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Tuesday, November 22, 2016

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

Re: **Chris Durning VS.
Department of Police
Docket Number: 8350**

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 - 11/22/2016 - 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
Elizabeth S. Robins
Victor Papai
Chris Durning

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

CHRISTOPHER DURNING	
vs.	DOCKET No.: 8350
DEPARTMENT OF POLICE	

I. INTRODUCTION

Appellant, Christopher Dunning, 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. However, Appellant alleges that NOPD failed to complete its investigation into Appellant’s misconduct in a timely fashion. The Commission shall first determine if NOPD’s investigation adhered to the standards required by our Rules and La. R.S. § 40:2531. If it did, the Commission will determine whether or not NOPD had sufficient cause to discipline Appellant. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD alleges that, on February 22, 2012, at approximately 2:00 a.m., Appellant was involved in a fight at the Krazy Korner Bar on Bourbon Street. (H.E. Exh. 1). NOPD further alleges that Appellant initiated the fight by pushing a fellow bar patron. *Id.* Following the fight, Appellant received medical treatment at Tulane Hospital. However, NOPD alleges that

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Appellant disregarded instructions to remain at the hospital so that he could submit to a substance abuse test. Finally, NOPD alleges that, when Appellant did finally submit to a substance abuse test, Appellant's blood/alcohol content measured well over the legal limit. *Id.*

According to NOPD, Appellant's actions violated the following NOPD Rules:

- Rule 2: Moral Conduct; Paragraph 1: Adherence to Law, to wit 17271 MCS 54-96 relative to Battery
- Rule 3: Professional Conduct; Paragraph 9: Use of Alcohol/Drugs Off Duty
- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source

(H.E. Exh. 1). NOPD suspended Appellant for sixty (60) days for the Rule 2 violation, ten (10) days for the Rule 3 violation and three (3) days for the Rule 4 violation.

B. February 22, 2012

NOPD Sergeant Daniel Wharton Jr., the individual assigned to investigate Appellant's misconduct, reviewed video footage of the February 22nd incident obtained from the Krazy Korner security personnel. (NOPD Exh. 1). After reviewing the video several times, Sgt. Wharton made the following observation in his report to NOPD:

At the 4:30 mark Mr. Bender [the victim] began to either walk pass (sic) or up to Officer Durning. At the 4:32 mark Sergeant Wharton observed Mr. Bender being thrust forward, as if he was pushed, followed by a flailing arm of Officer Michel. Sergeant Wharton observed Mr. Bender returning in a snap back type motion throwing a punch at Officer Michel and landing it.... After acquiring statements from Ms. Browniee and Mr. Bender and subsequent to reviewing the video with them, Sergeant Wharton concluded [that] Officer Michel and Officer Durning were possibly the aggressors of the fight.

Id. at p. 8 of 20.

During his cross-examination, Sgt. Wharton provided a higher degree of clarity with respect to Officer Durning and Officer Michel's roles as aggressors:

Q: Do you see Officer Durning push [Mr.] Bender?

A: Yes.

Tr. at 84:25-84:1.

It appears that Sgt. Wharton's assessment of the video changed when he viewed the video with the female target of Officer Michel and Appellant's unrequited advancements and Mr. Bender. *Id.* at 110:17-22. Following the conclusion of the hearing, Appellant moved the hearing examiner to mark the security video as an exhibit. NOPD objected to the video's introduction so Appellant proffered the video. The Commission accepts the video evidence and would encourage all appointing authorities and Appellants to provide the Commission with video evidence when available.

Sgt. Wharton himself responded to the incident at approximately 2:00 a.m. on the morning of February 22nd. Based upon his initial information, Sgt. Wharton knew that there was an allegation that NOPD officers had been involved in an altercation at the Krazy Korner bar on Bourbon Street. When Sgt. Wharton arrived, he observed that Appellant had a bruise on one of his eyes and appeared to be dazed. *Id.* at 16:1-3. EMTs transported Appellant from the Krazy Korner Bar to Tulane hospital. (NOPD Exh. 1).

When Sgt. Wharton and Sgt. Zschiedrich encountered Appellant at the hospital at approximately 5:00 a.m., they immediately noted an "overwhelming" odor of alcohol emanating from Appellant. (Tr. at 67:24-68:7). Due to the strong smell, Sgt. Zschiedrich asked Appellant to submit to a substance abuse test. When Appellant refused, Sgt. Zschiedrich ordered Appellant to submit to an administrative substance abuse test.¹ *Id.* Following the issuance of this order, medical personnel notified Appellant that they were going to perform a CAT scan on Appellant.

¹ The key distinction between the standard substance abuse test and an administrative one is that NOPD may not use the results of an administrative drug test in a criminal case against the accused officer.

