



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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NEW ORLEANS LA 70112
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CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
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LISA M. HUDSON
DIRECTOR OF PERSONNEL

LATOYA CANTRELL
MAYOR

Wednesday, August 28, 2019

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

Re: **Ananie Mitchell VS.
Department of Police
Docket Number: 8398**

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 - 8/28/2019 - 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: Shaun Ferguson
William R. H. Goforth
Brendan M. Greene
Ananie Mitchell

file



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CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

ANANIE MITCHELL, Appellant, vs. DEPARTMENT OF POLICE, Appointing Authority	DOCKET Nos.: 8398, 8571
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I. INTRODUCTION

Appellant, Ananie Mitchell, 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. Appellant, however, does allege that NOPD’s investigation violated the standards required by our Rules and Louisiana Revised Statute § 40:2531 (hereinafter “the Statute”). Therefore, the Commission shall first address Appellant’s procedural claims before assessing the merits of his appeal. At all times relevant to the instant appeal, Appellant served as an officer for NOPD and had permanent status as a classified employee.

A hearing examiner, appointed by the Commission, presided over an appeal hearing. The undersigned Commissioners have reviewed the Parties’ post-hearing briefs, transcript, and exhibits from this hearing as well as the hearing examiner’s report. Based upon our review, we hereby GRANT the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

Effective March 2, 2015, NOPD placed Appellant on emergency suspension in connection with an allegation that Appellant had propositioned “an individual for sex via text message.” (H.E. Exh. 1). According to the suspension notice, Appellant’s alleged actions violated NOPD Rule 2 – Moral Conduct – Paragraph 1 – Adherence to Law; to wit Louisiana Revised Statute 12:82(2)¹ relative to soliciting prostitution. *Id.* Louisiana law defines “prostitution” as “the solicitation by one person of another with the intent to engage in indiscriminate sexual intercourse with the latter for compensation.” La. R.S. § 14:82(A)(2). Included in the definition of “sexual intercourse” is “anal, oral, or vaginal sexual intercourse.” NOPD further alleged that Appellant’s actions violated was Rule 3: Professional Conduct; Paragraph 1: Professionalism, which 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.

On September 1, 2016, NOPD terminated Appellant’s employment. (H.E. Exh. 2a). NOPD based its decision to terminate Appellant upon allegations that he violated the following NOPD rules:

- Rule 2: Moral Conduct, Paragraph 1, Adherence to Law to wit La. R.S. 14:82

NOPD alleged that Appellant violated this rule when he “sent a text message to the complainant offering to pay him \$100 in exchange for [Appellant] performing oral sex on him.” NOPD further alleged that Appellant arranged the time and place to meet the complainant.

¹ The Commission notes that the suspension notice cites to the wrong revised statute.

- Rule 2: Moral Conduct, Paragraph 3, Honesty and Truthfulness (2 Counts)²
 - Appellant allegedly violated this rule when he denied soliciting the complainant for prostitution.
 - NOPD further alleged that Appellant violated this rule when he denied sending text messages to the complainant in order to set up a meeting between the complainant and Appellant.
- Rule 3: Professional Conduct, Paragraph 1, Professionalism
 - Appellant allegedly violated this rule when he was arrested after soliciting the complainant for prostitution.

B. NOPD's Investigation

On the evening of February 24, 2015, Sergeant Daniel Wharton, an investigator within NOPD's Public Integrity Bureau, received information that an NOPD police officer may be engaged in illegal activity. Since Sgt. Wharton was off-duty and away from PIB headquarters, he contacted Detective Johnny Young and asked him to handle the initial investigation. (Tr. at 103:3-8). Sgt. Young relocated to PIB headquarters where he met Sergeant Julie Jacobs and Lemar Harris, the individual who had made the allegation of illegal activity by a police officer. Upon speaking with Mr. Harris, Det. Young learned that Mr. Harris had alleged that an unknown NOPD officer had contacted him and was trying to arrange a sexual encounter in exchange for money. *Id.* at 105:21-106:2.

