



CITY OF NEW ORLEANS

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Monday, October 2, 2023

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Mr. Kevin Boshea
2955 Ridgelake Dr., Suite 207
Metairie, LA 70002

Re: **Sabrina Richardson VS.
Department of Police
Docket Number: 9409**

Dear Mr. Boshea:

Attached is the amended 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 - 10/2/2023 - 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: Anne E. Kirkpatrick, Interim Superintendent
Elizabeth S. Robins
Jay Ginsberg
Sabrina Richardson

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**SABRINA RICHARDSON,
Appellant**

Docket No. 9409

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

AMENDED DECISION

The Department of Police moved for rehearing on September 22, 2023, on the basis that the Commission's calculation of days of suspension in its September 13, 2023, decision was unclear, and on the basis that the Commission reconsider its decision as to the violations while Appellant was a Police Lieutenant before her promotion to Commander in 2019 (violations 5-8). The Commission issues the following amended decision to clarify the calculation of the days of suspension. The Commission denies NOPD's request that the Commission reconsider its decision as to violations 5-8.

Appellant, Lieutenant Sabrina Richardson, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from her 120-day¹ suspension beginning the week of October 23, 2022. (Exhibit HE-1). Richardson also appeals on the basis of sex discrimination pursuant to Civil Service Rule II, § 4.5. At all relevant times, Appellant had permanent status as a Police Lieutenant. (Tr., Vol. I, at 26; Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on January 26-27, 2023, and

¹ The Superintendent's Disciplinary Committee recommended a 164 working day suspension, but the Superintendent reduced the suspension to 120 calendar days to comply with Civil Service Rule XI, § 1.1. (Ex. HE-1). According to NOPD's Motion for Rehearing, Lt. Richardson served only 85 working days.

April 11, 2023. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the parties' post-hearing memoranda, the Hearing Examiner's report dated July 10, 2023, and controlling Louisiana law.

For the reasons set forth below, Richardson's appeal is GRANTED IN PART and DENIED IN PART.

I. FACTUAL BACKGROUND

Lt. Richardson's appeal concerns a 120 calendar day suspension for alleged violations of NOPD policies regulating police secondary employment, also known as police details. The definition of "secondary employment" under NOPD policy, Chapter 22.08, is "[t]he off-duty employment, for compensation, of any NOPD member by another individual, business, establishment, or organization where the member is performing the duties of a police officer or a function of the police department." (Ex. NOPD-39 at 2). *See also* City of New Orleans Ordinance Section 90-121. NOPD policy generally requires NOPD officers working secondary employment assignments to be in uniform, and NOPD officers may request use of NOPD police vehicles for secondary employment assignments. (Ex. NOPD-39 at 4 (subsection 17)). NOPD Policy emphasizes that NOPD officers work secondary employment assignments as representatives of NOPD:

Members working police secondary employment do so as representatives of the New Orleans Police Department. The image of the NOPD and the public's perception of officers' collective moral character are affected by the actions and appearance of the Department's members. Members will always uphold the highest standards of professionalism.

(Ex. NOPD-39 at 1 (subsection 5)).

The City of New Orleans established the Office of Police Secondary Employment (OPSE) to administer and manage police secondary employment. (Ex. NOPD-39 at 3 (subsection 8)). According to the OPSE website on nola.gov, NOPD details are administered through a “city-managed office.”² OPSE is staffed with employees of the City of New Orleans. Commissioned NOPD police officers may only work details through the Office of Police Secondary Employment, and the Superintendent of Police must authorize officers to work police details. (Ex. NOPD-39 at 1, 3 (subsections 6, 12)). However, NOPD police officers assigned to secondary employment customers are not compensated for this work through regular NOPD payroll. (Ex. NOPD-39 at 4 (subsection 17)). Instead, OPSE compensates officers hourly through a separate payroll system. (Ex. NOPD-39 at 4 (subsection 17)). NOPD officers may work secondary employment assignments only when they are off-duty from NOPD. (Ex. NOPD-39 at 4 (subsection 17)). OPSE sends a confirmation email to employees of the detail hours worked before payment is made. (Tr., Vol. I, at 184).

Lt. Sabrina Richardson is a 23-year veteran of NOPD. (Tr., Vol. I, at 24). NOPD promoted Richardson to Sergeant on March 3, 2009, and to Lieutenant in September of 2015.³ (Tr., Vol. I, at 25-26). She was promoted to the unclassified position of Commander and selected to serve as Commander of the Public Integrity Bureau (PIB) on March 31, 2019. (Tr., Vol. I, at 19).

² [Police Secondary Employment - About - City of New Orleans \(nola.gov\)](http://PoliceSecondaryEmployment-About-CityofNewOrleans(nola.gov))

³ NOPD promoted Richardson to the position of Police Captain in November of 2021, but NOPD removed her from that position in October of 2022 during her probationary period because of the instant allegations. (Tr., Vol. I, at 89-90). Because NOPD removed Richardson as Captain of the Third District during her probationary period, she never gained permanent status as a Captain and may not appeal this decision. Civil Service Rule II, section 4.1. Richardson also testified that prior to her removal as Captain of the Third District, she was being considered for Superintendent of Police. (Tr., Vol. I, at 122).

