



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
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LISA M. HUDSON
DIRECTOR OF PERSONNEL

LATOYA CANTRELL
MAYOR

Wednesday, August 28, 2019

Mr. Eric Hessler
PANO 2802 Tulane Avenue #102
New Orleans, LA 70119

Re: **Christopher Durning VS.
Department of Police
Docket Number: 8837**

Dear Mr. Hessler:

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 - 8/28/2019 - 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: Shaun Ferguson
William R. H. Goforth
Jay Ginsberg
Christopher Durning

file



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Wednesday, August 28, 2019

Mr. Eric Hessler
PANO 2802 Tulane Avenue #102
New Orleans, LA 70119

Re: **Christopher Durning VS.
Department of Police
Docket Number: 8875**

Dear Mr. Hessler:

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 - 8/28/2019 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

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Doddie K. Smith
Chief, Management Services Division

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Christopher Durning

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

<p>CHRISTOPHER DURNING, Appellant,</p> <p>vs.</p> <p>DEPARTMENT OF POLICE, Appointing Authority.</p>	<p>DOCKET Nos.: 8837 & 8875</p>
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I. INTRODUCTION

Appellant, Christopher Durning, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1 and asks the Commission to find that the Police Department for the City of New Orleans (hereinafter “NOPD”) did not have sufficient cause to discipline him. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

A referee, appointed by the Commission, presided over one day of hearing during which both Parties had an opportunity to call witnesses and present evidence. The referee prepared a report and recommendation based upon the testimony and evidence in the record. 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 placed Appellant on an unpaid, emergency suspension and subsequently terminated Appellant based upon an allegation that Appellant reported to work on August 14, 2018 under the influence of alcohol. (H.E. Exhs. 1, 2). According to NOPD, Appellant's alleged misconduct violated NOPD Rule 3: Professional Conduct; Paragraph 8, Use of Alcohol on Duty. For sake of clarity, the Commission reproduces the relevant portion of the rule below:

Members shall not drink intoxicating beverages while on duty except in the performance of duty and while acting under proper and specific orders from a superior officer. Members shall not appear for duty, or be on duty, while under the influence of intoxicants to any degree whatsoever, or with an odor of intoxicants on their breath.

NOPD further alleged that Appellant's actions constituted a violation of CAO Policy Memorandum 89 – applicable to NOPD personnel through NOPD Rule 4, Paragraph 4 – regarding use of alcohol while on duty. CAO Policy Memorandum 89 provides that, “[a]n employee or others whose blood alcohol level (BAC) is at or over 0.04% during work time or while operating City vehicles/equipment is in violation of the Substance Abuse Policy.”

B. August 14, 2018

The material facts relating to the instant appeal are not in dispute. Once a year, during the month of an officer's birthday, NOPD officers must participate in firearm training. Appellant, who had been with NOPD for eleven years at the time of his termination, had scheduled firearm training and/or recertification scheduled for August 14, 2018, the day after his birthday. On the evening of August 13th (Appellant's birthday) Appellant watched a recorded ball game on his home television while drinking three to four fingers of vodka and “about five or six beers.” (Tr. at 105:1-9). Appellant went to bed at some point after 8:00 p.m. and woke up around 3:30 a.m. on

August 14th in order to make the one-hour trip to the Camp Villere¹ shooting range where his firearm training/recertification occurred. *Id.* at 105:13-19. Appellant testified that he did not feel impaired in any way and did not believe he was intoxicated when he arrived at Camp Villere for his firearm training. *Id.* at 105:22-106:4.

When he arrived at Camp Villere, Appellant met range supervisors Sheila Matthews and Joel Tallant. *Id.* at 107:24-108:8. Neither Sgt. Matthews nor Mr. Tallant indicated that they had concerns regarding Appellant's suitability to participate in the firearm training. In fact, Sgt. Matthews asked Appellant to proceed down range and affix a target to be used in the training. *Id.* at 108:16-109:3. Appellant then participated in the firearm training and fired his service weapon several times along with approximately twenty-five other NOPD personnel. NOPD did not alleged that there were any issues or concerns with the manner in which Appellant completed his firearm training.

Sergeant Wayne Jacque, a twenty-four-year veteran of NOPD, was on duty on August 14, 2018 and assigned to handle any "after-hours" allegations of officer misconduct. *Id.* at 34:13-20, 35:11-18. At approximately 6:00 a.m., Sgt. Jacque received a phone call from Detective Carl Thibodeaux during which Det. Thibodeaux expressed a concern that Appellant had reported to firearm training under the influence of alcohol. *Id.* at 35:19-23. Det. Thibodeaux's concern was based upon a smell of alcohol he detected on Appellant's breath. *Id.* at 37:8-12. Sgt. Jacque instructed Det. Thibodeaux to confiscate Appellant's firearm and transport Appellant to Innovative Risk Management on Canal Street for a "reasonable suspicion" substance abuse test. *Id.* at 35:24-

¹ NOPD does not currently have an active shooting range and uses space leased from the Louisiana National Guard for firearm training and certification. Camp Villere is a National Guard facility located in Slidell, Louisiana.

