



CITY OF NEW ORLEANS

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Tuesday, December 10, 2019

Mr. Frank DeSalvo
739 Baronne Street
New Orleans, La 70113

Re: **Jimmie Turner Jr. VS.
Department of Police
Docket Number: 8853**

Dear Mr. DeSalvo:

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 - 12/10/2019 - 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
Renee E. Goudeau
Jay Ginsberg
Jimmie Turner

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

JIMMIE TURNER, JR. vs. DEPARTMENT OF POLICE	DOCKET No.: 8853
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I. INTRODUCTION

Appellant, Jimmie Turner, Jr., brings the instant appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission’s Rule II, § 4.1 seeking relief from the discipline imposed by the New Orleans Police Department (“NOPD”). At all times relevant to this appeal, Turner served as a classified lieutenant for the NOPD and had permanent status as a classified employee.

A hearing officer, appointed by the Commission, presided over a hearing on February 5, 2019 and February 6, 2019. At the hearing, both parties had an opportunity to call witnesses and present evidence. The hearing officer prepared a report and recommendation based upon the testimony and evidence in the record. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner’s report. Based upon our review, for the reasons stated herein, we DENY this appeal.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

Sgt. Peter Hansche submitted an eight (8) page complaint against Lt. Turner to Lt. Precious Banks on December 27, 2017, of the Public Integrity Bureau. (Ex. H.E.-1 at p. 1). A formal misconduct investigation was opened. (Ex. City-1). Lt. Banks interviewed all the members of the

homicide unit and, in total, interviewed 42 people. (Tr., Vol. I, at 226-35). NOPD concluded that Turner violated NOPD Policy 328, entitled “Discriminatory Harassment/Retaliation.” In particular, NOPD found that Turner violated NOPD Policy 328 by making the following statements:

- Making inappropriate comments to Sgt. Hansche and Marc Amos about their sexual preference;
- Making direct statements to Sgt. Hansche and Detective Ripp ridiculing them and implying they were lovers;
- Making a statement to Detective Brueggeman that Turner was thinking about him while Turner was touching himself while taking a shower;
- Asking Tanisha Sykes, “so what you sleeping with him?”;
- Asking Karen Barbaro who was using the copy machine. In response to her statement that she did not know, Turner stated “it was a black person – I bet you know who it was.”

(Ex. H.E.-1 at pp. 5-8). For each of these offenses, NOPD imposed discipline of a five (5) day suspension, for a total of 25 days. (Ex. H.E.-1 at pp. 8-10). In addition, NOPD demoted Lt. Turner to sergeant based on the following conduct:

- Approached Sgt. Hansche from behind and kissed him on the top of the head;
- Turner put his hands on Bruce Brueggeman’s neck and started massaging him saying “you [Brueggeman] going to give [Turner] a ride on [Brueggeman’s motorcycle]”
- Embraced Sgt. Hansche from behind.

(Ex. H.E.-1 at pp. 5-6).

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 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). 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); 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.

A. Occurrence of Complained-of Activity

Turner denied all of the allegations of inappropriate sexual comments and conduct. (Tr., Vol. I, at 12). The Commission finds that, based on the record as a whole, this denial is not credible. The Commission credits the testimony of the witnesses who testified about Turner’s inappropriate sexual comments and conduct.

Sgt. Hansche testified that he was assigned to the homicide unit in June of 2014, and that Turner had supervised Hansche for two years. (Tr., Vol. I, at 29-30). Sgt. Hansche testified he

was good friends with then-Sgt. Amos, and that Amos sometimes spent the night at Sgt. Hansche's home. (Tr., Vol. I, at 32-33). Turner asked Hansche whether he was the "big spoon" or the "little spoon." (Tr., Vol. I, at 32). Turner asked Hansche whether he and Amos were gay or what type of positions they slept in a dozen times or more. (Tr., Vol. I, at 33). Turner also made comments about Hansche and Detective Thomas Ripp being lovers. (Tr., Vol. I, at 34). Hansche testified that Turner made these comments to him because Hansche and Ripp "did some things together when we were off duty." (Tr., Vol. I, at 34). Ripp testified that Turner would refer to Hansche as Ripp's "daddy." (Tr., Vol. I, at 216). Turner also asked Ripp "who was on top" and "did you spend the night at Pete's last night." (Tr., Vol. I, at 216). Hansche also testified that Turner hugged him:

A. . . . And Lieutenant Turner approached me from behind and put his arms around my upper body with his hands on my chest and kind of hugged me from behind.