Richardson served as the head of PIB from March of 2019 to November of 2021. (Tr., Vol. I, at 96).

Following media reports of irregularities in NOPD police details, in November of 2021, the Federal Bureau of Investigation informed NOPD it was investigating 11 officers for public payroll fraud and wire fraud related to police secondary employment. (Tr., Vol. III, at 17; Ex. R-6 at 3). For some of these officers, at least as of April 11, 2023, the FBI investigation is ongoing. (Tr., Vol. III at 17). The Professional Standards and Accountability Bureau of NOPD (PSAB) audited officers' detail time sheets and payroll records, resulting in the initiation of formal disciplinary investigations of 26 officers by the Public Integrity Bureau (PIB) of NOPD. (Ex. R-6). Deputy Chief Arlinda Westbrook requested that PSAB conduct an audit of officers assigned to PIB to determine whether any investigators were in violation of NOPD policy for purposes of avoiding assigning officers to investigate the allegations who had potential conflicts of interest. (Ex. R-6). The audit reflected that then PIB Captain Sabrina Richardson, along with others, was in apparent violation of the secondary employment policy and the 16-hour and 35 minute per day work hour limit.⁴ (Ex. R-6). Eventually, PSAB audited all members of PIB. (Tr., Vol. III, at 71).

On November 23, 2021, the Superintendent of Police and PIB received an anonymous complaint via departmental mail alleging then Captain Richardson was receiving payments for working details at the Fairgrounds when she was not present:

Officer Sabina Richardson is working overtime at the fairgrounds on Gentilly and is not there. I have taken video of her signing in and then going home when she should be providing security patrols around and in my neighborhood. She does not even wear her uniform. She is frauding [sic] the fairgrounds, the new orleans police.

I am sending the video to news channel if nothing is done about her. It is a disservice to my home. This is why we have crime in the city.

⁴ Richardson is not appealing the letter of reprimand for the 16-hour and 35 minute per day limit.

(Ex. R-12; Tr., Vol. I, at 154; Tr., Vol. III, at 117). Richardson testified she worked the police detail at the Fairgrounds for six years and that Chief Westbrook was aware she was routinely working details during normal business hours. (Tr. Vol. I, at 115-16, 119).

Deputy Superintendent Westbrook assigned the investigation of Richardson to then Captain Nicholas Gernon on December 17, 2021. (Tr., Vol. I, at 146, 150). Chief Gernon asked for the audit already performed by PSAB and flagged all incidents of overlapping shifts, i.e., when the work hours of a paid detail coincided with the work hours entered into the NOPD timekeeping system and all instances of hours in excess of 16 hours and 35 minutes in a 24-hour period. (Tr., Vol. I, at 165). Chief Gernon obtained the time records from ADP, the City's timekeeping vendor, and compared the hours to the timecards from OPSE. (Tr., Vol. I, at 165-68). Chief Gernon testified that most of the timecards from OPSE were in Richardson's handwriting. (Tr., Vol. I, at 171). Four of the violations concerning overlapping hours from NOPD and OPSE occurred when Richardson was a non-exempt employee.⁵ (Tr., Vol. I, at 176). Chief Gernon also documented 13 instances when Richardson's hours in ADP overlapped with paid details after March 31, 2019, when NOPD promoted her to the unclassified position of Commander. (Tr., Vol. II, at 11-12, 32).

As the Commander of PIB, Richardson reported to Deputy Chief Arlinda Westbrook, who did not testify at the hearing. (Tr., Vol. I, at 88). The general office hours of PIB were 8:00 AM to 4:00 PM. (Tr., Vol. I, at 36). Captain Precious Banks, who currently manages PIB, testified that

⁵ On March 4, 2019, Lundi Gras, Richardson was paid hourly from 9:00 AM – 9:00 PM from NOPD, and also was paid by OPSE for working a detail from 3:00 PM – 7:00 PM. (Tr., Vol. I, at 218-19). On March 19, 2019, Richardson was paid by NOPD for working from 7:25 AM – 4:00 PM and also received compensation through OPSE for working a detail from 3:00 PM – 7:00 PM. (Tr., Vol. I, at 220). On March 20, 2019, NOPD paid Richardson for working from Noon to 8:30 PM, and Richardson received compensation through OPSE for a detail from 3:00 PM – 7:00 PM. (Tr., Vol. I, at 221). On March 26, 2019, Richardson received compensation from NOPD for working from 7:25 AM – 4:00 PM and received compensation through OPSE for a detail from 3:00 PM – 6:30 PM. (Tr., Vol. I, at 221).

