CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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DIRECTOR OF PERSONNEL

Thursday, July 21, 2022

Mr. Donovan A. Livaccari
101 W. Robert E. Lee, Suite 402
New Orleans, LA 70124

Re: **Kevin Thompson VS.**
Department of Police
Docket Number: 9347

Dear Mr. Livaccari:

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 - 7/21/2022 - 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Shaun Ferguson
Elizabeth S. Robins
Jim Mullaly
Kevin Thompson

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

KEVIN THOMPSON,
Appellant

Docket No. 9347

v.

DEPARTMENT OF POLICE,
Appointing Authority

DECISION

Appellant, Kevin Thompson, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his December 9, 2021, termination. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a Police Sergeant. (Tr. at 35; Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on January 26, 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 transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated June 22, 2022, and controlling Louisiana law.

For the reasons set forth below and as the hearing officer recommends in the attached Hearing Examiner Repoort, Sgt. Thompson's appeal is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

Sergeant Thompson is a 17-year veteran of NOPD with no prior discipline. (Tr. at 35, 41). On March 1, 2021, while off-duty, Sgt. Thompson was driving under the influence of alcohol in Slidell, Louisiana, resulting in Sgt. Thompson crashing his girlfriend's vehicle into a ditch. (Ex. HE-1). Sgt. Thompson was convicted on July 21, 2021, of misdemeanor DWI in City Court of

East St. Tammany, and was sentenced to six months in jail and $600 in court costs. (Ex. HE-1). The court suspended the jail sentence and placed Sgt. Thompson on 12 months of supervised probation. (Ex. HE-1). The City Court of East St. Tammany Parish terminated Sgt. Thompson's probation on December 15, 2021. (Ex. Appellant-3). The court expunged the conviction on December 22, 2021. (Ex. Appellant-5).

The parties stipulated that the violation occurred, and that the only issue before the Commission was whether the penalty of termination was commensurate with the violation. (Tr. at 5-6). The presumptive penalty for a DWI conviction (Level E on the disciplinary matrix) is a 45-day suspension. (Ex. City-1 at 3; Tr. at 15). NOPD may reduce the penalty to a 30-day suspension if mitigating factors or present and may aggravate the penalty to a 60-day suspension or dismissal if aggravating factors are present. (Ex. City-1 at 3; Tr at 15). In this case, NOPD aggravated the penalty under four of the factors listed in the Disciplinary Matrix/Penalty Schedule. (Ex. City-1 at 4; Ex. HE-1). In particular, NOPD aggravated the penalty for the following four reasons:

> (b) the nature and seriousness of the violation and its relationship to the employee's duties, position, and responsibilities;
> (h) the notoriety of the offense or its impact upon the reputation of the Police Department;
> (r) where the violation resulted in criminal conviction or arrest;
> (f) the effect of the violation upon management's confidence in the employee's future job performance

(Ex. HE-1 at 3). As for aggravating factor (b), NOPD aggravated this factor because Sgt. Thompson should have known the dangers of DWI. (Ex. HE-1; Tr. at 18). NOPD applied aggravating factor (h), the notoriety of the offense, because outside agencies were involved. (Ex. HE-1 at 3; Tr. at 24). NOPD applied aggravating factor (r), conviction or arrest, because Sgt. Thompson was convicted of DWI. (Ex. HE-1 at 3; Tr. at 16). NOPD applied aggravating factor (f) because of the potential for credibility concerns if Sgt. Thompson were to testify in court. (Ex.

HE-1 at 3; Tr. at 12). Based on these aggravating factors, NOPD terminated the employment of Sgt. Thompson. (Ex. HE-1).

NOPD admittedly failed to consider two mitigating factors:

> (c) The employee's past disciplinary and work record, including whether he or she has any commendations;
> (e) The employee's longevity with the department, and what he or she has contributed to the Department throughout employment;

Deputy Chief John Thomas testified that NOPD "didn't take the person into consideration," even though Chief Thomas considered Sgt. Thompson an "outstanding leader in this police department" and a "[g]ood employee, every well liked, never had any problems with him. . . ." (Tr. at 21).

