CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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MITCHELL J. LANDRIEU
MAYOR

Tuesday, June 03, 2014

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

Re: **Andrew Palumbo VS.**
Department of Police
Docket Number: 8068

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 - 6/3/2014 - 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,

Germaine Bartholomew

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Elizabeth S. Robins
Jay Ginsberg
Andrew Palumbo

DAVID ABBOTT	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NO. 8052 *c/w*
JAMES NEYREY	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NOS. 8054 & 8055 *c/w*
REGINALD SMITH	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NO. 8061 *c/w*
ANDREW PALUMBO	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NOS. 8068 & 8069

Appellants David Abbott, James Neyrey, Reginald Smith, and Andrew Palumbo are employed by the Department of Police ("Appointing Authority"). Abbott, Neyrey, and Smith are employed as Police Officers with permanent status. Palumbo is employed by the Appointing Authority as a Police Sergeant with permanent status. The Appellants received suspensions for violation of the Appointing Authority's internal regulation concerning Instructions from an Authoritative Source. Specifically, Abbot received a two day suspension (2011-1198-R), Neyrey received a ten day suspension (2011-1194-R), and a one day suspension (2011-1198-R), Smith received a two day suspension (2011-1194-R), and Palumbo received a one day suspension (2011-1198-R). The second

paragraph of the Appointing Authority's August 13, 2012 disciplinary letters to each of the Appellants provides the factual basis for the disciplinary action:

> This investigation determined that on [July 19, 2011 (2011-1194-R) and August 25, 2011 (2011-1198-R)], you worked a paid detail for Blaine Kern, Inc. [sic] for which you received a check made payable to cash as your payment. You admitted you understood the Departmental Rules and Regulations concerning cash payments or checks made payable to cash. You admitted in your administrative statement you cashed the check made payable to cash and received the payment. As such, you violated Rule 4: Performance of Duty, paragraph 2 – Instructions from an Authoritative Source to wit: Chapter 22.8 paragraph 37, and General Order 828.

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 April 11, 2013. 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.

During the hearing, the parties agreed to the following stipulations:

1. If Assistant Superintendent Darryl Albert had testified, his testimony would be the same as his testimony in the matter of *David Tregre v. Dept. of Police*, Docket No. 8030.
2. The Appellants were paid with checks made payable to cash for serving as motorcycle escorts. The checks were endorsed by the officers and deposited into their personal bank accounts.
3. All exhibits received as evidence are authentic.
4. The Appointing Authority agreed to reduce Neyrey's ten day suspension (2011-1198-R) to a one day suspension.

As reflected in the stipulations, the Appellants admit that they received and negotiated checks issued payable to cash as payment for the details outlined in the disciplinary letters. However, they contend that there is no evidence that the alleged derelictions bore any relationship to any impairment of the efficient operation of the department. They also contend that the investigations in these matters were not concluded within 60 or 120 days, which is not compliant with the minimum standards set forth in *La. R.S. 40:2531(B)(7)*.

A. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged

Asst. Supt. Darryl Albert testified that he conducted the pre-disciplinary hearing and recommended disciplinary action to the Appointing Authority. Asst. Supt. Albert stated that he relied upon the Appointing Authority's disciplinary guidelines when making his recommendations and that the actions recommended were within those guidelines.

He also explained that the rule prohibiting cash payments for details was promulgated to assure that all payments were property documented and to deter circumvention of the policies regarding paid details. According to Asst. Supt. Albert, cash payments are more difficult to track and link to the individuals that actually performed the work.

The Appellants contend that receiving checks made payable to cash is distinguishable from actually receiving currency as payment for a detail. They contend

that a check made payable to cash provides a sufficient paper trail to establish that they received legitimate payment for worked performed.

B. Investigations in these matters must be concluded within 60 or 120 days to be compliant with the minimum standards set forth in *La. R.S. 40:2531(B)(7).*

LSA 40:2531(b)(7) requires that all administrative investigations of law enforcement officers employed by municipal police departments be completed within 60 days. The statute further allows for an extension of that time limit to include an additional 60 days, for a total of 120 days, if the extension request is made within the first thirty days of the investigation.