According to Mr. Harris, the unknown officer had sent several text messages in which the officer offered Mr. Harris money in exchange for performing oral sex. Det. Young viewed the text messages on Mr. Harris's phone and observed that the sender of the text messages was

² After convening the hearing on February 20, 2019, but prior to introducing any evidence into the record, NOPD indicated to the hearing examiner that it intended to withdraw three of the five counts involving honesty and truthfulness. Appellant accepted the withdrawal but moved for a continuance which was unopposed by NOPD.

A. Mitchell
Nos. 8398, 8571

attempting to arrange a meeting at a city-owned gas station located on North Broad Street (hereinafter “North Broad gas station”). *Id.* at 110:3-8. The Commission observes that the North Broad gas station is used by numerous City employees in various departments (including DPW, NOFD, NOPD, and EMS) to refuel city-owned vehicles. Believing that there was very little time to arrange for surveillance, Sgt. Wharton instructed Det. Young to make do with the equipment available, arrange to follow Mr. Harris to the rendezvous place, and observe what happens. *See id.* at 116:18:117:9, 123:15-24.

After securing a small, hand-held recorder in Mr. Harris’s hoodie, Det. Young dropped Mr. Harris off at the Whole Foods grocery store parking lot located close to the North Broad gas station. He then instructed Mr. Harris to walk slowly towards the rendezvous site so that Det. Young could get into a surveillance position. *Id.* at 118:2-13. Det. Young also told Mr. Harris that, if at any time Mr. Harris felt unsafe, he should run back to the Whole Foods parking lot. *Id.* at 118:14-21.

While Det. Young was meeting with Mr. Harris and preparing the surveillance operation, Appellant and his partner, Officer Reginal Koeller, were transporting an arrested subject to the central lock-up facility located on Tulane Avenue. After dropping Officer Koeller and the arrested subject off at central lock-up, Appellant drove his assigned, marked NOPD vehicle to the North Broad gas station in order to refuel. *Id.* at 84:12-25. When he arrived at the gas station, Appellant realized that he had forgotten the card that he needed to operate the gas pumps. Instead of returning to NOPD headquarters, Appellant decided to fill out his daily activity log (referred to in the record as a “trip sheet”). *Id.* at 87:11-88:2. Appellant pulled his vehicle near a fence separating the North Broad gas station from the LaFitte Greenway in order to complete his activity report; Appellant

testified that it was his usual practice to complete his activity report while in his vehicle. *Id.* at 88:4-19.

While completing his report, Appellant was approached by an individual he claimed he did not recognize or know. *Id.* at 88:21-89:6, 89:24-90:3. The individual asked Appellant, “what I gotta do to make \$100?” and Appellant responded by asking the individual what he was talking about and the individual repeated his question. *Id.* at 92:7-17. Appellant explicitly denied offering the individual money for a sexual encounter and denied that he had texted the individual to arrange the meeting. *Id.* at 90:5-24. When Appellant opened the door of his vehicle to confront the individual, the individual ran off. *Id.* at 92:19-21. Appellant denied that he asked the individual if the individual was recording their interaction. *Id.* at 93:3-21. Following the interaction, Appellant returned to NOPD headquarters. *Id.* at 94:15-22.

While Appellant was interacting with the individual he claimed not to know, Det. Young was parked across Broad Street at a different gas station. *See id.* at 118:23-119:5. Det. Young testified that he observed Mr. Harris interact with an individual he described as “bald-headed” and in a marked NOPD vehicle. *Id.* at 124:7-23, 125:7-13. Det. Young then saw Mr. Harris run away from the NOPD vehicle towards the Whole Foods parking lot. At that time, Det. Young relocated to the Whole Foods parking lot while Sgt. Jacobs attempted to follow the NOPD vehicle that had left the Broad Street gas pumps. She eventually lost visual contact with the vehicle. *Id.* at 126:9-18.

Mr. Harris did not return to the Whole Foods parking lot and instead had ran to PIB headquarters. There, he met Det. Young, Sgt. Jacobs, Sgt. Wharton, and Special Agent Allen Car of the FBI. *Id.* at 127:10-19. During this meeting, Det. Young took photographs of the text messages on Mr. Harris’s phone and listened to the audio captured by the device planted on Mr.

Harris's person. *Id.* at 127:25-128:7.³ Det. Young acknowledged that he did not take any measures to investigate whether or not Appellant sent the offending texts to Mr. Harris, despite the fact that such measures were generally available to law enforcement entities. *Id.* at 138:1-139:15.