II. ANALYSIS

A. Due Process under *Loudermill*

Appellant raised the issue of a lack of notice of the possibility of termination, resulting in an alleged violation of Appellant's due process rights under *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532 (1985). As the hearing examiner correctly determined, Appellant received timely notice of his pre-termination hearing and was afforded an opportunity to be heard on December 9, 2021.

Because Sgt. Thompson has a property right in continued employment, NOPD cannot deprive him of this property interest without due process. *Loudermill*, 470 U.S. at 538; *Lange v. Orleans Levee Dist.*, 2010-0140 (La. 11/20/10), 56 So. 3d 925, 930. However, because Louisiana Constitution, article X, section 12(B) and Civil Service Rule II, section 4.1 grant Sgt. Thompson a full hearing following his termination, with the possibility of reinstatement under Rule II, section 4.16, the pre-termination hearing "need not be elaborate." *Loudermill*, 470 U.S. at 546-48. "When a civil service employee is entitled to a full evidentiary hearing after termination, and retroactive

relief such as reinstatement is available, pre-termination due process is satisfied by notice and an opportunity to be heard. *Lange*, 56 So. 3d at 931. "[O]nly the *barest* of a pre-termination procedure is required when an elaborate post-termination procedure is involved." *Id.*

On December 3, 2021, NOPD provided Sgt. Thompson with a description of the March 1, 2021, conduct resulting in the DWI and the subsequent conviction on July 21, 2021, along with the sustained NOPD rule violations. (Ex Appellant-1). NOPD conducted a pre-disciplinary hearing on December 9, 2021, and Appellant was able to respond to the charges against him at that time. (Tr. at 27, 40). Therefore, NOPD provided Sgt. Thompson with appropriate pre-termination due process.

B. Legal Standard for Commission's Review of Discipline

1. The Appointing Authority must show cause for discipline

"'Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).'" *Whitaker v. New Orleans Police Dep't,* 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep't of Police,* 2000-1682 (La. App. 4 Cir. 5/9/01)). "'Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged.'" *Id.* "'The Appointing Authority has the burden of proving the impairment." *Id.* (citing La. Const., art. X, § 8(A)). "The appointing authority must prove its case by a preponderance of the evidence." *Id.* "Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the public service.'" *Id.* "It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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).

In this case, the parties agreed that the conduct occurred and that it impaired the efficient operation of NOPD.

2. The Appointing Authority must show the discipline was commensurate with the infraction

The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep't,* 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied,* 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans,* 454 So. 2d 106 (La. 1984). The Appointing Authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 ("[NOFD] did not demonstrate . . . that termination was reasonable discipline"); *Durning*, 294 So. 3d at 540 ("the termination . . . deemed to be arbitrary and capricious").

a. Factors considered by Commission

"In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee's work record and

previous disciplinary record." *Matusoff v. Dep't of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 Westlaw 2562940, *writ denied,* 2020-00955 (La. 10/20/20), 303 So. 3d 313. The Commission considers the nature of the offense, the employee's work ethic, prior disciplinary records, job evaluations, and any grievances filed by the employee." *Honore v. Dep't of Pub.* Works, 14-0986, pp. 8-9 (La. App. 4 Cir. 10/29/15), 178 So. 3d 1120, 1131, *writ denied*, 2015-2161 (La. 1/25/16), 185 So. 3d 749

b. Commission's authority to affirm, reverse, or modify discipline

If, after considering these factors, the Commission finds the discipline is arbitrary or capricious, "[t]he Commission 'has the duty and authority to affirm, reverse, or *modify* the action taken by the Appointing Authority." *Durning,* 294 So. 3d at 538 (quoting *Honore v. Dep't of Pub. Works*, 179 So. 3d at 1127) (emphasis added).

The Fourth Circuit has issued conflicting decisions about whether the Commission may reduce a penalty when the Appointing Authority has carried its burden of showing cause for the discipline. "However, the authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty." *Pope v. New Orleans Police Dep't*, 2004-1888 (La. App. 4 Cir. 4/20/05), 903 So. 2d 1 5 (citing *Branighan v. Dep't of Police*, 362 So. 2d 1221, 1223 (La. App. 4 Cir. 1978); *Whitaker v. New Orleans Police Dep't*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572. *See also Jenkins v. New Orleans Police Dep't*, 2022-CA-0031 (La. App. 4 Cir. 6/22/22).[1] "Unless the Commission determine[s] that there was insufficient cause for the appointing authority to impose the [six] day suspension, the penalty must stand." *Whitaker*, 863 So. 2d at 575.

