



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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DIRECTOR OF PERSONNEL

Thursday, February 1, 2024

Mr. Louis Robein
2540 Severn Avenue, Suite 400
Metairie, LA 70002

Re: **Gregory Englerth VS.
Department of Fire
Docket Number: 9462**

Dear Mr. Robein:

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 - 2/1/2024 - 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, 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: Roman Nelson
Max V. Camp
Imtiaz A. Siddiqui
Gregory Englerth

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**GREGORY ENGLERTH,
Appellant**

Docket No. 9462

v.

**DEPARTMENT OF FIRE,
Appointing Authority**

DECISION

Appellant, Firefighter Gregory Englerth, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from the New Orleans Fire Department's May 1, 2023, imposition of a three-hour suspension. (Ex. HE-1). At all relevant times, Appellant had permanent status as a Firefighter. (Ex. HE-1; Tr. at 7). A Hearing Examiner, appointed by the Commission, presided over a hearing on July 14, 2023. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the parties' post-hearing briefs, the Hearing Examiner's report dated January 5, 2024, and controlling Louisiana law.

For the reasons set forth below, Firefighter Englerth's appeal is DENIED.

I. FACTUAL BACKGROUND

Firefighter Englerth was absent from work for two 24-hour tours beginning on February 28, 2023, and March 3, 2023, because of sickness. (Tr. at 8). He called in sick in accordance with NOFD policy. (Tr. at 17-18). Firefighter Englerth was also absent for the next tour beginning

March 6 because of scheduled annual leave. (Tr. at 15, 32). Therefore, Firefighter Englerth was absent from February 28 to March 9, missing three 24-hour tours of duty.

NOFD Standard Operating Procedure ADM-31-22-SOP requires a doctor's note when operations personnel are absent for more than one tour. (Ex. NOFD-1 at § 8.3.2(b); Tr. at 35). This policy also states that one indicator of sick leave abuse is use of sick leave in combination with scheduled leave. (Ex. NOFD-1 at § 5.2.1(a)). ADM-31-22-SOP requires that the documentation "specifically verify the reason, cause, or type of illness." (Ex. NOFD-1 at § 4.3).

When Firefighter Englerth returned to work on March 9, 2023 (or thereafter), he submitted documentation from a nurse practitioner reflecting that he was treated on February 28, 2023, at Southstar Urgent Care in Slidell, but the note failed to disclose the nature of the illness or injury. (Ex. NOFD-2; Tr. at 20, 26). The note reads that Firefighter Englerth is "Off work, and may return to work on 3-3-23." (Ex. NOFD-2; Tr. at 26). Firefighter Englerth testified that when he had not recovered by March 3, he scheduled a March 5 virtual visit with Optum Virtual Care (scheduled through the City's health insurer). (Ex. NOFD-3; Tr. at 30, 132). This note Firefighter Englerth provided to his superior documented the virtual office visit and stated that he could return to work on March 6. (Ex. NOFD-3). The note from the March 5 visit also did not disclose the nature of the illness or injury. (Ex. NOFD-3). NOFD approved the sick leave, and Firefighter Englerth received full pay for both 24-hour tours. (Ex. NOFD-6; Tr. at 54).

District Chief Mike Salvaggio had a counseling session with Firefighter Englerth on March 9, instructing him to provide appropriate documentation of his sick leave. (Ex. NOFD-4). When Firefighter Englerth failed to provide documentation of the nature of his illness or injury, NOFD began disciplinary proceedings on March 15, 2023, ultimately imposing a three-hour suspension on May 1, 2023. (Ex. NOFD-5; Ex. HE-1).

II. ANALYSIS

A. Legal Standard for Commission's Review of Discipline

“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep't*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep't of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.* “Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.” *Id.* “It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094).

1. The Appointing Authority must show the discipline was commensurate with the infraction

The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for disciplining the classified employee and, if so,

whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep't*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984). The appointing authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

B. The Department of Fire Has Carried Its Burden of Showing Cause for the Discipline of Firefighter Englerth

The Department of Fire has shown the occurrence of the complained-of activity. Firefighter Englerth failed to provide a doctor’s note reflecting the nature of his illness, even when he was given extra time to supply the note. Firefighter Englerth violated NOFD ADM-31-22-SOP by failing to supply appropriate documentation of his use of sick leave.