Q. What else did he do?

A. He laid his face onto my back between my shoulder blades and just kind of snuggled in like we were cuddling or something (indicating).

(Tr., Vol. 1, at 36). Hansche testified that on another occasion, "I was seated in a chair talking to Brueggeman and Lieutenant Turner walked up behind me and kissed me on the top of the head." (Tr., Vol. I, at 38).

Detective Barrett Morton, who worked in the homicide division, witnessed Turner kissing Hansche on the top of the head," and thought Hansche was offended by the kiss. (Tr., Vol. I at 144). Morton also corroborated Turner's comments suggesting that Hansche and Amos were lovers. (Tr., Vol. I, at 148). Morton further testified that Amos and Hansche were best friends away from the job, and that Hansche did not hide his emotions. (Tr., Vol. I, at 150, 156).

Marc Amos testified that Turner was his direct supervisor, and that Turner made comments to Amos and Peter Hansche suggesting they were in a romantic relationship: "Usually he would

ask some things like who's the big spoon, who's the little spoon, you know, who's the mommy, who's the daddy, that kind of thing." (Tr., Vol. I at 107). Amos estimated Turner made these types of comments every day or every other day. (Tr., Vol. I, at 108). Amos did not find the comments offensive, but Amos knew Hansche was "annoyed" by the comments. (Tr., Vol. I, at 108). Amos also witnessed Turner hugging Hansche: "Jimmie comes in and kind of spoons up behind Peter and kind of kneeds [sic] himself into his back like snuggling up to him (indicating) like in this weird kind of cat like hug." (Tr., Vol. I, at 112). Amos also described Hansche's reaction: "[T]he thing that really sticks out in my mind is the look of abject shock on Pete's face like he's not sure exactly what to do at this point, like do I turn around and knock this guy out, do I say something, what do I do." (Tr., Vol. I, at 112).

Detective Brueggeman, who worked in the homicide division, was supervised by Peter Hansche. (Tr., Vol. I, at 121-22). Brueggeman testified he interacted with Turner almost daily. (Tr., Vol. I, at 124). Brueggeman testified that Turner told him at a homicide scene that Turner was running late because he was taking a shower thinking of Brueggeman. (Tr., Vol. I, at 125). Officer Daniel Hiatt, who was assigned to the homicide division, described this incident as follows:

Um, we were on a homicide scene, I was standing next to Detective Brueggeman. Lieutenant Turner walked up to Detective Brueggeman and said, um, I was taking a shower before I came out here and I just wanted you to know that I was thinking about you while I was touching myself.

(Tr., Vol. 1, at 182). Brueggeman also described Turner walking up behind him, massaging his shoulders, and, referring to Brueggeman's screensaver of a motorcycle, asking "when are you going to give me a ride on your bike?" (Tr., Vol. I, at 128). Detective Barrett Morton witnessed this statement. (Tr., Vol. I, at 146).

Tanisha Sykes testified that Lt. Turner made inappropriate comments to her, such as “you sleeping with him?” and “I could come through the back window or the back door.” (Tr., Vol. I, at 192).

Karen Barbaro, a clerical employee in homicide, testified that Lt. Turner said to her that “you let him sit there because he’s one of your white friends.” (Tr., Vol. I, at 196-99).

B. Whether Turner’s Conduct Violated NOPD Policy 328

Turner argues that the above-described conduct did not violate NOPD Policy 328 because the conduct was not based on any other individual’s protected class and because the conduct did not interfere with any individual’s work performance. (Memorandum in Support of Jimmie Turner’s Appeal at 2). NOPD Policy 328.3 provides as follows:

328.3.1 DISCRIMINATION

The Department prohibits all forms of discrimination, whether on or off duty, including any employment-related action by an employee that adversely affects an applicant or employee and is based on race, color, ethnicity, gender, gender identity, religion, sex, age, notional origin or ancestry, genetic information, disability, military service, sexual orientation and other classifications protected by law.