[1] This decision is not yet final.

Despite this precedent, the Fourth Circuit has reversed the Commission's failure to modify a penalty, even though the Appointing Authority carried its burden of showing legal cause: "Although the record provides a rational basis for determining that the Department had legal cause to take the disciplinary action against Honore, we find the record does not provide a rational basis for the Commission's conclusion that termination was the appropriate disciplinary action, commensurate with the offense." *Honore v. Dep't of Public Works*, 178 So. 3d at 1129. *See also Hills v. New Orleans City Council*, 98-1101 (La. App. 4 Cir. 12/9/98) ("Although the record evidence is sufficient to prove that the counsel fiscal office had good and lawful cause for taking disciplinary action against Ms. Hills, it is insufficient to prove that the punishment chosen—i.e. dismissal—is commensurate with the offense.") Likewise, the Fourth Circuit has affirmed the Commission's decision to reduce a termination to an 80-day suspension, even though the Fourth Circuit found the Commission correctly determined that a police officer "committed the offense of reporting to work under the influence of alcohol and with the smell of alcohol on his breath" and "such a violation undoubtedly endanger[ed] him/her, his/her co-workers, and the general public." *Durning*, 294 So. 3d at 539-40. The Commission reduced the penalty based on error in NOPD's application of the mitigating and aggravating circumstances. *Id.* at 540.

C. The discipline was arbitrary and capricious

The Appointing Authority has not met its burden of showing the discipline was reasonable, especially in light of the expungement of the conviction. *Neely,* 332 So. 3d at 307. The penalty is not commensurate with the dereliction and is arbitrary and capricious. *Durning,* 294 So. 3d at 540. The undersigned Commissioners agree with the hearing officer that NOPD improperly failed to consider the mitigating factors of Sgt. Thompson's 17 years of service and lack of any prior discipline. *Durning,* 294 So. 3d at 540.

As the hearing officer correctly determined, NOPD erroneously applied four aggravating factors. All drivers are aware of the danger of DWI, so NOPD erroneously applied the aggravating factor of the relationship of the violation to Sgt. Thompson's job duties. DWI's are likely to involve outside agencies, so the enhancement of the penalty based solely on the involvement of the Slidell Police Department and the Louisiana State Police is in error. Because a DWI is a level E offense, the arrest and conviction is already a factor in the level of discipline, as Deputy Chief Thomas conceded, so enhancement on this basis is inappropriate. (Tr. at 22). To the extent that NOPD enhanced the penalty because Sgt. Thompson exercised his right to a trial, the Commission finds that this enhancement was in error. (Tr. at 31). Further, Sgt. Thompson informed NOPD during his pre-disciplinary hearing on December 9, 2021, that he had moved for expungement of the conviction, and the court granted this expungement on December 22, 2021. (Tr. at 27, Ex. Appellant-5). Therefore, because NOPD did not charge Sgt. Thompson with untruthfulness, (Tr. at 26), and the conviction has now been expunged, the enhancement based on Sgt. Thompson's future credibility is in error.

Therefore, for these reasons, the Commission reduces Sgt. Thompson's discipline to the presumptive penalty, a 45-day suspension.

NOPD shall reinstate Sgt. Thompson, with back pay from January 23, 2022, to present, along with all emoluments of employment.

This the 21st day of July, 2022.

WRITER:

Brittney Richardson (Jul 12, 2022 10:15 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:

J H Korn (Jul 12, 2022 13:38 CDT)

JOHN KORN, VICE-CHAIRPERSON

Mark C. Surprenant (Jul 12, 2022 10:17 CDT)

MARK SURPRENANT, COMMISSIONER

KEVIN THOMPSON	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	NO. 9347

HEARING EXAMINER REPORT

This is the appeal of an emergency suspension and termination. By disciplinary letter dated December 9, 2021, the Appellant was terminated after he was convicted of first offense driving while intoxicated in violation of La. R.S. 14:98. *See* Disciplinary letter, H.E. 1.

