



CITY OF NEW ORLEANS

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Tuesday, September 27, 2016

Mr. Donovan A. Livaccari
101 W. Robert E. Lee, Suite 402
New Orleans, LA 70124

Re: **Damond Harris VS.
Department of Police
Docket Number: 8460**

Dear Mr Livaccari:

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 - 9/27/2016 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, 12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Jim Mullaly
Damond Harris

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

DAMOND HARRIS vs. DEPARTMENT OF POLICE	DOCKET No.: 8460
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I. INTRODUCTION

Appellant, Damond Harris, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1. The Appointing Authority, the Police Department for City of New Orleans, (hereinafter “NOPD”) does not allege that the instant appeal is procedurally deficient. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD alleged that Appellant violated NOPD Rule 3, Paragraph 1 and NOPD Rule 3 Paragraph 13. (H.E. Exh. 1). As a result of Appellant’s alleged rule violations, NOPD suspended Appellant for a total of five days; three days related to Rule 3, Paragraph 1 and two days related to Rule 3, Paragraph 13. *Id.*

NOPD Rule 3, Paragraph 1 reads as follows:

Employees shall conduct themselves in a professional manner with the utmost concerns for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or

otherwise act in a manner which brings discredit to the employee or the New Orleans Police Department.

Id.

NOPD Rule 3, Paragraph 13 is reproduced below:

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

Id.

The disciplinary notice NOPD issued to Appellant specifies that the conduct NOPD perceived as violating the above-cited rules stemmed from an interaction between Appellant and Orleans Parish Assistant District Attorney Michael Heier (hereinafter “ADA”). *Id.* Specifically, NOPD alleged that Appellant sent inappropriate texts to the ADA in response to requests from the ADA that Appellant attend a pre-trial prep session. NOPD also alleged that Appellant posted references to his inappropriate texts on Appellant’s Facebook page.

B. Text Messages and Social Media

At 1:36 p.m. on Tuesday, January 20, 2015, the ADA contacted Appellant via text to Appellant’s cell phone. (NOPD Exh. 2). In his first text, the ADA informs Appellant that there is a jury trial scheduled to begin on Thursday, January 22, 2015 and inquires as to Appellant’s availability. Appellant responds to the ADA via text at 5:57 p.m. and states that “Yes, im (sic) available. What Section?.” The ADA writes back, “J.” And Appellant texts, “Ok.” *Id.* It is at this point in the “conversation” that the tone turns far less cordial.

The ADA informs Appellant that “We [presumably meaning the ADA and Appellant] need to meet tomorrow to talk through your testimony.” Appellant responds to this statement with the acronym “Lmao” and informs the ADA that he “don’t (sic) work for free. So we will meet

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Thursday when im (sic) being paid.” *Id.*¹ The ADA responds that he “don’t (sic) go to trial unprepared. You can pick when tomorrow but we need to talk.” To which Appellant replied, “Not my problem, I don’t work for this shitty (sic) city for free. So I will see you Thursday morning.”

Then, at 6:53 a.m. on Wednesday, January 21, 2015, Appellant sent the following text message to the ADA:

ADA Heier, I just checked my NOPD court notify and I DO NOT have a trial or any court set for section J this month. So with that being said I won’t be coming to court tomorrow for a supposed trial you have set. Have a great morning.

Id.

Appellant’s interaction with the ADA prompted Kirk Bouyelas, Chief of Investigations for the Orleans Parish District Attorney’s Office, to write to NOPD Deputy Superintendent Arlinda Westbrook and complain about Appellant’s conduct. (NOPD Exh. 1). Mr. Bouyelas’s letter purports to attach the above-mentioned texts and a screen shot of posts captured on the social media website Facebook. (NOPD Exh. 3). In the posts, a user identified as Damond Harris writes:

You just gotta love when a new ADA texts your phone informing you of a court case in a few days. They then inform you that you HAVE to meet with them prior to the Court day to go over the case. I could just imagine the look on their face when they read my reply text lmao.

Id.

This post garners some responses to which the user identified as Damon Harris writes; “This person reason (sic) told me I HAVE to meet with them on my own time to go over the case because they don’t go to trial un-prepared lmao,” and “I already have a subpoena for the trial date but according to them I HAVE to meet with them a day prior to the trial lmao.” *Id.*

¹ The Commission finds that the acronym “LMAO” stands for “Laughing My Ass Off” and is a derivation of the more common/tame “LOL” or “Laughing Out Loud.”

C. NOPD's Investigation

After receiving Mr. Bouyelas letter, NOPD initiated an internal investigation. (NOPD Exh. 4). As part of that investigation, Sergeant Tyrone Robinson interviewed Appellant. Sgt. Robinson testified that Appellant did not deny sending the texts to the ADA, but claimed that he was on medication at the time he sent the texts and was not fully cognizant of his actions. (Tr. at 17:18-18:1). According to Sgt. Robinson, Appellant did not deny making the Facebook posts reproduced above, nor did Appellant offer any explanation for the posts. *Id.* at 18:6-11. On cross-examination, Sgt. Robinson acknowledged that he did not know who had access to the Facebook posts identified in the disciplinary letter. *Id.* at 23:15-22

III. LEGAL STANDARD

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued without sufficient cause, he/she may bring an appeal before this Commission. *Id.* It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, an Appointing Authority has the burden of proving, by a preponderance of the evidence; 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, it must then determine if that discipline “was commensurate with the infraction.” *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus,

the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

IV. ANALYSIS

A. Occurrence of the Complained of Activities

1. Texts & Professionalism

The Commission is not persuaded that Appellant's texts should be excused because Appellant was allegedly under the influence of a prescribed narcotic to aid him in sleep. Appellant responded to the ADA's initial text at 5:57 p.m. on the evening of January 20, 2015 and sent subsequent texts that were unprofessional. Then, at 5:53 a.m. the morning of January 21st, Appellant had the wherewithal to text the ADA back, picking up the conversation almost exactly where it left off twelve hours earlier. Appellant does not offer an apology or mention his sleep medication. In fact, Appellant went so far as to review NOPD's automated trial schedule and retracted his earlier assurance to the ADA that he would appear in court on January 22nd. Frankly, Appellant's representations that he was under the influence of prescription medication and does not recall sending the texts to the ADA are disingenuous, self-serving and not at all credible.