she works from 8:00 AM to 4:00 PM, and that she supervises 35 people. (Tr., Vol. I, at 143). While leading PIB, Richardson worked the following details that overlapped in whole or part with her NOPD work hours as recorded in ADP: 6:00 AM – Noon (April 3, 2019), 1:00 AM – Noon (May 8, 2019), 6:25 AM – 3:00 PM (May 15, 2019), 5:00 AM – Noon (May 28, 2019), 8:00 AM – 7:00 PM (Jul 5, 2019), 10:30 AM – 9:30 PM (August 2, 2019), 10:00 AM – 2:00 PM (January 13, 2020), 6:00 AM – Noon (January 31, 2021; February 7, 2021; February 14, 2021); 9:00 AM – 5:00 PM (May 20, 2021); Midnight – 6:00 AM (May 27, 2021); 4:00 PM – 11:00 PM (November 12, 2021). (Tr., Vol II, at 221-42). Notably, Richardson was receiving compensation for police details while the subordinates under her leadership were working at the PIB offices, unsupervised. She also apparently regularly worked her eight-hour primary job at PIB immediately after a midnight to 6:00 AM shift at the Fairgrounds. Further, Chief Gernon testified Richardson exceeded the 24 hour/week limit of paid details on a consistent basis: “she went past the 24-hour a week detail . . . regularly.” (Tr., Vol. II, at 57). The superintendent of police regularly issued a waiver of the 24 hour/week policy limit.” (Tr., Vol. II, at 57). Therefore, Chief Gernon did not find any violations of the 24-hour policy. (Tr., Vol. II, at 57).

Chief Gernon testified that he did not believe Richardson was trying to “gain [game] the system” or steal. (Tr., Vol.II, at 53). Chief Gernon also testified that Richardson’s second statement (when she addressed the specific violations) was credible. (Tr., Vol. II, at 46, 77).

Chief Gernon explained that the problem with the hours of details overlapping with hours of work is that this occurrence constitutes payroll fraud or “double dipping.” (Tr., Vol. II, at 77). Chief Gernon testified that when NOPD officers receive payment from two different sources for the same hours worked, these overpayments understandably fuel the public outrage that police officers are more interested in earning extra income than serving the public. (Tr., Vol. II, at 78-79)

Chief Gernon explained that the public believes “we’re not actually doing our jobs” because “you’re more worried about being at your detail than you are about being at work.” (Tr., Vol. II, at 78). Therefore, according to Chief Gernon, when an NOPD officer receives double compensation for overlapping shifts at NOPD and a police detail, the result is a loss of confidence from the citizens. (Tr., Vol. II, at 78-79).

Officers serving in the rank of Commander/Captain and above are categorized as Executive Administrative Professional (EAP) employees. (Tr., Vol. I, at 111). These leadership positions come with 24/7/365 responsibilities. (Tr., Vol. I, at 35). They are not required to “punch a clock” and are trusted to work at least a 40-hour week. (Tr., Vol. I, at 35, 111). Most officers in these positions work considerably more hours. (Tr., Vol. I, at 35, 111). EAP employees are exempt employees under the Fair Labor Standards Act (FLSA), so EAP employees are not eligible for overtime compensation. (See Tr., Vol. I, at 173-74).

NOPD commissioned officers serving in FLSA-exempt roles are well-compensated by the City of New Orleans. Richardson’s average salary for the years from 2019 to 2021 was \$137,200. This average does not include any income Richardson earned from police secondary employment (details). According to the City of New Orleans Code of Ordinances Section 90-121, Lieutenants currently earn \$43/hour for police details, and officers in all ranks above Lieutenant receive \$47/hour. Chief Gernon testified the last time he worked a detail was in 2019 when he was the Eighth District Captain. (Tr., Vol. I, at 169). Jonette Williams, the Deputy Superintendent of the Management Services Bureau, testified she had not worked a detail since 2015. (Tr., Vol. II, at 150).

Chief Gernon looked at Richardson’s vehicle locations for a four month and two to three week period, the time period records from the City’s license plate readers were available. (Tr.,

Vol. I, at 191-93). This window of time is significantly shorter than the time period Chief Gernon used to compare OPSE and NOPD/ADP hours. Over this time period, the records from the license plate readers reflect that Richardson's car was not in the assigned area of her detail location on 10 occasions. (Tr., Vol. I, at 199; Ex. NOPD-2; Ex. NOPD-3). Of these ten occasions, nine of the license plate readings from the camera in Algiers were during details at the Fairgrounds. (Tr., Vol. I, at 199). One reading during Richardson's detail at the Superdome for the Bayou Classic was from the camera on Chef Menteur. (Tr., Vol. I, at 199-200). Richardson informed Chief Gernon that another person was using her car to move her belongings while she was working the Bayou Classic. (Tr., Vol. I, at 200).

II. ANALYSIS

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984).

As set forth below, Richardson's appeal is DENIED in part and GRANTED in part.

