



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
SUITE 900 – 1340 POYDRAS ST.  
NEW ORLEANS LA 70112  
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON  
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CLIFTON J. MOORE, JR.

LATOYA CANTRELL  
MAYOR

Friday, October 5, 2018

LISA M. HUDSON  
DIRECTOR OF PERSONNEL

Mr. Eric Hessler  
PANO 2802 Tulane Avenue #102  
New Orleans, LA 70119

Re: **Lisa Garay VS.**  
**Department of Police**  
**Docket Number: 8779**

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 - 10/5/2018 - 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 cursive script that reads "Doddie K. Smith".

Doddie K. Smith  
Chief, Management Services Division

cc: Michael S. Harrison  
Daniel T. Smith  
Jay Ginsberg  
Lisa Garay

file

**CIVIL SERVICE COMMISSION**  
**CITY OF NEW ORLEANS**

<p>LISA GARAY, Appellant,</p> <p>vs.</p> <p>DEPARTMENT OF POLICE, Appointing Authority.</p>	<p>DOCKET No.: 8779</p>
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**I. INTRODUCTION**

Appellant, Lisa Garay, 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”) issued Appellant discipline in the form of an eight-day suspension and letter of reprimand. Appellant did not bring forth any procedural challenges. A referee appointed by the Commission presided over one day of hearing on June 5, 2018. 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 DENY the appeal and render the following judgment.

## II. FACTUAL BACKGROUND

### A. Alleged Misconduct

NOPD alleged that Appellant violated the following rules:

- Rule 3: Professional Conduct: Paragraph 1: Professionalism.
- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source; to wit, verbal instructions.
- Rule 4: Performance of Duty; Paragraph 4: Neglect of Duty (C.8), Failing to thoroughly search for, collect, and identify evidence of an arrest or investigative situation.

(H.E. Exh. 1).

#### *1. Professionalism*

NOPD Rule 3, Paragraph 1 regarding professionalism provides that:

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.*

NOPD alleged that Appellant violated the above-cited rule on or about February 27, 2017 when she directed unprofessional comments to her supervisor, Sergeant Albert Miller. Specifically, NOPD alleged that Sgt. Miller had given Appellant an order to accomplish a task. When Sgt. Miller asked Appellant if she had accomplished the task, Appellant allegedly told Sgt. Miller that if he wanted the task accomplished, he should have performed it himself, or words to that effect. Further NOPD claims that Appellant went on addressing Sgt. Miller in an unprofessional manner when she told him that she was not going to “play y’all’s games,” and indicated that Sgt. Miller could write her up for insubordination if he did not like her response. *Id.*

## ***2. Instructions from an Authoritative Source***

The relevant portion of NOPD Rule 4, Paragraph 2 regarding instructions from an authoritative source reads as follows:

An employee shall professionally, promptly, and fully abide by or execute instructions issued from any authoritative source, including any order relayed from a superior by an employee of the same or lesser rank. If the instructions are reasonably believed to be in conflict with the Rules, Policies and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority.

If the issuing authority elects to insist upon execution of the instructions which are reasonably believed to be in conflict with Department Rules, Policies, and Procedures, the employee receiving the instructions shall have the right to request and is entitled to receive, IMMEDIATELY, said instructions in writing, except in cases of emergency as determined by the supervisor. The issuing authority shall be held responsible should any conflict materialize; however, no instructions shall be issued or executed which are in violation of law.

*Id.*

For the purposes of the instant appeal, the “instruction from any authoritative source” was Sgt. Miller’s direction to Appellant to document a fellow employee’s (Sade Shepherd) phone number and address if/when Ms. Shepherd called in sick. Appellant allegedly violated Sgt. Miller’s direction when she failed to record Ms. Shepherd’s phone number and address when Ms. Shepherd called in sick on February 27, 2017 and allegedly deleted Ms. Shepherd’s phone number from NOPD’s call log. *Id.*

## ***3. Neglect of Duty***

The relevant portion of NOPD Rule 4, Paragraph 4.c.8 regarding neglect of duty reads as follows:

Each member, because of his grade and assignment, is required to perform certain duties and assume certain responsibilities. A member's failure to properly function in either or both of these areas constitutes a neglect of duty.