1. Initiation of the Investigation

The Appellants contend that when the Appointing Authority sent an email on September 7, 2011, to the Appellants with specific questions related to compliance with General Order 828, an investigation began for purposes of *La. R.S. 40:2531(B)(7)*. As a consequence, they argue that the investigations began prior to the issuance of the DI-1's, which were initiated on October 21, 2012. According to the Appellants, if no extension requests were made by the Appointing Authority until November 2, 2012, the requests were more than thirty days past the initiation of an investigation and thus violative of civil service rules allowing for an additional sixty days to investigate.

However, *La. R.S. 40:2531(B)(7)* references a formal and written complaint made against a law enforcement officer as the starting point of an investigation for purposes of the statute. Initial inquires by email regarding compliance with a rule is not a formal investigation. The purpose of the inquiry was to determine whether a formal

investigation was warranted. The Appointing Authority, as required by the statute, initiated a DI-1 which is a formal investigation once it determined that an investigation was necessary. Based upon the DI-1 initiation date, the November 2, 2012 requests for extensions of time were within thirty days of the initiation of the investigations and thus compliant with Civil Service rules.

2. Close of the Investigation

The Appellants further contend that the "Notice to Accused Law Enforcement Officer Under Investigation of a Pre-Disciplinary Hearing or a Determination of an Unfounded or Unsustained Complaint" received by the Appellant on June 27, 2011, does not meet the requirements of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) because it does not provide the Appellants with sufficient notice and an opportunity to respond to all of the charges that may form the basis for disciplinary action. The Appellants also rely upon the recent Fourth Circuit appellate decision, *Mulvey v. Dept. of Police*, 108 So. 3d 891 (La.App. 4 Cir. 1/30/13), where the court found that "...a notice that does not timely alert an officer as to whether a disciplinary hearing is definitely required is deficient, dilatory and fails to sufficiently alert an officer of the status of his or her investigation." *Id. at 897*

First, Appellants' reliance on *Loudermill* is misplaced. *Loudermill* applies to terminations. The Appellants are appealing suspensions, where the notice requirements do not apply. Second, *Mulvey* is distinguishable. In *Mulvey*, the notice received by the Appellant provided no date for a pre-disciplinary hearing. In the instant case, the June 27, 2011 notice provided an August 17, 2011 disciplinary hearing date. While the record

suggests that the hearing did not occur on the original date stated, it satisfied the concerns expressed in *Mulvey*. It alerted the Appellant that a disciplinary hearing was required thus signaling the end of the disciplinary investigation.

LEGAL PRECEPTS

An employer cannot discipline an employee who has gained permanent status in the classified city civil service 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, based on 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.*

CONCLUSION

The Appointing Authority has established by preponderance of evidence that it disciplined the Appellants for legal cause. The Appellants knew or should have known that the acceptance of a check made payable to cash was violative of internal rules. Further, the Appointing Authority is justified in enforcing a legitimate rule that protects the integrity of its detail policy. Checks made payable to cash can be cashed by anyone, while a check issued to a specific individual is more restrictive.

The Appointing Authority complied with La. R.S. 40:2531(b)(7). The investigation began with the initiation of the DI-1's, which are formal and written complaints. The investigations ended when the Appellants' received their notices of pre-disciplinary hearing forms, which sufficiently alerted the Appellants that a disciplinary hearing would occur and that the investigation phase was concluded.

D. Abbott #8052
J. Neyrey #8054/8055
R. Smith #8061
A. Palumbo #8068/8069

Considering the foregoing, the Appellants appeals are DENIED.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 3rd DAY OF June, 2014.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, COMMISSIONER

CONCUR:

REV. KEVIN W. WILDES, S.J., CHAIRMAN

JOSEPH S. CLARK, COMMISSIONER