III. APPELLANT'S PROCEDURAL CLAIMS

During the course of the appeal hearing, Appellant lodged two separate procedural challenges. First, Appellant alleged that NOPD violated the Statute by failing to complete its investigation within the time delays provided by law. Alternatively, Appellant alleged NOPD's discipline constituted "double jeopardy" in violation of Appellant's constitutional rights. The Commission addresses each claim in turn.

A. Timeliness of NOPD's Investigation

The provisions of Louisiana Revised Statute § 40:2531, known colloquially as the "Police Officers' Bill of Rights" govern the investigative due process that NOPD must afford to "police employees" as defined by the statute. It is undisputed that NOPD Officers, like Appellant, are "police employees" pursuant to § 40:2531. Any investigation that does not conform to the due process requirements enumerated in § 40:2531 renders the related discipline "an absolute nullity."

When a formal, 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. Except as otherwise provided in this Paragraph, each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days.... The investigation shall be considered complete upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint. *Nothing in this Paragraph shall limit any investigation of alleged criminal activity.*

³ The Commission shares the hearing examiner's concern that the audio was not played during the course of the instant appeal hearing. Det. Young believed that the recording device was operating sufficiently and that it had captured some of the conversation between Mr. Harris and the as-yet unidentified NOPD officer. Such a recording could have served to impeach Appellant's credibility regarding his account of the interaction between himself and Mr. Harris. Instead, the only eye-witness account of the interaction is Appellant. Therefore, the Commission shall accept Appellant's version of the interaction.

La. Rev. Stat. § 40:2531(B)(7)(emphasis added).

For the purposes of La. R.S. 40:2531, an investigation begins when NOPD initiates a DI-1 form. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 17); 165 So.3d 191, 202-03; see *O'Hern v. Dep't of Police*, 2013-1416 (La. 11/8/13, 7); 131 So.3d 29, 33. (“the sixty-day period within which to complete an investigation [does] not begin until the start of the administrative investigation.”); *Young v. Department of Police*, 13–1596, p. 1, n. 2 (La.App. 4 Cir. 6/25/14), 152 So.3d 193, 194, n. 2. The investigation ends “upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint.” La. R. S. § 40:2531(B)(7). But, if the misconduct allegedly perpetrated by a “police employee” is also subject to a criminal investigation, the Louisiana Supreme Court has held that the time limitation for completing the administrative investigation is tolled until the criminal investigation is completed. *Kendrick v. Dep't of Police*, 2016-0037 (La.App. 4 Cir. 6/1/16, 17); 193 So.3d 1277, 1287(citing *O'Hern supra*). When the criminal investigation ends, so too does the tolling of the sixty-day deadline. *Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16)(notice of a *nolle prosequi* signaled the completion of the criminal investigation and ended the tolling related to that criminal investigation).

The criminal matter related to the allegations against Appellant ended on June 8, 2018 when, following a trial before a judge, Appellant was found not guilty of soliciting for prostitutes and malfeasance in office. (Joint Exh. 1). Give the applicable case law, NOPD had sixty days from June 8, 2018 to issue Appellant notice of the investigation’s outcome or secure an extension. Based upon the record before us, however, NOPD apparently decided to initiate – and complete – an administrative investigation into Appellant’s alleged misconduct prior to the conclusion of the criminal proceedings.

NOPD asserts that it began its administrative investigation into Appellant's alleged misconduct on May 4, 2016 when it directed Appellant to provide NOPD investigators with an administrative statement. Then, on May 23, 2016, two years before the criminal trial had run its course, NOPD issued Appellant notice of the investigation's conclusion and directed him to appear at a disciplinary hearing. Per state law, this May 23rd notice represented the end of NOPD's investigation.

Based upon the facts before us and applicable case law, the Commission finds that NOPD's investigation adhered to the procedural due process requirements of La. R.S. 40:2531.

B. Appellant's Claim of Double Jeopardy

The Commission accepts the hearing examiner's analysis with respect to Appellant's claim of double jeopardy and reproduces his analysis below.