The following acts or omissions to act, although not exhaustive, are considered neglect of duty:

Failing to thoroughly search for, collect, preserve, and identify evidence in an arrest or investigative situation.

Appellant allegedly violated this rule when she failed to record Ms. Shepherd's phone number and address when Ms. Shepherd called in sick on February 27, 2017 and allegedly deleted Ms. Shepherd's phone number from NOPD's call log. *Id.*

Prior to receiving testimony or evidence, the hearing examiner discussed the allegations with both Parties and articulated what appeared to be a stipulation. Appellant stipulated that her conduct on February 27, 2017 violated NOPD's rule regarding instructions from an authoritative source. (Tr. at 8:4-20). Through this stipulation, Appellant admitted that she had received an instruction from Sgt. Miller to collect Ms. Shepherd's contact information. She further stipulated that, not only did she fail to secure such information, she actively deleted Ms. Shepherd's phone number from the NOPD call log in an attempt to "hide" Ms. Shepherd's number from supervisors. *Id.* Appellant stipulated to the exact same conduct with respect to the allegation that she failed to collect and preserve evidence in an investigative situation. *Id.* at 9:15-10:2. Based upon an initial review of the stipulation, it is clear that Appellant focused her case on an argument that the eight-day suspension she received was not commensurate with her misconduct. As the Commission will observe below, Appellant's testimony did not match her stipulation.

#### **B. February 27, 2017**

At all times relevant to the instant appeal, Appellant served as a Police Technician in NOPD's Central Evidence and Property Facility (hereinafter "Central Evidence"). As a technician at Central Evidence, Appellant was – as one would expect – responsible for collecting and cataloging evidence and property collected by NOPD Officers. (*See* tr. at 6-11). Sergeant Aaron

Cronk was a supervisor at Central Evidence along with Sgt. Miller. Together, they supervised five civilian technicians and four NOPD Officers.

During the 2017 Mardi Gras season, NOPD increased staffing levels at all of its facilities, including Central Evidence. As part of the staffing arrangement, Ms. Shepherd, who, like Appellant, worked as a Police Technician, moved to the night shift under the direct supervision of Sgt. Cronk. *Id.* at 15:8-15. Following the change in her hours, Ms. Shepherd began to call in sick. Concerned that Ms. Shepherd would miss a significant period of time and render Central Evidence understaffed during Mardi Gras, Sgt. Cronk attempted to contact Ms. Shepherd via phone. Though he never spoke directly to Ms. Shepherd, he left her several messages. *Id.* at 14:24-15:6. Eventually, Sgt. Cronk believed that the number Ms. Shepherd provided was no longer active. *Id.* at 15:6-8. Sgt. Cronk then went on a “wellness check” to the address Ms. Shepherd had provided to NOPD when she had reported her absences. When he arrived at the address, he discovered that it was a large apartment complex. Since Ms. Shepherd had not provided NOPD with a specific apartment number, Sgt. Cronk was unable to determine which apartment belonged to Ms. Shepherd. *Id.* at 15:8-12.

