



MITCHELL J. LANDRIEU  
MAYOR

# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
SUITE 900 – 1340 POYDRAS ST.  
NEW ORLEANS LA 70112  
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON  
RONALD P. MCCLAIN, VICE-  
CHAIRPERSON

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LISA M. HUDSON  
DIRECTOR OF PERSONNEL

Wednesday, January 25, 2017

Mr. Eric Hessler  
PANO 2802 Tulane Avenue #101  
New Orleans, LA 70119

Re: **Roy Caballero VS.  
Department of Police  
Docket Number: 8255**

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 - 1/25/2017 - 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 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: Michael S. Harrison  
Shawn Lindsay  
Victor Papai  
Roy Caballero

file

CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS

ROY CABALLERO

vs.

DEPARTMENT OF POLICE

DOCKET NO.: 8255

### I. INTRODUCTION

Appellant, Roy Caballero, 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") 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.

NOPD suspended Appellant for a total of forty-three (43) days after finding Appellant violated the following NOPD rules:

- 1) Rule 2: Moral Conduct ¶ 1 – Adherence to Law to wit: Louisiana Revised Statute 14:98, operating a vehicle while intoxicated (30-day suspension);
- 2) Rule 2: Moral Conduct ¶ 1 – Adherence to Law to wit: Louisiana Revised Statute 14:99, reckless operation of a motor vehicle (10-day suspension);
- 3) Violation of NOPD Rule 3: Professional Conduct ¶ 1 – Professionalism (3-day suspension).

(H.E. Exh. 1).

### II. FACTUAL BACKGROUND

At the time of the alleged incident, Appellant was a Police Officer with permanent status. On May 1, 2008, Appellant was visiting a friend for dinner. (Tr. at 53:4-7). During the course of the evening, Appellant consumed a "few" drinks, watched some movies at his friend's house and

fell asleep. *Id.* at 52:22-53:7. At approximately 2:40 a.m., Appellant woke up and decided to drive back to his home on the North Shore across the Lake Pontchartrain Causeway Bridge. *Id.* at 53:8-13.

While Appellant was driving across the bridge, he claims that he fell asleep, struck a Causeway Police cruiser that was in pursuit of another vehicle and then crashed into the side of the Causeway guard wall. *Id.* at 53:22-54:3. The Causeway Police cruiser was traveling at a speed in excess of the limit established for the Causeway Bridge because it was in pursuit of a speeding car. *Id.* at 41:18-24. Further, at the time of the impact, the Causeway Police cruiser did not have its siren or emergency lights on. *Id.* at 40:7-10. As a result of the impact, Appellant claims that he struck his head on something which rendered him unconscious. *Id.* at 54:3-5. An ambulance was dispatched to the accident scene but Appellant declined transportation to the hospital because he “owed the hospital money already.” *Id.* at 54:19-21.

Because a Causeway Police vehicle was involved in the accident, the Causeway Police Officer called the State Police to the scene. *Id.* at 41:6-8. State Police Trooper Byron Porter arrived on scene at approximately 3:26 a.m., approximately fifteen (15) minutes after the accident had occurred. *Id.* at 43:1-16. Trooper Porter observed that Appellant had bloodshot eyes, “somewhat slurred” speech, poor balance and a strong odor of alcohol on his breath. *Id.* at 38:21-24. In response to a question by Trooper Porter, Appellant confirmed that he had “a few” alcoholic beverages during the course of the evening. *Id.* at 38:25-39:3. Upon making these observations and hearing Appellant’s statement, Trooper Porter administered a field sobriety test to Appellant. Based upon the results of the field sobriety test, Trooper Porter cited Appellant for DWI and improper lane use. *Id.* at 39:7-14. In the course of administering the field sobriety test to Appellant, Trooper Porter asked Appellant whether or not Appellant had suffered any type of

injury. *Id.* at 48:4-8. Appellant responded that he was not injured. (Tr. at 48:10-13; NOPD Exh. 2).

In connection with the citations issued to him by Trooper Porter, Appellant appeared in the First Parish Court of Jefferson Parish where he pled guilty to a violation of La. R.S. 14:99 and the Parish District Attorney chose to drop the charge related to La. R.S. 14:98. *Id.* at 51:15-22.

