony regarding any inappropriate interactions that occurred at work between Appellant and any of her co-workers that preceded the alleged inappropriate postings. Furthermore, the S&WB called only one of Appellant's co-workers as a witness, Lakesha Stewart. During her testimony, Ms. Stewart first alleged that she felt threatened by Appellant's Facebook postings, (*id.* at 42:1-15) however, shortly thereafter, Ms. Stewart specifically denied feeling threatened and instead testified that she "wasn't comfortable" with the postings made by Appellant. *Id.* at 43-44. Appellant's supervisor, Ms. Chatters, testified that "several employees and the supervisors were expressing their concerns about feeling threatened by [Appellant's] posts." *Id.* at 35:22-24. Ms. Chatters testimony represents hearsay, and while such testimony

[1] The S&WB did not introduce any evidence that Appellant had any prior discipline on her record. Furthermore, there was no testimony that the ten-day suspension at issue in the instant appeal was progressive in nature or that prior discipline was an aggravating factor warranting a higher level of discipline.

may be admissible at an appeal hearing if the Commission finds that it is competent evidence,[2] Ms. Chatters failed to identify any employees by name and did not provide any detail as to what these employees said about Appellant's post. Instead, Ms. Chatters made only general comments as to what others told her they were feeling. The S&WB had every opportunity to call these other employees and supervisors and instead chose only to call Ms. Stewart who testified that she was "concerned" about Appellant's posts.

III. POSITION OF PARTIES

A. Appointing Authority

The S&WB argued that there was sufficient cause to discipline Appellant under Rule IX, §1.1 because Appellant violated the S&WB's "Work Place Harassment Policy by utilizing social media to make profanity laced comments against fellow employees." (S&WB Exh. 7). Due to the nature and severity of Appellant's conduct, the S&WB argues that a ten-day suspension is appropriate.

B. Appellant

Appellant represented herself during the hearing and claimed that her Facebook posts were not directed at her co-workers but rather were general comments of frustration. Further, Appellant states that she had a few glasses of wine prior to her early Sunday morning post and that the post was just her "talking to herself." *Id.* at 22:7-14.

IV. STANDARD

It is well-settled that, in an appeal before the Commission, an appointing authority has the burden of proving, by a preponderance of the evidence: 1) the occurrence of the complained of

[2] The Louisiana Fourth Circuit Court of Appeals has ruled "that hearsay evidence may be admitted in administrative hearings if it is competent evidence." *Honore' v. Dep't of Pub. Works*, 2014-0986 (La.App. 4 Cir. 10/29/15, 13); 178 So.3d 1120, 1129 (citing *Diggs v. Dept. of Police,* 12–1276, p. 7 (La.App. 4 Cir. 4/24/13), 115 So.3d 1150, 1154).

activity, and 2) that the conduct complained of impaired the efficiency of the public service. *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, we 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 Commission's analysis is a three-pronged one with the appointing authority bearing the burden of proof for each prong.

V. ANALYSIS

A. The Complained of Activity

There is no dispute that Appellant's Facebook posts in the record contain inappropriate language. Furthermore, Appellant's posts contain images of her wearing her S&WB uniform. While Appellant claims that her posts were not targeted at her coworkers, the Commission finds that at least one of her co-workers was a "friend" on Facebook and could thus see the posts made by Appellant. Furthermore, while the Commission fully agrees with Appellant that being a mother is in fact a job – a very rewarding and at times trying one – we find that the post referencing Appellant's job was in fact a reference to her job with the S&WB. However, the Commission is unable to find that Appellant violated the S&WB "workplace harassment policy" because that policy was not introduced into evidence during the course of the appeal hearing. Furthermore, the S&WB did not produce any evidence or testimony showing that Appellant was aware of such a policy never mind the level of discipline one could expect for a violation of that policy.

The Commission finds that Appellant was aware that coworkers had access to her posts and that she posted a picture of herself wearing a S&WB uniform. At most, Appellant engaged in inappropriate, off-duty activity on her social media account. Thus, the S&WB proved, by a preponderance of the evidence, that Appellant engaged in misconduct, but did not show that Appellant's conduct violated any S&WB policy. *See Royal v. Sewerage & Water Bd.*, 2013-1528 (La.App. 4 Cir. 4/30/14, 5); 139 So.3d 1039, 1042 (the La. Fourth Circuit Court of Appeal declined to consider S&WB policies because those policies were not introduced during the appeal hearing).[3]

B. Did Appellant's Misconduct Impair the Efficiency of the S&WB?

To be sure, the Commission recognizes the impact of workplace violence, and employers have a responsibility to take seriously all instances of threatening behavior, even those perpetrated in social media. However, those employers also have the responsibility of educating employees on what behavior is acceptable and what behavior will carry with it serious discipline. During the course of the hearing, the S&WB did not introduce any evidence as to the Workplace Harassment Policy or any training employees received in connection with that policy. Nevertheless, the Commission accepts Ms. Chatters that Appellant's conduct was disruptive and resulted in several employees and supervisors expressing concerns. However, because those employees and supervisors did not testify, the extent of the disruption is not clear.

