GARY LEE	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NO. 8174

Appellant was a Police Officer with permanent status. He was first hired by the Appointing Authority on February 3, 1985, and was promoted to his current class on February 15, 1993. The Appellant received five, fifteen and two day suspensions, and was terminated from his employment with the NOPD by letter dated May 28, 2013. As set forth in the disciplinary letter:

> The investigation determined that... Commander Weiss was notified that on Monday, February 11, 2013 at about 2:50 p.m., you had called in sick and were unable to report for work as scheduled in the Fourth Police District. Commander Weiss believed that you called in a fictitious illness in order to work outside employment at the Lundi Gras festivities. Commander Weiss instructed Sergeant Al Miller to relocate to Waldenburg Park, where the Lundi Gras festivities were taking place, to see if you were there working. At about 3:50 p.m., Sergeant Miller relocated to Waldenburg Park and walked passed a tent with the name "Team Funnel Cake" on the outside. Sergeant Miller observed you working inside of the tent, took photographs, and then notified Commander Weiss of his findings.
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> You stated to Lieutenant Lea that you called in sick prior to the start of your tour of duty of February 11, 2013. You stated that you went to work at yours and your wife's business to sell funnel cakes at Waldenburg Park. Officer Lee stated you were not sick and could have come into work without hindrance. You added that because he never received an answer from Commander Weiss about your request for leave, you felt you had no choice but to call in sick. You also stated that the business he and his wife run is under the name GLEE, LLC and that in about 2010 or 201 1 you submitted an outside employment form to be put on file with the pol ice department. You informed Lieutenant Lea that you do not recall submitting an outside employment form for the years 2012 or 2013.
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> As such, Rule 2: Moral Conduct, paragraph 3, Honesty and Truthfulness; Subparagraph B, Rule 4: Performance of Duty, paragraph 1, Reporting for Duty, Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source to wit. Chapter 22.9;

OutsideEmployment, and Rule 5: Restricted Activities; Paragraph I : Fictitious Illness or injury.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held over the course of two days on December 2, 2014 and March 31, 2015. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

The testimony was as follows:

COMMANDER DOUGLAS ECKERT:

Commander Eckert is currently a Commander with the NOPD and was assigned as District Investigative Unit (DIU) commander as a Lieutenant in the Fourth District on February 11, 2013.

Commander Eckert testified that at some time maybe a week before Mardi Gras season had started the Appellant came in before 7:00 or 8:00 a.m. and asked if he could have furlough for Lundi Gras, which is the Monday before Mardi Gras. Commander Eckert testified that he informed the Appellant that he was not sure if that was possible and, further, instructed the Appellant to put his request in writing via a formal correspondence or Departmental Form 105.

Commander Eckert testified that he never received the Form 105 request from the Appellant. He testified that at the time, while the Appellant did not work directly under his command, he was serving as the Parade Route Commander for the Fourth District and that leave requests would have had to be presented to either him or through the chain of

Command to the Commander of the District at the time, Commander Weiss. Commander Eckert testified that he personally never received a formal 105 request for leave, nor granted the Appellant leave.

On cross-examination, Commander Eckert testified that it is not unusual for officers to be given furlough or leave during Mardi Gras, and that leave can be requested and given verbally without a written request. He testified that the Appellant had told him on the day that he came into his office that he had an outside business and that he wanted to work that outside business on Lundi Gras.

Commander Eckert testified that it would not have been unusual for sick leave to be granted to an Officer who calls in sick during Mardi Gras as the Appellant did in this case.

LIEUTENANT ARDEN TAYLOR:

Lt. Taylor is assigned to the Performance Standards section of the Compliance Bureau and was so assigned in February of 2013. Lt. Taylor testified that while performing his duties on the parade route convoy he was called and informed that there was an officer that may have been working a detail at a fair that was on North Peters and just off of Iberville and the name of it was Funnel Cakes. Lt. Taylor testified that the officer was identified as the Appellant, and that he was informed that the Appellant may be working while he was off duty.

Lt. Taylor testified that he and Lieutenant Brian Monteverde relocated to the location, identified the officer at the target location as the Appellant, and contacted his commander just to let him know that that's what was going on; that the Appellant was actually at that location.

