



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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CITY CIVIL SERVICE COMMISSION

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RONALD P. McCLAIN, VICE-  
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STEPHEN CAPUTO  
CLIFTON J. MOORE, JR.

LATOYA CANTRELL  
MAYOR

Wednesday, October 3, 2018

LISA M. HUDSON  
DIRECTOR OF PERSONNEL

Ms. Charmaine Smith

Re: **Charmaine Smith VS.  
Department of Police  
Docket Number: 8760**

Dear Ms. Smith:

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 - 10/3/2018 - 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,

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

Doddie K. Smith  
Chief, Management Services Division

cc: Michael S. Harrison  
Stephanie Dovalina  
Jay Ginsberg  
file

**CIVIL SERVICE COMMISSION**  
**CITY OF NEW ORLEANS**

CHARMAINE SMITH, Appellant,  vs.  DEPARTMENT OF POLICE, Appointing Authority.	DOCKET No.: 8760
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**I. INTRODUCTION**

Appellant, Charmaine Smith, 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 Police Department for City of New Orleans, (hereinafter “NOPD”) issued Appellant discipline in the form of a twenty-day suspension. Appellant did not bring forth any procedural challenges.

A referee appointed by the Commission presided over one day of hearing on April 5, 2018. 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-IN-PART and GRANT-IN-PART the appeal and render the following judgment.

## II. FACTUAL BACKGROUND

### A. Alleged Misconduct

NOPD alleged that Appellant violated the following rule on four occasions:

- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source; to wit, NOPD Policy 1014.2 Sick Leave/Employee Responsibilities.

(H.E. Exh. 1).

NOPD Policy 1014.2 provides that:

Sick leave may be used for absences caused by illness, injury, temporary disability, including pregnancy and maternity [leave], or for medical, dental or vision exams or medical treatment of the employee.

Sick leave is not considered vacation. Abuse of sick leave shall result in disciplinary actions. Employees on sick leave shall not engage in secondary employment, outside employment, other police-related activities, with the exception of mandatory court appearances, or participate in any sport, hobby, recreational or other activity that may impede recovery from the injury or illness.

*Id.*

NOPD alleged that Appellant violated the above-cited rule on May 8, 2016, May 25, 2016, July 18, 2016 and August 6, 2016. *Id.* On each of these occasions, Appellant allegedly called in sick but worked at another job as a security guard. *Id.*

### B. Appellant's Sick Leave Usage

By and large, the Parties agree on the material facts in this appeal. Appellant began working for NOPD in April of 2015. (NOPD Exh. 7 at p. 3 of 10). Her initial assignment was as a member of the now-defunct "NOLA Patrol" program. *Id.* While working with NOLA Patrol, Appellant reported to NOPD personnel in the Eighth District and received very little guidance on NOPD policies governing the use of leave. (Tr. at 74:17-75:13). The majority of her training

within NOLA Patrol was how to interact with the French Quarter's homeless population and when to issue parking citations. *Id.*

In May 2016, NOPD wound down the NOLA Patrol program and provided those who worked in the program with an opportunity to apply for other positions within the City. Appellant took advantage of this offer and obtained a position as a Police Technician I within NOPD's crime lab. (Tr. at 68:22-69:7). As part of her duties as a Technician in the Crime Lab, Appellant "processed" crime scenes. This included work in the field consisting of operating a vehicle, collecting evidence, taking photographs, and retrieving firearms. *Id.* at 46:16-47:13. Appellant began training for her job as a Technician on or about June 2016. As part of her training, Appellant received a copy of NOPD's policies, including the above-cited sick leave policy. *Id.* at 47:21-48:17.

Appellant acknowledged that she called in sick on the days alleged in the disciplinary notice and further admitted that, after she had called in sick, she worked as a security guard for her second employer Frain Services. (Tr. at 73:15-24).<sup>1</sup> Appellant explained that there was very little training or supervision of "specialists" who worked within NOLA Patrol and she never received guidance on the process for using annual versus sick leave. *Id.* at 30:18-31:15. The confusion grew as NOPD phased out the NOLA Patrol program and Appellant's direct supervisor transferred to another NOPD Division. *Id.* Appellant did not challenge the underlying facts that led to her discipline, but asserted that NOPD was holding her accountable for rules and policies that were not adequately explained to her. *Id.* at 79:2-25.

