



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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Friday, December 18, 2020

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Jennifer Dupree VS.**
Department of Police
Docket Number: 9114

Dear Mr. Boshea:

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 - 12/18/2020 - 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,

Doddie K. Smith
Chief, Management Services Division

cc: Shaun Ferguson
Elizabeth S. Robins
Jay Ginsberg
Jennifer Dupree

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

JENNIFER DUPREE,
Appellant

vs.

DOCKET NO. 9114

NEW ORLEANS POLICE DEPARTMENT,
Appointing Authority

I. SUMMARY OF THE DECISION

Appellant, Jennifer Dupree, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from the discipline imposed by the New Orleans Police Department ("NOPD") on November 6, 2019. That discipline consisted of an oral reprimand, a 120 day suspension, and dismissal. At the time she was disciplined, Dupree was employed as a Lieutenant with the NOPD and had permanent status as a classified employee.

A Hearing Examiner, appointed by the Commission, presided over a hearing held on January 29, 2020 and February 12, 2020. At this hearing, both parties had an opportunity to call witnesses and present evidence. After the hearing concluded, the Hearing Examiner provided the Commission with his advisory report dated August 31, 2020, which is attached hereto.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcripts from January 29, 2020 and February 12, 2020, all exhibits submitted at the two day hearing, and the post hearing memoranda submitted by the parties, the

Hearing Examiner's August 31, 2020 report, and controlling Louisiana law. For the reasons set forth below, we **DENY** the appeal in part and **GRANT** the appeal in part.

II. ANALYSIS

A. Dupree Failed to Enter Her Correct Mileage

The Appointing Authority established that on multiple occasions Dupree failed to enter the correct mileage from her vehicle's odometer when fueling at the City pumps. Further, Dupree even acknowledged that her entries were inconsistent and that she failed to adhere to the Appointing Authority's policy requiring that she report accurate mileage from her odometer when fueling her vehicle. (Hearing Examiner's Report, p. 39). Thus, the Commission concludes that Dupree violated Rule 4: Neglect of Duty, Paragraph 4, subparagraph C6, failing to comply with instructions, oral or written, from an authoritative source, to wit: Chapter 13.14, Vehicle Fueling and Fuel Services, Employee Responsibilities by failing to enter the correct mileage from her vehicle's odometer for which she received an oral reprimand. The Commission DENIES Dupree's appeal on this issue in that the Appointing Authority carried its burden of proving that the Appellant's oral reprimand was justified.

B. Dupree Violated a Direct Order

On July 12, 2018, Dupree submitted her first take-home vehicle form and listed [redacted] in Geismar, Louisiana as her domicile address. The Superintendent rejected her form on July 16, 2018, because Dupree's listed address was beyond the forty (40) mile limit allowed by the Department for a take-home vehicle. On July 17, 2018, Dupree submitted a second take-home vehicle form and instead listed [redacted] in Metairie, Louisiana, her parents' address, as her domicile. The Superintendent approved this form because the driving distance was below the approved forty (40) mile limit.

This Commission finds that, although Dupree may have been unaware of the 40 mile restriction when she submitted her first request, she was certainly aware of it when she submitted her second request. Further, Dupree does not dispute that she drove her take-home vehicle beyond the 40-mile limit on multiple occasions after she was informed that her initial take-home vehicle request form was not approved. Accordingly, the Commission concludes that Dupree violated Rule 4: Performance of Duty, Paragraph 2, Instructions from an Authoritative Source by disobeying a direct order, for which she received a 120-day suspension. The Commission DENIES Dupree's appeal on this issue in that the Appointing Authority carried its burden of proving that the Appellant's 120 day suspension was justified.

C. Dupree Knowingly Submitted False or Inaccurate Reports

As indicated above, after Dupree started using her take-home vehicle, she periodically began entering the wrong mileage from her vehicle's odometer when fueling at City pumps. Dupree also instructed her subordinate, Officer Robert Ponson, to wrongfully enter her ADP (Automatic Data Process, Inc.) payroll deduction for her take-home vehicle at the 0-20 mileage option. These actions apparently went undetected until August 23, 2018, when the Appointing Authority received an anonymous tip that several officers, including the Appellant, were improperly using their take-home vehicles. The Appointing Authority then used undercover surveillance to investigate this tip and discovered that Dupree was using her vehicle to drive to her domicile in Geismar, beyond the 40 mile limit.

The Appointing Authority charged Dupree with: (1) disobeying an order by commuting to and from Geismar, LA in the take-home vehicle, and (2) failing to properly enter the correct mileage from the take-home vehicle's odometer, coupled with an additional determination that the Appellant caused her subordinate to enter false information into the payroll system regarding her

take-home mileage. The Appointing Authority also determined that these violations evidenced a premeditated scheme by the Appellant to conceal her improper use of her take-home vehicle, which led to the Appointing Authority's decision to dismiss/terminate her.

The Commission agrees with the Appointing Authority and finds that Dupree intentionally attempted to deceive the NOPD by submitting her take-home vehicle form with false and inaccurate information. More specifically, the Commission concludes that Dupree acted dishonestly by: (1) submitting her take-home vehicle form with an address that was not her domiciliary address, (2) entering erroneous mileage at the gas pumps in an attempt to cover up her taking the vehicle beyond the allowable mileage, and (3) knowingly allowing false information to be entered into the ADP payroll system for her take-home vehicle payment. Further, the Commission finds the facts in *Gant v. New Orleans Police Dep't* to be particularly analogous to this case because the Fourth Circuit there concluded that the appellant acted deceitfully by using a friend's apartment address as a "workaround" to the NOPD's take-home vehicle policy. 286 So.3d 524, 532 (La. App. 4th Cir. 2019). Thus, the Commission DENIES Dupree's appeal on this issue in that the Appointing Authority carried its burden of proving that the Appellant's dismissal was justified.

D. Timeliness of Investigation

i. Initiation of the Investigation

Dupree contends that, pursuant to La. R.S. 40:2531(C), all disciplinary action taken against her is an absolute nullity because the Appointing Authority failed to initiate its investigation timely as required by La. R.S. 40:2531(B)(7), otherwise known as the Police Officers' Bill of Rights, which states, in pertinent part, that: "When a **formal and 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.**” (Emphasis added).

In contrast to the “formal and written complaint” requirement found in La. R.S. 40:2531(B)(7), Chapter 52.1.1 of the New Orleans Police Department Manual Policy does not mandate that the initial complaint be formal and in writing. The NOPD Manual instead states that an investigation must commence within fourteen days of the Cognizance Date which it defines as “the date on which an NOPD supervisor, whether assigned to PIB or assigned to another bureau, **receives a complaint of alleged employee misconduct from any source**, observes employee misconduct, or gains knowledge from any source of employee misconduct.” (Emphasis added).

To our knowledge, the Louisiana Fourth Circuit Court of Appeal has never ruled on this inconsistency between La. R.S. 40:2531(B)(7) and the NOPD Manual in regard to whether or not the initial complaint that triggers the investigation’s deadlines must be “formal and written.” However, the Fourth Circuit has rejected arguments that have tried to contend that investigations were started before “formal and written” complaints were made. *See Abbott v. New Orleans Police Dept*, 165 So.3d 191, 202-03 (La. App. 4th Cir. 2015). Thus, the Commission concludes that the “formal and written complaint” language found in La. R.S. 40:2531(B)(7) controls and supersedes the “from any source” language found in the NOPD Manual.

Applying the above conclusion, that there must be a formal and written complaint, to the facts of this case, Lieutenant Precious Banks, the officer assigned to the Public Integrity Bureau’s Intake Section in this matter, drafted a formal and written complaint against the Appellant on December 28, 2018. (Exhibit NOPD #9). The Commission concludes that this complaint was the “formal and written complaint” required by La. R.S. 40:2531(B)(7). As such, the Commission declines to use August 23, 2018, the date the NOPD received an anonymous tip regarding Dupree’s

conduct, or any other date prior to December 28, 2018, as the start date for the investigation deadlines because no formal and written complaint was made until December 28, 2018.

Next, the Commission finds that the NOPD initiated its investigation into Dupree on January 11, 2019, the date that the DI-1 Form was completed. As the Fourth Circuit has stated, “this court consistently has held that the NOPD initiates its investigation under La. R.S. 40:2531(B)(7) on the date it initiates the DI-1 form.” *Abbott*, 165 So.3d at 202-03. The Commission finds that the NOPD satisfied the requirement of La. R.S. 40:2531(B)(7) by initiating its investigation within fourteen days of the December 28, 2018 “formal and written complaint.” The Commission thus DENIES the Appellant’s appeal on this issue.

ii. Completion of the Investigation

Under La. R.S. 40:2531(B)(7), an investigation of an officer must be completed “within sixty days” of its initiation unless a sixty day extension is received from the Civil Service Commission. In the present case, the Appointing Authority received a sixty day extension from this Commission on January 29, 2019 (Exhibit NOPD #10); thus, it was required to complete its investigation on or before May 9, 2019.