As Ms. Shepherd’s direct supervisor, Sgt. Cronk was understandably concerned about both the compromised staffing level at Central Evidence and Ms. Shepherd’s condition. He conferred with Sgt. Miller, who was the day-watch supervisor at Central Evidence, to confirm that Ms. Shepherd was actually calling in every day. *Id.* at 15:13-19. Sgt. Cronk then requested Sgt. Miller to direct whoever fielded the next call from Ms. Shepherd to secure an accurate phone number and full address. *Id.* at 15:19-23. Per Sgt. Cronk’s request, Sgt. Miller instructed Central Evidence’s day watch personnel, including Appellant, to record Ms. Shepherd’s contact information –

including the incoming call information from NOPD's caller ID log – the next time she called. *Id.* at 8:2-2-12.<sup>1</sup>

True to form, Ms. Shepherd did call again and this time asked specifically to speak with Appellant. *Id.* at 67:23-68:8. Appellant spoke briefly with Ms. Shepherd, wrote down the phone number and address Ms. Shepherd supplied using an NOPD sick leave form and ended the call. *Id.* at 61:7-18. Appellant did not record the actual number reflected on NOPD's caller ID log for Ms. Shepherd. In fact, Appellant went so far as to delete the record of Ms. Shepherd's incoming call in order to hide the number from Central Evidence supervisors. *Id.* at 8:9-20. Appellant denied that she was aware of any investigation by Sgt. Miller or Sgt. Cronk into Ms. Shepherd's sick leave use. *Id.* at 65:19-66:3. Even with this alleged ignorance of any investigation, Appellant believed that Sgt. Miller was setting up a case to terminate Ms. Shepherd for Ms. Shepherd's sick leave use. *Id.* at 66:4-11.

When Sgt. Cronk followed up with Sgt. Miller regarding Ms. Shepherd's absence on the 27th, Sgt. Miller informed Sgt. Cronk that Ms. Shepherd did call in and that Appellant fielded the call. However, Sgt. Miller claimed that when he had asked Appellant for Ms. Shepherd's contact information Appellant allegedly told Sgt. Miller that she was not "playing y'all's games" and that if Sgt. Miller wanted Ms. Shepherd's contact information he should get it himself. *Id.* at 19:4-11.<sup>2</sup> When Sgt. Cronk confronted Appellant regarding this alleged statement she acknowledged that there was a conversation between herself and Sgt. Miller regarding Ms. Shepherd, but claimed that

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<sup>1</sup> Here the Commission refers to Appellant's stipulation that she received an instruction from Sgt. Miller to record Ms. Shepherd's apartment number and phone number. During her testimony, Appellant claimed that Sgt. Miller never mentioned recording the incoming call data from NOPD's caller ID log. Therefore, Appellant only recorded the number Ms. Shepherd provided during her call on February 27th and not the number reflected in the caller ID log. (Tr. at 61:22-62:10).

<sup>2</sup> The Commission notes that Sgt. Miller did not testify during the instant appeal hearing. Therefore, we accept Sgt. Cronk's account of Sgt. Miller's claims, not for the truth of the matter asserted, but for the impact such claims had on Sgt. Cronk's investigation. The record would have greatly benefitted from Sgt. Miller's in-person testimony.

she could not recall what she said during that conversation. *Id.* at 19:24-20:4. During the appeal hearing, Appellant denied making the statements identified in the disciplinary letter to Sgt. Miller. *Id.* at 70:5-22.

### 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

#### *1. Professionalism*

Appellant allegedly directed her unprofessional comments towards Sgt. Miller. Therefore, the Commission expected that Sgt. Miller would testify in connection with the allegations regarding professionalism. For reasons not contained in the record, Sgt. Miller did not testify. Therefore, the Commission is left with the statement Appellant provided to Sgt. Cronk and her appeal hearing testimony. When speaking to Sgt. Cronk, Appellant admitted to talking with Sgt. Miller about Ms. Shepherd's number, but claimed not to remember what she said. The Commission agrees with Sgt. Cronk's assessment Appellant's alleged statements – made to a supervisor – constitute singular events that would make an impression on the person uttering them. That Appellant waited until her appeal hearing to deny making such statements is deeply concerning.

We agree with the hearing examiner that Appellant's shifting position regarding her comments is sufficient to find that it is more likely than not that she made the comments NOPD attributed to her in the notice of discipline.