It is stipulated by the parties, and the Appointing Authority is therefore not required to prove that the appeal is timely.

The appeal was heard by this Hearing Examiner on January 26, 2022.

BACKGROUND

The parties stipulated that there is no issue regarding whether or not the violation occurred. Thus, the Appointing Authority is relieved from the burden of proving the occurrence of the complained of conduct.

The issue "here is whether… the penalty of termination is commensurate with the offense." Tr. at 5:22-6:4.

The Superintendent Committee recommended an aggravated penalty that was outside of the presumptive penalty for a Level E violation. *Id.* at 6:22-7:7; *see also* H.E. 1.

Per the Disciplinary Letter,

> the Committee's decision that the DWI violation should be aggravated up to Dismissal [was] based upon the following factors outlined in the [disciplinary] Matrix:
>
> 1. *(b) the nature and seriousness of the violation and its relationship to the employee's duties, position and responsibilities;*

Sergeant Thompson, a 19 year veteran and a 13 year DWI certified employee, willingly consumed alcohol at a party and drove his girlfriend's vehicle home. As a result, he caused an accident when he drove the vehicle into a ditch.

As a DWI certified police officer, Sergeant Thompson knows first-hand the dangers that exist when someone knowingly consumes alcohol and drives. Most of his career involved Sergeant Thompson reprimanding those accused of drinking and driving. Drinking and driving is a serious hazard which he should have known was in direct contradiction to his training and job duties.

2. *(h) the notoriety of the offense or its impact upon the reputation of the Police Department*

Upon questioning by the State Trooper Folse, Sergeant Thompson falsified his role in the accident as a driver. Trooper Folse smelled a strong odor of an alcoholic beverage that emitted from his breath, along with a sway in his stance.

He performed poorly during a Stand Field Sobriety Test which led to him being issued a summons in lieu of a physical arrest. He later provided a breath sample of .156g% BAC while at Slidell Police Department.

By his own admission, Sergeant Thompson recognized that he brought discredit to the New Orleans Police Department by his decision to become so intoxicated that night.

3. (r) *where the violation resulted in a criminal conviction or arrest.*

Sergeant Thompson appeared for trial on Wednesday, July 21, 2021, before Honorable Judge Bray D. Haggerty of East St. Tammany. After all testimony was heard, Judge Haggerty noted, "**an issue of credibility in this matter**" and found him "'**GUILTY**' as charged for DWI 1st offense and Driving on a Roadway laned for Traffic."

He was sentenced to six (6) months in jail and ordered to pay $600.00 plus court costs. The court suspended the six months and placed him on supervised probation for 12 months subject to all general conditions of probation.

4. *(f) the effect of the violation upon management's confidence in the employee's future job performance.*

Sergeant Thompson was convicted after his judge trial. Furthermore, these convictions pose Brady/Giglio issues for Sergeant Thompson. Under Brady/Giglio, when a police officer is called as a witness in a court proceedings, the prosecutor must disclose impeachment evidence, meaning any evidence that casts a substantial doubt upon the credibility of the witness testimony. Convictions, such as a DWI, fall within this legal requirement and calls Sergeant Thompson credibility into question.

> Lack of trust in our officers undermines the ability of the Department to deliver its mandate to protect and serve coupled with the community's trust of the Department in doing so. As a police officer, Sergeant Thompson has to be held to a higher standard within our community. Ultimately, due to his decision to drive intoxicated, Sergeant Thompson is incapable of delivering that mandate and has lost our confidence in his ability to remain a New Orleans police officer.

H.E. 1, at p. 3.

At the beginning of the hearing, the Appellant suggested that "[t]he disciplinary hearing notification does not put the appellant on notice that any of these aggravating circumstances were at issue, and nowhere does it mention that termination was being considered by the committee." Tr. at 7:17-23. The Appellant suggested that the hearing notification violated his right to notice under *Loudermill* and "Civil Service Rule 9, which requires that the employee be put on notice that 6 termination is a considered penalty." *Id.* at 7:25-8:6.

LOUDERMILL ISSUE

The Appellant suggests that the Disciplinary Hearing Notification, Appellant Exhibit 1, did not provide him adequate notice and an opportunity to respond prior to his termination in violation of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and Rule IX, § 1.2 of the Rules of the Civil Service Commission for the City of New Orleans.