La. R.S. 40:2531(B)(7) states that: “the investigation shall be considered complete upon notice to the [police officer] under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint.” This statutorily required written notice of the alleged completion of the investigation was provided to the Appellant via Officer Regina Williams’ May 8, 2019 report. (Exhibit NOPD #8). However, after receiving Officer Williams’ report, Deputy Superintendent Westbrook rejected it in her capacity as Williams’ supervisor and asked Commander Sabrina Richardson to perform a separate review of Williams’ report.

On August 2, 2019, Richardson submitted a “cover letter” (Exhibit NOPD #16) to Williams’ report. Although Richardson essentially agreed with Williams’ conclusions, she provided different reasons for the disciplinary conclusions. In closely comparing Richardson’s August 2, 2019 cover letter with Superintendent Ferguson’s November 6, 2019 dismissal/termination letter (Exhibit 1), this Commission agrees with and adopts for its own the Hearing Examiner’s conclusion that “what is in the termination letter is heavily borrowed from the cover letter.” (February 12, 2020 Hearing, p. 71).

Accordingly, the issue before this Commission is whether Richardson’s August 2, 2019 “cover letter” violated La. R.S. 40:2531(B)(7) in that it amounted to a continuation of the investigation beyond the legally mandated deadline of May 9, 2019, thus rendering all discipline a nullity as dictated by La. R.S. 40:2531(C). This Commission finds that, though Richardson reached similar conclusions to those provided by Williams in her May 8, 2019 report, Richardson’s August 2, 2019 cover letter expanded the number of counts against the Appellant, provided additional fuel consumption analysis, and gave Richardson’s own reasons for the Appellant’s discipline and ultimate dismissal/termination. Importantly, as the Fourth Circuit recognized in *Pozzo v. Dep’t of Police* , "allowing [the]NOPD to add exhibits and details to its investigation following notice to an accused officer would essentially render the sixty-day deadline moot." 267 So.3d 1148, 1155 (La. App. 4th Cir. 2019). This Commission concludes that Richardson’s very untimely August 2, 2019 cover letter did just that and more to the prejudice of the Appellant in that it was clearly relied upon to a significant extent in the November 6, 2019 dismissal/termination notice sent to the Appellant.

In conclusion, the Commission is duty bound to follow controlling law in rendering a decision in this matter. Given that legal directive, especially that which comes forth from *Pozzo*, the Commission finds that the investigation by the Appointing Authority was not completed by

May 9, 2019 and thus GRANTS the Appellant's appeal on this issue. The Appointing Authority's actions violated the minimum standards set forth in La. R.S. 40:2531(B)(7). Just as the Appointing Authority in levelling discipline against the Appellant rightly held her to comply fully with all applicable department rules, so also must the Appointing Authority be held fully to its legal obligation to comply with the requirements of La. R.S. 40:2531 (B)(7). The Commission orders that all discipline imposed against the Appellant is rendered an absolute nullity in accordance with La. R.S. 40:2531(C) and should be removed from the Appellant's record. In addition, the Appointing Authority is ordered to reinstate the Appellant with all back pay and emoluments to the classified position of Police Lieutenant effective retroactively to the date of her dismissal/termination.

E. Notice of the investigation

La. R.S. 40:2531(B)(1) required the Appointing Authority to provide the Appellant with notice of the "nature of the investigation" prior to the commencement of its interrogation of her. On May 8, 2019, Commander Williams presented Dupree with a document entitled "Notice to the Accused of Completed Investigation and Notice of Pre-Disciplinary Hearing." However, Commander Williams testified that she inadvertently failed to include in that Notice an allegation against Dupree for giving a false or inaccurate report.

Accordingly, Dupree contends she was not aware of the nature of the investigation and was therefore unable to defend herself from the most serious allegation of intentionally concealing her activities and misleading the Appointing Authority through the submission of false or inaccurate reports. Conversely, notwithstanding Commander Williams' error, the Appointing Authority contends that Dupree was made aware of the nature of the investigation when Appellant was informed that she was under investigation for driving her take-home vehicle

beyond the 40-mile limit and, by doing so, she was acting inconsistently with her approved request for a take-home vehicle that provided a residence within the 40-mile limit.

The Commission finds that Dupree was sufficiently informed of the nature of the investigation before providing her statement. As the Fourth Circuit has recognized, "La. R.S. 40:2531 does not require that the law enforcement officer know the exact charges that may be brought against him. All that is required is that the investigating agency inform the police officer 'of the nature of the investigation.'" *Knight v. Department of Police*, 619 So.2d 1116 (La. App. 1993). In this case, Commander Williams testified that she alerted Dupree to all aspects of this investigation and presented her with the specific forms during her questioning. (Tr. Vol. I, p. 278-84, Commander Williams' Testimony). Further, Williams indicated that the Appellant was present at the PIB extension hearing where the Rule 6, Paragraph 2: False and Inaccurate Reports violation was read aloud into the record. (Tr. Vol. I, p. 160-01, Commander Williams' Testimony). Dupree also conceded that she was questioned regarding her submission of the two forms when her statement was taken. (Tr. Vol. I, p. 137-38, Dupree's Testimony). Thus, the Commission concludes that Appointing Authority adequately complied with the requirements found in La. R.S. 40:2531(B)(1), and the Commission DENIES the Appellant's appeal on this issue.

F. Dupree's reassignment to Police Lieutenant

On March 29, 2019, during Dupree's investigation, the Appointing Authority reassigned Dupree from the unclassified position of Police Commander to her previously held classified position of Police Lieutenant. This reassignment resulted in both a reduction of Dupree's pay and rank. Thus, Dupree argues that her termination was a "legal nullity" because she was already disciplined when the Appointing Authority reduced her rank and pay.

However, as the Hearing Examiner noted in his Report, “the creation of the unclassified position of Police Commander was undertaken specifically to remove the position from the classified service, allowing for the insertion and removal of Police Commanders from the classified positions of Police Captain or Police Lieutenant without the protections and oversights otherwise provided by Civil Service rules.” (Hearing Examiner’s Report, p. 36). “This change was requested by the Appointing Authority and was authorized by the Civil Service Commission.” *Id* . Further, New Orleans Civil Service Rule I, Section 1 defines “demotion” and “promotion” as:

23. “Demotion”: a change of an employee *in the classified service* from a position in one class to a position in another class for which a lower pay grade is provided in the pay plan. (Emphasis Added).

56. “Promotion” a change of an employee *in the classified service* from a position in one class to a position in another class for which a higher pay grade is provided in the pay plan. (Emphasis Added).

Because Dupree’s original reassignment to the unclassified position of Police Commander was not a “promotion,” her reassignment back to the classified position of Police Lieutenant was not a “demotion” under New Orleans Civil Service Rules. Thus, the Commission concludes that Dupree was only disciplined once; when she was disciplined in November 2019 from her classified position as Police Lieutenant. Therefore, the Commission DENIES the Appellant’s appeal on this issue.

III. CONCLUSION

As indicated above, after reviewing the entire record in this matter in light of controlling Louisiana law, the Appellant’s appeal is **GRANTED IN PART AND DENIED IN PART**. Appellant shall be reinstated as of the effective date of her dismissal to the classified position of Police Lieutenant with all emoluments of employment.

Judgment rendered this 18th day of December, 2020.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER: Mark C. Surprenant
Mark C. Surprenant (Dec 10, 2020 15:47 CST)
MARK SURPRENANT, COMMISSIONER

CONCUR: Brittney Richardson
Brittney Richardson (Dec 18, 2020 11:44 CST)
BRITTNEY RICHARDSON, COMMISSIONER

I concur with Commissioners Surprenant and Richardson as to the remedy reinstating Appellant, but I write separately to adopt the reasoning of the hearing officer as to the violation of La. R.S. 40:2531. In particular, I find it dispositive that the New Orleans Police Department violated La. R.S. 40:2531(B)(7) by conducting an investigation of Appellant from September 10, 2018, to December 18, 2018, which was not concluded until the May 8, 2019 notice to Appellant. Therefore, NOPD failed to complete the investigation of Appellant within 60 days, and any discipline is an absolute nullity. La. R.S. 40:2531(C).