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<sup>1</sup> Appellant also told NOPD investigators that her job as a Crime Lab Technician was more physically demanding than her security job – which allowed her to sit and monitor security camera footage. *Id.* at 37:1-38:20.

### 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

Appellant admitted to the conduct alleged in the disciplinary notice. She waived a “pre-disposition” conference with NOPD investigators and proceeded directly to the penalty stage of NOPD’s disciplinary process. (Tr. at 19:16-20:3). Both the testimony and exhibits establish Appellant’s violation.

Based upon the foregoing, the undersigned Commissioners find that Appellant engaged in the alleged misconduct.

**B. Impact on NOPD's Efficient Operations**

Sick leave is a valuable benefit available to employees who are too ill to report to work. Abuse of such a benefit undermines an employer's ability to assign personnel and fully staff various operations. This is especially true for an organization like NOPD which already suffers from severe understaffing. Further, Appellant's absences interrupted her training schedule and reduced her availability to render assistance to other Technicians charged with processing crime scenes.

As a result of the foregoing, we find that Appellant's conduct had an adverse impact on the efficient operations of NOPD.

**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).

NOPD has established that Appellant's training as a Crime Lab Technician involved a review of all NOPD policies, including the sick leave policy. This policy unambiguously prohibits employees from working secondary employment while on sick leave. Prior to her time at NOPD's Crime Lab, however, Appellant received very little, if any, training regarding the proper protocols for reporting absences or requesting leave. Appellant was the only witness to testify as to the apparently lax enforcement of NOPD's policies at NOLA Patrol.

The hearing examiner found Appellant to be an earnest and candid witness who was frustrated that NOPD had seemingly changed the rules without adequate notice or training. Though it had ample notice of Appellant's claims regarding NOLA Patrol's *laisse faire* approach to sick leave, NOPD did not seek to challenge or otherwise contradict Appellant's testimony. Therefore, the Commission accepts Appellant's representations regarding her time at NOLA Patrol.

Since NOPD issued Appellant discipline in connection with her use of sick leave, there have not been any further instances of sick leave abuse. In fact, NOPD relied upon Appellant to train ten newly-hired technicians. The Commission finds that Appellant's subsequent conformity to the sick leave policy, combined with the lack of supervision and training while Appellant was a "specialist" at NOLA Patrol, serves as a significant mitigating factor.

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.* As we have stated in the past, the Commission does not exercise this authority lightly. Yet, in the matter now before us, Appellant has presented mitigating factors that warrant a lesser penalty.

We agree with the hearing examiner that Appellant's move from NOLA Patrol to NOPD's Crime Lab constituted a "very different job" with very different standards of performance. The

Crime Lab is a vital element of the investigative branch of NOPD and the employees who staff the Lab must perform at a very high level. Appellant's transition was a difficult one, but that does not excuse her conduct once assigned to the Crime Lab. If she had questions regarding the use of sick leave, she should have consulted with a supervisor.

The general lack of training, guidance and supervision Appellant received while with NOLA Patrol militates against serious discipline for her sick leave usage in May 2016. But once Appellant began working at the Crime Lab, she should have realized she was in a very different situation and leaned on her trainers and supervisors for guidance. Therefore, the Commission finds that NOPD did not abuse its discretion when it suspended Appellant ten days for violating the sick leave policy in July and August of 2016. The ten days related to the period of time Appellant was with NOLA patrol however failed to take into account mitigating circumstances.

## **V. CONCLUSION**

As a result of the above findings of fact and law, the Commission hereby DENIES-IN-PART and GRANTS-IN-PART Appellant's appeal. NOPD had good cause to issue Appellant the ten-day suspension related to Appellant's sick leave abuse on July 18, 2016 and August 6, 2016. The undersigned Commissioners do not find that NOPD had good cause to issue discipline associated with Appellant sick leave usage on May 8, 2016 or May 25, 2016 while Appellant was assigned to NOLA Patrol. NOPD shall remit to Appellant all back pay and emoluments related to the ten-day suspension tied with the May 2016 dates.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.



C. Smith  
No. 8760

Judgment rendered this 3<sup>rd</sup> day of October, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

  
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RONALD M. McCLAIN, VICE-CHAIRPERSON

10-1-18  
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DATE

CONCUR  
  
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CLIFTON MOORE, Jr., COMMISSIONER

10/1/18  
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STEPHEN CAPUTO, COMMISSIONER

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