CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Friday, January 5, 2018

Mr. Jonathan Morgan

Re: **Jonathan Morgan VS.**
Sewerage & Water Board
Docket Number: 8676

Dear Mr. Morgan:

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 - 1/5/2018 - 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: Bruce H. Adams
James E. Thompson, III
Jay Ginsberg
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

JONATHAN MORGAN vs. SEWERAGE & WATER BOARD	DOCKET No.: 8676

I. INTRODUCTION

Appellant, Jonathan Morgan, 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 Senior Maintenance Technician II for the S&WB and had permanent status as a classified employee.

On Thursday, July 6, 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 two days effective April 3-4, 2017. (H.E. Exh. 1). The reason for Appellant's two-day suspension was his involvement in a "preventable accident." Specifically, the S&WB alleged that Appellant was involved in an automobile accident on August 10, 2016. The S&WB classified the cause of the accident as "driving an unsafe vehicle." Under S&WB's Policy #60 (Accident Review Board), such an accident constituted a "Class II offense." The S&WB indicated that the S&WB's Accident Review Board (hereinafter "ARB") convened on February 14, 2017 to consider the circumstances regarding Appellant's accident. Upon consideration, the ARB recommended that Appellant receive a two-day suspension and attend mandatory defensive driving training. Then-Executive Director Cedric Grant agreed with the recommendation and issued the suspension notice.

B. August 10, 2016

Ironically, at the time of the underlying accident Appellant's responsibilities included traveling around the City of New Orleans in response to accidents involving S&WB vehicles. (Tr. at 7:20-8:5). In the course and scope of conducting his duties, Appellant operated a S&WB vehicle. *Id.* at 8:11-14. On August 10th, Appellant was traveling through the intersection of Tchopitoulas and Race Streets when he made contact with a vehicle in front of him. *Id.* at 10:7-23. After making contact with the vehicle, Appellant pulled over to the side of the road to inspect possible damage to the vehicles with the other driver. According to Appellant, there was no damage to either vehicle. *Id.* at 14:17-20.

Soon after the accident occurred, Appellant called NOPD to report the accident and an NOPD Officer eventually arrived at the scene. The Officer prepared a report regarding the accident

and the hearing examiner accepted the report into evidence as "S&WB Exh. 1." In his report, the Officer opined that Appellant (referred to in the report as "Driver of Vehicle #1") was responsible for the accident. However, the Officer did not issue Appellant a citation because "the vehicle [was] a city owned vehicle through [the] Sewerage and Water Board of New Orleans." (S&WB Exh. 1). The Officer also notes that "no one received any injuries in the above crash." *Id.*

On the morning of August 10, 2017, Appellant brought his assigned S&WB vehicle to the S&WB's mechanic shop due to a concern he had regarding the vehicles brakes. A S&WB mechanic inspected the vehicle, even going so far as to take it for a test drive, and determined that while the brakes were "spongy" the vehicle was "okay to drive." *Id.* at 15:14-24. Ronald Doucette, the S&WB's Deputy Director for Security, testified that, Appellant's knowledge of the "spongy" brakes served as an aggravating factor in the ARB's decision to recommend a two-day suspension. *Id.* at 30:1-14.

C. Policy #60

The S&WB promulgated Policy #60 and established a formal ARB on November 9, 2016. (S&WB Exh. 4). 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." *Id.* According to Mr. Doucette, with Policy #60, the S&WB was "trying to establish a process for review of automobile accidents involving Sewerage and Water Board vehicle, which had been somewhat neglected in the past. (Tr. at 27:6-9).

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.*

The Commission notes that there is nothing in the record to indicate that Appellant has received any prior discipline.

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 his accident. 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 an unsafe S&WB vehicle when he caused a preventable accident.

For his part, Appellant acknowledged that he made contact with the vehicle in front of him and does not seriously contest that he was at fault for the contact. The road conditions were less than ideal on August 10th and it is not clear whether Appellant was speeding or simply not paying close enough attention to his surroundings. Nevertheless, Appellant "bumped" into the vehicle in front of him. To the extent that this "bump" constitutes an accident, the Commission finds that Appellant was responsible for it.

The Commission respectfully disagrees with Mr. Doucette that Appellant's desire to have the vehicle inspected prior to operating it on August 10th serves as an aggravating factor warranting stronger discipline. If anything, it shows that Appellant was concerned enough about the vehicle to have a mechanic inspect it. According to Appellant, the S&WB's own mechanic indicated that the vehicle was safe to drive. Given that there was no attempt on the S&WB's part to rebut Appellant's version of events, the Commission finds Appellant's account credible. Therefore, the S&WB failed to establish that Appellant knowingly operated an unsafe vehicle.

As a result of the foregoing, the Commission finds that Appellant was responsible for a very minor preventable accident that did not cause any property damage or personal injury.

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, there was no damage or injury in the matter now before us.

The Commission also acknowledges that, as a result of the August 10th accident, Appellant's supervisor had to remain at the accident scene instead of attending to his normal duties. This represented an inconvenience to the S&WB and Appellant. Finally, pursuant to S&WB policy, Appellant likely had to undergo mandatory drug and alcohol testing. This would have taken 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 two-day suspension.

Appellant received a two-day suspension based upon a policy that did not exist at the time of his underlying misconduct. The facts of the instant appeal follow closely with an earlier appeal decided by Commission's in *Mason v. Sewerage & Water Board*, C.S. No. 8661 (November 13, 2017). In Mason, an employee received a five-day suspension for the second of two accidents that occurred prior to the S&WB's adoption of Policy #60. As a result, we found, as we do here, that employees had no notice or training on the S&WB's new accident review policy prior to the policy's implementation. We also observed that any deterrent established by the penalty matrix contained within the policy had no impact on employee conduct prior to implementation.

But, even if Policy #60 was in place, the undersigned Commissioners struggle to find justification for the ARB's classification of Appellant's August 10th accident as a "Class II" offense since such an offense requires "severe" property damage or "serious injury." Mr. Doucette himself acknowledged that a Class II accident must involve property damage or personal injury. Yet, neither of these elements were present on August 10th. The S&WB did not contest Appellant's claim that there was no damage to either vehicle involved in the accident, and the police report confirms that no one suffered any injuries, let alone a "serious" one. As we observed in the *Mason* case, the training that the S&WB provides to employees on Policy #60 may address the distinctions between offenses, but Appellant did not have the advantage of such training prior to August 10, 2016.

As a result of the foregoing, we find that a two-day suspension is not commensurate with Appellant's offense. Instead, we find a written reprimand and referral to defensive driving training 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 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 two-day suspension was not in place at the time of Appellant's August 10, 2016 accident. Therefore, we Order the S&WB to restore to Appellant all back pay and all emoluments related to the two-day suspension identified in "Hearing Examiner Exhibit 1." We further Order that the S&WB remove any reference to the two-day suspension and replace it with a written reprimand.

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 "second 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 5th day of January, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Ronald L. McClain

RONALD McCLAIN, VICE-CHAIRPERSON — DATE 1/2/18

CONCUR

Tania Tetlow

TANIA TETLOW, COMMISSIONER — DATE 1/3/18

MICHELLE CRAIG, CHAIRPERSON — DATE 1/3/2018