CJ Moore
CJ Moore (Dec 11, 2020 04:03 CST)
CLIFTON J. MOORE, JR., VICE-CHAIRPERSON

JENNIFER DUPREE

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 9114

REPORT OF THE HEARING EXAMINER

I. INTRODUCTION AND PRELIMINARY MATTERS

A. Disciplinary Action Taken by Appointing Authority

At the time of the disciplinary action, Jennifer Dupree ("Appellant") was employed by the Department of Police ("Appointing Authority") as a Police Lieutenant with permanent status. However, in the instant appeal, all alleged acts of misconduct and all evidence relied upon by the Appointing Authority in taking disciplinary action was collected while the Appellant was employed in the unclassified position of Police Commander. Prior to taking disciplinary action, but while the Appellant was still under formal investigation, the Appointing Authority returned the Appellant to her classified position of Lieutenant.

The Appointing Authority's factual basis for taking disciplinary action originated from actions taken by the Appellant regarding the use of a take-home vehicle and its determination that the Appellant made false and inaccurate reports with the intention to conceal those actions. All violations sprung from the Appointing Authority determination that the Appellant drove her take-home vehicle without approval beyond the mileage limit set forth in policy. A summary of the facts upon which the Appointing Authority relied are

set forth in the second, third, fourth, and fifth paragraphs of the November 6, 2019 disciplinary letter, which provide:

You authored a City of New Orleans Take-Home Vehicle Add/Delete/Charge form, on Thursday, July 12, 2018, and submitted it to the Superintendent's office for approval. Superintendent Michael Harrison disapproved the form on Tuesday, July 16, 2018, because your address was beyond the 40 miles allowed by the Department to take the vehicle. After this disapproval, you continued to take the department issued vehicle to your residence at [redacted] Geismar, Louisiana and [redacted] Geismar, Louisiana.

The Public Integrity Bureau received anonymous information [August 23, 2018] that you were driving your unmarked departmental issued vehicle to Geismar, Louisiana after you were disapproved by Superintendent Michael to do so. A covert surveillance operation commenced. During the course of the covert operation, by the Special Investigations Section, several documents were gathered and handed over to the investigator. The covert operation also captured on surveillance photographs and videos showing you at your residences at [redacted] and [redacted] Geismar, Louisiana after you were disapproved to take the vehicle beyond the allowed approved mileage.¹

You authored a City of New Orleans Take-Home Vehicle Add/Delete/Change form, on Thursday July 12, 2018, and submitted it to the Superintendent's office for approval. Superintendent Michael disapproved the form on Tuesday, July 16, 2018, because your address was beyond the 40 miles allowed by the Department to take the vehicle. On July 17, 2018, the next day of being disapproved to drive your vehicle to your residence at [redacted], you submitted a new Take Home Vehicle Add/Delete/Change form stating your residence as [redacted]. The investigation revealed this residence is in fact your parents' residence.

¹ The August 23, 2018 date is undisputed but not contained in the disciplinary letter. The date is inserted for informational purposes to confirm a timeline.

The Automatic License Plate Reader and gasoline consumption records assisted with confirming the vehicle was being driven for long distances. Through documentation and evidence, it was established that you disobeyed a direct order from Superintendent Michael Harrison and drove your police vehicle to Geismar, Louisiana at least 45 times.

The investigation also revealed that you instructed administrative officers (Sgt. Shawn Summers and Officer Robert Ponson) to enter your vehicle usage mileage at -20 miles at least 31 times, while the vehicle was being taken to Geismar, Louisiana.

Based upon its investigation, the Appointing Authority reprimanded, suspended, and terminated the Appellant after determining that she violated the following internal rules:

- Rule 4: Performance of Duty, Paragraph 2 Instructions from an Authoritative Source (Specifically Disobeying a Direct Order) (45 Counts)/ **120-day suspension.**

The Appointing Authority stated in the disciplinary letter:

You violated this rule when you continued to take the departmental issued vehicle to your residence at [redacted], Geismar, Louisiana after Superintendent Michael Harrison's direct order of disapproval to not drive the vehicle to Geismar, LA.

- Rule 4: Performance of Duty, Paragraph 4, Neglect of Duty, subparagraph C6, failing to comply with instructions, oral or written, from an authoritative source, to wit: Chapter 13.14, Vehicle Fueling and Fuel Services, Employee Responsibilities
5. Each member is responsible for the use and security of his/her assigned PIN
- (b) Employees shall enter the correct mileage from the odometer of the vehicle fueled / **Oral Reprimand.**

The Appointing Authority stated in the disciplinary letter:

You violated this rule when you consistently entered your vehicle mileage incorrectly at the City gas pumps.

- Rule 6: Official Information, Paragraph 2: False or Inaccurate Reports
An employee shall not knowingly make, or cause or allow to be made, a false or inaccurate oral or written record or report of an official nature, or intentionally withhold material matter from such report or statement. / **Dismissal**

The Appointing Authority stated in the disciplinary letter:

You violated this rule when you in totality 1. knowingly submitted a Take Home Vehicle form listing an address which is not your domiciliary address, 2. knowingly entered erroneous mileage information at the gas pumps to cover up taking the vehicle beyond the allowed mileage, and 3. knowingly allowed for false information to be entered for your ADP Take Home Vehicle payment entries.

(Hearing Examiner Exh. 1)

B. Legal Arguments Offered by Appellant

The Appellant made several legal arguments most of which, if accepted, would require the Commission to grant the Appellant's appeal, regardless of the evidence supporting disciplinary action.

1. Public Integrity Bureau (PIB) Investigation was not Completed within the Time Limitations mandated by LA RS 40:2531

New Orleans Police Departmental Policy Chapter 52.1.1, titled "Misconduct Complaint Intake and Investigation", governs the reporting, receipt, classification, assignment, processing, investigation, and disposition of complaints regarding allegations of misconduct against employees. The policy includes, under the heading *Formal Disciplinary Investigation Due Date*

Calculation found in paragraphs 82 and 83, the time restraints under which PIB must operate. The policy provides as follows:

82. An administrative investigation shall be completed within the time limitation mandated by LA RS 40:2531, which requires every investigation to be initiated within fourteen (14) days of the Cognizance Date. The date when a PIB investigation is initiated is known as the Classification Date. All due dates are calculated upon the Classification Date.

83. Every investigation must be completed within sixty (60) days of the Classification Date unless an extension of sixty (60) days is granted by Civil Service. The Civil Service extension extends the final due date to 120 days from the classification date. Within that time frame, the investigator's written investigation (accompanied by exhibits), the various levels of supervisory review which may necessitate corrections/additions/clarifications, the final approvals at every level, and the verbal and/or written "Notice to Accused Law Enforcement Officer Under Investigation of a Pre-Disciplinary Hearing or a Determination of an Unfounded or Not Sustained Complaint" (NOPD Form #308) must be completed.

New Orleans Police Departmental Policy Chapter 52.1.1 includes, under the heading *Definitions*, the definitions of Cognizance Date and Classification Date. The relevant definitions are as follows:

Cognizance date—The date on which an NOPD supervisor, whether assigned to PIB or assigned to another bureau, receives a complaint of alleged employee misconduct from any source, observes employee misconduct, or gains knowledge from any source of employee misconduct.

Classification date—The date on which PIB determines the complaint will be investigated as a public complaint; internally generated complaint; minor infraction resolved through counseling or training; or NFIM.

The Appellant contends that PIB failed to initiate an investigation within 14 days of the cognizance date and, as a consequence of the delay, failed to complete its investigation within the time restraints mandated by LA RS 40:2531. The Appellant further contends that PIB failed to complete its investigation within the time restraints mandated by LA RS 40:2531 by continuing to investigate after the investigation was formally concluded.

If the Appellant establishes that PIB violated LA RS 40:2541, her appeal must be granted regardless of whether in fact she violated internal rules that would otherwise subject her to disciplinary action. LA RS 40:2541 (C), provides as follows:

There shall be no discipline, demotion, dismissal, or adverse action of any sort taken against a police employee or law enforcement officer unless the investigation is conducted in accordance with the minimum standards provided for in this Section. Any discipline, demotion, dismissal, or adverse action of any sort whatsoever taken against a police employee or law enforcement officer without complete compliance with the foregoing minimum standards is an absolute nullity.

2. Reassignment to Classified Position of Police Lieutenant was a demotion

On March 29, 2019, while under investigation and prior to taking final disciplinary action, the Appointing Authority reassigned the Appellant from her unclassified position of Police Commander to her classified position of Police Lieutenant. It was from that position that the Appellant was terminated. The Appellant contends that the reassignment was a demotion and disciplinary in

nature and, consequently, the Appointing Authority is barred from terminating her employment for the same acts of alleged misconduct.