A. Failing to Inform OPSE when Leaving Fairground Detail

The Commission denies Richardson's appeal of Violations 1 and 39-46. (Ex. HE-1). NOPD has carried its burden of showing cause for the discipline of Richardson under Subsection 21 of NOPD Chapter 22.08, Police Secondary Employment.

First, NOPD has shown that the complained-of activity occurred. Subsection 21 required Richardson to notify OPSE if she left her detail before the scheduled end time. (Ex. NOPD-39 at 4). License plate readers show that Lt. Richardson was not at her detail location during assigned hours on nine occasions over a four month and two to three week period in 2021. In fact, she was nine miles away on the West Bank, near her residence. (Ex. NOPD-38). She did not inform OPSE that she had left her detail. (Tr., Vol. 1, at 49).

Richardson argues, "Since OPSE had absolutely no role in the Fairgrounds detail, there is no way Appellant could have been found in violation of the Rule." (Appellant's Post-Hearing Memorandum at 24). Richardson offered evidence from the coordinator of the Fairgrounds detail, Captain James Scott, that he was in charge of supervision of the detail pursuant to a 2005 ordinance. (Tr., Vol. II, at 221; Ex. R-5 (City of New Orleans Ordinance No. 22,053)). Captain Scott, who did not require officers working the Fairgrounds detail to sign out, testified that neither he nor any of the officers working the detail were required to report to OPSE. (Tr., Vol. II, at 223). Relying on Captain Scott's testimony, Richardson argues that she was not required to report to OPSE when she left the Fairgrounds detail because of Captain Scott's role of coordinator and the method of creation of the detail. (*See* Appellant's Post-Hearing Memorandum at 24). Richardson's argument is weakened by the fact that she failed to report leaving the detail early to Captain Scott, and she necessarily received payment for hours she did not work. Although subsection 21 requires notice to OPSE "as soon as possible" and refers to "exigent circumstances," (Ex. NOPD-39),

OPSE provided Richardson with an opportunity to inform OPSE that she left her detail when it sent her the calculation of hours and payment.

NOPD Policy, Police Secondary Employment, Chapter 22.08, subsection 6 provides that “The City of New Orleans and the Department require that **all** police secondary employment is (a) [e]stablished through and coordinated by the OPSE.” (Ex. NOPD-39 at 1) (emphasis added). The Fairgrounds is a customer, defined as “[a] business, public or private entity, or individual that contracts with the Office of Police Secondary Employment to employ and pay for security or related services provided by off-duty NOPD members.” (Ex. NOPD-39 at 2). Subsection 9 of Chapter 22.08 provides that “OPSE shall be the New Orleans Police Department’s sole contact source for coordinating all elements and services relating to police secondary employment assignments.” (Ex. NOPD-39 at 9). Subsection 21 required Richardson to notify OPSE if she left the Fairgrounds detail early: “Should a member working a police secondary employment assignment be required to leave a police secondary employment location before the scheduled end time for exigent circumstances, the member shall be responsible for notifying OPSE as to the reason and exact time he/she left the assignment as soon as possible.” (Ex. NOPD-39 at 4). Although Chief Gernon testified that he did not believe Richardson was attempting to “steal,” Richardson necessarily received payment from OPSE for hours she did not work, even though OPSE gave her an opportunity to review the time submitted. (Tr., Vol. I, at 184; Tr., Vol. II, at 53). Chief Gernon testified as follows about the time and payment information OPSE emails to NOPD officers working details:

So, every time you work a detail, at the end of that pay period, you get an email from OPSE with a list, like a little grid, a little spreadsheet, saying, you worked the Superdome for eight hours at \$50.00 an hour, so that's XYZ dollars, and then it does that for everyone [sic], and it totals it up at the end to say that on this check, you should have reached \$620.00, whatever the case may be. So, it's almost like a

check and a balance at the end of your pay period, you can look and see, did they overpaid [sic] me or underpaid [sic] me for detail so you can make sure that their records are right to give the officer the opportunity to catch those mistakes on the front end . . .

(Tr., Vol. III, at 81).

Richardson's failure to inform OPSE that she left her detail, either contemporaneously or when she received the email containing her hours worked, impaired the efficient operation of NOPD, as Richardson necessarily received payment for hours she did not work. The existence of a public complaint illustrates the public's loss of confidence in NOPD caused by Richardson's payroll fraud.

Therefore, NOPD carried its burden of showing cause for the discipline of Richardson for Violations 1 and 39-46.

The discipline imposed by NOPD is commensurate with the violation. NOPD imposed the presumptive penalty of five working days for each of the nine separate incidents. The Commission denies Lt. Richardson's appeal of the 45 working day suspension.