#### *2. Instructions from an Authoritative Source*

In order to establish a violation of the policy regarding instructions from an authoritative source, NOPD must prove Appellant disregarded or disobeyed a lawful instruction or order issued by a superior. While she later denied that Sgt. Miller issued an instruction to record the phone number Ms. Shepherd used to report sick, Appellant originally stipulated to this fact. Based upon the record before us, the undersigned Commissioners find that Sgt. Miller did issue Appellant an instruction to record the phone number used by Ms. Shepherd to call in sick using NOPD's caller

ID function. The Commission also finds that Sgt. Miller's instruction was reasonable and lawful since supervisors must monitor sick leave usage by employees, especially in instances where the sick leave impacts critical staffing needs.

This blatant and confusing contradiction between Appellant's stipulation and her testimony severely undercut her credibility. Furthermore, Appellant admitted to deleting Ms. Shepherd's number in order to hide it from her supervisors. The Commission finds that this deliberate action suggests that Appellant was well aware that Sgt. Miller was trying to secure an accurate phone number through which to contact Ms. Shepherd. Appellant's decision to delete the precise information her supervisor sought represented a blatant disregard of an explicit, lawful instruction issued by a supervisor.

Based upon the above findings, the Commission finds that NOPD has established that Appellant failed to adhere to a direct and lawful order issued by a supervisor.

### ***3. Neglect of Duty – Failure to Collect Evidence***

As noted above, Appellant stipulated that Sgt. Miller issued her specific instructions regarding the collection of Ms. Shepherd's contact information, but then testified that she was not aware of any investigation into Ms. Shepherd's sick leave use. She then claimed that she believed that Sgt. Miller was intent on firing Ms. Shepherd because of her absences. These two positions are incongruous as NOPD pointed out during Appellant's cross-examination. (*See id.* at 69:14-23). Given Sgt. Miller's instructions, it should have been readily apparent to Appellant that Central Evidence supervisors were investigating Ms. Shephard's sick leave use during a very busy Mardi Gras season.

Appellant's active interference with an investigation into a co-worker's sick leave usage constitutes a violation of NOPD's policy regarding the collection and preservation of evidence.

### **B. Impact on NOPD's Efficient Operations**

Supervisors must have the ability and authority to direct the work of subordinates. That is what makes them supervisors. When subordinates chose which instructions to follow based upon personal perceptions of the intent behind such instructions, they disrupt the chain of command and compromise the flow of work. In NOPD, a paramilitary organization, the impact is even starker. While Appellant was not a commissioned officer, she was a member of a vital element of NOPD's operations. Namely, the collecting, cataloging and securing evidence and property collected in the field. Her adherence to instructions from her supervisors is paramount to the orderly and efficient operations of Central Evidence. Any failure on Appellant's part to faithfully execute directions would have an adverse impact on NOPD's efficient operations.

In the matter now before the Commission, Appellant's failure to execute an instruction from Sgt. Miller regarding Ms. Shepherd's contact information interfered with Sgt. Miller and Sgt. Cronk's ability to monitor sick leave usage of a Central Evidence employee during a very challenging time of year.

As a result of the foregoing, we find that Appellant's active failure to follow Sgt. Miller's direction had an adverse impact on the efficient operations of NOPD. Appellant then exacerbated the situation by responding to Sgt. Miller's inquiry in a disrespectful and flippant manner. This also had an adverse impact on Central Evidence's efficient operations.

### **C. Was the Discipline Commensurate with Appellant's Offense**

In conducting its analysis, the Commission must determine if Appellant's discipline 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

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976, 978 (citing *Staehe v. Dept. of Police*, 98–0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

***1. Professionalism***

NOPD issued Appellant a letter for reprimand for her unprofessional and disrespectful response to Sgt. Miller’s inquiry regarding Ms. Shepherd’s contact information. A letter of reprimand is the most lenient form of discipline available to appointing authorities under Civil Service Rules. Since this incident constituted Appellant’s first offense under NOPD’s professionalism rule, the undersigned Commissioners find that a letter of reprimand is commensurate with Appellant’s misconduct in this instance.