3. PIB Investigator Failed to Inform Appellant of the Nature of the Investigation prior to taking her Administrative Statement

LA RS 40:2531(B)(1) provides as follows:

B. Whenever a police employee or law enforcement officer is under investigation, the following minimum standards shall apply:

(1) The police employee or law enforcement officer being investigated shall be informed, at the commencement of interrogation, of the nature of the investigation and the identity and authority of the person conducting such investigation, and at the commencement of any interrogation, such officer shall be informed as to the identity of all persons present during such interrogation. The police employee or law enforcement officer shall be allowed to make notes.

The Appellant contends that PIB violated the above-cited provisions of LA RS 40:2531 by failing to inform her, prior to taking her administrative statement, that she was under investigation for making a false or inaccurate report. According to the Appellant, the omission of this information regarding the allegation that resulted in her termination violated LA RS 40:2531 by depriving her of notice of the nature of the investigation.

4. No Intent to Deceive

Certain core facts are not in dispute. The Appellant acknowledges that she drove her take home vehicle to her residence located beyond the 40 miles allowed by departmental rules with full knowledge that doing so violated departmental rules. While the Appellant does not contest that she violated

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internal rules regarding instructions from an authoritative source by disobeying a direct order, she contends that she did not make false or inaccurate reports with an intent to deceive to facilitate her use of the take-home vehicle beyond the 40-mile limit.

The distinction is important because, while the Appellant was suspended for 120 days for taking the vehicle beyond the 40-mile limit, she was terminated for allegedly making false or inaccurate reports to facilitate the use of the take-home vehicle beyond the 40-mile limit.

II. FACTUAL BACKGROUND AND TESTIMONY

A. Take-Home Vehicle Requests

From June 2018 through March of 2019, the Appointing Authority employed the Appellant as the Commander of the Second Police District. (Tr. Vol. 1, P. 41). Appellant was one of eight Police Commanders (now known as "provisional Police Captains")² responsible for one of the eight police districts.

At all times relevant to this matter (and currently), the Police Department employed a total of sixteen commanders/provisional Police Captains. Within the department's chain of command, Police Commanders report directly to one of the five Deputy Superintendents who are each responsible for one of the five police bureaus. District Police Commanders, such as the Appellant, are assigned to the Field Operations Bureau. (NOPD Operations Manual Chapter

² Police Commanders are now identified as provisional Police Captains after a Court ruling that prevents the Appointing Authority from appointing Police Commanders as unclassified employees.

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11.1, Title: Organizational Structure). The position of District Commander is defined as "a commissioned police officer, holding the rank of Commander (now Captain) or above, charged with the duties and responsibilities of providing for uniformed police coverage, answering calls for service, and managing case investigations within a specific geographical area of the City of New Orleans. (NOPD Operations Manual Chapter 11.0.1, Title: Duties and Responsibilities of District Commanders, Supervisory Members and Officers).

As a newly assigned District Commander, the Appellant required a take-home vehicle associated with her new assignment. To that end, on July 12, 2018, the Appellant submitted a City of New Orleans Take-Home Vehicle Form through her chain of command. (NOPD Exh. 1). The form identified her address as [REDACTED], Geismar, LA 70734. Through the submission of the Take-Home Vehicle Form, the Appellant sought authorization to use her assigned police vehicle to travel to and from her identified residence. (Tr. Vol. 1, P. 12). The Appellant submitted the form through the chain of command to the Deputy Commander of the Field Operations Bureau Paul Noel. Deputy Noel had delegated review and signatory authority for such forms to his Executive Assistant, Police Captain Ernest Demma. As reflected in the document, Capt. Demma approved the request on behalf of Deputy Superintendent Noel. However, Michael Harrison, the Superintendent of Police, disapproved the request because the request did not comply with City policy that restricts the

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use of a take-home vehicle to a distance not to exceed forty (40) miles, absent approval from the City's Chief Administrative Officer (CAO). As reflected in the request form, the Appellant stated that the one-way driving distance from her actual domicile to her primary reporting for duty site was 59.4 miles, which, on its face, exceeds the driving limit dictated by policy.

Capt. Demma testified that, as Dep. Supt. Noel's executive assistant, he reviews all requests for take-home vehicles and, after his review and signature, the request is then forwarded to the Superintendent's office for final approval. (Tr. Vol. 2, P. 8). While he was fully aware of the 40-mile driving distance restriction, he mistakenly approved the request having misread the 59.4 miles as 39.4 miles. The Superintendent's office caught his error and rejected the request. (Tr. Vol 2, P. 13).

After learning of the error, Capt. Demma contacted the Appellant by telephone to discuss her request. He told her that he made a mistake and that she must submit a cover letter through the chain of command to the Chief Administrative Officer or submit a new request form with a different address that complied with policy. (Tr. Vol. 2, P. 15 and P. 27-35). Capt. Demma recalled that the Appellant mentioned other residences including her rental property and her parent's residence located in Metairie. He suggested that she submit a new form with a different residence as long as it was an address where she actually resided. (Tr. Vol 2, P. 31-35).

After her conversation with Capt. Demma, the Appellant submitted a second take-home vehicle request form on July 17, 2018, that identified Metairie La. as the residence where she intended to take her vehicle when not using the vehicle for work duties. As reflected in the request form, the Appellant stated that the one-way driving distance from her actual domicile to her primary reporting for duty site was 8.4 miles. (NOPD Exh. 2; Tr. Vol. 1, P. 19 – 25). The Appellant testified that she provided the Haring Road address because she stayed there during the week and she thought it qualified as a residence for purposes of the take-home vehicle policy, based upon her conversation with Capt. Demma. The Appellant was aware that she did not have permission to take the vehicle to Geismar. Nonetheless, with that knowledge, she took the vehicle to Geismar on numerous occasions from September to December of 2018. (Tr. Vol. 1, P. 21 – 22). She testified that she did not conceal that she had multiple residences and that, prior to her appointment as Police Commander, her supervisors were fully aware that she lived in Geismar. (Tr. Vol. 1, P. 47). The Appellant stated that she resided at her parent's home two or three days during the work week, which was in close proximity to her assignment, and that she drove the vehicle to and from Geismar, where she resided with her wife, part of the work week and during weekends and holidays. (Tr. Vol. 2, P. 52).

B. Anonymous Complaint and Covert Surveillance

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On August 23, 2018, after the Appointing Authority approved the Appellant's second take-home vehicle request form, PIB received an anonymous complaint regarding a potential violation of the take-home vehicle policy. (Tr. Vol 1, pp. 61, 82 - 83, 294 – 295; Dupree Exh. 8). This is reflected in the PIB investigative report authored by PIB's investigator Commander Regina Williams as follows:

On Thursday, August 23, 2018, information concerning a member of the New Orleans Police was relayed to the Public Integrity Bureau, Special Investigations Section. The information received alleged misconduct by Commander Jennifer Dupree, who is currently assigned to the New Orleans Police Department Second Police District. It was alleged that Commander Dupree may have violated the City of New Orleans Take Home Vehicle Policy and the New Orleans Police Departmental Policy governing the use of a take home vehicle. The complainant expressed their concerns surrounding Commander Dupree's use of her city of New Orleans taken home vehicle while wishing to remain anonymous.

(Dupree Exh. 8, p. 5)

Instead of initiating a formal complaint based upon the anonymous tip, PIB chose to refer the matter to its Special Investigations Section (SIS). As reflected in its organization chart and confirmed by testimony, SIS reports directly to the Bureau's Deputy Superintendent, Arlinda Westbrook. (Tr. Vol. 1 pp. 308 – 309; Tr. Vol 2, pp. 186 -187; NOPD Operations Manual Chapter 11.1, Title: Organizational Structure). Sgt. Wayne Jacque is the Commander of SIS. He testified that SIS primarily engages in covert operations including surveillance of departmental employees. There is no Internal policy documenting the function

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of SIS, its role in investigations, or its standard operating procedures. Sgt. Jacque testified that SIS surveils departmental employees in response to tips of possible misconduct received from third parties to determine the accuracy of those tips. (Tr. Vol. 1, pp. 286 - 287).

Sgt. Jacque supervised the Appellant's surveillance. His subordinates conducted the surveillance using undercover vehicles parked at the Appellant's various residences, including those in Geismar, Louisiana, Metairie, Louisiana; and New Orleans, Louisiana. The surveillance began on September 10, 2018 and concluded on December 18, 2018. Sgt. Jacque testified that the surveillance established a pattern where the Appellant would take her departmental vehicle to her parent's residence in Metairie on Tuesdays and Wednesdays, while she would take her vehicle to the home in Geismar that she shared with her wife on the other days of the week and weekends. (Tr. Vol. 1, p. 300). The parties stipulated to the surveillance dates and locations. (Joint Ex. 1). The surveillance established that on the dates surveillance occurred, the Appellant drove her departmental vehicle and spent her off time at the Geismar addresses and the Metairie address.³ During the 94-day surveillance period, SIS uncovered 45 days in Geismar and 12 days in Metairie. SIS did not conduct surveillance on 37 of the 94 days. (T. Vol. 1, pp. 227 – 241; Joint Ex. 1).