Louisiana Constitution Article 10, § 8, provides in part that: "No person who has gained permanent status in classified state or city service shall be subject to disciplinary action except for cause expressed in writing." Rule IX, § 1.2 of the Rules of the Civil Service Commission for the City of New Orleans, states that "[i]n every case of termination of employment of a regular employee, the appointing authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking the action." In *Loudermill*, the United States Supreme Court held: "The essential requirements of due process...

are notice and an opportunity to respond....The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story....To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. 532, at 546.

Under *Loudermill*, and in light of Rule IX, § 1.2, of the Rules of the Civil Service Commission, the Louisiana Fourth Circuit Court of Appeals has concluded that an employee is entitled to advance notice of the charges and evidence against him prior to his pre-termination hearing. *Riggins v. Department of Sanitation*, 617 So.2d 112, 113-114 (La.App. 4 Cir. 1993). An explanation of the evidence is a prerequisite to the employee's pre-termination opportunity to present his side of the story. *Webb v. Department of Safety & Permits,* 543 So.2d 582, 583 (La.App. 4 Cir.1989). Notice of the charges should fully describe the conduct complained of and set forth the relevant dates and places and the names of witnesses against the employee to enable the employee to fully answer and prepare a defense. *Webb*, 543 So.2d 582, 584.

The key *Loudermill* issue was whether the Appellant received timely notice of the pre-termination hearing and whether he was afforded an opportunity to be heard. *Williams v. Sewerage and Water Bd.*, 876 So.2d 117 (La. App. 4th Cir. 2004).

A pre-termination hearing, though obligatory, need not be elaborate or evidentiary. *Loudermill*, 470 U.S. at 545, 105 S.Ct. 1487. The purpose of the hearing is not to determine with certainty whether termination is appropriate; instead, the hearing should have served as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545–546, 105 S.Ct. 1487. When a civil service employee is entitled to a full evidentiary

hearing after termination, and retroactive relief such as reinstatement is available, pre-termination due process is satisfied by notice and an opportunity to respond. *Haughton Elevator Div. v. State, Through Div. of Admin.*, 367 So.2d 1161, 1165 (La. 1979).

In other words, only the barest of a pre-termination procedure is required when an elaborate post-termination procedure is provided. *Lange v. Orleans Levee Dist.*, 56 So.3d 925, 31 IER Cases 1018 (La. 2011).

Here, the Disciplinary Hearing Notification, Appellant 1, informed the Appellant of the complained of conduct, as well as the possible rule violations and penalties. The Appellant was afforded an opportunity to respond and in fact appeared at and participated in the pre-termination hearing. The Appellant was afforded post-termination remedies in the form of the present appeal. The Appellant received adequate due process.

The Hearing Examiner will proceed to the merits.

THE MERITS

The testimony and evidence received was as follows:

DEPUTY SUPERINTENDENT JOHN THOMAS (RET.)

Chief Thomas is currently the Director of Public Safety in Homeland Security with the City of New Orleans; he was at all relevant times the Deputy Superintendent of the Field Operations Bureau with the New Orleans Police Department. Tr. at 10:1-7.

Chief Thomas sat as the chairperson on the Disciplinary Committee. *Id.* at 11:15-18.

Chief Thomas testified that the Appellant's conduct impaired the efficient operation of the NOPD. He explained that "having a criminal conviction of DWI and having to testify in ... court was problematic and could create some *Brady-Giglio* [credibility] issues as him being a law enforcement officer having to testify against defendants in court. Tr. at 12:13-20.

Chief Thomas testified that the NOPD uses a Disciplinary Matrix, found at NOPD Policy 26.2.1, when arriving at a recommended penalty. *Id.* at 12:23-13:9.

Chief Thomas explained that the Matrix outlines aggravating and mitigating factors to be considered in determining the appropriateness of a penalty. *Id.* at 14:5-16.