Firefighter Englerth’s violation of NOFD ADM-31-22-SOP impairs the efficient operation of NOFD. Superintendent of Fire Roman Nelson testified that the purpose of this policy is to curb sick leave abuse and to ensure a firefighter is cleared to return to work. (Tr. at 92-93). Superintendent Nelson also testified that the requirement that the medical provider inform NOFD of the nature of the illness is an alternative to requiring the firefighter to have a doctor sign an NOFD form clearing a firefighter to return to work. (Tr. at 97). Superintendent Nelson explained the importance of return to work documentation: “Firefighters have a drastically different job. They have a dangerous job that requires physical fitness and mental fitness.” (Tr. at 113).

The federal Fifth Circuit Court of Appeals held in 2015 that the Shreveport Police Department's requirement that an officer furnish or verify the nature of the illness or injury that caused the officer's absence did not violate the Rehabilitation Act's prohibition against disability discrimination. *Taylor v. City of Shreveport*, 798 F.3d 276, 284 (5th Cir. 2015). In its discussion of the constitutional claims based on the home confinement policy, the Fifth Circuit recognized that "[a] 'police department, as a paramilitary organization, must be given considerably more latitude in its decisions regarding discipline and personnel management than the ordinary government employer.'" *Id.* at 280 (quoting *Crain v. Bd. of Police Comm'rs of the Metro. Police Dep't of the City of St. Louis*, 920 F.2d 1402, 1409 (8th Cir.1990)).

1. The penalty imposed by the Department of Fire is commensurate with the violation

The three-hour suspension, the presumptive penalty for a violation of RR-1, concerning familiarity and compliance with NOFD policies, is commensurate with the violation. Notably, a three-hour suspension is a less severe financial penalty than a denial of sick leave for the tours of duty. (Tr. at 54).

C. NOFD did not Issue a Written Reprimand to Firefighter Englerth

Firefighter Englerth asserts that Chief Salvaggio's counseling constituted a letter of reprimand. Firefighter Englerth further argued that NOFD disciplined him twice for the same conduct and failed to comply with the Firefighter Bill of Rights when issuing this discipline. *See* Appellant's Post-Hearing Brief. Firefighter Englerth's May 15, 2023, appeal refers only to a suspension, so, even if the counseling rose to the level of a written reprimand, Firefighter Englerth failed to appeal the counseling timely.

The counseling form does not constitute a written reprimand. Civil Service Rule I(43) defines a letter of reprimand as a document that is “kept in a centralized personnel file to be referred to as needed.” Civil Service Rule I(43) also states that “[t]his characteristic distinguishes it from other documentation, such as a documentation of oral counseling , which is not kept centrally.”

Superintendent Nelson testified that the purpose of Chief Salvaggio’s counseling of Firefighter Englerth was to document the instruction to turn in compliant paperwork. (Tr. at 102). More importantly, Superintendent Nelson did not rely on the counseling form when imposing discipline, suggesting that the document was not placed in Firefighter Englerth’s personnel file.

Further, the document is titled “Documentation of Employee Counseling,” and requires a “reason(s) for the counseling session.” (Ex. NOFD-4). Chief Salvaggio stated: “Turning in improper documentation to return to duty from Sick Leave. Sick Leave did not provide the nature of illness from his attending physician.” (Ex. NOFD-4). In the blank for “Suggestions for improvement,” Chief Salvaggio stated, “Provide proper documentation when returning to work.” (Ex. NOFD-4). The contents of the form reflect that Chief Salvaggio simply prepared a written record of an oral counseling, unlike the situation in *McCormick v. New Orleans Public Library*, No. 8821 (Civil Service Commission 7/2/20),¹ in which the Commission ruled that a “Notification of Written Warning” constituted a letter of reprimand where the supervisor stated that “Any additional violations . . . will be cause for immediate further disciplinary action.”

Based on all these circumstances, the March 9, 2023, counseling session does not constitute a written reprimand.

Firefighter Elglert’s appeal is DENIED.

¹ Available publicly online at nola.gov/getattachment/bbef58fc-9ae8-402a-8557-cc545de41154/Zuri-McCormick-vs-NOPL-8821/

New Orleans, Louisiana, this the 1st day of February, 2024.

WRITER:


Brittney Richardson (Jan 31, 2024 13:20 CST)
BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:


J H Korn (Jan 30, 2024 20:37 CST)
JOHN KORN, VICE-CHAIRPERSON


Ruth Davis (Jan 29, 2024 14:42 CST)
RUTH DAVIS, COMMISSIONER