Appellant's communication with the ADA was unprofessional and showed a clear disdain for the ADA and proper preparation for a criminal trial. We find that NOPD has established that Appellant violated NOPD Rule 3, Paragraph 1.

2. NOPD Social Media Policy

NOPD's rules prohibit activity on social media that "embarrasses, humiliates, discredits, or harms the operation and reputation of the Police Department or any of its members." (H.E. Exh. 1). There is no evidence on the record that shows Appellant published or in any way distributed the Facebook posts in evidence as NOPD Exhibit 4. NOPD offered no explanation as

to how the DA's office obtained the postings. For his part, Appellant testified that the settings on his Facebook page are "private" and prevent anyone who is not a "friend" to view his posts. *Id.* at 60:1-8. NOPD did not contradict Appellant's assertion on this point. Furthermore, Appellant testified that he does not identify himself as a New Orleans Police Officer on his Facebook profile and does not appear in uniform. *Id.* at 60:3-6. The Commission finds that NOPD did not establish that a reader of Appellant's Facebook posts could have identified Appellant as an NOPD Officer or connected the posts to the NOPD. Given this finding, the Commission holds that NOPD has failed to carry its burden with respect to its allegations that Appellant violated NOPD's social media policy.

B. Impairment of Efficient Operation of Appointing Authority

1. Professionalism

Part of NOPD's essential function is working hand-in-hand with the Orleans Parish District Attorney's Office to prosecute defendants. Frequently, NOPD Officers serve as vital witnesses in criminal matters. Deputy Superintendent Robert Bardy testified that the relationship between NOPD and the DA's office is an important one, and actions that compromise that relationship adversely impact the operations of both NOPD and the DA. The Commission certainly agrees with this assessment. And, while NOPD did not offer any testimony the ADA involved, Mr. Bouyelas letter to Deputy Superintendent Westbrook serves as a harsh rebuke of Appellant's actions. Based upon the foregoing, we find that NOPD has established that Appellant's unprofessional texts to the ADA impaired the efficient operation of the Appointing Authority.

2. NOPD Social Media Policy

NOPD's rules prohibit activity on social media that "embarrasses, humiliates, discredits, or harms the operation and reputation of the Police Department or any of its members." The

Commission finds that such activity would compromise the faith the public has in NOPD to perform duties in a professional manner and thus impair the efficient operation of NOPD. However, NOPD did not establish: 1) who had access to Appellant's Facebook posts, 2) who actually viewed Appellant's Facebook posts, or 3) whether or not Appellant identified himself as an NOPD Officer on his Facebook Account. As far as the record stands, Appellant's "Facebook Friends" could have lived anywhere in the world and thought that Appellant was a witness in a criminal trial being handled by a relatively green ADA. Therefore, the Commission finds that there is no evidence that Appellant's Facebook postings interfered with NOPD's efficient operation. Further, when asked on cross-examination how Appellant's Facebook post hindered the operations of the Police Department, Sgt. Robinson stated "I couldn't tell you, but the complaint was for professionalism." (Tr. at 29:1-4).

C. Discipline Commensurate with Offense

In conducting its analysis at this stage, the Commission must determine if Appellant's suspension was "commensurate with the dereliction;" otherwise, the discipline would be "arbitrary and capricious." *Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (citing *Staehele v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

Based upon the discipline notice issued to Appellant, it is clear that NOPD suspended Appellant for three days in connection with his text messages to the ADA and two days for the Facebook posts. (H.E. Exh. 1). As the Commission observed above, Appellant's unprofessional conduct towards the ADA interfered with the efficient and orderly prosecution of a criminal matter by straining the relationship between an important witness – Appellant – and the ADA responsible for the prosecution. Deputy Superintendent Bardy noted that the NOPD Commander who handled

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the disciplinary hearing recommended a one-day suspension. However, Deputy Superintendent Bardy disagreed with that recommendation as being too lenient given the degree of Appellant's misconduct and the target of that misconduct. The Commission notes a three-day suspension is within the penalty schedule NOPD generated in connection with violations of the Professionalism Rule. (NOPD Exh. 9). Based upon the facts before us, we find that a three-day is commensurate with Appellant's misconduct.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS IN PART and DENIES IN PART Appellant's appeal. NOPD is hereby ordered to remit to Appellant all back pay and emoluments related to the two-day suspension issued for Appellant's alleged violation of NOPD's Social Networking Policy.

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Judgment rendered this 26th day of Sept, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION


MICHELLE D. CRAIG, CHAIRPERSON

9/26/16
DATE


RONALD P. McCLAIN, VICE-CHAIRMAN

9/26/16
DATE


TANIA TETLOW, COMMISSIONER

9/26/16
DATE