Chief Thomas explained the penalty matrix for the Level E violation at issue here would have a range of (1) 30 day suspension, (2) 45 day suspension, (3) 60 day suspension, and (4) dismissal; the 30 day suspension being the lowest possible penalty, the 45 day suspension being the presumptive penalty, and the 60 day suspension and dismissal being the available if there are sufficient aggravating circumstances. *Id.* at 15:1-12.

In explaining why termination was warranted in this case, Chief Thomas explained that it was because the Appellant "was convicted in State court, which is a misdemeanor conviction. Usually, the're are sustained administratively, but this was a conviction." *Id.* at 16:2-5.

Chief Thomas also explained that he relied upon the fact that the state court judge had indicated that there were some credibility issues. *Id.* at 16:6-7; 16:12-13.

Chief Thomas acknowledged that the Appellant was not "charged with [an] honesty and truthfulness" violation per NOPD policy, nor determined to have lied by any law enforcement agency or court. *Id.* at 16:19-20; 26:19-27:1.

Chief Thomas explained that another aggravating factor was that Sergeant Thomas had been assigned to the Traffic Division of the NOPD and thus knew of the dangers of drinking and driving. *Id.* at 17:4-12; 18:4-17.

Chief Thomas testified that another aggravating factor was that his blood alcohol level was high. Tr. at 18:25-19:15.

On cross-examination Chief Thomas testified that the Appellant "was always known to be a good person;" he was a "[g[ood employee, very well liked, never had any problems with him. Very well liked person." *Id.* at 21:2-8.

Chief Thomas testified that the Appellant had no disciplinary history that he knew of prior to this incident. *Id.* at 21:9-11.

Chief Thomas testified that the Appellant is a "very well liked person, very respectful. He's always been a leader, always been one who actually took the lead on everything. As far as I know Kevin Thompson, he's always been an outstanding leader in this police department." *Id.* at 21:11-17.

However, Chief Thomas testified that the Committee did not consider the Appellant's stellar career and reputation as mitigating factors. *Id.* at 21:18-23.

Chief Thomas acknowledged on cross that the Appellant was assigned to the 5th Police District and not the Traffic Division at the time of this incident. *Id.* at 22:9-13.

Chief Thomas acknowledged on cross that "the level assigned to a particular violation takes into account the seriousness of the violation in and of itself." *Id.* at 22:25-23:5. That is, the nature and seriousness of the violation is built into the matrix... [it] was a Level E violation... because it is a fairly serious violation." *Id.* at 23:6-13.

Chief Thomas acknowledged on cross-examination that every Police Officer is aware of the seriousness of driving while intoxicated. *Id.* at 23:18-21.

With regard to the aggravating factor "the notoriety of the offense or its impact on the reputation of the police department," Chief Thomas based his determination that this factor was present because outside law enforcement agencies were involved. Tr. at 24:-25:8.

Chief Thomas acknowledged that at the disciplinary hearing on this matter, the Appellant advised him that the expungement of his arrest and conviction was pending; he admitted that had the matter been expunged at the time of the hearing, the Committee "would have had to discuss that," but "[i]t wasn't expunged at the time." *Id.* at 27:2-28:1.

When asked "[h]ow is Sergeant Thompson's case different from any other DWI case that came along," Chief Thomas stated that "[h]e was convicted in court." *Id.* at 31:18-21.

On re-direct, Chief Thomas was asked one question: "Why does the department feel like a criminal conviction for a DWI was such an aggravating circumstance?" Id. at 34:5-8.

Chief Thomas' answer was thus: "As a law enforcement officer, we are there to actually go to court, and that is a part of our job as it relates to defendants, and if we are being convicted as a law enforcement officer, ourselves, I think it sends the wrong message to he community, to the public as law enforcement officers if we are having convictions. It effects our job to be having convictions of crimes. It sends the wrong message to the community that - it is just not efficient to be a law enforcement officer, enforcing the law to actually have broken the law." *Id.* at 34:9-21.

THE APPELLANT

The Appellant was called in his case-in-chief.

The Appellant testified that at the time of the subject incident he was in fact assigned to the Public Integrity Bureau of the NOPD, not the Traffic Division and not the 5th District. *Id.* at 35:9-17.

The Appellant testified that he had a "[c]lear record, never been in trouble, never received a letter of reprimand, no suspension days," it was "part of the reason why [he] was selected to go into the Public Integrity Bureau. [He] never had any integrity issues on the job." Tr. at 35:20-25.

