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# CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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Wednesday, July 31, 2019

Mr. Michael T. Bell  
7809 Airline Dr., Suite 2015  
Metairie, LA 70003

Re: **Nahlisha Smith VS.**  
**Department of Police**  
**Docket Number: 8834**

Dear Mr. Bell:

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 - 7/31/2019 - 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  
Daniel T. Smith  
Jay Ginsberg  
Nahlisha Smith

**CIVIL SERVICE COMMISSION**

**CITY OF NEW ORLEANS**

<p>NAHLISHA SMITH, Appellant,</p> <p>vs.</p> <p>DEPARTMENT OF POLICE, Appointing Authority.</p>	<p>DOCKET No.: 8834</p>
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**I. INTRODUCTION**

Appellant, Nahlisha Smith, 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 her. 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 suspended Appellant for a total of twenty-one days and issued her a Letter of Reprimand related to three separate allegations of misconduct. First, NOPD alleged that Appellant failed to follow established procedures when she left her assigned area on October 16, 2017. (H.E. Exh. 1). After substantiating this first allegation against Appellant, NOPD issued Appellant a Letter of Reprimand. *Id.* Appellant does not contest the imposition of the Letter of Reprimand. (Tr. at 11:6-24).

The second instance of alleged misconduct involved NOPD's assertion that Appellant, while on duty and transporting evidence, "diverted to a friend's apartment complex and remained to take pictures of the complainant's vehicle and co-complainant's residence." (H.E. Exh. 1). The "complainant" in the instant appeal is Appellant's ex-husband.<sup>1</sup> Due to Appellant's alleged failure to dedicate her entire work-day to police duties, NOPD issued Appellant a one-day suspension. *Id.* Appellant does not contest the issuance of the one-day suspension or the facts that led to its issuance. (Tr. at 11:6-24).

The third and final instance of misconduct was the focus of the instant appeal hearing. NOPD alleged that Appellant violated NOPD's rules regarding employee use of social media platforms. (H.E. Exh. 1). The rule at issue states in pertinent part:

Employees shall not post any material on the internet including but not limited to photos, videos, word documents, etc. that violates any local, state or federal law, and/or embarrasses, humiliates, discredits, or harms the operations and reputation of the Police Department or any of its members.

*Id.*

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<sup>1</sup> The Commission shall to refer to Appellant's ex-husband as the "Complainant."

According to NOPD, Appellant violated the above-cited rule when she posted photographs of the Complainant's vehicle on Appellant's Facebook account with a caption that read:<sup>2</sup>

I wish them miserable bishes stop texting my phone and be concerned with while their man car is parked in the driveway of the calliope project. Don't come for me unless I send for you. I don't want him. But it's obvious he don't want just you either.

Id.

NOPD alleged that an aggravating factor to Appellant's post was that she took the photograph of the Complainant's car while on duty and posted the photo with the caption while on duty. *Id.* Based upon Appellant's alleged violation of the social media rule, NOPD suspended Appellant for twenty days. *Id.*

#### **B. October 16, 2017**

The facts at issue in the instant appeal are largely not in dispute. Appellant acknowledged that she was on duty on October 16, 2017 and while on duty took photographs of the Complainant's car and posted the photo, along with above-quoted caption, to her Facebook account. (Tr. at 12:9-14:14). Further, Appellant admitted that she was operating a marked NOPD vehicle at the time and was wearing clothing that identified her as an NOPD officer. *Id.*

Appellant stated that she posted the photograph and caption to her "private" Facebook account where only those individuals she had authorized as "friends" would be able to view posted items. *Id.* at 15:3-23. According to Appellant, neither the Complainant, nor the co-Complainant, would have been able to see the post because they were not Appellant's "friends" on Facebook. *Id.* While Appellant claimed that the Complainant did not have access to her private Facebook account, the Complainant did become aware of Appellant's October 16th post.

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<sup>2</sup> As is the Commission's practice, quotes pulled from employee social media accounts will be reproduced without the traditional "(sic)" indicating spelling, grammatical and/or syntax errors that appear in the original text.

On October 30, 2017, the Complainant and co-Complainant contacted the Office of Independent Police Monitor (hereinafter “IPM”) to lodge a complaint against Appellant. (App. Exh. 1). Based upon the complaint, the IMP referred the matter to NOPD’s Public Integrity Bureau for investigation. Following NOPD’s investigation, Deputy Superintendent Paul Noel conducted a pre-disciplinary hearing and made a recommendation that NOPD substantiate the allegations against Appellant and issue a twenty-day suspension.