Lt. Taylor testified that he and Lieutenant Brian Monteverde spoke with the Appellant and learned that the Appellant was scheduled to work the parade route that day but that he had taken sick leave and was actually working with his family members at Funnel Cakes.

Lt. Taylor testified that due to staffing shortages during Mardi Gras and the Super Bowl, there was an order that came out from the Chief of Operations requesting that all members assigned to the specific duties could not utilize their leaves during that period because of the specific duties and any leave request would have to go through the chain of command to their chief to be approved.

On cross-examination, Lt. Taylor testified that during his questioning of the Appellant, the Appellant did not try to mislead him in anyway and was truthful and honest in answering all of his questions. Lt. Taylor testified that the Appellant admitted to calling in sick and was cooperative in the investigation.

Lt. Taylor testified that notwithstanding the strains put on the Department during the time, leave was granted for myriad reasons, even for officers to ride in Mardi Gras parades.

LIEUTENANT BRIAN MONTEVERDE:

Lt. Monteverde was also assigned to the Performance Standards section of the Compliance Bureau in February of 2013.

Lt. Monteverde's testimony was substantially similar to that of Lt. Taylor. He testified that the Appellant was cooperative with the investigation and truthful in his answers to questions. He testified that the Appellant admitted that he had requested

furlough, which was denied, that he was supposed to be on the parade route but that he had called in sick, and that he was working at Funnel Cakes.

LIEUTENANT TERRANCE ST. GERMAIN:

Lt. St. Germain was also assigned to the Performance Standards section of the Compliance Bureau in February of 2013.

Lt. St. Germain testified regarding outside employment and an officer's obligation in order to receive authorization to work outside employment. He testified that there is a form (NOPD Exhibit 1) that Officers fill out. The form has to identify the outside employment and provide a description of what that employment entails. The Form is sent through the chain of command, meaning the Officer's immediate supervisor, the Commander, the Bureau Chief, and ultimately to the Superintendent's office and that's where it is reviewed by the Performance Standards Section. The request must be renewed annually.

Lt. St. Germain testified that Officers are not permitted to work outside employment during their regular working hours, and that they are not permitted to work outside employment while out sick.

Lt. St. Germain testified that it is his Office that maintains the records of outside employment requests and that a search of his records going back to 2010 revealed no such requests by the Appellant.

Lt. St. Germain testified that he was not asked to search the records dating back further than 2012 until the day prior to the hearing when he was asked to do so by the City Attorney.

DEPUTY SUPERINTENDENT DARRYL ALBERT:

Chief Albert presided over the Appellant's disciplinary hearing on May 14, 2013. He testified regarding the use of sick leave. Chief Albert explained that an officer can use sick leave when he or she is in fact ill or if guidelines of Family Medical Leave Act apply where they care for a loved one or someone they are the primary caregiver for. So it is under FMLA or under the guise they were actually sick themselves that an Officer can utilize sick time.

Chief Albert testified that an Officer calling in sick can call the Desk Sergeant, and that the Desk Sergeant would then complete a Form 109R, which is a standard form for the police department to document sick leave. He testified that at the time of this incident, NOPD policy required an Officer to call the Desk or a Rank if he intended to leave his house for any non-medical reason. Chief Albert testified that there was no evidence to suggest that the Appellant informed anyone that he would be working at Funnel Cakes while out sick.

Chief Albert testified that due to staffing shortages during Mardi Gras and the Super Bowl, there was an order that came out from him requiring "all hands on deck," meaning that everyone will be working. He testified that manpower requirements were so heavy and intense that any authorization for time off would have been heavily scrutinized even more than in the past. He testified that his records indicate that he did not receive any leave request from the Appellant requesting leave on Lundi Gras.

Chief Albert testified that because the Appellant's request for leave would have been for outside employment, it would have been given low priority even if he had

received such a request. He testified that he likely would only have granted it if nobody else was off.

Chief Albert testified that he did not personally inspect the outside employment files to determine if the Appellant had ever submitted a request; rather, he relied upon his staff to do that research as testified to by Lt. St. Germaine.

Chief Albert testified that Officer Lee violated the sick leave policy when he called in sick and was not sick. Further, Officer Lee called in and utilized sick time to work an outside employment, which is not authorized.