### **III. POSITION OF PARTIES**

#### ***A. Appointing Authority***

NOPD asserts that, while the Jefferson Parish District Attorney chose to dismiss the DWI charge against Appellant, the standard of proof in a criminal case is far higher than for an administrative hearing like the one now before the Commission. Through the evidence and testimony presented during the course of the appeal hearing, NOPD argues that it has shown that it was more likely than not that Appellant was operating his vehicle under the influence of alcohol when he was involved in an accident on May 1, 2008. Further, evidence of his conviction for reckless operation of a motor vehicle is ample evidence of Appellant's second rule violation. Finally, NOPD contends that Appellant's actions on May 1, 2008 violate NOPD's rule requiring Officers to comport themselves in a professional manner.

#### ***B. Appellant***

Appellant argues that the impaired behavior Trooper Porter observed and attributed to alcohol was actually caused by an injury Appellant sustained to his head following the accident. Thus, it is Appellant's position that NOPD has failed to establish that he was operating his vehicle under the influence of alcohol on May 1, 2011. Appellant does not appear to contest the fact that his guilty plea for reckless operation of a motor vehicle represents a violation of NOPD's rule against violating the law. However, Appellant does challenge whether or not a ten-day suspension

is warranted for such a violation. Additionally, Appellant challenges the three-day suspension issued for an alleged violation of NOPD's rule regarding professionalism.

#### IV. STANDARD

##### ***A. General Standard and Burden of Proof***

No person who has gained permanent status in the classified service shall be subjected to disciplinary action except for cause expressed in writing. La. Con. Art. X, § 8(A). And, it is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A), 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. *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 three-pronged with the appointing authority bearing the burden of proof for each prong.

##### ***B. Standard When Appellant is Accused of Violating a Law***

An additional consideration that the Commission must address is whether or not an allegation that an Appellant violated a criminal statute – and thus violated NOPD rules – changes NOPD's standard of proof. Put simply, the Commission must answer the question, do NOPD's allegations that Appellant violated La. R.S. 14:99 and 14:98 change the standard from “preponderance” to “beyond a reasonable doubt”? We find that it does not.

In *Bailey v. Dep't of Pub. Safety & Corr.*, 2005-2474 (La.App. 1 Cir. 12/6/06, 10); 951 So.2d 234, 240, Mr. Bailey, a sergeant in the Louisiana State Police, was arrested for violation of La. R.S. 14:98 (operating a vehicle while intoxicated) and 32:58 (careless operation of a vehicle). Mr. Bailey was eventually acquitted of the criminal charges but the appointing authority terminated him for, among other things, violating Louisiana State Police rules and regulations that prohibit employees from breaking the law. *Id.* at 239. Mr. Bailey appealed his termination to the Louisiana State Police Commission.<sup>1</sup> In his appeal, Mr. Bailey argued that, because his termination was based upon an allegation that he committed a criminal act, and he was subsequently acquitted of that criminal act, his termination is invalid. *Id.* The State Police Commission rejected this argument and found that:

[U]nlike a criminal proceeding in which the state must prove beyond a reasonable doubt all the elements of the charged crime, the appointing authority in an administrative proceeding need only prove by a preponderance of the evidence that the complained of action occurred and that it impaired the efficient operation of the public service.

*Id.* (citing *Walters v. Department of Police of New Orleans*, 454 So.2d 106, 113 (La.1984)). The State Police Commission went on to find that the appointing authority had sufficient cause to terminate Mr. Bailey's employment. *Id.* The First Circuit affirmed the State Police Commission's decision and noted with approval that the State Police Commission recognized that it was "not their role to determine whether Mr. Bailey was guilty or innocent as to the *crime* of driving while intoxicated and that [Mr. Bailey's] acquittal, for whatever reason, by the Court in Calcasieu Parish of DWI, is interesting but certainly not dispositive of his disciplinary action before this tribunal." *Id.* at 240-41 (emphasis in original).

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<sup>1</sup> While the Louisiana State Police Commission is organized under a different Part of the Louisiana Constitution (Art. X, § 43) the burden of proof on appeals is the same as appeals before this Commission.