Discriminatory harassment, including sexual harassment, is verbal or physical conduct that demeans or shows hostility or aversion toward an individual based upon that individual’s protected class. It has the effect of interfering with an individual’s work performance or creating a hostile or abusive work environment.

Conduct that may, under certain circumstances, constitute discriminatory harassment, can include making derogatory comments, authoring crude and offensive statements or remarks, making slurs or off-color jokes, stereotyping, engaging in threatening acts, making indecent gestures, pictures, cartoons, posters or material, making inappropriate physical contact, or using written material or department equipment and/or systems to transmit or receive offensive material, statements or pictures. Such conduct is contrary to department policy and to the department’s commitment to a discrimination-free work environment.

(Exhibit City 4). According to Turner, the complained-of conduct must meet all the definitions of discriminatory harassment in NOPD Policy 328.3. For example, according to Turner, the conduct must interfere with an individual’s work performance or create a hostile or abusive work

environment in order for the conduct to violate NOPD 328.3. The Commission does not interpret NOPD Policy 328.3 in such a restrictive manner. The evidence was overwhelming that Turner, the commander of the homicide unit, engaged in conduct in violation of the third paragraph of NOPD Policy 328.3, including making derogatory comments, authoring crude and offensive statements or remarks, making slurs or off-color jokes, stereotyping, and making inappropriate physical conduct. Turner's legal status as a supervisor makes this conduct more significant. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.") NOPD is not required to show that Turner exposed NOPD to liability under state or federal anti-discrimination laws before NOPD may take disciplinary action.

Even though the Commission does not view NOPD Policy 328.3 as requiring NOPD to prove that Turner's conduct interfered with any officer's work performance or created an abusive or hostile work environment as a matter of law, the Commission finds that Turner's conduct did interfere with the work performance of NOPD officers. Hesché testified he found Turner's conduct demeaning and belittling. (Tr., Vol. I, at 35). Hesché viewed Turner's kiss on the top of his head as akin to patting a dog on the head, suggesting that the actor can "do whatever I want with it." (Tr., Vol. I, at 39). Brueggeman testified Turner's statements made him "uncomfortable," and that he did not view the statements as teasing. (Tr., Vol. I, at 130, 133). Detective Barrett Morton testified that Hesché was offended by Turner's kiss and that Turner made Brueggeman uncomfortable. (Tr., Vol. I, at 144, 147). Ripp also testified that Turner's behavior made Hesché uncomfortable. (Tr., Vol. I, at 219). Karen Barbaro, to whom Turner made a racially tinged comment, testified she was "hurt." (Vol. I, at 200).

In the same vein, Turner argues that none of his conduct was based on the protected class of any individual under the second paragraph of NOPD Policy 328.3. Again, the Commission does not view the application of NOPD Policy 328.3 in such a restrictive manner. Even if the Commission were to require the conduct to be based on the protected class of an individual, the evidence offered by NOPD is sufficient to meet this element. For example, the record, viewed as a whole, reflects that Turner engaged in stereotyping. In particular, Turner did not view Sgt. Hansche as sufficiently masculine. Hansche had close male friends, who occasionally spent the night at his home. Hansche expressed his emotions. Hansche had requested and received mental health treatment through NOPD's Officer Assistance Program based on family issues. (Tr., Vol. I, at 52-53, 56).¹ As Hansche articulated Turner's treatment of him, "I felt as though all the stuff with Amos and me with ripping me, with making fun of how I dressed I thought all that was because he enjoyed to tease me, he enjoyed to see me struggle." (Tr., Vol. I, at 57).

In 2015, the federal Fifth Circuit Court of Appeals, sitting *en banc*, considered an earlier panel's reversal of a jury verdict in a same-sex sexual harassment case because the evidence was insufficient as a matter of law to sustain the jury's finding that the harasser discriminated against the plaintiff ironworker "because of . . . sex" in violation of Title VII. *EEOC v. Boh Bros. Const. Co., LLC*, 731 F.3d 444, 450 (5th Cir. 2013). At trial, the EEOC had "asserted that Wolfe harassed Woods because Woods was not a manly-enough man in Wolfe's eyes." *Id.* at 453. Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Fifth Circuit held "a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping." *Id.* at 456. In the case before it,