³ During the period of surveillance, the Appellant moved from one Geismar address to a second Geismar address.

SIS also obtained various documents that informed PIB as to the Appellant's domicile, including the Appellant's marriage certificate, supplemental pay deposit information, and her employment verification for a loan application. (NOPD Exh's 3, 4, and 5).

As noted above, Sgt. Jacque's direct supervisor is Deputy Supt. Westbrook. Sgt. Jacque testified that once SIS verifies a violation of internal policy or law, they are required to report it to Deputy Supt. Westbrook. While he acknowledged that during the four-month period of surveillance he met with Deputy Supt. Westbrook regularly, he could not confirm or deny that he discussed the Appellant's surveillance with his supervisor during this period. He stated that he did not remember. (Tr. Vol. 1, pp. 309 – 311). The Appellant confirmed that, after "sporadic" surveillance, SIS eventually verified the reliability of the tip. As a consequence of their surveillance, a formal complaint was initiated. (Tr. Vol. 1, pp. 311 – 312).

Deputy Supt. Westbrook testified that she authorized SIS to conduct surveillance regarding "rumors" of possible violations of the department's take-home vehicle policy. Though there was a specific allegation concerning the Appellant received by PIB, Deputy Supt. Westbrook characterized the inquiry as general in nature and not directed towards the Appellant. (Tr. Vol. 2, pp. 192-194). She also testified that, even after SIS provided surveillance information documenting multiple instances when the Appellant drove her take-home

vehicle beyond the 40-mile limit, she "really didn't have much of an issue" regarding the Appellant's actions until she received a phone call in December from an undisclosed source informing her that the Appellant was driving the car beyond the 40 mile limit. (Tr. Vol. 2, pp. 195 - 196). Contradicting the testimony of Sgt. Jacque, her subordinate, who testified that the surveillance confirmed the tip and resulted in a formal investigation, Deputy Supt. Westbrook testified that it was a complaint she received personally from a "very high-ranking individual" regarding the Appellant that caused her to initiate a formal investigation. Although she testified that she met daily with Sgt. Jacque, she insisted that she did not rely specifically upon the surveillance evidence when she decided to initiate a formal investigation against the Appellant. (Tr. Vol. 2 pp. 196-199, p. 216).

C. Formal Investigation

1. Receipt of Formal Complaint

Lt. Precious Banks is assigned to PIB's Intake Section. She testified that she was informed on December 28, 2018, by Sgt. Jacque, based on instructions from Deputy Supt. Westbrook to initiate a formal complaint against the Appellant. The basis of the complaint was for driving her take-home vehicle beyond the 40-mile limit after she being denied permission to do so. Lt. Banks was further instructed to provide all documentation accumulated by SIS during their surveillance. (Tr. Vol. 2, pp. 272 – 277). In response, Lt. Banks completed an

Initiation of a Formal Disciplinary Investigation dated December 28, 2018.
(NOPD Exh. 9 and Dupree Exh. 10).

2. Investigation of Formal Complaint

a. Initiation of Formal Investigation

On January 22, 2019, the formal investigation was assigned to Commander Reginal Williams, who supervised criminal and administrative investigations and personally investigated complaints against other high-ranking officers, including other commanders. (Tr. Vol. 1, p. 154). She filed a request for an extension of time to complete her investigation with the Department of Civil Service on the date she received the complaint for investigation, which was granted, extending her investigative deadline by 60 days. (NOPD Exh. 10).

b. Driving Take Home Vehicle to Geismar

Commander Williams relied exclusively on the evidence gathered by SIS. She reviewed the two take-home vehicle request forms submitted by the Appellant. She reviewed the results of the surveillance conducted by SIS from September through December of 2018, while consulting with the officers assigned to SIS regarding their activities and discoveries. She testified that she relied primarily on the surveillance video and photographs gathered by SIS that confirmed the Appellant's movements to and from her work assignment.

The secondary supporting evidence obtained by SIS and reviewed by Commander Williams included all of the documents indicating that the

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Appellant's domicile was her residence in Geismar. These documents supported, but did not add any new information beyond what was confirmed by the surveillance.

Based upon Commander Williams review of the surveillance compiled by SIS and her review of the secondary documents establishing domicile, she concluded that during the relevant period the Appellant was domiciled in Geismar and that she was driving her vehicle to and from her work assignment to Geismar on a regular basis. (Tr. Vol. pp. 164 – 176).

According to Commander Williams, the investigation stood or fell based upon the surveillance she obtained from SIS. In her judgement, had the surveillance established that the Appellant was commuting from the Metairie residence on a regular and consistent basis, regardless of her declared domicile, it would have impacted her investigation in a light favorable to the Appellant. (Tr. Vol. 1, pp. 200 and 275).

c. Payroll Deductions for Take-Home Vehicle Based Upon Mileage

Commander Williams reviewed payroll records provided by SIS. She examined the Appellant's pay history from July 12, 2018 through December 2018. (Tr. Vol. 1, pp. 75 – 76; pp. 177-187; Dupree Exh. 4). As explained by Commander Williams, City employees pay the City for the use of a take-home vehicle based upon mileage. Employees report their mileage by entering a mileage amount into the payroll system. Based upon the entry, a payroll

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deduction is made. According to CAO policy, \$24.04 is deducted bi-weekly for the personal use of an assigned vehicle when the mileage is zero to twenty miles one-way. \$72.12 is deducted bi-weekly when the mileage is twenty miles or greater. (NOPD Exh. 12).

City employees are not permitted to input their own payroll information. In the Appellant's case, Officer Robert Ponson entered the Appellant's payroll, including her mileage. Commander Williams testified that she was informed by Officer Ponson that he was instructed by the Appellant to enter zero to twenty for her mileage. He also informed her that there were times when he was instructed to change it to twenty to forty, but he could not recall the reason. Commander Williams stated that her review showed a small number of occasions when twenty to forty was entered into the payroll system. (Tr. Vol 1, pp. 185 – 186).

Officer Ponson testified that as the Second Police District's administrative officer it was his responsibility to enter his Commander's payroll information, including take-home vehicle mileage. There is a drop box with two options, zero to twenty and twenty to forty. Officer Ponson testified that the Appellant usually instructed him to input zero to twenty, but recalls two occasions where the Appellant instructed him to input twenty to forty. (Tr. Vol 2, pp. 30 – 44).

The Appellant confirmed that she relied upon Officer Ponson for payroll entries, including her mileage. She recalled speaking to Officer Ponson once

and denies instructing him to use the zero to twenty mileage amounts exclusively. She recalls instructing him to input five days per pay period at zero to twenty and five days at twenty to forty because she was splitting her time between two residences in different mileage categories. (Tr. Vol. 1 pp. 27 - 28). The Appellant, testified that she did not check her payroll based upon her assumption that it was accurate and consistent with her instructions. She stated that she had no intent to avoid paying the required amount for the use of her take-home vehicle and denies attempting to deceive anyone. (Tr. Vol. 2, p. 289).

d. Fuel Records

As part of her investigation, Commander Williams obtained gas consumption records from the fuel card issued to the Appellant for 2018 from the CAO's Equipment Maintenance Division, City Fleet for use at the City's pumps. (NOPD Exh. 13). According to Commander Williams, the records indicate that the gas consumption was extremely high during the months that the Appellant operated the take-home vehicle, which was from the September through December. (Tr. Vol 1, pp. 188 – 191).⁴

The Appellant was assigned a fuel card to use when fueling her take-home vehicle. Commander Williams reviewed the Appellant's mileage entries when fueling her take-home vehicle at the City's pumps. Commander Williams

⁴ While not reviewed as part of the investigation, NOPD Exh. 13 reflects high mileage for the entirety of 2018.

found that the mileage entries were inconsistent and did not reflect accurate reporting of fuel use. The inconsistencies took the form of transposed numbers and nonsequential entries. (Tr. Vol. 1, pp. 195 – 198).