36:7. The City of New Orleans contracts with Innovative Risk Management Services (hereinafter “Innovative”) to provide “after-hours” substance abuse screening. *Id.* at 7:16-8:10.

Due to traffic, Sgt. Jacque did not arrive at Innovative’s Canal Street offices until approximately 8:00 a.m. When he arrived, Sgt. Jacque escorted Appellant into the offices and completed necessary paperwork in order to have Innovative’s staff administer a breathalyzer exam to Appellant. Sgt. Jacque stated that, when he encountered Appellant on the morning of the 14th, Appellant did not appear to be impaired and did not exhibit any sign of intoxication. *Id.* at 53:11-15. The Commission observes that, in Sgt. Jacques long career with NOPD, he has received training on how to interact with intoxicated individuals and has a great deal of practical, on-the-job experience with intoxicated individuals. *See id.* at 52:21-25, 53:7-10. Sgt. Jacque testified that Neither Sgt. Matthews nor Sgt. Thibodeaux (both experienced NOPD personnel) observed Appellant exhibiting any outward signs of intoxication aside from the odor of alcohol on Appellant’s breath. *Id.* at 54:3-55:18.

Anthony Jones, the director of Innovative, testified that he reviewed the testing documentation related to the breathalyzer tests administered to Appellant and that the documentation established that the test administration adhered to Innovative’s standards. *Id.* at 13-17, 22:14-18. The documentation showed that Innovative employee Sharon Jones,² administered Appellant two breathalyzer tests. (NOPD Exh. 2; Tr. at 16:13-23). The first test, administered at 7:59 a.m. on August 14, 2018 indicated that Appellant’s BAC was 0.063%. (NOPD Exh. 2). The second test, administered at 8:23 a.m., indicated Appellant’s BAC was 0.058%. *Id.* An intervening calibration test established that the apparatus used to administer the BAC was activating properly and there was no residue present that would impact test results.

² Ms. Jones possesses certifications in the administration of Blood Alcohol Tests. (Tr. at 16:21-23).

(NOPD Exh. 2; 16:24-17:11). Mr. Jones also confirmed that Innovative staff performed a calibration verification test on the equipment used for Appellant's BAC test and the results confirmed that the equipment was operating properly. (Tr. at 24:13-22, 28:10-21).

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 Misconduct

An NOPD employee violates the rule regarding the use of alcohol when he/she reports to his/her assignment under the influence of alcohol "to any degree whatsoever" and/or with the odor

of intoxicants on his/her breath. Appellant does not dispute that he consumed the equivalent of 8-10 alcoholic drinks on the evening before his firearm training. This volume of alcoholic beverages, coupled with the fact that at least two NOPD supervisors smelled alcohol on Appellant's breath establish that Appellant violated the second provision of NOPD's policy regarding the use of alcohol on duty. The results from breathalyzer further confirm that Appellant's BAC exceeded the maximum threshold established by City policy for employees operating city-owned vehicles. While the Commission accepts that Appellant's BAC was below the legal limit for the purposes of operating a motor vehicle, he was nevertheless under the influence of alcohol while on duty as defined by City policy. The Commission also finds that the fact that Appellant did not display any outward signs of intoxication, other than the smell of alcohol on his breath, does not serve alter the Commission's conclusion as to the underlying misconduct.

Based upon the record, the Commission finds that NOPD has established Appellant reported to work under the influence of alcohol and with the smell of alcohol on his breath.

B. Negative Impact on the Appointing Authority's Efficient Operations

It should go without saying that any police officer who reports to work under the influence of alcohol endangers him/herself, his/her co-workers and the general public. Police officers occupy a position of trust and authority and have the power to deprive individuals of their liberty and, in the most extreme circumstances, their lives. Due to the outsized role police officers play in the community, it is reasonable and necessary to hold them to very high standards of conduct. Mandating that officers refrain from drinking alcohol to the extent that it impairs their actions, judgement or reflexes is a common-sense rule promulgated by NOPD.

The primary impact of Appellant's actions was to expose the City, NOPD, and coworkers to an unacceptable level of risk. Appellant's irresponsible behavior ran counter to the high

expectations NOPD and New Orleans residents have for police officers. It is of no moment that Appellant did not believe he was under the influence of alcohol. On the evening before an early morning training session, Appellant consumed what any reasonable adult would view as a great deal of alcohol. He then failed to recognize the fact that he not only smelled of alcohol, but was reporting to work with too much alcohol in his system.

The Commission finds that NOPD has established that Appellant's actions had an adverse impact on NOPD's efficient operations.

