



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
BRITTNEY RICHARDSON, CHAIRPERSON
JOHN H. KORN, VICE-CHAIRPERSON
CLIFTON J. MOORE, JR.
MARK SURPRENANT
RUTH WHITE DAVIS

Monday, August 8, 2022

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

Mr. Eric Hessler
PANO 320 N. Carrollton Avenue #202
New Orleans, LA 70119

Re: **Berger et al VS.**
Department of Police
Docket Number: 6265

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 - 8/8/2022 - 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
Jay Ginsberg
Berger et al

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

ERIC BERGER, *ET AL.*
Appellant

Docket No. 6265

v.

DEPARTMENT OF POLICE,
Appointing Authority

DECISION

Appellant, Raymond Huber, is the only remaining appellant of this promotion appeal filed by several police officers¹ on October 19, 2000,² alleging improper removal from the promotion list and discrimination. The Commission allowed amendment of this petition to add Appellant and Eric Hessler on October 18, 2021. (Civil Service Record – October 18, 2021, Order). This order provided that Huber’s and Hessler’s discrimination appeals were untimely, but that Huber and Hessler could request an investigation concerning the application of former Rule VI, § 3.4, governing the removal of candidates from an eligible list. (Civil Service Record – October 18, 2021, Order).

At all relevant times, Appellant had permanent status as a Police Officer. (Tr. at 43). A Hearing Examiner, appointed by the Commission, presided over a hearing on June 6, 2022. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the appeal file, the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner’s report dated July 13, 2022, and controlling Louisiana law. The

¹ The original officers on the October 19, 2000, Civil Service appeal were Kermit C. Robertson, Eric J. Berger, Richard J. Hunter, Michael D. Glasser, and Bruce K. Little. (Civil Service Record – October 19, 2000, letter from Frank DeSalvo on behalf of the Police Association of New Orleans) (5/31/18 Tr. at 5).

² The Civil Service Rules contain no provision for abandonment of an appeal.

Commissioners have also reviewed Rule VI, section 3, of the Civil Service Rules in effect from 1997 to 2004.

For the reasons set forth below, Officer Huber's appeal is DENIED,

I. FACTUAL BACKGROUND

According to the Civil Service Rules effective in at all relevant times,³ Rule VI, section 3, titled "Certification of Eligibles," read as follows:

- 3.1 Upon a request from an appointing authority to fill a position other than by demotion, transfer, or reinstatement, the Director shall certify to the appointing authority the names of three eligible for such position of the class of the vacant position, and if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy. In cases of demotion, transfer or reinstatement, the Director shall approve or disapprove the name of the person submitted by the appointing authority.
- 3.2 (a) The eligible certified shall be the highest ranking eligible willing to accept employment, ranked in the following order: (1) all the eligibles on the appropriate reemployment list, if any; (2) those on a promotion list, if any; (3) those on an entrance employment list. All the names on any one of such lists shall be exhausted before any names are certified from another list, but the names certified may be taken from two or more lists if necessary to make a certification of three eligibles. Names shall be certified from each list in the order of their rank on that list.
- (b) The certification of eligibles from promotional and/or employment lists may be presented in the form of a single band. Names on the appropriate re-employment list, if any, shall be certified first. If fewer than three of those are willing to accept the position, then the top-ranking eligible from the promotion list, grouped into a single band according to the established psychometric formula for that examination, shall be certified. If no promotion list exists, the same procedure shall be applied to the employment list. As those eligibles with the highest scores are eliminated through appointment or removal from the list, additional names will be added to the band as necessary to maintain the same range of scores within the band.

³ The Commission relies on a copy from of the Civil Service Rules in the Department's possession published on December 13, 2004. This copy reflects that Rule VI, section 3 had not been amended since 1990.

- (c) Within 45 days after such names are certified the appointing authority shall appoint one of those whose names are certified to each vacancy which is to be filled. Requisitions which are not returned within this 45 day period shall be canceled. In each case of acceptance of an appointment, such appointment shall become effective as of the date on which the appointee enters upon duty in accordance with the Law and Rules.
 - (d) If the appropriate lists do not contain the names of a sufficient number of eligible willing to accept appointment to make possible the certification of three eligible persons, the names of all persons on such lists who are willing to accept appointment shall be certified.
- 3.3 When fewer than three names are certified to fill a vacancy, the appointing authority may make his appointment from the names certified. If he does not wish to make an appointment from the names certified, the Director may authorize him to make a provisional appointment.
- 3.4 If the appointing authority passes over the name of an eligible on a register in connection with three separate appointments he has made from the register, written request may be made of the Director that the name of such eligible be omitted from any subsequent certification to the same appointing authority from the same register. The name of such eligible shall thereafter not be certified to him from that register for future vacancies in that class of positions.

