



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
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CHAIRPERSON
TANIA TETLOW
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CLIFTON MOORE, JR.

MITCHELL J. LANDRIEU
MAYOR

Tuesday, September 26, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Ashish Shah VS.
Department of Police
Docket Number: 8538**

Dear Mr. Hessler:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 9/26/2017 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

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

For the Commission,

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

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Brendan M. Greene
Ashish Shah

file



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Tuesday, September 26, 2017

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PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Ashish Shah VS.
Department of Police
Docket Number: 8568**

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Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Brendan M. Greene
Ashish Shah

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CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

ASHISH SHAH vs. DEPARTMENT OF POLICE	DOCKET Nos.: 8538 & 8568
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I. INTRODUCTION

Appellant, Ashish Shah, 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. And, Appellant stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission’s analysis will be limited to whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Police Sergeant for NOPD and had permanent status as a classified employee.

On Wednesday, June 28, 2017, a hearing examiner appointed by the Commission presided over an appeal hearing. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner’s report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD placed Appellant on emergency suspension and subsequently terminated Appellant for multiple alleged violations of NOPD Rule 2, Moral Conduct, Paragraph 1, Adherence to Law, to wit, Louisiana Revised Statute 14:70. (H.E. Exhs. 1, 2). This NOPD rule reads as follows:

Employees shall act in accordance with the constitutions, statutes, ordinances, administrative regulations, and the official interpretations thereof, of the United States, the State of Louisiana, and the City of New Orleans, but when in another jurisdiction shall obey the applicable laws. Neither ignorance of the law, its interpretations, nor failure to be physically arrested and charged, shall be regarded as a valid defense against the requirements to this rule.

(H.E. Exh. 2).

Louisiana Revised Statute 14:70 regarding false accounting provides as follows:

A. False accounting is the intentional rendering of a financial statement of account which is known by the offender to be false, by anyone who is obliged to render an accounting by the law pertaining to civil matters.

B. Whoever commits the crime of false accounting shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both.

La. R.S. 14:70.

NOPD alleged that Appellant violated NOPD Rule 2 on sixteen occasions between October 1, 2014 and October 29, 2014 when he provided the Office of Police and Secondary Employment with false information regarding the amount of time he worked on a paid detail. *Id.*

NOPD further alleged that Appellant's actions constituted a violation of NOPD Rule 3: Professional Conduct; Paragraph 1 Professionalism. (H.E. Exh. 1). This rule reads as follows:

Employees shall conduct themselves in a professional manner with the utmost concern 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.

B. Appellant's Paid Detail

Through a provision in the consent decree executed by the United States Department of Justice and the City of New Orleans, NOPD agreed to establish the Office of Police Secondary Employment (“OPSE”). The primary function of the OPSE is to coordinate the assignment of NOPD Officers to various security details throughout the City. (Tr. at 76:24-77:7). OPSE also processes the payment by OPSE customers to NOPD Officers.

Through an on-line portal maintained by OPSE, various businesses, private individuals and groups may request an NOPD's Officer's presence at a specific event or location. Once OPSE receives the request, it posts the assignment on-line and NOPD Officers have the option of signing up to work the event – also known as a “paid detail.” Businesses often establish a regular paid detail. Typically, the same rotation of NOPD Officers work regular paid details. OPSE requires customers and Officers to accurately report the hours worked by NOPD Officers on paid details.

In 2014, the Home Depot established a regular paid detail at its store located at 1100 Claiborne Avenue. The Home Depot's paid detail had three six-hour shifts. Appellant requested and received the 6:00 a.m. – 12:00 p.m. shift. (*See* tr. at 90:10-91:16).

On or about September 22, 2014, John Salomone, Director of OPSE, received a complaint from the inventory control manager at Home Depot. (Tr. at 99:14-80:5, NOPD Exh. 9). The gist of the complaint was that Appellant had frequently left his post at Home Depot and failed to accurately record his time. *Id.* Along with the complaint, the inventory control manager sent Col. Salomone videos and screen shots of Appellant apparently leaving his paid detail early and arriving well past 6:00 a.m. (Tr. at 80:6-81:2).