## V. ANALYSIS

### A. The Complained of Activity

#### *i. Violation of La. R.S. 14:98 (DWI).*

NOPD introduced sufficient evidence to establish, by a preponderance of the evidence, that Appellant operated his vehicle while intoxicated on the night of May 1, 2008. The crime of operating a vehicle while intoxicated is defined as “the operation of any motor vehicle when operator of the motor vehicle is under the influence of alcoholic beverages.” La. R.S. § 14:98(A)(1).

Appellant admits to consuming alcoholic beverages during the course of the day on April 30, 2008 before heading home across the Causeway. And, the State Police Trooper who reported to the scene of the accident observed Appellant exhibiting obvious signs of intoxication. While it is possible to attribute some of these signs to Appellant’s alleged head injury, the fact that Trooper Porter smelled alcohol on Appellant’s breath and Appellant did not mention his alleged head injury to Trooper Porter during the course of the field sobriety test makes it more likely than not that Appellant was operating a vehicle while intoxicated. Therefore, NOPD has satisfied its burden with respect to this allegation.

#### *ii. Violation of La. R.S. 14:99 (Reckless Operation of a Motor Vehicle)*

The record shows that Appellant plead guilty to a charge that he violated La. R.S. 14:99 by operating a motor vehicle “in a criminally negligent or reckless manner.” Through evidence of Appellant’s guilty plea, NOPD has established that Appellant violated NOPD Rule Rule 2: Moral Conduct ¶ 1 – Adherence to Law.

*iii. NOPD Rule 3, ¶ 1*

NOPD's rule regarding professionalism reads as follows:

Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or otherwise act in a manner which brings discredit to the employee or the New Orleans Police Department.

(H.E. Exh. 1)

Here, NOPD has established, by a preponderance of the evidence, that Appellant consumed alcoholic beverages to the point of impairment, chose to drive his truck home across the Causeway, recklessly operated his vehicle and caused an accident with a Causeway Patrol vehicle. The Commission finds that such conduct is unprofessional and brought discredit to the Appellant. Therefore, NOPD has established its burden with respect to this alleged misconduct.

**B. Appellant's Misconduct Impaired the Efficient Operation of NOPD**

The Commission finds that when NOPD Officers violate the very laws that they are charged with monitoring and enforcing, it necessarily impairs NOPD's ability to efficiently execute its purpose. Further, when an NOPD Officer engages in the type of behavior Appellant engaged in on May 1, 2008, the public is endangered, just as it would be when any individual decides to drive a motor vehicle under the influence of alcohol. This necessarily impairs NOPD's ability to protect the public and provide necessary services. Finally, when an Officer acts in an unprofessional manner or acts in a way that brings discredit to himself or NOPD, the Officer's credibility within NOPD and the community at large is compromised. Thus also impairing the efficient operation of NOPD.



**C. Appellant's Discipline was Commensurate with the Offense**

Since NOPD has established that Appellant engaged in misconduct and that his misconduct compromised the public service provided by NOPD, the Commission now turns to whether or not a forty-three-day suspension is the appropriate level of discipline for such misconduct. In conducting its analysis, the Commission must determine if the Appellant's suspension 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 developed clear rules and expectations for its Officers with respect to adherence to the law. Not only must NOPD Officers enforce the law, they must also earn and maintain the trust of the communities in which they work and live. When an Officer violates a law, and endangers the public in doing so, he necessarily erodes trust that co-workers and members of the community may have had in him/her. The undersigned Commissioners find that the nature of the misconduct engaged in by Appellant is extremely serious. It follows that any discipline related to this misconduct be equally serious. Bearing this in mind, the forty-three (43) day suspension NOPD issued to Appellant was commensurate with his various rule violations.

**V. CONCLUSION**

Based upon the foregoing, the undersigned Commissioners find that NOPD had sufficient cause to discipline Appellant and that the discipline issued was commensurate with Appellant's misconduct. Therefore, the appeal is hereby DENIED.

Judgment rendered this 25th day of January, 2017

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

Tania Tetlow  
TANIA TETLOW, COMMISSIONER

1/24/17  
DATE

Ronald P. McClain  
RONALD P. McCLAIN, VICE-CHAIRPERSON

1/18/17  
DATE

Joseph S. Clark  
JOSEPH S. CLARK, COMMISSIONER

1-18-2017  
DATE