Deputy Superintendent Noel testified that, when recommending a level of discipline, he takes into account aggravating and mitigating circumstances. In Appellant’s case, Deputy Superintendent Noel believed that the fact that Appellant was on duty when she made an inappropriate social media post was an aggravating factor. (Tr. at 50:19-51:13). Deputy Superintendent Noel also made a vague reference to “a series of incidents” between Appellant and Complainant, but did not provide any specific testimony on what such “incidents” entailed. *See id.* at 51:14-52:10. Another aggravating factor was the media attention Appellant’s Facebook post gained, which allegedly brought discredit to both Appellant and NOPD. *Id.* at 73:6-22.

Ultimately, then-Superintendent Michael Harrison accepted Deputy Superintendent Noel’s recommendations and issued Appellant a twenty-day suspension for violating the social media policy.

### **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 social media when he/she posts “any material in the internet... [that] embarrasses, humiliates, discredits or harms the operations and reputation of the Police Department or any of its members.” NOPD alleged that Appellant’s post embarrassed and discredited both NOPD and Appellant in several ways. First, NOPD asserted that Appellant was a well-known member of the force and when her post became public, observers easily connected it with her role as a police officer and with NOPD. Appellant did not contest NOPD’s evidence on this point other than to argue that she had posted the content at issue to a private Facebook account accessible only to “friends.” Her claim, however, is undercut by the fact that the Complainant and another individual identified in the record as the co-Complainant, were not Appellant’s “friends” and should not have been able to view the post. Nevertheless, those outside Appellant’s digital group of friends did gain access to the post.

NOPD next alleged that Appellant's post garnered some media attention. For her part, Appellant admitted that members of the media sought her out for comment. The Commission finds that, when a police officer takes time out of his/her work day to post a photograph showing the location of an ex-husband or ex-wife, he/she embarrasses him/herself. The assumption, fair or not, is that the officer has much better things to do with his/her time than to keep tabs on former lovers. While the Commission recognizes that Appellant did not provide the post to media outlets, she was responsible for the attention as soon as she decided to post the photograph and caption.

Based upon the record, the Commission finds that NOPD has established Appellant violated NOPD's social media policy.

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

In the preceding section, the Commission found that Appellant engaged in misconduct that brought discredit and embarrassment to herself and NOPD. The negative impact of such misconduct on NOPD's efficient operations is clear but difficult to quantify. On a basic level, the residents and visitors of New Orleans should and do expect that law enforcement personnel will exercise sound judgment on and off duty, but especially on duty. The Commission emphasizes this point not to denigrate the vital role all City employees play in the maintenance of important services, but to recognize that police officers occupy a unique position of power and authority.

When a police officer demonstrates offensive and unprofessional conduct while on duty, he/she compromises her position as a figure of respect and authority and diminishes the reputation of the department as a whole. Residents rightly question whether NOPD establishes the same high expatiations maintained by residents themselves.

In the matter now before the Commission, Appellant escalated what was apparently a personal feud with her ex-husband into a public spectacle. To make matters worse, she did so while on duty, operating an NOPD vehicle and wearing clothing that clearly identified herself as an NOPD officer. Her actions reflected poorly on herself and NOPD.

For the above-stated reasons, the Commission finds that Appellant's misconduct 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 Appellant's earlier violation of NOPD's social media rule served as an aggravating factor and justified a more severe level of discipline. NOPD argued that Appellant's October 16, 2017 social media post constituted a "second offense" under NOPD's penalty matrix. The Commission recognizes and appreciates the thoroughness of NOPD's penalty matrix. The matrix operates on a theory of progressive discipline and contains a section that establishes progressively severe penalties for employees who have multiple substantiated violations of the same policy. Ideally, through a progressive discipline policy, an appointing authority will issue discipline that will, 1) put an employee on notice that the offending actions are not acceptable, and 2) serve as a deterrent against future misconduct. The key to the effective implementation of such a policy, however, is to issue discipline in a timely manner.