It would have been appropriate for NOPD to aggravate the penalty for these violations based on then-Captain Richardson's level and scope of responsibility within the Department and the nature of her position. Richardson violated this rule as a Captain assigned to the Public Integrity Bureau. Richardson should be held to a higher standard as the leader of a department that investigated misconduct by members of the Police Department. Even if the coordinator of the Fairgrounds detail allowed her to leave the detail and approved payment to her for time she was not working, as Richardson argues, Richardson should not have accepted these payments. The undersigned Commissioners expect a ranking member of the Police Department to report a pattern of abuse, not profit from it. The Commission recognizes that it may not impose a more severe

sanction than the Appointing Authority. Civil Service Rule II, § 4.16. *See also Matusoff v. Dep't of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 WL 2562940 at *6, *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313 (holding that Commission may not uphold discipline for a reason different than the reason in the letter of discipline). Therefore, the Commission is limited to a suspension of five working days for each violation.

B. Working Assigned Details while on Duty Violations

For Violations 5-21 pursuant to Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source to wit NOPD Chapter 22.08; Subsection 25 Working details while on NOPD duty, the undersigned Commissioners grant Richardson's appeal of all violations except the four violations when Richardson was an hourly employee.

1. Violations as FLSA-exempt employee

Thirteen of 17 of these instances occurred when Richardson was an FLSA-exempt Executive Administrative Professional (EAP) employee (violations 9-21). **An overlap between NOPD hours and detail hours in the ADP system for EAP employees does not necessarily mean that an officer worked a paid detail shift while on duty with NOPD, as the ADP system is not an authoritative source for EAP employee NOPD duty hours.**

- Chief Gernon testified EAP employees are salaried employees and are not required to punch a clock. (Tr., Vol. I, at 111). Chief Gernon also testified EAP employees may only take leave in whole-day increments. (Tr., Vol. I, at 244). NOPD Policy 13.37, Payroll and Timekeeping, Subsection 7 prohibits EAP employees from taking leave in less than whole-day increments. (Ex. NOPD-40). The effect of this leave policy is compensation for a full day of work if an EAP employee works any part of the day.

- EAP employees are FLSA-exempt employees and are not eligible for overtime compensation. (Tr., Vol. I, at 174) There is no policy preventing exempt employees from working paid details.
- The purpose of the Payroll and Timekeeping policy is to ensure timely and accurate disbursement of pay and to comply with local, state, and federal law. (Ex. NOPD-40). Operations Manual Chapter 13.37 Payroll and Timekeeping states: “As such, every City employee is required to: i) Personally and accurately record time, attendance, and leave on a biweekly(or weekly basis if applicable)...” Although EAP employees must approve their time in ADP, EAP employees cannot enter their own time and therefore cannot possibly comply with the letter of this policy. (See Tr., Vol. I, at 27; Tr., Vol. II, at 89).
- For EAP employees, the hours entered into the ADP timekeeping system are not an accurate representation of the hours they are actually on NOPD duty.
 - The ADP system auto-populates NOPD EAP officers’ duty hours to 40 hours per week for purposes of compensation. (Tr., Vol. I, at 174).
 - EAP employees can have their timekeepers (who are subordinates) adjust their hours however they want based on verbal or written instructions. (Tr., Vol. I, at 208). As verbal instructions are apparently acceptable under NOPD policy, there is no audit trail.
 - Richardson testified that any overlap between NOPD hours in the ADP system and her detail hours maintained by OPSE were caused by the subordinate assigned to adjust her hours failing to adjust her hours or leave time as instructed. (Tr., Vol. III, at 192, 194-95). Sgt. Garcia confirmed one occasion when he failed to change the

payroll entry when instructed, which he remembered because he worked the detail with Richardson. (Tr., Vol. II, at 99)

- Chief Gernon stated that ADP payroll records currently auto-populate his hours worked from 8:30-4:30. (Tr., Vol. I, at 175). He stated that he normally gets to work before 9:00 and leaves between 5:30 and 6:15. (Tr., Vol. I, at 175). Therefore, Chief Gernon approves his time electronically in the ADP system although it is not an accurate reflection of his time working for NOPD.
- The ADP payroll system is not used to ensure accuracy of the hours EAP employees are on duty. Chief Gernon stated; *“For EAP employees, they’re responsible for their time, but you wouldn’t necessarily look at the ADP entries to determine when they actually worked.”* (Tr., Vol. II, at 28) (emphasis added). However, Chief Gernon did exactly this – looking at the ADP entries to determine the hours Richardson worked – in his investigation.
- EAP employees can adjust their NOPD work hours at will. Lt Richardson stated that she checked with Chief Westbrook about adjusting her NOPD hours prior to accepting any detail assignment. (Tr., Vol. I, at 119). This means she was effectively not on NOPD duty when working shifts, regardless of whether her hours were moved in the ADP system.
- As an EAP salaried employee, one is always on the clock. EAP employees are required to come in during off hours depending on their position. As an EAP employee, one is *“always considered working.”* (Tr., Vol. III, at 98) (emphasis added).
- Richardson admitted that she was responsible for approving her time in ADP and failed to always ensure its accuracy. (Tr., Vol. III, at 160). Richardson also testified, “I didn’t care what ADP reflected as my working hours, because all that is, is that for me to get

compensated. I was a salaried employee at the time.” (Tr., Vol. III, at 177). This failure to ensure the accuracy of her hours worked in ADP does not necessarily mean she worked details while on NOPD duty.