Believing that they had time to retrieve the necessary paperwork from the PIB Offices to initiate an administrative substance abuse test while Appellant was undergoing the CAT scan, Sgt. Wharton and Sgt. Zschiedrich left the hospital. (Tr. at 18:4-8; NOPD Exh. 1).

When Sgt. Wharton and Sgt. Zschiedrich returned to the hospital with the paperwork, Appellant had left. Appellant claimed that he did not recall either Sgt. Wahrton or Sgt. Zschiedrich issue an order requiring him to remain at the Hospital and that he left because he had underwent the CAT scan and did not receive any further instructions from the medical staff. Two hours later, Sgt. Wharton and Sgt. Zschiedrich located Appellant at Appellant's residence and escorted Appellant to a substance abuse testing facility. (Tr. at 18:17-20.). And, at 8:46 a.m. the breath alcohol test administered to Appellant revealed a BAC of .166. (NOPD Exh. 3). This result is inconsistent with Appellant's claim that he only had one or two beers over the course of several hours leading up to the altercation at the Krazy Korner bar. Appellant attempted to explain this elevated BAC by asserting that he continued to drink when he returned home from the hospital.

C. NOPD's Investigation

The DI-1 form signals the beginning of NOPD's investigation into allegations of Officer misconduct for the purposes of calculating the sixty-day deadline. However, a criminal investigation tolls the time allowed for investigations into police employee misconduct in that, during the pendency of a criminal investigation or prosecution regarding the alleged misconduct, the sixty-day delay does not apply. La. Rev. Stat. § 40:2531(B)(7). Here, the criminal investigation/case regarding Appellant's conduct on February 22, 2012 ended on December 6, 2012 when the New Orleans Municipal Court changed the status of the case to "CLOSED" after the city attorney entered a *nolle prosequi*. (App. Exh. 1). On March 6, 2013, NOPD alleges that

it provided notice to Appellant that the administrative investigation was over and directed Appellant to attend a disciplinary hearing regarding alleged violations of Rules 2, 3, and 4. (NOPD Exh. 5). During its case-in-chief and in its post-hearing brief, NOPD argued that the ongoing criminal investigation into Officer Michel served to toll the sixty-day delay regarding Appellant's alleged misconduct because the criminal charges against Officer Michel arose out of the same set of circumstances. The criminal investigation into Officer Michel's actions on February 22, 2012 did not end until January 17, 2013 when Officer Michel pled "no contest" to the remaining criminal charge pending against him – possession of a firearm in an alcoholic beverage outlet. (App. Exh. 2).

III. LEGAL STANDARD

An appointing authority may discipline permanent employees in the classified service only if there is sufficient cause to support such discipline. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued 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. Timeliness of NOPD's Investigation

1. Background Case Law

The provisions of Louisiana Revised Statute § 40:2531, known colloquially as the “Police Officers’ Bill of Rights” govern the investigative due process that NOPD must afford to “police employees” as defined by the statute. It is undisputed that NOPD Officers, like Appellant, are “police employees” pursuant to § 40:2531. Any investigation that does not conform to the due process requirements enumerated in § 40:2531 renders the related discipline “an absolute nullity.”

When a formal, written complaint is made against any police employee or law enforcement officer, the superintendent of state police or the chief of police or his authorized representative shall initiate an investigation within fourteen days of the date the complaint is made. Except as otherwise provided in this Paragraph, each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days.... The investigation shall be considered complete upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint. *Nothing in this Paragraph shall limit any investigation of alleged criminal activity.*

La. Rev. Stat. § 40:2531(B)(7)(emphasis added).

We are bound by Fourth Circuit case law interpreting the sixty-day deadline contained within La. R.S. 40:2531. And, for the purposes of La. R.S. 40:2531, an investigation begins when NOPD initiates a DI-1 form. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 17); 165 So.3d 191, 202-03; *see O'Hern v. Dep't of Police*, 2013-1416 (La. 11/8/13, 7); 131 So.3d 29, 33. (“the sixty-day period within which to complete an investigation [does] not

begin until the start of the administrative investigation.”); *Young v. Department of Police*, 13–1596, p. 1, n. 2 (La.App. 4 Cir. 6/25/14), 152 So.3d 193, 194, n. 2. The investigation ends “upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint.” La. R. S. § 40:2531(B)(7). But, if the misconduct allegedly perpetrated by a “police employee” is also subject to a criminal investigation, the Louisiana Supreme Court has held that the time limitation for completing the administrative investigation was tolled until the criminal investigation was completed. *Kendrick v. Dep't of Police*, 2016-0037 (La.App. 4 Cir. 6/1/16, 17); 193 So.3d 1277, 1287(citing *O'Hern supra*). When the criminal investigation ends, so too does the tolling of the sixty-day deadline. *Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16)(notice of a *nolle prosequi* signaled the completion of the criminal investigation and ended the tolling related to that criminal investigation).