The problem with NOPD's argument that Appellant's October 16, 2017 warrants a more severe level of discipline because it is a second offense lies in the timing of discipline related to the first offense. In an earlier appeal involving the same Parties – Smith v. NOPD (C.S. No. 8827) – Appellant challenged the issuance of a five-day suspension related to an alleged violation of NOPD's social media policy. The Commission dismissed the appeal as untimely, but the record establishes that the offending post that led to the five-day suspension occurred on January 23, 2017 almost nine months prior to the social media post at issue now. Yet, NOPD did not render any discipline related to the January 2017 post until July 13, 2018 a little over one month prior to the issuance of the twenty-day suspension now before the Commission.

A five-day suspension issued months **after** Appellant's October 2017 Facebook post did not have (nor could it have had) any impact on Appellant's conduct. In using the five-day suspension as an aggravating factor, NOPD necessarily argues that a more severe form of discipline is warranted because a lesser penalty was ineffective. But, since NOPD did not issue any discipline to Appellant related to a social media policy prior to October 2017, the Commission holds that NOPD cannot rely upon the July 13th five-day suspension as an aggravating factor.

Similarly, the Commission finds that NOPD did not establish that the nebulous "back-and-forth" between Appellant and the Complainant constituted legitimate aggravating factors. There is certainly circumstantial evidence in the record to suggest that Appellant and the Complainant do not have a good relationship. That is very far, however, from a finding that the poor relationship between Appellant and the Complainant had manifested itself in prior misconduct that in turn served as justification for a harsher disciplinary measure.

The undersigned do agree, however, that there are two aggravating factors present that warrant a higher level of discipline than the minimum two-day suspension contemplated by the

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NOPD penalty matrix. The Commission appreciates the Hearing Examiner's concern that NOPD should avoid punishing employees twice for the same misconduct. In his report, the Hearing Examiner opined that NOPD could not use the fact that Appellant was on duty at the time she published the offending Facebook post because it had already issued her a one-day suspension for failing to dedicate her entire work day to her police duties. The Commission finds that there is a distinction between the facts that led to Appellant's one-day suspension and those that led to her twenty-day suspension.

The one-day suspension was related to Appellant's decision to deviate from her assigned duties and relocate to "a friend's apartment complex" and take pictures of the Complainant's car. Her decision to publicize her deviation through an inappropriate and provocative social media post is a separate, if related action. The Commission thus finds that the fact that Appellant was on duty when she posted about the Complainant's location constitutes an appropriate aggravating factor and justified a penalty above the minimum two-day suspension identified in NOPD's penalty matrix for a Level C first offense.

In the prior case reference above (C.S. No. 8827), NOPD issued Appellant a five-day suspension in connection with a social media post she published while on duty that targeted a supervisor. In the matter now before the Commission, the target of Appellant's ire was a civilian, and as such was more susceptible to influence and intimidation. Thus, the Complainant's status as a civilian is an appropriate aggravating factor.

Bearing in mind the above findings of fact and law, the Commission holds that a twenty-day suspension was not commensurate with Appellant's misconduct. But the undersigned Commissioners do believe that Appellant engaged in serious misconduct in violation of NOPD's common sense rule regarding social media posts.

## 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. Because Appellant did not challenge the issuance of the one-day suspension or letter of reprimand, both shall remain in full force and effect.

As a result of the Commission's finding that a twenty-day suspension was not commensurate with Appellant's misconduct, NOPD shall reduce the duration of the suspension from twenty days to ten days and remit all applicable back pay and emoluments related to reduction. NOPD shall also modify Appellant's disciplinary record (both long and short forms) to reflect a ten-day suspension. Finally, the Commission observes that Appellant has now had ample warning that her actions on social media platforms have the unfortunate habit of coming to the attention of NOPD. In the future, it is the Commission's hope that Appellant shall avoid future violations of NOPD's social media policy since the next substantiated violation could result in very serious discipline up to and including termination.

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N. SMITH  
No. 8834


Judgment rendered this 31<sup>st</sup> day of July, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

  
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MICHELLE D. CRAIG, CHAIRPERSON

7/29/19  
\_\_\_\_\_  
DATE

CONCUR  
  
\_\_\_\_\_  
CLIFTON J. MOORE, Jr., VICE CHAIRPERSON

7/29/19  
\_\_\_\_\_  
DATE

  
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BRITTNEY RICHARDSON, COMMISSIONER

7-23-19  
\_\_\_\_\_  
DATE