- Richardson does not agree that she ever worked a detail shift while working an NOPD shift at the same time. (Tr., Vol. I, at 76)
- Overlaps between NOPD duty and shifts in the ADP system did not cause Richardson to be paid for work she did not perform while she was an FLSA-exempt EAP employee.

Therefore, Richardson’s appeal is granted as to 13 of the 17 instances of working secondary details while on NOPD duty (violations 9 - 21).

NOPD failed to discipline Richardson for these 13 instances (violations 9-21) as an exempt employee under Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source to wit NOPD Chapter 13.37 Payroll and Timekeeping or another applicable policy. The Commission may not deny an appeal for a reason other than the reason in the written notification required under Civil Service Rule IX, § 1.3. *Matusoff v. Dep't of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 WL 2562940 at *6, *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313.

2. Violations as FLSA-non-exempt employee

Richardson’s appeal is denied as to the four (violations 5-8) of the 17 instances when Richardson was a Lieutenant in the Special Victims Unit. NOPD has carried its burden of showing that Richardson, while employed by NOPD as a non-exempt employee eligible for overtime compensation, had a duty to ensure her hours worked were accurate in the ADP timekeeping system. Richardson testified that “it was absolutely my responsibility to verify the payroll.” (Tr., Vol. III, at 162). These ADP time records and the OPSE records of hours worked that paid details

show that Richardson received compensation for the same hours worked from two different employers on four occasions. Therefore, she was working details while on NOPD duty.

Two of these incidents of “double dipping” were for four hours, and two of these incidents were for one hour. Therefore, NOPD has carried its burden of showing that the underlying conduct occurred. In 2015, the Fourth Circuit, affirming discipline of an officer for accepting cash payments for police details, noted that “[t]his court, on several occasions, has upheld findings of legal cause for disciplining an officer for violating various rules and regulations relating to paid details.” *Abbott*, 165 So. 3d at 199 n. 8 (collecting cases).

Richardson’s double-dipping while an hourly employee impaired the efficient operation of NOPD. As Chief Gernon explained, the public loses confidence in officers who enforce the law when the officers fail to avoid even the appearance of fraudulent conduct.

a. The penalty imposed on Richardson for each violation of NOPD detail policy is not commensurate with each violation

The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for disciplining the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep’t*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *Abbott*, 165 So.3d at 197; *Walters*, 454 So. 2d 106 (La. 1984). The Appointing Authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep’t of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

“In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee’s work record and previous disciplinary record.” *Matusoff*, 2020 Westlaw 2562940. . The Commission considers the “nature of the offense the employee’s work ethic, prior disciplinary records, job evaluations, and any grievances filed by the employee.” *Honore v. Dep’t of Pub. Works*, 14-0986, pp. 8-9 (La. App. 4 Cir. 10/29/15), 178 So. 3d 1120, 1131, *writ denied*, 2015-2161 (La. 1/25/16), 185 So. 3d 749.

The Commission finds that the penalty of a seven-day suspension for each violation is not commensurate with the violation. In at least one previous decision, the Fourth Circuit Court of Appeal has held that a penalty was commensurate with the violation when “[o]ther officers who committed the same infraction as Capt. Waguespack received the same discipline.” *Waguespack v. Dep’t of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13), 119 So. 3d 976, 978. Other officers who had more than six instances of overlapping hours (of more than two hours) over a three-year period received a negotiated settlement of a two-day suspension. (Tr., Vol. III, at 16). Based on this comparison⁶, the penalty of a 28-day suspension for two instances of a four-hour overlap and two instances of a one-hour overlap during March of 2019 is not commensurate with the violation. The 28 working day suspension for violations 5-8 is reduced to a two working day suspension.

C. Appeal Based on Sex Discrimination

Richardson has failed to carry her burden of proof to show sex discrimination under Civil Service Rule II, § 4.6. In disciplinary actions where the classified employee alleges discrimination, the burden of proof on appeal, **as to the factual basis for the discrimination**, is on the employee.

⁶ The Commission notes that Richardson’s comparison of her discipline following an administrative investigation to the discipline in negotiated settlements is imperfect.