The Appellant acknowledged the inconsistencies, but also testified that on certain occasions when her take-home vehicle was not available, she drove another departmental vehicle, which she fueled with her assigned fuel card because the other vehicle did not have an assigned fuel card. She testified that some of the entries were in error because, on a few occasions, she inverted the numbers and on other occasions she was not paying attention or was distracted because she was on the phone. (Tr. Vol. 1 pp. 30 – 34).

e. Investigative Statements

During the course of her investigation, Commander Williams interviewed and obtained recorded statements from the Appellant and other witnesses. She informed other witnesses that the allegations she was investigating included a charge of making a false or inaccurate report. However, Commander Williams did not inform the Appellant that she was under investigation for filing a false or inaccurate report. Commander Williams testified that she was required to include the allegation in the notice to the Appellant, but left it out inadvertently. NOPD Operations Manual, Chapter 52.1.2, Title: Misconduct Compliance Investigator Responsibilities, Accused Employee's Statement, paragraph 5., provides that:

At least five days before taking a statement from an accused employee, the investigator shall provide notification (Form #196) to the accused employee informing the employee of the:

- (a) Allegation(s) against the employee;
- (b) Employee's rights and responsibilities relative to the investigation; and
- (c) Date, time, and location the employee is to appear for the statement.

Commander Williams stated that, at the beginning of the interview, she informed the Appellant of the nature of the investigation and that, although the charge was not mentioned during the interview, the Appellant knew it was one of the allegations because it was included in her request for an extension of time, of which the Appellant received a copy. (Tr. Vol. 1, pp. 256 – 264; NOPD Exh. 10).

The Appellant testified that she was informed that she was under investigation for driving her take-home vehicle to Geismar and that, by doing so, she disobeyed a direct order. She stated that she was not prepared to respond to a charge that she made a false or inaccurate report because she was not provided notice of this charge as required by State statute and internal policy. (Tr. Vol. 1, pp. 100 – 112; Dupree Exh. 5; NOPD Exh. 7).

f. Submission of Investigative Report

Commander Williams submitted her investigative report on May 8, 2019. (Dupree Exh. 8). On the same date, she also presented the Appellant with a document entitled "Notice to the Accused of Completed Investigation and Notice of Pre-Disciplinary Hearing", of which the Appellant acknowledged

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receipt on May 8, 2019. These documents memorialize the official conclusion of the formal investigation. (NOPD Exh. 8).

In her report, Commander Williams concluded that the Appellant's second take-home vehicle request was made falsely, that her payroll entries for mileage were made falsely, that she drove her vehicle to Geismar without permission, and that she neglected her duty by failing to enter correct mileage from the vehicles odometer when getting fuel from the City's fuel pumps. (Tr. Vol. 1, p. 205; Dupree Exh. 8). However, Deputy Supt. Westbrook did not concur with all of the findings and requested that Commander Sabrina Richardson review the investigative report. (Tr. Vol. 2, p. 59).

g. Review by Commander Sabrina Richardson

Commander Richardson replaced Commander Williams at PIB following Commander Williams' transferred to another assignment. She testified that, while she had no role in the Appellant's investigation, Deputy Supt. Westbrook instructed her to review Williams's investigative report and file materials.

Commander Richardson testified that she reviewed the report in late July or early August of 2019. She conferred and reported her findings to Deputy Supt. Westbrook, who instructed her to prepare a cover letter that was submitted to Supt. Shaun Ferguson on August 2, 2019. (Tr. Vol. 2, pp. 58 – 63; NOPD Exh. 16). The final disciplinary letter closely tracts the cover letter received by Ferguson.

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Commander Richardson stated that she concurred with Commander William's recommendations but not her explanations. (Tr. Vol. 2, p. 66). Richardson concluded that the Appellant intentionally made false mileage entries when fueling her vehicle to conceal her trips to and from her actual domicile. She reasoned that if the Appellant was actually traveling to and from Metairie, her gasoline consumption would not have been so conspicuously high during the months she was under surveillance. (Tr. Vol. 2, p. 67; NOPD Exh. 16).

In her report, Commander Richardson characterizes the Appellant's consumption of gas during the surveillance period as "outrageous", based upon a review of the Fleet report obtained during the investigation. Her analysis is reflected in her report as follows:

If Commander Dupree only drove her Departmental vehicle the 16.6 miles round trip from her domiciliary address in Metairie to her place of assignment, she would not have consumed the outrageous amounts of gasoline as evidenced by the Fleet report. On average, on the dates of July 13, 2018 to November 30, 2018, she consumed 92.4 gallons of gasoline per month. Even if Commander Dupree drove the vehicle an additional 30 miles per day (46.6 miles per day) conducting any other police related activities, on an average 30-day month basis, her vehicle's gasoline consumption still would not have been as elevated as shown in the attached report. On average, the Ford Explorer gets approximately 25 miles per gallon. If the 46.6 miles per day is multiplied by 5 days in a week, multiplied by 4 weeks of the year, and divided by the average of 25 miles per gallon, $(46.6 \times 5 \times 4 \div 25 = 37.28)$, Commander Dupree would have only consumed approximately 37.28 gallons of gasoline monthly if she was truly just traveling to and from the address and conducting normal police activities.

(NOPD Exh. 16, pp. 9 – 10)

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Through her analysis, Commander Richardson concluded that "Commander Dupree knowingly made a false gasoline mileage entry report by her intentional false entries at the City owned gasoline pumps to conceal her actual miles traveled each day", thus creating additional supporting justification for terminating the Appellant for making a false report. (Id.)

Commander Richardson maintained that she did not conduct further investigation and that she relied solely on evidence that was collected during the course of Commander William's investigation. She explained that had she obtained and relied upon evidence that was not part of the investigative file, it would have qualified as conducting further investigation, which she was not permitted to do. (Tr. Vol. 2, pp. 85 -86).⁵

D. Pre-termination Hearing and Recommended Penalty

On October 10, 2019, eight days after Commander Richardson submitted her recommendations, the Appellant received a document called "Disciplinary Hearing Notification". (NOPD Ex. 17). The notification informed the Appellant of her impending disciplinary hearing before a Bureau Commanders' Committee, consisting of Deputy Supt.'s Noel, Westbrook, and Thomas. The notification also provided the Appellant with notice of the found violations and their factual basis.

⁵ When asked why she did not compare the Appellant's mileage with those of other District Commanders, which would have provided a more accurate measure of normal gasoline consumption for an individual with the Appellant's responsibilities, Richardson explained it would have required further investigation. Any additional investigation would have been untimely and violative of State statute.

On November 6, 2019, the Committee conducted its disciplinary hearing and issued a document entitled "Disciplinary Hearing Disposition". (NOPD Exh. 18). The Committee's recommendation reflected in this document was to sustain all of the violations found by PIB. The Committee also recommended the appropriate penalty for the violations, based upon the Appointing Authority's penalty matrix.

Deputy Supt. Thomas testified for the Committee. He stated that a Bureau Commanders' Committee is convened to conduct the pre-disciplinary hearing, when a potential penalty is termination. (Tr. Vol. 2 p. 123). In preparation for the hearing, Deputy Supt. Thomas reviewed the entire investigative case file. He stated that the primary focus of the hearing was a review of the take-home vehicle forms and the Appellant's decision to take her assigned vehicle beyond the 40-mile limit. (Tr. Vol. 2 pp. 125 – 127).

While Deputy Supt. Thomas reviewed all of the Committee's recommendations in his testimony, the focus of his testimony was on the Committee's determination that the Appellant knowingly made a false or inaccurate report with the intent to deceive. According to Deputy Supt. Thomas, the Appellant's second take-home vehicle request form, showing a Metairie address, was intentionally misleading because the Appellant drove the vehicle to her domicile in Geismar on a regular basis. (Tr. Vol 2, pp. 144 -145). Deputy Supt. Thomas confirmed that he was aware that the Appellant acted

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upon the advice of Capt. Demma and accepted as true the fact that he suggested to her that she could submit a second request with a different residence. Nonetheless, he held firm that the Appellant's actions evidenced an intent to deceive based upon the take-home vehicle form and the surveillance performed by SIS, showing her actual movements while driving her departmental vehicle. (Tr. Vol. 2, pp. 149 – 157, p. 182).

Based upon these findings, and what Deputy Supt. Thomas characterized as the facts in their totality, the Committee recommended dismissal because making a false or inaccurate report was a “Level G” violation for which no discretion is allowed. According to Deputy Supt. Thomas, the Appellant's actions reflected a lack of trustworthiness, which is intolerable for a police officer. (Tr. Vol. 2, pp. 131 – 134). The Appointing Authority accepted the Committee's recommendation, as reflected in the November 6, 2019 termination letter received by the Appellant.

III. ANALYSIS

A. Did the Public Integrity Bureau violate LA RS 40:2531 by failing to initiate a formal investigation once cognizant of Appellant's alleged misconduct?

The undisputed facts confirm that on August 23, 2018 PIB received an anonymous tip regarding a potential violation of the take-home vehicle policy by the Appellant. Thereafter, Deputy Supt. Westbrook tasked SIS with

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conducting surveillance to determine whether the anonymous tip was sufficiently reliable to warrant a formal investigation.