In the matter now before us, NOPD argues that, because the allegations against Appellant involved criminal conduct, the timelines contained within La. R. S. § 40:2531(B)(7) do not apply at all, citing to *O'Hern* and *McMasters v. Dep't of Police*, 2013-2634 (La. 2/28/14, 2), 134 So.3d 1163, (Mem)–1164, *reh'g denied* (May 2, 2014), *reh'g denied*, 2013-2634 (La. 5/2/14), 138 So.3d 1236.

The Commission observes that NOPD made the exact same argument in *Kendrick*; “[i]n essence, the Department's argument is that because it alleged criminal misconduct in its investigation, the sixty-day limit is totally inapposite.” *Kendrick, supra* at 1287. The Fourth Circuit rejected this argument and found that “the Supreme Court in *O'Hern* held that the third exception provides for a ***tolling*** of the sixty day period, ***not an elimination*** of that period. *Id.* at 1289. (emphasis added); *see also Liang v. Dep't of Police*, 2013-1364 (La.App. 4 Cir. 8/20/14,

2), 147 So.3d 1221, 1230. (statutory deadline not tolled where accused officer's alleged rule violations were not related to the investigation of criminal activity allegedly perpetrated by other officers); *Adams v. Dep't of Police*, 2013-0200 (La.App. 4 Cir. 12/18/13, 12), 131 So.3d 378, 386, writ granted, 2014-0140 (La. 3/21/14), 135 So.3d 624 (Sixty-day period applied to an administrative investigation following criminal investigation). Therefore, the Commission finds that that the sixty-day limit does apply in the matter now before us. Thus, we now turn to whether or not NOPD completed its investigation within this timeline.

2. Appellant's Alleged Rule Violations and NOPD's Criminal Investigations

Appellant argues that, the *nolle prosequi* entered in the criminal case against him on December 6, 2012 signaled the end of the criminal investigation and started the clock running on the sixty-day deadline. NOPD takes the position that La. R. S. § 40:2531(B)(7), *O'Hern* and its progeny stand for the proposition that the deadline for the completion of an administrative investigation is tolled by any criminal investigation, not just investigations into criminal charges against the individual police employee. NOPD further argues that Appellant was either a co-defendant or witness in the criminal cases against Officer Michel and the sixty-day deadline did not begin until the end of the criminal cases against Officer Michel.

The question before us is straightforward; did the sixty-day limit on NOPD's administrative investigation into Appellant's misconduct begin on December 6, 2013 (in which case it was not timely completed) or January 17, 2013 (in which case NOPD did timely complete the investigation).

In *Liang*, NOPD accused a Sergeant of failing to supervise subordinates and falsely reporting payroll. *Liang*, supra, at 1222. These allegations stemmed from an incident in which a female complainant alleged that Officers under the supervision of the Sergeant perpetrated a

rape. *Id.* One of the Officers admitted to leaving work early on the night of the alleged rape. NOPD never initiated criminal charges for the Sergeant, but did not begin its administrative investigation into the allegations against the Sergeant until after the criminal investigation against the Officers had concluded, which was well beyond the sixty-day delay allowed by statute. In defending its actions, NOPD argued that “an administrative investigation can never under any circumstances take preference over a criminal investigation, regardless of whether or not the officer facing administrative investigation is the subject of the criminal investigation tolling the time limitation.” *Id.* at 1227. In considering this argument, the court observed that:

Neither the Louisiana Supreme Court nor this Court has addressed whether the sixty day time limitation within La. R.S. 40:2531 B(7) may be tolled for an unlimited time pending *any* investigation of criminal activity that does not involve or implicate the officer subject to administrative investigation for rule violations.

Id. at 1227. (emphasis in original). This led the court to distinguish Sergeant Liang’s appeal from the one in *O’Hern*, since Sergeant Liang’s “alleged rule violations bore no substantial relationship to the investigation of criminal activity by the other officers.” *Id.* at 1230. (emphasis added) Ultimately, the court found that “NOPD’s criminal investigation of unrelated allegations of criminal activity cannot excuse the failure to comply with the minimum standards for completing an administrative investigation within sixty days as required under La. R.S. 40:2531 B(7).” *Id.* (emphasis added). Therefore, the key question for the Commission is whether or not the outstanding criminal investigation into Officer Michel’s actions on February 22, 2012 bore a “substantial relationship” into NOPD’s administrative investigation into Appellant’s alleged rule violations. To answer this question, the Commission must look at the specific criminal charges against each Officer.