***2. Instructions from an Authoritative Source & Neglect of Duty***

NOPD has established that Appellant engaged in misconduct when she did not record Ms. Shepherd’s contact information and then compounded her misconduct by deleting Ms. Shepherd’s phone number from NOPD’s call log. The allegations against Appellant with respect to her failure to follow Sgt. Miller’s instructions, however, are cumulative and represent a distinction without a difference. Essentially, NOPD sought to punish Appellant twice for the same conduct as evidenced by the following testimony provided by Police Commander Darryl Albert:

Q. In Rule (4) Performance of Duty, instructions from an authoritative source that was sustained and [NOPD] gave [Appellant] a seven-day punishment for that, and correct me if I am wrong but basically you said because she was told get specific information from Sade Shepherd I believe the name was and she intentionally refused to do so?

A. She not only intentionally refused to do so the information that was registered and logged on the phone system was intentionally deleted by [Appellant].

Tr. at 52:8-17.

Based on this testimony, the seven-day suspension was based on Appellant’s refusal to follow Sgt. Miller’s instruction and her intentional deletion of Ms. Shepherd’s number. Cmdr.

Albert then responded to questions explaining how Appellant's conduct constituted a violation of the neglect of duty rule:

Q. So you found her being negligent in the next Rule (4) Performance of Duty for the exact same thing that she intentionally didn't do so how is it that she can intentionally not do something and be negligent also?

A. Well the instructions were -- she was given instructions to document the number, to record it and provide it on the form that was given to them to document those.

Q. And she intentionally refused to do that?

A. She intentionally refused to do it. Her neglect came in, her neglect of duty came in where she actually neglected to do it. She did neglect to do it. She intentionally did not follow the instructions and she neglected her duty as an employee of the agency when given instructions to follow an order. She neglected to do what she was given orders to do.

*Id.* 52:21-53:11.

Essentially, NOPD takes the position that by intentionally disregarding Sgt. Miller's instructions, Appellant neglected her duty as an employee and thus violated two rules. This needlessly complicates what was a straight-forward instance of an employee disregarding an order. NOPD's rule regarding instructions from an authoritative source fully encompasses Appellant's disregard of Sgt. Miller's instruction and intentional deletion of Ms. Shepherd's phone number from NOPD call logs. The addition of the failure to collect evidence in an investigation is not only a poor vehicle for discipline in this instance, it sets NOPD up for failure when it comes to consistently applying the rule as illustrated by the difference in disciplinary sanctions tied to each rule.

Appellant's refusal to follow Sgt. Miller's direction and intentional deletion of Ms. Shepherd's call log data warranted a seven-day suspension under one rule. But the exact same conduct apparently warranted only a one-day suspension under a different rule. There is no explanation on the record for the difference in penalty. A better approach, and the one adopted by

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the Commission in this case, is to view the fact that Appellant's actions were intentional and impeded an investigation into a co-worker's use of sick leave as aggravating factors rather than separate offenses.

Bearing the above in mind, the Commission finds that Appellant's actions constitute serious misconduct and blatant insubordination. The Commission considers Appellant's intentional deletion of Ms. Shepherd's phone number as an active interference with her supervisor's attempt to monitor sick leave usage by Ms. Shepherd. These are aggravating factors that warrant serious discipline.

Therefore, we find that an eight-day suspension was commensurate with Appellant's failure to follow Sgt. Miller's instructions.

#### **V. CONCLUSION**

As a result of the above findings of fact and law, the Commission hereby DENIES the Appeal.

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Judgment rendered this 5<sup>th</sup> day of October, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

  
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CLIFTON MOORE, Jr., COMMISSIONER

10/1/18  
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DATE

CONCUR

  
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MICHELLE D. CRAIG, CHAIRPERSON

10-2-2018  
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STEPHEN CAPUTO, COMMISSIONER

10-1-18  
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