Chief Albert testified that during the disciplinary hearing, the Appellant had indicated that he did in fact submit a 105 requesting leave for Lundi Gras. However, Chief Albert testified that there was no record of any such request.

Chief Albert testified that during the disciplinary hearing, the Appellant had indicated that he did in fact submit an outside employment request but that there was no record of any such request.

Chief albert testified that the five (5) day suspension for failing to report to duty, the fifteen (15) day suspension for reporting a fictitious illness, and the two (2) day suspension for failing to submit an outside employment form were all within Departmental guidelines and appropriate given the circumstances.

Chief Albert testified that he found the Appellant to be untruthful when he indicated to him at his pre-disciplinary hearing that he had submitted the Form 105 requesting leave and the outside employment form. Chief Albert testified that the penalty of dismissal for untruthfulness was the only appropriate penalty insofar as the

Department has a zero tolerance policy for violation of its honesty and truthfulness policy that requires dismissal.

Chief Albert testified that all of the allegedly untruthful statements by the Appellant were made to him at the pre-disciplinary hearing. Chief Albert testified that he did not open a separate investigation into whether the Appellant violated the Department's truthfulness policy. He testified that in such a case, where during the course of a commander's hearing he determines that additional misconduct occurs that was not before him at the commander's hearing, "[g]enerally [the policy is to] open a new investigation."

Chief Albert admits that the disciplinary letter could have been more detailed, and should have been more detailed.

Chief Albert testified later in his testimony that the Appellant's act of calling in sick when he was not sick violated the Department's truthfulness policy. Chief Albert admits later in his testimony that the Appellant expressly informed investigators that he did not turn in a 105 requesting leave and that all of the questions he was asked during the investigation with regard to forms had to do with his LLC documentation, not outside employment forms.

LIEUTENANT JULIA LEA:

Lt. Lea is assigned to the PIB. She investigated this matter. Lt. Lea testified that in addition to interviewing all of the witnesses, she had contacted compliance to assist her in finding out if there was an outside employment form on file for Officer Lee. She also did a check of the secretary of state website for his LLC to see if that had been approved

by the Department. And she obtained the sick leave form that was on file from the desk officer when he called in that day.

Lt. Lea testified that she was tasked with investigating the Appellant for possible violations of Departmental rules, specifically Rule (2) moral conduct, paragraph (3), subparagraph (B); Rule (4) performance of duty, paragraph (1) reporting for duty; Rule (4) performance of duty, paragraph (2) instructions from an authoritative source, to wit: Chapter 22.9 outside employment; Rule (5) restricted activities, paragraph (1) fictitious illness or injury.

Lt. Lea testified that the Appellant admitted to her that he wanted leave due to his prior engagement with his funnel cake business, that he wanted to work the Lundi Gras festivities in Waldenburg Park, and he had requested leave in order to be able to do that.

Lt. Lea testified that the Appellant admitted to her that he decided to call in sick because he had no other option in order to work the funnel cake tent, and that he did in fact call in sick when he was not sick.

Lt. Lea testified that she prepared the Disciplinary Letter in this case, which was based upon her investigation.

Lt. Lea testified that the penalty for first offense fictitious illness, as in this case, is a one to thirty day suspension according to the NOPD discipline matrix found in Chapter 26.2 of the NOPD Policy and Procedural Manual.

When asked whether it is the department's policy that everyone that calls in a false or fictitious injury or illness is guilty of truthfulness, Lt. Lea testified that "[i]t's really on a case-by-case basis."

When asked "[a]s an investigator what factors would [she] consider when [she] decided whether or not to charge somebody with a truthfulness violation as opposed to a fictitious illness when the facts and circumstances are exactly the same?" Lt. Lea testified that she does not "necessarily know under what circumstance [she] would add the charge for truthfulness to a fictitious illness." Lt. Lea testified that in this case, she did not make that determination; rather, Captain Weiss added that charge to the DI-1. Captain Weiss did not testify in this matter.

LEGAL PRECEPTS

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action by his employer except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); Walters v. Department of Police of New Orleans, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city civil service commission. The burden on appeal, as to the factual basis for the disciplinary action is on the appointing authority. Id.; Goins v. Department of Police, 570 So 2d 93 (La. App. 4th Cir. 1990).

