

CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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Monday, August 17, 2015

Mr. Raymond C. Burkart, III
19407 Front Street
Covington, LA 70433

Re: **James Young VS.
Department of Police
Docket Number: 8141**

Dear Mr. Burkart, III:

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 - 8/17/2015 - 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 shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,



Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Jay Ginsberg
James Young

file

JAMES YOUNG

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 8141

Appellant is a Police Sergeant with permanent status. The Appellant received a one-day suspension for violation of the Appointing Authority's regulations concerning Instructions from an Authoritative Source and Chapter 74.3 of the NOPD Policy and Procedure Manual relative to Mandatory Tribunal Attendance. As reflected in the disciplinary letter:

On April 5, 2012, at about 9:00 a.m., you failed to appear in Criminal District Court, Section "E," under case number 510-634. Documentation confirmed that you were properly served with a subpoena via [the] electronic "court Notify" system. You admitted that you did not appear at your scheduled court date. Lastly, you failed to contact CDC, Section "E" to inform the judge of your inability to attend... As such, you violated Rule 4: Performance of Duty, paragraph 2 – Instructions from and Authoritative Source, to wit Chapter 74.3 relative to Mandatory Tribunal Attendance.

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 on June 20, 2012. 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 Appellant does not dispute any of the foregoing facts. Indeed, he admits that he did not attend the scheduled court hearing and that by the time he called the Assistant District Attorney at around 10:00 a.m. on the date of the hearing, the matter had been continued. Rather, Appellant submitted that the discipline issued by the Appointing Authority was null and void for violation of La. R.S. 40:2531, which requires that an

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administrative investigation of an officer be completed "within sixty days" of its initiation.¹ After a complete examination of the record evidence, we agree.

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 of proof 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.

¹ Appellant also offered mitigating circumstances, namely the care of his young child. However, for the reasons that follow, we need not consider this argument.

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This case turns on the application of La. R.S. 40:2531, referred to as The Police Officer's Bill of Rights. The Police Officer's Bill of Rights specifies that certain "minimum standards shall apply" to an internal departmental investigation of an officer such as Mr. Young who is the subject of such investigation. La. R.S. 40:2531(B). Young v. Department of Police, 2013- 1596 (La. App. 4th Cir. 6/25/2014), --So.3d--, 2014 WL 2885470. It so happens that the Young case involved the same Mr. Young who is the Appellant in this case and his appeal in Civil Service Case No. 8140. As in that case, the particular minimum standard at issue in this appeal is that the investigation of the officer must be completed "within sixty days" of its initiation. La. R.S. 40:2531(B)(7). Id. at *2.

In Young, the Fourth Circuit overturned the decision of a three member panel of the Commission and declared that all "discipline imposed... by Superintendent Ronal Serpas, the appointing authority, an absolute nullity." Id. at * 3. The court reasoned and held:

"The investigation shall be considered complete upon notice to [the police officer] under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint." La. R.S. 40:2531(B)(7).

"There shall be no discipline, demotion, or adverse action of any sort taken against [a police officer] unless the investigation is conducted in accordance with the minimum standards provided for" in §2531. La. R.S. 40:2531(C). And, most importantly for the purposes of Mr. Young's appeal, "[a]ny discipline, demotion, or adverse action of any sort whatsoever taken against [a police officer] without complete compliance with the foregoing minimum standards is *an absolute nullity.*" Id. (emphasis added).

There are, however, three exceptions to the sixty-day time limitation under §2531 B(7). The first is that the appointing authority may petition the Commission for an extension of up to an additional sixty days, and the Commission may grant such an extension if the appointing authority "has shown good cause" for additional time to complete its investigation. La. R.S. 40:2531 B(7). The second exception is that the police officer under

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investigation and the appointing authority may enter "into a written agreement extending the investigation for up to an additional sixty days." *Id.* The third exception is that the sixty-day limitation "does not apply" when the investigation is one of alleged criminal activity. *McMasters v. Department of Police*, 13-2634, p. 2 (La. 2/28/14), 134 So. 3d 1163, 1164; La. R.S. 40:2531 B(7) ("Further, nothing in this Paragraph shall limit any investigation of alleged criminal activity.").

Here, none of these exceptions apply. Thus, the appointing authority was required to complete its investigation within sixty days of its investigation.

Young, 2014 WL 2885470 at *2.

In this case, the relevant facts are not disputed. The initial complaint was received on April 5, 2012. The DI-1 form was completed on April 9, 2012. The DI-1 form was received by PIB on April 11, 2012. Captain Michael Glasser, who was assigned to conduct the investigation, completed his investigation and submitted his findings to his chain of command on April 18, 2012. The Appellant did not receive a notice of pre-disciplinary hearing until October 4, 2012. There is no record evidence that any extensions were requested of or granted by the Commission or that there was any written agreement between the Appellant and the Appointing Authority extending the investigation. Further, even if a request for an extension had been requested and granted, or the parties had agreed to an extension in writing, the Appointing Authority would have nonetheless exceeded the maximum amount of 120 days to complete its investigation by nearly 60 days.

As in Young, because the investigation was not completed until October 4, 2012, "the appointing authority unquestionably exceeded the maximum time-limitation and thereby violated one of the minimum standards of the Police Officer's Bill of Rights."

Young, 2014 WL 2885470 at * 2.

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Considering the foregoing, the Appellant's appeal is GRANTED, and the discipline imposed is vacated, restoring the Appellant all back pay and emoluments.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 17th DAY OF August, 2015.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION



RONALD P. MCCLAIN, COMMISSIONER

CONCUR:



JOSEPH S. CLARK, COMMISSIONER



MICHELLE D. CRAIG, CHAIRMAN