[3] The matter of *Tugwell v. Plaquemines Par. Gov't*, 2014-0657 (La.App. 4 Cir. 11/19/14, 3); 154 So.3d 695, serves as a useful guidepost as to what an appointing authority must show when issuing discipline based upon an alleged work policy violation. In *Tugwell*, the appointing authority alleged an employee violated a policy regarding preventable accidents and suspended that employee for five days. *Id.* at 698. During the appeal hearing, the appointing authority introduced the policy itself along with a form, signed by the appellant, in which the appellant acknowledges receiving the policy. The policy established a five-day suspension for first time violations. *Id.* The appointing authority went so far as to introduce testimony from its human resource manager explaining why the appointing authority adopted the policy in the first place. In matter now before this Commission, there is no such evidence or testimony.

C. Appellant's Discipline was not Commensurate with her Offense

Since the Appointing Authority has established that Appellant engaged in misconduct and that such misconduct compromised the efficient operation of the Department (albeit in a limited manner), the Commission now turns to whether or not a ten-day suspension is the appropriate level of discipline for such misconduct. In conducting its analysis, the Commission must determine if the Appellants' termination 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).

As noted above, the S&WB satisfied the first two parts of the three-part test for discipline under a civil service system but not to the extent necessary to sustain a ten-day suspension. Based upon the record, Appellant did not have any prior discipline and was not aware that postings on social media could lead to a substantial level of discipline. Furthermore, other than employees expressing concerns regarding the posts, no evidence or testimony shows that Appellant engaged in on-duty misconduct. Therefore, the Commission does not find that a ten-day suspension is commensurate with the misconduct perpetrated by Appellant. Appellant's discipline his hereby modified so as to reflect a one-day suspension. *See Clark v. Dep't of Police*, 2012-1274 (La.App. 4 Cir. 2/20/13, 4); 155 So.3d 531, 534 *writ denied,* 2013-0642 (La. 4/26/13); 112 So.3d 846 (the Commission has the authority to modify a penalty where there is insufficient cause for imposing the greater penalty); *see also Chinh Nguyen v. Dep't of Police*, 2011-0570 (La.App. 4 Cir. 8/31/11, 8); 72 So.3d 939.

D. Back pay and Resignation

Following the S&WB's investigation in to the allegations against Appellant, Appellant resigned; she did so of her own volition and no member of the S&WB pressured her to resign. Tr. at 13:13-14:1. However, the notice informing Appellant that she was to return to work was never received by Appellant because Appellant was evicted from the residence to which the S&WB sent the notice. In addition to the letter, Ms. Chatters attempted to contact Appellant to let her know that she needed to report to work on September 4, 2014. But, Ms. Chatters was unable to reach Appellant. *Id.* at 38:1-39:25. It is an employee's responsibility to keep an appointing authority updated as to his/her correct address and contact information. This is especially true when a disciplinary act is pending. Here, Appellant should have been in regular contact with the S&WB and informed her supervisors of any change in Appellant's contact information. Therefore, Appellant's request for restoration of pay for September 4 through September 18, 2014 is denied.

V. CONCLUSION

Upon considering the testimony and evidence submitted in connection with the instant appeal, the Commission finds that there was insufficient cause to discipline Appellant for ten days since the Appointing Authority did not establish that Appellant violated S&WB policy. However, the Commission finds that there was sufficient cause to issue Appellant a one-day suspension for using social media to direct inappropriate and unprofessional comments towards co-workers. Therefore, the appeal is DENIED INPART and GRANTED in part. The Appellant's ten-day suspension shall be reduced to a one-day suspension. Appellant's personnel record shall reflect this modification and S&WB shall restore to Appellant all back pay and emoluments related to those nine days.

Judgment rendered this 23rd day of March, 2016

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

Tania Tetlow
TANIA TETLOW

3/22/16
DATE

CONCUR

MICHELLE D. CRAIG, CHAIRPERSON

3/30/16
DATE

Joseph S. Clark
JOSEPH S. CLARK, COMMISSIONER

3/30/16
DATE