The civil service commission has a duty to decide independently from the facts presented whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. Walters, v. Department of Police of New Orleans, supra. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. Cittadino v. Department of Police, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct

complained of impaired the efficiency of the public service. Id. The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. Id. While these facts must be clearly established, they need not be established beyond a reasonable doubt. Id.

ANALYSIS

The Appellant was disciplined for four separate Rule violations. With regard to the five, fifteen and two day suspensions, same are AFFIRMED. The Appellants termination is REVERSED and VACATED. Each disciplinary action will be addressed separately.

Rule (4) performance of 15 duty, paragraph (1) reporting for duties

This violation was sustained and the Appellant received a five-day suspension. The Appointing Authority met its burden of proof and established by a preponderance of the evidence that the Appellant was disciplined for cause. The Appellant does not dispute the material facts. He admits that he did not report for duty.

The Appointing Authority likewise met its burden of showing that the violation in this case impaired the efficient operation of the Police Department by virtue of the Department losing one of its members that was scheduled to work during a very busy time for the Department and without much notice.

Rule (5) restricted activity, 17 paragraph (1) factitious illness or injury

This violation was sustained and the Appellant received a fifteen-day suspension. Again, the Appointing Authority met its burden of proof. The Appellant admits that he reported a fictitious injury in order to avoid having to report to work and, as above, the Department lost one of its members during a very busy time.

Rule (4) 19 performance of duty, paragraph (2) instruction from authoritative source, to wit: Chapter 22.9 employment

This violation was sustained and the Appellant received a two-day suspension. Again, the Appointing Authority met its burden of proof. The overwhelming evidence demonstrated that the Appellant had not submitted the proper paper work and obtained the proper authorization to be working outside employment on February 11, 2013. The Appointing Authority likewise met its burden of showing that the violation impaired the efficient operation of the Police Department by establishing that the Department has a real interest in monitoring the outside employment activities of those who serve the public as police officers.

Rule (2) moral conduct, 13 paragraph (3) honesty and truthfulness, subparagraph 14 (B)

This violation was sustained and the Appellant was dismissed. The Appointing Authority did not meet its burden in proof.

First, the Appellant was not afforded adequate due process as the disciplinary letter is vague, ambiguous and does not describe the conduct complained of that purportedly gave rise to the discipline imposed. In Evangelist v. Department of Police, 2008-CA-1375 (La. 9/16/2009), 32 So.3d 815, the Louisiana Fourth Circuit Court of Appeal explained:

> The U.S. Supreme Court considers… tenured civil service employment to be a property right which is protected by the Due Process Clause of the U.S. Constitution. The Supreme Court in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), held:
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> > The essential requirements of due process. . . are notice and an opportunity to respond. . . . The tenured public employee is entitled to oral or written notice of the charges against

> him, an explanation of the employer's evidence, and an opportunity to present his side of the story…

> It is a basic precept of our system of justice, fair play, and due process that one accused—of a crime, an administrative breach of conduct or code violation, or a civil tort—be given notice of that which he or she is alleged to have done or failed to have done… In Webb v. Dept. of Safety & Permits, 543 So.2d 582 (La. App. 4th Cir. 1989), we held that "notice of the charges should fully describe the conduct complained of . . . to enable the employee to fully answer and prepare a defense."

Evangelist, 32 So.3d 815, 818-819.

Here, the disciplinary letter does not set forth how it is that the Appellant was untruthful. In fact, the disciplinary letter acknowledges what was established above, that the Appellant fully admits to all of the complained of conduct, specifically; that he called and reported a fictitious illness, that he did not report to duty, and that he did not have the appropriate outside employment authorization on record with the Department on February 11, 2013. The testimony evinced at the hearing was also confusing and muddled. One could be led to understand that the truthfulness charge was an afterthought. Thus, the Appellant was not "enable[d] to fully answer and prepare a defense." *Id.*

Second, the basis for the investigation into the allegations of untruthfulness was not clearly set forth at any stage of the proceeding. The DI-1 does not provide a clear basis for the charge. The notice of pre-disciplinary hearing is unclear. Neither Rule 22.9 governing sick leave, nor Rule 26.2 setting forth the penalty matrix for violations of same provide notice that termination is a possible penalty. On the contrary, the maximum penalty for a first time violation for reporting a fictitious illness is thirty days; the Appellant received a fifteen day suspension.