Based upon policy, the tip received on August 23, 2018 by itself satisfies the definition of "cognizance" contained in New Orleans Police Department Policy Chapter 52.1.1. The policy provides that cognizance is the date on which PIB receives a *complaint of alleged employee misconduct from any source*. Even assuming that PIB wanted to confirm the reliability of the anonymous tip before initiating a formal investigation, it is also undisputed that, through its surveillance, SIS did in fact confirm the reliability of the tip by actual observance of the Appellant's alleged misconduct as early as September 14, 2018. Policy states that in circumstances where cognizance is not established by the receipt of a complaint, it is established when PIB *observes employee misconduct*.

PIB did not provide any credible explanation at the hearing to explain or justify its continued surveillance of the Appellant through December 18, 2018, 3 months after cognizance of the violation. Sgt. Jacque acknowledged that, once SIS verifies a violation of internal policy or law, they are obligated to report it to Deputy Supt. Westbrook. However, Sgt. Jacque was evasive when questioned regarding his reporting responsibility. While he testified that he reported to Deputy Supt. Westbrook on a regular basis, he did not want to confirm or deny that he discussed the Appellant's surveillance with his supervisor during the period of surveillance. Considering the totality of the circumstances,

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including Appellant's rank, assignment, and her unique position as the only female District Commander, it is simply not credible that Sgt. Jacque failed to apprise Deputy Supt. Westbrook of the information gleaned from SIS's surveillance. If that was in fact the case, Sgt. Jacque failed to follow policy regarding his reporting responsibilities.

Deputy Supt. Westbrook's testimony was also evasive and in conflict with that of her subordinate Sgt. Jacque. Sgt. Jacque testified that the formal investigation was initiated based upon the results of the surveillance. Deputy Supt. Westbrook testified that the eventual initiation of a formal complaint was not connected to the months of surveillance she authorized. She stated that she had no actual knowledge of the individuals who were the subjects of the surveillance. Her testimony suggests that she was not aware that the Appellant was under surveillance and that she did not know that SIS had observed repeated alleged violations of internal policy by the Appellant. Her testimony is troubling in that it suggests that she either misrepresented the truth regarding her knowledge of a violation, which required her to initiate a formal investigation, or that she was not properly supervising her subordinate Sgt. Jacque by her failure to stay abreast of the surveillance of a conspicuous, high ranking member of the department.

In its post-hearing brief, the Appointing Authority relies upon a New Orleans Civil Service Commission case involving the initiation of a formal

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investigation by the New Orleans Police Department, *Abbott v. New Orleans Police Department*, 2014-0993 (La. App. 4 Cir. 2/11/2015), 165 So. 3d 191. This Hearing Examiner is very familiar with *Abbott*, having served as the Hearing Examiner in the *Abbott* case.

In *Abbott*, several police officers received suspensions, ranging from one to two days, for failure to follow instructions from an authoritative source regarding the method of payment for working private details. Departmental witnesses credibly testified that they sent emails to employees on September 11, 2011, to determine whether a formal investigation was warranted. In *Abbott*, the Appointing Authority established that the emails were part of an informal inquiry to determine whether suspicion of a violation was confirmed.

In the instant case, it was prudent for PIB, through SIS, to confirm that a formal investigation was warranted by conducting surveillance before subjecting an employee to a formal investigation. But unlike *Abbott*, any argument by the Appointing Authority that the surveillance and gathering of documents was an informal inquiry is without merit. In *Abbott*, the Appointing Authority made an email inquiry that informed the Appellants of the Appointing Authority's concerns, and then initiated a formal investigation within a reasonably short period of time once it determined that a formal investigation was warranted.

Conversely, in this matter, PIB made no inquiry. PIB concealed a fully cognized complaint for months without reasonable explanation. A classification date was chosen arbitrarily, based upon conflicting justifications, including that "a high-ranking individual" instructed PIB, through Deputy Supt. Westbrook, to act upon the evidence that PIB had pocketed for months. Virtually the entire investigation, and the investigation's conclusions, were based upon the evidence gathered prior to the initiation of a formal complaint.

The purpose of LA RS 40:2531 (C) is to prevent the kinds of abuses that are evident here. The failure to adhere to LA RS 40:2531 appears to be intentional and calculated to prejudice the Appellant by concealing and delaying a formal investigation until it suited the Appointing Authority's purposes. The facts suggest that PIB was cognizant for months of conduct that warranted a formal investigation, but chose instead to hold onto the information until they decided it was time to use it against her.

The discipline taken against the Appellant is an absolute nullity based upon the Appointing Authority's failure to complete its investigation within the time limitations dictated by LA RS 40:2531. As such, Appellant's appeal should be GRANTED.⁶

⁶ This is a report with recommendations based upon the Hearing Examiner's analysis of the law, documentary evidence, and witness testimony. If this report was a final decision, the analysis would end here. However, because this report is not a final decision, the Hearing Examiner will address the remaining issues and provide further analysis and recommendations.

B. Did the Public Integrity Bureau violate LA RS 40:2531 by continuing to investigate the complaint after the investigation was formally concluded?

New Orleans Police Departmental Policy Chapter 52.1.1, paragraph 83, *Formal Disciplinary Investigation Due Date Calculation* instructs PIB with regard to when an investigation begins and when a formal investigation ends. If a formal investigation continues after the calculated due date, any disciplinary action resulting from the investigation is a nullity under LA RS 40:2531. As stated in policy, once a "final due date" is established, "within that time frame" the following must be completed:

- the investigator's written investigation (accompanied by exhibits),
- the various levels of supervisory review which may necessitate corrections/additions/clarifications,
- the final approvals at every level, and
- the verbal and/or written 'Notice to Accused Law Enforcement Officer Under Investigation of a Pre-Disciplinary Hearing or a Determination of an Unfounded or Not Sustained Complaint' (NOPD Form #308)

As noted above, Commander Williams' investigative report, accompanied by exhibits, was submitted for approval on May 8, 2019. However, Deputy Supt. Westbrook, as the Bureau Commander of PIB and as Supt. Shawn Ferguson's designated agent, rejected the report as evidenced by her May 11, 2019 signatures. (Dupree Exh. 8). It was not until August 2, 2019 that

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Deputy Supt. Westbrook, as the Bureau Commander of PIB and as Supt. Shawn Ferguson's designated agent, approved a PIB case Cover Sheet submitted by Commander Richardson with additional recommendations. (NOPD Exh. 16).

The Appointing Authority contends that the formal investigation concluded on May 8, 2019 when the Appellant received notice. It further contends that the disapproval of the investigative report did not change the due date because no further investigation occurred, even though approval of the investigation was withheld until after Commander Richardson submitted her recommendations on August 2, 2019.

The Appointing Authority characterizes Commander Richardson's recommendations as a review of a completed investigation rather than further investigation. Commander Richardson testified that Deputy Supt. Westbrook instructed her to review the investigative report and its attachments, and provide her analysis. Because Commander Richardson did not change the outcome of the formal investigation and did not rely upon any new evidence, she did not consider herself conducting further investigation.

However, Commander Richardson did make additional recommendations, based upon further analysis of the Appellant's fuel consumption, that were not in the final investigative report. While the same rule violations remained, Commander Richardson provided additional reasons for finding that the Appellant intentionally gave a false or inaccurate report. The

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Appointing Authority's reliance on Commander Richardson's report is evidenced by the Appointing Authority's incorporation of her report in the termination letter.

PIB did not follow Chapter 52.1.1, paragraph 83 regarding timely investigations. It provided the Appellant with notice that the investigation was ended prior to final approval of the investigative report. Final approval was withheld for almost three months by Deputy Supt. Westbrook while Commander Richardson continued her analysis. Commander Richardson continued investigating the charges against the Appellant after the actual investigator submitted her report. Her recommendations were substantive and it remains investigative in nature regardless of whether she collected any new evidence. Finally, even assuming that Commander Richardson was not furthering the investigation, internal rules require **final approval of the investigative report** by the Appointing Authority prior to the investigative deadline. The Investigative report was rejected by the Appointing Authority on May 11, 2019 – not approved.

Again, the discipline taken against the Appellant is an absolute nullity based upon the Appointing Authority's failure to complete its investigation within the time limitations dictated by LA RS 40:2531. As such, Appellant's appeal should be GRANTED.

C. Did the Public Integrity Bureau violate LA RS 40:2531(B)(1) by failing to inform the Appellant of the nature of the investigation prior to the commencement of her interrogation?

LA RS 40:2531(B)(1) establishes minimum standards for an investigator to follow while investigating a law enforcement officer. The standards include providing the subject of the investigation with notice of the “nature of the investigation” prior to the commencement of an interrogation. *Id.* The Appointing Authority contends that the Appellant was informed of the nature of the investigation prior to taking her statement, even though the investigator failed to inform her of the allegation that she had made a false or inaccurate report; an allegation that, if sustained, would result in an automatic termination.