La. Const. art. X, § 8(B); *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12), 87 So. 3d 925, 927 (quoting *Goins v. Dep't of Police*, 570 So.2d 93, 94 (La. App. 4th Cir.1990)). *See also* Civil Service Rule II, §§ 4.4, 4.8. In 1983, the Fourth Circuit Court of Appeal held the Commission erred by relying on the Title VII *McDonnell-Dougllass* burden-shifting framework for discrimination claims under Article X, Section 8(B) of the Louisiana Constitution. *Mixon v. New Orleans Police Dep't*, 430 So. 2d 210, 212 (La. App. 4 Cir. 1983) (“we conclude the Commission erred in applying the federal burden of proof standard instead of the burden specified in LSA–Const. Art. 10 § 8(B).”). Recently, the Fourth Circuit Court of Appeal, in a plurality opinion, applied the *McDonnell Douglass* framework in a mixed motive whistleblower appeal by a probationary employee. *Balancier v. Sewerage & Water Board of New Orleans*, No. 2022-0255 (La. App. 4 Cir. 10/19/22), 2022 Westlaw 11119572.

In order to show a *prima facie* case of discrimination under the *McDonnell Douglass* framework, Richardson must show that (1) she is a member of a protected class; (2) she was qualified for her position; (3) she suffered an adverse employment decision; and (4) similarly situated male employees were treated more favorably. *Guidry v. Glazer's Distributors of Louisiana, Inc.*, 2010-218 (La. App. 3 Cir. 11/3/10), 49 So. 3d 586, 590–91. Even under the more lenient *McDonnell Douglass* standard, Richardson's sex discrimination appeal fails because the NOPD imposed less severe discipline on both male and female officers. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 345 (5th Cir. 2005) (“However, the record reflects that both Indian and non-Indian salespersons were affected by the blanket pay and commission cuts”). Also, the comparators offered by Richardson were not similarly situated because they were not leading the Public Integrity Bureau at the time of the alleged violations. *See, e.g., Dileo v. Ashcroft*, 201 F.

App'x 190, 191 (5th Cir. 2006); *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009) (“employees who have different work responsibilities . . . are not similarly situated”).

Therefore, Richardson’s appeal based on sex discrimination is denied.


III. CONCLUSION

For the reasons stated herein, Richardson’s appeal of Violations 1, 5-8, and 39-46, is DENIED. Richardson’s sex discrimination appeal is also DENIED. Richardson’s appeal of Violations 9-21 is GRANTED.


NOPD shall remove the discipline for Violations 9-21 from Richardson’s record. NOPD shall reimburse Richardson’s lost wages and other emoluments of employment for the suspension served by Richardson in excess of 47 working days.

This the 2nd day of October, 2023

WRITER:


Brittney Richardson (Sep 29, 2023 09:19 CDT)
BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:


Ruth Davis (Oct 1, 2023 10:00 CDT)
RUTH DAVIS, COMMISSIONER

DISSENT BY COMMISSIONER KORN

I agree with the majority opinion that Richardson's sex discrimination appeal should be DENIED. I agree that Richardson's appeal of Violations 9-21 should be GRANTED. I also agree that Richardson's appeal of Violations 5-8 should be DENIED.

Regarding Violations 5-8, I note several serious concerns with the appointing authority's penalty assessment rationale. First, I find that the appointing authority knowingly and purposefully violated several of its own policies regarding consistency of discipline. **NOPD Operations Manual Chapter 26.2.1.** states: "The New Orleans Police Department is committed to holding officers who commit misconduct accountable through an equitable, consistent disciplinary process."

Lt. Richardson was the only employee to have discipline applied to each individual count. Discipline could and perhaps should have been applied to each count rather than consolidating the counts, but counts were consolidated for every other employee who committed similar infractions including two Captains, one the head of PIB. Other employees with similar infractions received from 2 to 5 days, while Lt Richardson received 119 days.

The **NOPD Operations Manual Chapter 26.2 paragraph 45** requires that PIB provide information regarding the discipline imposed on other NOPD employees for similar violations. Chief Goodley asked for this information and PIB declined to provide it as clearly required. Recusal of PIB from the investigation does not remove this requirement. NOPD also ignored several pieces of correspondence from the Police Monitor regarding concerns with consistency of discipline, specifically that counts should either be all separate or all consolidated across employees.. (Tr., Vol. II, at 186; *See generally* testimony of Stella Cziment, Tr., Vol. II, at 179-

216). Consequently, the appointing authority imposed an order of magnitude higher level of discipline on Richardson, 114 days more than any other first offender in this case.

In addition to ignoring the consistency of discipline policy, I find that NOPD improperly applied the aggravating and mitigating factors in its disciplinary matrix. All applicable mitigating and aggravating factors should be considered. NOPD Operations Manual Chapter 26.2.1 under Sub-section 4, Aggravating and Mitigating Circumstances states:

Discipline must be consistent. The same or similar violation must be given the same or similar penalty. However, it is recognized that the circumstances of an offense may make it more or less egregious and therefore deserving of a lesser or greater penalty. The following non-inclusive factors, if applicable to the particular case, should be considered when considering discipline, as mitigating or aggravating circumstances.

I also note that the following mitigating circumstances from NOPD Policy Chapter 26.2.1, Subsection 4, were applicable yet not considered: (c) past disciplinary and work record, including commendations; (d) previous sustained violation of a higher level in the preceding 36 months; (e) longevity in the department and contributions; and (q) whether the employee accepted responsibility for her actions.