The parties stipulated to the following facts:

Raymond Huber began his employment with the New Orleans Police Department (“NOPD”) on May 28, 1978. (Joint Exhibit 1 at 2). Huber obtained permanent status as a member of the classified city civil service. (Joint Exhibit 1 at 2). Huber was promoted to Police Officer IV on February 15, 1993. (Joint Exhibit 1 at 2). Huber retired from NOPD on February 7, 2004. (Joint Exhibit 1 at 2). At the time of his retirement, Huber’s classification was Police Officer IV. (Joint Exhibit 1 at 2). NOPD terminated Huber’s employment as of August 8, 1997, but the termination was reversed on appeal to the New Orleans Civil Service Commission (“Commission”), Docket No. 5685 c/w 5686, in a decision dated May 27, 1999. (Joint Exhibit 1 at 2). NOPD terminated Huber’s employment as of November 29, 2001, but the termination was reversed on appeal to the

New Orleans Civil Service Commission (“Commission”), Docket No. 6440, in a decision dated June 17, 2003. (Joint Exhibit 1 at 2).

The Department of Civil Service allowed Huber to sit for the test for sergeant in 1997, based on his pending appeal of his termination, as was the practice of the Department. (Tr. at 25, 49). Officer Huber passed the test, and was placed in Band 3. (Tr. at 48). NOPD failed to promote Officer Huber to sergeant, and in September of 2000, NOPD promoted officers in Band 4, passing over Officer Huber. (Tr. at 53-54).

The Personnel Director, Amy Trepagnier, testified that under the “Rule of Three” as it was applied in 1997, if NOPD passed over a candidate three times, then the candidate’s name was removed from the eligible list. (Tr. at 11) (Rule VI, section 3.4). Under Rule VI, section 3.1, the Department of Civil Service provided NOPD with a list of three names for a vacancy and an additional name for each additional vacancy. (Tr. at 11). Under a consent decree in effect at the time, candidates whose scores were not statistically significantly different were placed in a band. (Tr. at 11) (Rule VI, section 3.2(b)). All the candidates in the same band were considered tied for ranking purposes. (Tr. at 13-14, 19-21). In order to move to a lower band, NOPD could pass over a limited number of candidates in the higher band. (Tr. at 23-24) (Rule VI, sections 3.1, 3.2(b)). NOPD could remove two “considers” from the list for every three candidates selected. (Tr. at 31). NOPD could have passed over Appellant to appoint eligible candidates in band 4. (Tr. at 22-23). NOPD was only required to consider Appellant. (Tr. at 26).

II. ANALYSIS

The Commission allowed the addition of Appellant to this appeal based on its discretion to grant requests for investigation under Louisiana Constitution, article X, section 10(B). This section

provides that “[e]ach commission may investigate violations of this Part and the rules, statutes, or ordinances adopted pursuant hereto.” La. Const., art. X, § 10.

Based on the information presented at the hearing of this matter, the Commission finds no violation of Civil Service Rule VI, section 3.4, as it applied from 1997-2004. Due to the passage of time, incomplete documentation is available. Based on Appellant’s testimony, NOPD passed over Appellant for the first time in September 2000. NOPD had the discretion under Rule VI, sections 3.1 and 3.2(b) to pass over Appellant and to select a candidate in a lower band. It is unsurprising that NOPD may have exercised its discretion to pass over Appellant, as it had terminated his employment on two occasions. No documentation reflects that Appellant’s name was removed from the eligible list following Appellant’s reinstatement, either at the request of NOPD or otherwise. However, NOPD could have requested the removal of Appellant’s name from the eligible list under Rule VI, section 3.4 if NOPD passed over his name on three occasions.

The Commission finds no violation of Civil Service Rule VI, section 3, based on the investigation.

This the 8th day of August, 2022.

WRITER:



Brittney Richardson (Aug 5, 2022 16:05 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:



J H Korn (Aug 5, 2022 16:27 CDT)

JOHN KORN, VICE-CHAIRPERSON

Mark C. Surprenant

Mark C. Surprenant (Aug 5, 2022 18:18 CDT)

MARK SURPRENANT, COMMISSIONER