As a result of the information he received from the Home Depot, Col. Salomone contacted NOPD's Deputy Chief of Compliance, Jay Ginsberg, who recommended that Col. Salomone refer the matter to NOPD's Public Integrity Bureau ("PIB"). *Id.* at 81:17-82:19. Col. Salomone followed Mr. Ginsberg's advice and referred the matter to PIB.

C. NOPD's Investigation

Deputy Superintendent Paul Noel oversaw NOPD's Field Operations Bureau at all times relevant to the instant appeal and conducted disciplinary hearings regarding allegations of misconduct against NOPD Officers. (Tr. at 20:1-8). Deputy Superintendent Noel recalled the allegations against Appellant and presided over the disciplinary hearing that eventually led to Appellant's dismissal. *Id.* at 20:15-18. Prior to the hearing, Deputy Superintendent Noel reviewed the investigative material regarding Appellant's alleged misconduct. *Id.* at 20:20-21:2. Part of NOPD's investigation into Appellant's misconduct included surveillance of Appellant during times Appellant had committed to working the Home Depot paid detail. (NOPD Exh. 4).¹ Upon reviewing the material produced by investigators in PIB, Deputy Superintendent Noel believed that Appellant had intentionally falsified his time on at least sixteen occasions in a one-month span of time. Deputy Superintendent Noel was also aware that Appellant had pled guilty to one count of false accounting in Orleans Parish Criminal court. (Tr. at 35:8-22).

¹ The investigative summary introduced by NOPD in connection with Deputy Superintendent Noel's testimony constitutes hearsay evidence. The hearing examiner accepted the summary for two purposes. First, the document establishes when NOPD initiated the investigation into Appellant's misconduct. Second, the documents represent the material upon which Deputy Superintendent Noel relied in conducting the disciplinary hearing that eventually led to Appellant's dismissal. There are no sworn statements from the detectives who allegedly conducted surveillance of Appellant and therefore the Commission does not accept the report as "competent hearsay evidence." *See Taylor v. New Orleans Police Dep't*, 2000-1992 (La.App. 4 Cir. 12/12/01, 5); 804 So.2d 769, 773, *writ not considered*, 2002-0139 (La. 3/22/02); 811 So.2d 935. (hearsay in the form of sworn statements by NOPD Officers deemed "competent" hearsay evidence). However, given Appellant's guilty plea and failure to deny the allegations presented by Deputy Superintendent Noel during the disciplinary hearing, the Commission does not find that the results of the surveillance a vital piece of NOPD's case.

During the disciplinary hearing, Appellant had the opportunity to respond to allegations that he had falsely reported his time to Home Depot and OPSE on numerous occasions. Appellant was “very apologetic” during the disciplinary hearing and admitted that he had left his paid detail to run errands and conduct personal business. *Id.* at 33:9-16, 32:22-33:8. At one point in the disciplinary hearing, Appellant informed Deputy Superintendent Noel that Appellant had provided the employees at Home Depot his personal cell phone in case they needed to reach him while he was gone. *Id.* at 37:9-17. Deputy Superintendent Noel found Appellant’s actions “ridiculous” because Home Depot was not paying Appellant to be available by phone – that was what 911 was for. Instead, Home Depot was paying Appellant approximately \$29.33/hr. to be physically present at the North Claiborne facility.

III. LEGAL STANDARD

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

0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

IV. ANALYSIS

A. Occurrence of the Complained of Activities

Appellant, through counsel, represented that his primary challenge to the disciplinary action taken by NOPD was that termination was not commensurate with Appellant's misconduct. This is consistent with Appellant's responses to NOPD's investigation in which he apologizes for his actions but offers little explanation or justification.

Appellant had numerous opportunities to deny the allegations presented to him during the disciplinary hearing and instant appeal hearing. He did not. The Commission appreciates Appellant's candor, but recognizes that NOPD's investigation included particularly damning evidence consisting of surveillance captured by detectives assigned to PIB. Thus, Appellant appears to have had very little choice but to admit to the misconduct.

Based upon the foregoing, the Commission finds that NOPD has established that Appellant engaged in the underlying misconduct.