There is a wealth of case law in which an employee was charged with criminal activity, the charges were either dismissed or the employee was acquitted, but the employee still faced discipline. The simple matter is that the standard of proof in criminal matters is far different than in civil service proceedings. While the state must establish a violation of criminal statute beyond a reasonable doubt, an appointing authority need only establish a violation of policy or rule by a preponderance of the evidence.

In *Bailey v. Dep't of Pub. Safety & Corr.*, 2005-2474 (La.App. 1 Cir. 12/6/06, 10); 951 So.2d 234, 240, Mr. Bailey, a sergeant in the Louisiana State Police, was arrested for violation of La. R.S. 14:98 (operating a vehicle while intoxicated) and 32:58 (careless operation of a vehicle). Mr. Bailey was eventually acquitted of the criminal charges but the appointing authority terminated him for, among other things, violating Louisiana State Police rules and regulations that prohibit employees from breaking the law. *Id.* at 239. Mr. Bailey appealed his termination to the

Louisiana State Police Commission.⁴ In his appeal, Mr. Bailey argued that, because his termination was based upon an allegation that he committed a criminal act, and he was subsequently acquitted of that criminal act, his termination is invalid. *Id.* The State Police Commission rejected this argument and found that:

[U]nlike a criminal proceeding in which the state must prove beyond a reasonable doubt all the elements of the charged crime, the appointing authority in an administrative proceeding need only prove by a preponderance of the evidence that the complained of action occurred and that it impaired the efficient operation of the public service.

Id. (citing *Walters v. Department of Police of New Orleans*, 454 So.2d 106, 113 (La.1984)). The State Police Commission went on to find that the appointing authority had sufficient cause to terminate Mr. Bailey's employment. *Id.* The First Circuit affirmed the State Police Commission's decision and noted with approval that the State Police Commission recognized that it was "not their role to determine whether Mr. Bailey was guilty or innocent as to the *crime* of driving while intoxicated and that [Mr. Bailey's] acquittal, for whatever reason, by the Court in Calcasieu Parish of DWI, is interesting but certainly not dispositive of his disciplinary action before this tribunal." *Id.* at 240-41 (emphasis in original).

In *Sanders v. Dep't of Police*, 2008-0917 (La.App. 4 Cir. 1/28/09, 7-8); 4 So.3d 891, 895, a NOPD officer was arrested and charged with second degree cruelty to a juvenile. And, while the assistant district attorney entered a *nolle prosequi* regarding the charge, this Commission found that NOPD had established that the officer's conduct violated its internal policy requiring adherence to the law. *Id.* at 893, 895; *see also Dep't of Pub. Safety & Corr., Louisiana State Penitentiary v. Hooker*, 558 So.2d 676, 679 (La. Ct. App. 1st Cir. 1990)("[I]t must follow that if

⁴ While the Louisiana State Police Commission is organized under a different Part of the Louisiana Constitution (Art. X, § 43) the burden of proof on appeals is the same as appeals before this Commission.

an *acquittal* on a criminal charge does not preclude a civil service disciplinary action on the same facts, a *nolle prosequi* on a criminal charge does not preclude such an action either.”).

Finally, Commission notes that NOPD actually disciplined Appellant **before** Appellant’s criminal trial and subsequent acquittal.

Bearing in mind the above facts, the Commission finds that Appellant’s termination did not amount to double jeopardy in violation of Appellant’s due process rights under the United States or Louisiana Constitution.

III. LEGAL STANDARD

A. General Standard

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.

B. Standard When Appellant is Accused of Violating a Law

An additional consideration that the Commission must address is whether or not an allegation that an Appellant violated a criminal statute – and thus violated NOPD rules – changes NOPD’s standard of proof. Put simply, the Commission must answer the question, do NOPD’s allegations that Appellant violated La. R.S. 14:82 change the standard from “preponderance” to “beyond a reasonable doubt”? We find that it does not.

As we have already observed above, in *Bailey*, the First Circuit held that a police officer acquittal was not dispositive when considering whether or not a department had sufficient cause to discipline the police officer. In making its finding, the First Circuit noted that the standard of proof in disciplinary cases was by a preponderance of the evidence. *Bailey, supra* at 240. This is consistent with other cases with similar factual bases. *E.g., Sanders, supra* at 895; *Hooker, supra* at 679.