Also, three factors were badly misapplied. First, NOPD determined the violation was intentional, inadvertent, or committed maliciously or for personal gain. (Ex. HE-1 at 5).; NOPD Policy Chapter 26.2.1, Subsection 4(k). However, at the hearing, Chief Gernon stated, "To clarify that, I don't think that Captain Richardson was purposely looking to gain [game] the system or steal. That's not what my investigation showed, and that's what I was trying to explain to any future reviewer." (Tr., Vol. II, at 46). Based on the result of Chief Gernon's investigation,

Richardson's lack of intent should have been considered a substantial factor in mitigation, certainly not an aggravating factor..

Second, NOPD misapplied the factor of the notoriety of the offense or impact on NOPD's reputation. (Ex. HE-1 at 5). There was considerable negative press coverage over an extended period noting Richardson's rank and command of PIB, which was based on the assumption that she was trying to cheat the system for personal gain. (*See Tr.*, Vol. I at 91-92, 132). However, the investigator concluded that he did not believe that she was in fact trying to cheat the system. Notoriety should not be an aggravating factor if negative press coverage is based on an incorrect presumption of intent or guilt. *See Brickeen v. NOHSEP*, No. 9179 at 5-6 (Civil Service Commission 5/6/21) (granting appeal of termination and noting that media descriptions of Brickeen's law enforcement role were inaccurate).

Third, "consistency of the penalty with those imposed for a similar offence within the disciplinary matrix" was noted as a mitigating factor. However, the last sentence states: "*In the pre-disciplinary hearings conducted by the Public Integrity Bureau, for other junior officers charged with violation of Ch. 22.08 and in negotiated settlements, it was reported (but unconfirmed) that some officers received less than the presumptive penalty.*" This was not considered a mitigating factor because of the intentional decision not to provide this information to the investigator.

I would grant Richardson's appeal of Violations 1 and 39-46 under **Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source to wit NOPD Chapter 22.08 Police Secondary Employment Subsection 21**, for reasons outlined in the Hearing Examiner's report.

License plate readers show that Richardson was not at her detail location during assigned hours on nine occasions over a four month and two to three week period in 2021. In fact, she was nine miles away on the West Bank, near her residence. (Ex. NOPD-38). However, NOPD disciplined Richardson for failing to notify OPSE when she left her detail for exigent circumstances, and the evidence shows that Richardson was not required to notify OPSE when working the detail at the Fairgrounds. Captain James Scott, a retired NOPD officer, testified a 2005 City of New Orleans ordinance requires the Fairgrounds to pay for a police detail in the neighborhood surrounding the Fairgrounds. (Tr., Vol. II, at 221) *See* City of New Orleans Ordinance No. 22,053. “The applicant [Churchill Downs] shall provide 24 hours a day and 7 days per week New Orleans Police patrol.” (Ex. R-5). The ordinance requires a coordinator who schedules the officers and supervises the officers and rank when working the detail. (Ex. R-5). Captain Scott is the police detail coordinator, and testified that OPSE did not coordinate this secondary employment and no police officers working the detail were required to notify OPSE.. The appellant followed the protocol established by Capt. Scott and had no reason to believe that OPSE had a role. The investigating officer did not interview the supervisor of the detail, Capt. Scott, prior to making this charge; OPSE did not testify at the hearing, and Capt. Scott’s testimony was not refuted. Therefore, I would find that NOPD has failed to carry its burden of showing the complained-of conduct occurred. *Jenkins v. New Orleans Police Dep’t*, 2022-0031 (La. App. 4 Cir. 6/22/22), 343 So. 3d 238, 242. (affirming Civil Service Commission’s grant of appeal when “the CSC held that the NOPD failed to carry its burden of proving the first factor: the occurrence of the complained of conduct”).

I note that the description of the factual basis for the discipline in the October 17, 2022, letter may have violated other NOPD policies, such as leaving a paid detail early under Chapter

22.08 Police Secondary Employment, subsection 13(d), (Ex. NOPD-39), leaving assigned area under Chapter 26.2.1 Disciplinary Matrix, Rule 4, paragraph 48, (Ex. NOPD-44), or any other applicable provision requiring Richardson physically to be in her assigned detail location. The appointing authority did not allege that Lt. Richardson failed to return to her detail on any occasion or that she was paid for hours for which she did not work. The appointing authority did not notify Lt Richardson that she was charged with anything other than a failure to notify OPSE. The Commission may not substitute a different policy violation then the violation provided to Richardson on October 17, 2022. *Matusoff v. Dep't of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 WL 2562940 at *6, *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313.

I would grant Richardson's appeal of violations 1 and 39-46.

J H Korn

J H Korn (Sep 27, 2023 10:31 CDT)

JOHN KORN, VICE-CHAIRPERSON