Appellant faced one criminal charge and Officer Michel faced two criminal charges as a result of actions on February 22, 2012. Both officers faced charges related to the fight; Assault (La. R.S. 54-97) for Officer Michel, and Battery (La. R.S. 54-96) for Appellant. However, only Officer Michel faced an additional charge, Possession of Firearm in Alcoholic Beverage Outlet (La. R.S. 14:95.5). (App. Exh. 1). The City Attorney entered a *nolle prosequi* related to the Assault and Battery charges on December 6, 2012. Thus, the commission finds that the criminal investigations into Officer Michel's alleged assault and Appellant's alleged battery ended on December 6, 2012. However, the "investigation" related to Officer Michel's alleged possession of a firearm in the Krazy Korner bar continued until January 17, 20113 when Officer Michel pled no contest.

The Commission finds that the criminal charges against Officer Michel arising out of his alleged assault bore a substantial relationship to the alleged rule violations perpetrated by Appellant. Thus, any criminal investigation into Officer Michel's alleged assault would toll the sixty-day limit on Appellant's misconduct. However, the criminal investigation into Officer Michel's alleged assault ended on December 6, 2012, the same day the criminal investigation ended in connection with Appellant's battery. Therefore, in order to establish that its investigation into Appellant's alleged rule violations was timely, NOPD must establish that the criminal investigation into Officer Michel's alleged possession of a firearm in the Krazy Korner bore a substantial relationship to Appellant's alleged rule violations.²

² At this point in our decision, we find it helpful to review the rules NOPD alleged that Appellant violated:

- Rule 2: Moral Conduct; Paragraph 1: Adherence to Law, to wit 17271 MCS 54-96 relative to Battery
- Rule 3: Professional Conduct; Paragraph 9: Use of Alcohol/Drugs Off Duty
- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source

In order to establish that Officer Michel violated Louisiana's law prohibiting possession of a firearm in an alcoholic beverage outlet, NOPD and/or the Orleans Parish District Attorney would have to show that the Krazy Korner was an "alcoholic beverage outlet" as defined by the statute and that Officer Michel intentionally possessed a firearm while at the bar. La. R.S. § 14:95.5. Pursuant to state law, an "Alcoholic beverage outlet" is "any commercial establishment in which alcoholic beverages of either high or low alcoholic content are sold in individual servings for consumption on the premises, whether or not such sales are a primary or incidental purpose of the business of the establishment." Given the description of the Krazy Korner contained within the record, nothing in NOPD's investigation into Appellant's alleged rule violations would have hampered any attempt to establish the Krazy Korner as an alcoholic beverage outlet. That leaves the question as to whether or not Officer Michel was in possession of a firearm on February 22, 2012. According to NOPD's administrative investigation, security personnel at the Krazy Korner first observed a firearm on Officer Michel's person and disarmed him. (NOPD Exh. 1 at p. 2 of 20). Louisiana State Police then took possession of the firearm.

Id.

Conspicuously absent from the record is any testimony offered by NOPD's witness establishing that an administrative investigation into Appellant's alleged rule violations would have interfered with the criminal investigation into Officer Michel's possession of a firearm. There is nothing in the record to suggest that Sgt. Wharton, who led the administrative investigation of Appellant's conduct, asked Appellant about Officer Michel's possession and/or use of a handgun during the early morning hours of February 22, 2012. This is an important factor in determining whether an exception to the sixty-day deadline applies. *See Kendrick*, 193

So.3d at 1288. (the exception applies where NOPD presents facts supporting the deferral of the administrative investigation until the completion of the criminal investigation). However:

Absent some evidence that the alleged criminal misconduct was the subject of a criminal investigation or that a criminal investigation was the cause of a delay in pursuing an administrative investigation, the third exception does not apply.

Id. at 1289.

Here, Appellant's alleged criminal misconduct was the subject of a criminal investigation, but that criminal investigation ended on December 6, 2012. The only outstanding criminal investigation in the record after December 6th was the one involving Officer Michel's possession of a firearm in an alcoholic beverage outlet, and NOPD did not establish that this investigation caused a delay in pursuing an administrative investigation into Appellant's alleged rule violations. Therefore, the provision of La. R.S. § 40:2531 allowing for tolling during the pendency of a criminal investigation does not apply.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the Appellant's appeal. The Commission finds that the criminal investigations into Officer Michel's alleged battery and Appellant's alleged assault on February 22, 2016 tolled the sixty-day period within which NOPD needed to complete its administrative investigation into Appellant's alleged rule violations. However, these criminal investigations ended on December 6, 2012 when the court recorded a *nolle prosequi* in each matter. The only remaining criminal investigation, Officer Michel's alleged violation of La. R.S. § 14:95.5, was not substantially related to Appellant's alleged rule violations and did not serve to toll the sixty-day deadline. Therefore, the discipline issued to Appellant was an absolute nullity.

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Judgment rendered this 14th day of November, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

11/15/2016

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

11/15/16

DATE



TANIA TETLOW, COMMISSIONER

11/16/16

DATE