IV. ANALYSIS

A. Occurrence of the Complained of Activity

While there are ostensibly four separate alleged rule infractions at issue in the appeal now before the Commission, each infraction stems from the allegation that Appellant offered Mr. Harris \$100 for a sexual encounter. In order to meet its burden, NOPD must establish that Appellant was the author of texts to Mr. Harris. Yet, NOPD did not even establish that Appellant knew Mr. Harris.

NOPD relied entirely upon circumstantial evidence in presenting its case before the hearing examiner. The evidence established that Appellant was at the Broad Street gas pumps at approximately 7:30 p.m. on the evening of February 24, 2015. This, in and of itself, is not unusual since all manner of City employees use the City-owned gas depot to refuel. Appellant was unable

to refuel his vehicle because he claimed to have forgotten his “gas card.” Instead of returning to NOPD headquarters, Appellant decided to fill out his trip sheet. NOPD did not introduce any evidence to contradict Appellant’s account. While he was parked, Appellant was approached by an individual who asked Appellant “what do I have to do to make \$100” or words to that effect. Appellant claimed that he was confused by this question and asked the individual what he was talking about. The individual repeated his question and before Appellant could ask more questions, the individual took off running. Appellant claimed that he did not recognize the individual and NOPD chose not to call Mr. Harris to contradict Appellant’s testimony.

In fact, Mr. Harris’s testimony is conspicuously absent. NOPD did establish that Appellant and Mr. Harris were both at the facility that houses the Orleans Parish Criminal District Court and Orleans Parish Criminal Drug Court on January 29, 2015. But that is as far as NOPD was able to get. Appellant was working a security assignment for a criminal trial on the 29th and testified that he did not leave the courtroom, not even to eat lunch or use the restroom. NOPD did not introduce any evidence or testimony to contradict Appellant’s claim. In order for NOPD to establish that Appellant knew Mr. Harris’s number, it first had to establish a basis for Appellant’s knowledge. There is no such basis in the record.

Appellant flatly denied sending Mr. Harris any text messages and the record established that Appellant’s personal cell phone number did not match the number from which the offending texts originated. There was passing reference made to “spoofing” in the record but there is absolutely no evidence to suggest that Appellant somehow disguised his cell phone number. Det. Young was the only witness called who participated in the investigation into Appellant’s alleged misconduct and Det. Young acknowledged that, NOPD had not been able to connect any phone used by Appellant to the text messages on Mr. Harris’s phone.

NOPD asks the Commission to accept the claim by Mr. Harris that the author of the texts was an unknown police officer and then draw an inference that, because Appellant was at the rendezvous location mentioned in the texts, that Appellant was the author of the texts. Mr. Harris's claim, however, comes in the form of hearsay testimony through Det. Young. Appellant did not have an opportunity to cross-examine Mr. Harris. Presumably, Mr. Harris testified during Appellant's criminal trial and was subject to cross-examination by Appellant's criminal defense attorney. But NOPD did not seek to introduce Mr. Harris's testimony into evidence. The fact that it was perfectly reasonable for Appellant to be at the rendezvous location – a frequently-used fueling location for city-owned vehicles – serves to further undercut NOPD's case. This was not a secluded location where an on-duty NOPD Officer had no place being. It is also no secret that NOPD personnel frequently drive to the Broad Street gas pumps to refuel.

Based upon the scant record before us, the Commission finds that NOPD has utterly failed to establish that Appellant offered Mr. Harris any money in exchange for a sexual encounter. And, since all of the alleged misconduct at issue depends upon NOPD establishing that Appellant made such an offer, NOPD has failed to meet its burden in each ancillary allegation.

IV. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the appeal. NOPD shall rescind the emergency suspension and termination referenced above and remit to Appellant all appropriate back pay and emoluments.

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A. Mitchell
Nos. 8398, 8571

Judgment rendered this 28th day of August, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

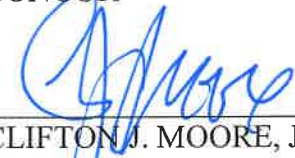


MICHELLE D. CRAIG, CHAIRPERSON

8/23/2019

DATE

CONCUR



CLIFTON J. MOORE, Jr., COMMISSIONER

8/27/19

DATE



BRITTNEY RICHARDSON, COMMISSIONER

8-23-2019

DATE