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); *see also*, *Clark v. Dep't of Police*, 2018-0399 (La.App. 4 Cir. 10/10/18, 7); 257 So.3d 744, 749.

Deputy Superintendent Noel testified that the "presumptive" penalty for a first-time violation of NOPD's rule regarding the use of alcohol at work is an eighty-day suspension. Per NOPD's own penalty matrix, in order to vary from the presumptive penalty, NOPD must establish aggravating or mitigating circumstances. The Commission has observed in the past that it is not necessarily bound by an appointing authority's penalty matrix, but the existence of a published document that establishes levels of discipline for specific offenses puts employees on notice of consequences for misconduct. Such a penalty matrix also militates against arguments of arbitrary penalties provided that NOPD applies the matrix in a consistent manner.

In the matter now before the Commission, NOPD decided to depart from the presumptive penalty pertaining to the rule violation at issue and progress all the way to termination. NOPD's primary argument was that Appellant's participation in firearm training, during which he discharged his firearm (at an inanimate target in a controlled environment) served as an aggravating factor that warranted termination. The Commission does not disagree that Appellant's participation in firearm training was a troubling element in this case, and the undersigned do not necessarily disagree that it could serve as an aggravating fact. At the same time, however, because NOPD strayed from the presumptive penalty, the Commission must determine if there are any mitigating factors at play. We find that there are.

First, none of the NOPD supervisors with whom Appellant interacted on August 14th witnessed Appellant displaying any outward signs of impairment. These supervisors had extensive experience within NOPD and were trained to recognize and interact with intoxicated personnel. Yet, there was no evidence that Appellant's motor skills were compromised, no evidence that he was slurring his speech, and no evidence that the alcohol he consumed the night before had any impact on Appellant's cognitive abilities. The only outward sign of possible intoxication was the smell of alcohol on Appellant's breath. Secondly, Appellant did not interact with any members of the public on August 14th and did not execute any police powers. This may have been the result of quick acting supervisors, but such quick action does not change the fact that Appellant did not present as intoxicated to any member of the public. Finally, Appellant was below the legal limit of BAC for the purposes of operating a vehicle while intoxicated under Louisiana law. The Commission makes this observation, not to endorse Appellant's conduct, but to emphasize that the degree to which Appellant was under the influence was relatively low based upon his BAC only.

The Commission notes that the above-mentioned mitigating factors do not excuse Appellant's actions. He engaged in extraordinarily risky behavior that NOPD has gone to great lengths to discourage. The Commission finds that NOPD's presumptive penalty of an eighty-day unpaid suspension represents a severe form of discipline that is commensurate with the offence the rule seeks to deter. Had Appellant damaged NOPD or private property, interacted with a member of the general public while intoxicated, executed a police power while intoxicated or had a BAC level that exceeded 0.08%, NOPD's decision to terminate may have been appropriate.

Given the facts of the case before us, however, the undersigned Commissioners find that NOPD failed to establish sufficient aggravating factors to justify straying so far from the presumptive penalty established by the penalty matrix. Appellant was an eleven-year veteran of NOPD with no prior discipline related to the use of alcohol or drugs while on duty. Therefore, we find that termination was not commensurate with Appellant's misconduct and was therefore arbitrary and capricious.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS-IN-PART and DENIES-IN-PART the appeal. As a result of the Commission's finding that termination was not commensurate with Appellant's misconduct, NOPD shall reinstate Appellant with backpay and emoluments. The Commission's backpay and emolument award, however, shall be reflect an eighty-day, unpaid suspension. NOPD shall revised Appellant's disciplinary forms to reflect an eighty-day suspension and shall remove all reference to termination (in both Appellant's long and short form).

Additionally, the Commission has held in previous decisions that an unpaid emergency suspension imposed prior to the end of an investigation into misconduct allegedly perpetrated by

C. Durning
Nos. 8837 & 8875

a law enforcement officer is an absolute nullity pursuant to Louisiana Revised Statute 40:2531. Therefore, NOPD shall remit to Appellant all back pay and emoluments related to his unpaid emergency suspension.

Finally, the one-day suspension related to Appellant's violation of CAO policy memorandum 89 shall remain in place.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

C. Durning
Nos. 8837 & 8875

Judgment rendered this 28th day of August, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

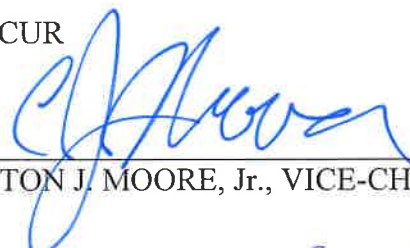


JOHN H. KORN, COMMISSIONER

8/27/19

DATE

CONCUR



CLIFTON J. MOORE, Jr., VICE-CHAIRPERSON

8/27/19

DATE



BRITTNEY RICHARDSON, COMMISSIONER

8-27-19

DATE