B. Impact on NOPD's Efficient Operations

Deputy Superintendent Noel testified that when NOPD Officers violate the law, it brings discredit to both the Officer and NOPD. This in turn compromises NOPD's credibility in the community and diminishes the Officer's ability to fully perform his/her policing duties. In the matter now before us, Appellant's actions were not only criminal, but involved dishonesty. NOPD does not have to establish widespread knowledge or media coverage of Appellant's misconduct to show an adverse impact on NOPD's operations. It is enough that several members of the Home

Depot's staff were aware of Appellant's actions and any member of the public would be privy to Appellant's guilty plea.

Finally, the Commission finds that when an NOPD employee engages in misconduct that has elements of dishonesty or fraud, he compromises his ability to serve as an effective member of a criminal investigation. Criminal records and records of misconduct by law enforcement officers are typically discoverable as part of a criminal prosecution and the prosecution arguably must disclose such records. *See Giglio v. United States*, 405 U.S. 150, 155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Appellant's guilty plea and related discipline could serve to undercut his credibility should he serve as a witness in a criminal case.

As a result of the foregoing, we find that Appellant's conduct had an adverse impact on the efficient operations of NOPD.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, 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 *Staeble v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

NOPD's penalty matrix includes a range of a thirty-day suspension to dismissal for personnel who commit a misdemeanor while on duty or off duty and "under the color of law." (NOPD Exh. 8). The Commission is not bound by the penalty matrix developed by NOPD and must conduct an independent analysis of the facts present in any appeal. However, the clear delineation of a penalty matrix serves to put employees on notice that certain conduct carries with

it specific consequences. Publishing such a matrix and issuing discipline consistent with such a matrix militates against a finding that discipline is/was arbitrary.

Deputy Superintendent Noel testified that he viewed NOPD Personnel working paid details to be “on duty” because such personnel used NOPD equipment and were wearing an NOPD uniform. Alternatively, Deputy Superintendent Noel testified that Appellant could have been “off duty” but working “under the color of law” for the same reasons. The Commission notes that the United States Court of Appeals for the Fifth Circuit has held that paid detail work, as described by the consent decree, is work performed “by an NOPD officer or employee during his or her off-duty hours.” *Powers v. United States*, 783 F.3d 570, 581 (5th Cir. 2015). However, the court also observed that, “an officer performing detail work must conduct himself in accordance with NOPD rules because he is representing the department and utilizing the police power that the City has bestowed upon him.” *Id.* at 582. Therefore, the Commission finds that NOPD Personnel working paid details are “off duty” but operating under the color of law. As a result, we find that Appellant engaged in serious misconduct while representing NOPD.

Deputy Superintendent Noel testified that Appellant’s repeated dishonest conduct served as an aggravating factor when NOPD determined the appropriate level of discipline. Appellant suggested that Home Depot was somehow complicit in his misconduct because a Home Depot employee signed off on Appellant’s time. The Commission does not find Appellant’s suggestion compelling. First and foremost, Appellant repeatedly and knowingly misrepresented the amount of time he spent at Home Depot. Secondly, Home Depot was actively cooperating with PIB’s investigation into Appellant’s misconduct and did not interfere with PIB’s surveillance of Appellant. The Commission further observes that there is a disparity – real or perceived – between the status and authority enjoyed by an NOPD Officer versus that of an employee at Home Depot.

A. Shah
Nos. 8538 & 8568

The asset protection manager of the North Claiborne Home Depot took the appropriate action by notifying OPSE of Appellant's possible misconduct.

Finally, we note that an investigation by the United States Department of Justice found that, prior to the consent decree, there was "a longstanding pattern of illegal and unconstitutional conduct by NOPD officers" and that the paid detail system was among the root causes of such conduct. *Id.* at 579-580. Given the troubled history of paid details, NOPD must strongly discourage precisely the type of misconduct perpetrated by Appellant. Therefore, we find that termination is an appropriate level of discipline.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant's appeal.

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A. Shah
Nos. 8538 & 8568

Judgment rendered this 26th day of September, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

Ronald P. McClain
RONALD P. McCLAIN, VICE-CHAIRMAN

9/25/17
DATE

Tania Tetlow
TANIA TETLOW, COMMISSIONER

9/25/17
DATE

Michelle D. Craig
MICHELLE D. CRAIG, CHAIRPERSON

9/25/2017
DATE