Commander Williams acknowledged that she was required to include in her notice to the Appellant all current rule violations being investigated. She testified that her failure to include an allegation of giving a false or inaccurate report was inadvertent. Notwithstanding the error, the Appointing Authority contends that the Appellant was made aware of the nature of the investigation when she was informed, she was under investigation for driving her take-home vehicle beyond the 40-mile limit. and that, by doing so, she was acting inconsistently with her approved request for a take-home vehicle that provided a residence within the 40-mile limit.

Conversely, the Appellant contends that she was not aware of the nature of the investigation. She further contends that, as a consequence, she was

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unable to defend herself from the most serious allegation of intentionally concealing her activities and misleading the Appointing Authority through the submission of false or inaccurate reports.

Commander Williams failed to comply with NOPD Operations Manual, Chapter 52.1.2, which requires the investigator, prior to taking the accused employee's statement, to provide notice of the "allegations against the employee". However, notwithstanding the Commander's error, which does appear to have been inadvertent, the Appellant was sufficiently informed of the nature of the investigation before providing her statement. According to the Louisiana Fourth Circuit Court of Appeal, "R.S. 40:2531 does not require that the law enforcement officer know the exact charges that may be brought against him. All that is required is that the investigating agency inform the police officer 'of the nature of the investigation'". *Knight v Department of Police*, 619 So. 2d 1116, 1119 (4th Cir. App. May 27, 1993). As in *Knight*, Commander Williams sufficiently informed the Appellant of the nature of the investigation, thereby complying with the statute.

D. Was the Appellant's reassignment to Police Lieutenant a demotion that constituted discipline?

On March 29, 2019, while the Appellant was under investigation, the Appointing Authority reassigned the Appellant from the unclassified position of Police Commander to her previously held classified position of Police Lieutenant.

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The reassignment resulted in both a reduction in pay and a reduction in rank, Commander being a higher rank than Lieutenant. Appellant argues that her termination was a "legal nullity" because she was already disciplined when the Appointing Authority reduced her rank and pay.

The creation of the unclassified position of Police Commander was undertaken specifically to remove the position from the classified service, allowing for the insertion and removal of Police Commanders from the classified positions of Police Captain or Police Lieutenant without the protections and oversights otherwise provided by Civil Service rules. This change was requested by the Appointing Authority and authorized by the Civil Service Commission.

The Appellant's prior reassignment to Police Commander by the Appointing Authority, came without the necessity of taking a promotional examination or being placed on a promotional list, because the reassignment was from a classified position to an unclassified position. New Orleans Civil Service Rule I, Section 1, titled DEFINITIONS define promotion as follows:

56. "Promotion" a change of an employee ***in the classified service*** from a position in one class to a position in another class for which a higher pay grade is provided in the pay plan. (Emphasis Added)

Thus, Appellant's reassignment was not considered a promotion as defined by Civil Service rules.

Because the Appellant's reassignment to Police Commander was not a promotion, it follows that her reassignment back to Police Lieutenant was not a

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demotion. New Orleans Civil Service Rule I, Section 1, defines demotion as follows:

23. "Demotion": a change of an employee ***in the classified service*** from a position in one class to a position in another class for which a lower pay grade is provided in the pay plan. (Emphasis Added)

Therefore, while New Orleans Civil Service Rule II, Section 4.1 includes demotions as an appealable disciplinary action, the Appellant's reassignment does not meet the definition of demotion for purposes of the Commission's rules because the Appellant's position as a Police Commander was not in the classified service.

The Appellant did not appeal her removal from the unclassified position of Police Commander because she knew there was no appeal right afforded to employees holding unclassified positions. It was only after she was removed from her classified position as Police Lieutenant that she sought review by the Commission pursuant to its rules regarding disciplinary actions taken against classified employees.

The Appellant's contention that her appeal should be granted because she was reassigned for the same reasons she was terminated, while accurate, does not alter the fact that the reassignment was not a demotion and thus not disciplinary in nature according to civil service rules. As such, the Appointing Authority only disciplined the Appellant once and, if her appeal is granted, she is

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entitled to reinstatement and back pay to her last classified position, which was Police Lieutenant.

E. Did the Appointing Authority establish that the Appellant violated Rule 4: Performance of Duty, Paragraph 2, Instructions from an Authoritative Source, by disobeying a direct order?

The Appellant does not dispute that she drove her take-home vehicle beyond the 40-mile limit on multiple occasions after being informed that her initial take-home vehicle request form was disapproved. Capt. Demma explained to the Appellant that using her Geismar residence would violate CAO policy prohibiting using a take-home vehicle to commute to and from a residence beyond 40-miles absent specific approval. Thus, if the Appellant was unaware of the restriction when she submitted her first request, she certainly became aware once that request was.

The Appellant acknowledged her mistake and she admitted knowingly violating the CAO policy and disobeying instructions from an authoritative source when she continued to commute to and from Geismar on a regular basis.

Based upon the foregoing, the Appointing Authority has established that the Appellant violated Rule 4: Performance of Duty, Paragraph 2, Instructions from an Authoritative Source by disobeying a direct order, for which she received a 120-day suspension.

F. Did the Appointing Authority establish that the Appellant neglected her duty by failing to properly enter the correct mileage from the vehicle's odometer when fueling at the City Pumps?

The Appointing Authority established that on multiple occasions the Appellant failed to enter the correct mileage from her vehicle's odometer when fueling at the City pumps. The Appellant acknowledged that her entries were not consistent and that she failed to adhere to the Appointing Authority's policy requiring that she report accurate mileage from her odometer when fueling her vehicle.

Based upon the foregoing, the Appointing Authority has established that the Appellant violated Rule 4: Neglect of Duty, Paragraph 4, subparagraph C6, failing to comply with instructions, oral or written, from an authoritative source, to wit: Chapter 13.14, Vehicle Fueling and Fuel Services, Employee Responsibilities by failing to enter the correct mileage from the vehicle's odometer for which she received a written letter of reprimand.

G. Did the Appointing Authority establish that the Appellant violated Rule 6: Official Information, Paragraph 2: False or Inaccurate Reports by knowingly providing information calculated to conceal the use of her take-home vehicle beyond the 40-mile limit?

A violation of the internal rule regarding the submission of a false or inaccurate report is perceived by the Appointing Authority as an act of deceit that renders a police officer unfit to serve. Hence, the only recommended penalty allowed by the Department's penalty matrix is termination.

In the instant case, the Appointing Authority sustained violations of two internal rules: 1) disobeying an order by commuting to and from Geismar, LA in the take-home vehicle, and 2) failing to properly enter the correct mileage from the take-home vehicle's odometer, coupled with an additional determination that the Appellant caused her subordinate to enter false information into the payroll system regarding her take-home mileage. The Appointing Authority determined that these violations evidenced a premeditated scheme to conceal the improper use of a take-home vehicle.

The Appellant contends that she submitted her second take-home vehicle request in good faith, based upon her telephone conversation with Capt. Demma, and that her inaccurate mileage fuel entries were the product of inattentiveness and cutting corners. Regarding her subordinate's mileage entries made on her behalf by Officer Ponson, the Appellant has a different recollection of how she instructed him.

The Appellant's brief exchanges between both Capt. Demma and Officer Ponson occurred in mid-2018, as did the fueling of the Appellant's vehicle. The Appellant and all witnesses upon whom the parties relied were asked to search their memories more than 8 months later to recall brief encounters that would not have seemed important at the time. It appears that all witnesses, including the Appellant, attempted to recall these exchanges and activities as best they

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could, considering PIB's extended delays in initiating a formal complaint and conducting a formal investigation.

The Appellant made a serious error in judgement when she accepted Capt. Demma's interpretation of the take-home vehicle policy without further examination. She neglected her duty by failing to properly enter her mileage when fueling her departmental vehicle and she failed to properly supervise her subordinate, who was responsible for entering her payroll. However, PIB's failure to initiate a timely investigation makes it impossible to know whether the Appellant acted with an intent to deceive. PIB's delay negatively impacted the integrity of the investigation and prejudiced the Appellant.

Based upon the foregoing, the Appointing Authority has failed to establish by a preponderance of evidence that the Appellant violated Rule 6: False or Inaccurate Reports.

IV. CONCLUSION

Based upon the foregoing, the Appellant's appeal should be GRANTED, and the Appointing Authority ordered to reinstate the Appellant with all back pay and emoluments to the classified position of Police Lieutenant.

August 31, 2020
DATE

s/ Jay Ginsberg
HEARING EXAMINER