Further, none of the witnesses for the Appointing Authority articulated any clear policy with regard to whether reporting a fictitious illness also could or should also violate the truthfulness policy. On the contrary, Lt. Lea, when asked whether it is the Department's policy that everyone that calls in a false or fictitious injury or illness is guilty of truthfulness, testified that "[i]t's really on a case-by-case basis." When asked "[a]s an investigator what factors would [she] consider when [she] decided whether or not to charge somebody with a truthfulness violation as opposed to a fictitious illness when the facts and circumstances are exactly the same?" Lt. Lea testified that she does not "necessarily know under what circumstance [she] would add the charge for truthfulness to a fictitious illness." Lt. Lea testified that in this case, she did not make that determination; rather, Captain Weiss added that charge to the DI-1. Captain Weiss did not testify in this matter.

Third, notwithstanding the above, the Appointing authority did not prove the occurrence of the complained of activity. At the hearing, the Appointing Authority was, again, unclear as to how it was that the Appellant was untruthful. It appears that two theories were advanced: first, the Appellant was untruthful when he said he was sick; second, the Appellant was untruthful at his pre-disciplinary hearing when he allegedly informed Chief Albert that he had submitted outside employment forms in 2010 or 2011. Neither of these theories is supported. As set forth in the disciplinary letter, the truthfulness policy is such:

> Employees are required to be honest and truthful at all times, in their spoken, written, or electronic communications. Truthfulness shall apply when an employee makes a materially false statement with the intent to deceive. A statement is material when, irrespective of its admissibility .under the rules of evidence, it could have affected the

> course or outcome of an investigation or an official proceeding, whether under oath or not, in all matters and official investigations relating to the scope of their employment and operations of the Department, as follows:
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> > (b) employees shall not will fully or negligently make any false, misleading, or incorrect oral, written, or electronic communication

In this case, pursuant to the above definition, neither the Appellant's reporting of a fictitious illness on February 11, 2013, nor his alleged statements to Chief Albert at his disciplinary hearing that he had submitted outside employment applications in 2010 or 2011, even assuming (without deciding) that these statements were made, could support a sustained violation of the policy. For one, the Appellant admitted to all of the complained of conduct and every investigator in this case testified that the Appellant was forthright and truthful during the investigation. Moreover, Chief Albert testified that the investigation was concluded by the time the Appellant allegedly made the statements regarding submitting the forms in 2010 or 2011 at his disciplinary hearing. Lt. St. Germain testified that he was not asked to search the records dating back further than 2012 until the day prior to the hearing when he was asked to do so by the City Attorney.

What is more, the Appellant admitted and, pursuant to the disciplinary letter and all of the testimony in this case, it is a fact that the Appellant admitted that he did not have valid authorization on February 11, 2013, to work outside employment. According to the relevant policy and all of the testimony, requests for outside employment have to be renewed every year. It is therefore immaterial to *this* proceeding whether the Appellant had sought or was granted permission to operate his funnel cake business in 2010 or 2011. Accordingly, there is no evidence at all that the Appellant made a

"materially false statement" that "could have affected the course or outcome of an investigation or an official proceeding."

With regard to the last point, if the Appointing Authority took issue with the Appellant's alleged testimony at his disciplinary hearing that he applied for permission to work outside employment in 2010 or 2011 which, as established above, had nothing to do with the allegations that were the subject of the subject investigation, nothing would have prevented the Appointing Authority from opening a new investigation into whether those statements violated the truthfulness policy. The Appointing Authority, for reasons that are unclear, chose not to.

Considering the foregoing, the Appellant's appeal is DENIED in part and GRANTED in part as set forth above. The Appellant's termination is vacated and the Appellant is ordered to be reinstated to his employment with all back pay and emoluments.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 16TH DAY OF NOVEMBER, 2015.

TANIA TETLOW, COMMISSIONER

CONCUR:

RONALD P. McCLAIN, COMMISSIONER

JOSEPH S. CLARK, COMMISSIONER