¹ Turner's attitude toward Hansche was less than supportive. Turner testified that when Hansche reluctantly requested leave from Turner by phone to commit a family member to in-patient substance abuse treatment, Hansche sounded "unstable." (Tr., Vol. II, at 153). Hansche testified he was "crying," and that he "didn't want to reveal my personal business to [Turner]." (Tr., Vol. II, at 57). Turner described this conversation with Hansche as follows: "Got Pete he's a mess he's screaming and hollering I don't know what to do my [family member] going through a situation he's in a crisis, uh, blah, blah, blah, this that. I said Pete, look just calm down. I don't need to know all of that." (Tr., Vol. II, at 152). Turner testified Hansche was having a "psychotic crisis." (Tr., Vol. II, at 149).

the Fifth Circuit ruled that the “EEOC may rely on evidence that Wolfe viewed Woods as insufficiently masculine to prove its Title VII claim.” *Id.* at 456. In the same way, in the record before the Commission, Turner’s derogatory comments about Hansche (and Hansche’s male friends) and Turner’s sexually-oriented offensive touching of Hansche were based on Hansche’s failure to meet Turner’s expectations of male behavior. Although the harasser’s conduct in *Boh Bros.* was more egregious, including approaching the plaintiff from behind and simulating anal intercourse with him on multiple occasions and stating, when the plaintiff was in his car napping that “[i]f your door wouldn’t have been locked, my d-ck probably would have been in your mouth,” the Commission finds that Turner’s treatment of Hansche (and his male friends) was based on Hansche’s failure to act sufficiently masculine in Turner’s eyes. Therefore, Turner’s behavior was based on Hansche’s (and Hansche’s friends’) male sex under NOPD Policy 328.3.

In the alternative, Turner’s actions constituted sexual advances. Turner’s shower statement to Brueggeman, in particular, is a sexual advance, and is particularly egregious when considering that Turner was Brueggeman’s superior’s supervisor. (Tr., Vol.I, at 121-24); *Ellerth*, 524 U.S. at 765. When viewed in combination with Turner’s massaging of Brueggeman’s shoulders while asking Brueggeman to “take him for a ride” on Brueggeman’s motorcycle, Turner’s conduct could be viewed as requests for sexual favors by a supervisor. Although none of Turner’s subordinates, including Brueggeman, claimed an adverse employment action was taken against him or her, any discipline or discharge of the recipients of these subordinates could have given rise to such liability to NOPD.

C. Impact on NOPD’s Efficient Operations

Deputy Superintendent Paul Noel, one of the three deputy superintendents on Turner’s internal hearing panel, testified that Turner’s conduct impaired the efficient operation of NOPD

because Turner “creat[ed] an environment that’s not a safe and productive place to work.” (Tr., Vol. I, at 164). Noel further testified that Turner “potentially damaged the trust of the public as well.” (Tr., Vol. I, at 164). Turner’s role as commander of the homicide division of NOPD exacerbated the harm to the operations of NOPD: “[O]bviously being assigned as the principal manager of the homicide section that carries great weight and responsibility and it’s very important for the City of New Orleans and the New Orleans Police Department to have that unit operating at peak efficiency. So it’s literally a matter of if we’re going to save lives and keep the City safe we need to make sure that unit is operating efficiently so every homicide can be properly investigated . . .” (Tr., Vol. 1, at 166).

D. Was the Discipline Commensurate with Appellant’s Offense

The Commission finds Turner’s conduct egregious, especially because Turner was serving as the commander of the homicide division. Turner engaged in harassment of his subordinates, and Turner’s harassment included physical touching, in addition to comments. Therefore, the Commission finds Turner’s demotion and 25-day suspension were commensurate with his offense. The Commission also finds Turner’s apparent untruthfulness a cause for concern, suggesting Turner is not fit to serve in the position of commander of a division of NOPD.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES Turner’s appeal.

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Judgment rendered this 10th day of December, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



MICHELLE D. CRAIG, CHAIRPERSON

12-3-2019

DATE

CONCUR



CLIFTON MOORE, Jr., COMMISSIONER

12/5/19

DATE



MARK SURPRENANT, COMMISSIONER

12/9/19

DATE