The Appellant testified, and offered evidence to support that after his DWI trial he went through the proper channels and had his arrest and conviction set aside, dismissed and expunged. *Id.* at 39:23-40:2.

The Appellant testified that the expungement process was nearly completed at the time of his pre-termination hearing, and that he had asked for some more time to complete the process and to delay the hearing. *Id.* at 40:1-25.

Indeed, the pre-termination hearing was held on December 9, 2021, and Appellant's motions to set aside and expunge the arrest and conviction were granted on December 15th and December 22, 2021. *Id.* at 41.

ANALYSIS AND RECOMMENDATION

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)).

The analysis has three elements. The appointing authority bears the burden of proof as to each element. The Hearing Examiner will address each element separately.

I. OCCURRENCE OF THE COMPLAINED OF CONDUCT

It is stipulated that the complained of conduct occurred. Thus, the Appointing Authority was relieved of its burden and this element is proven.

II. IMPAIRMENT OF THE PUBLIC SERVICE

The issue is whether the Appointing Authority "demonstrated by a preponderance of the evidence" that the Appellant's DWI arrest and conviction... "***did in fact*** impair the otherwise efficient operation of the [New Orleans] Police Department, which is a mandatory showing for cause when terminating civil service employees. *Lensey v. Shreveport Mun. Fire & Police Bd.*, 839 So.2d 1032, 1038 (La. App. 2 Cir. 2003) (emphasis added). "Complaints, publicity and gossip in themselves do not constitute legal cause for discharge. Notoriety is something a police officer, or any public employee, or official for that matter, cannot control. There must be more than mere notoriety, for that in and of itself proves nothing." *Lensey*, 839 So.2d at 1037; citing *Reboul v. Department of Police*, 420 So.2d 491, 495 (La.App. 4 Cir.1982).

In this case, the only testimony regarding the impairment of the service was from Chief Thomas. He testified that the incident impaired the service because it occurred out of Parish and involved outside law enforcement agencies. This tends to militate against a finding that the conduct impaired the service. *See Lensey* (*supra*). Chief Thomas also speculated that a conviction for DWI might impair the service if the Appellant was to be called as a witness in a criminal case and his credibility possibly impeached. Any such possibility was made moot two weeks after the pre-termination hearing was held when the Appellant's arrest and conviction was expunged.

Nonetheless, the parties stipulated that the only issue for the Commission to decide is whether the penalty was commensurate with the conduct. Thus, the Hearing Examiner will pretermit on the issue of whether the Appointing Authority carried its burden on this element.

III. RELATION OF THE DISCIPLINE TO THE INFRACTION

The question here is whether Appellant's misconduct warranted termination; otherwise, the discipline would be "arbitrary and capricious." *See Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (*citing Staehle v. Dept. of Police,* 98–0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033). The Commission's authority to "hear and decide" disciplinary cases "includes the authority to modify (reduce) as well as to reverse or affirm a penalty." *Whitaker v. New Orleans Police Dept.*, 863 So.2d 572, 576 (La.App. 4 Cir. 9/17/03)(citing La. Const. art. X, § 12; *Branighan v. Department of Police,* 362 So.2d 1221, 1223 (La.App. 4 Cir.1978)); *Bankston v. Dep't of Fire*, 2009-1016 (La.App. 4 Cir. 11/18/09, 10), 26 So.3d 815, 822.

According to the NOPD Disciplinary Matrix/Penalty Schedule, Chapter 26.2.1 of the NOPD Operations Manual, "[e]very offense level has a minimum penalty, a presumptive penalty, and a maximum penalty. The penalty hearing officer ***must*** recommend the presumptive penalty unless aggravating or mitigating circumstances exist and are specifically articulated in the hearing record." *See* City Exhibit 1, p. 2 and p. 3 at ¶ 3 (emphasis added). Further, "[d]iscipline must be consistent. The same or similar violation must be given the same or similar penalty. However, it is recognized that the circumstances of an offense may make it more or less egregious and therefore deserving of a lesser or greater penalty." *See* City Exhibit 1, at p. 4, ¶ 4. The Disciplinary Matrix/Penalty Schedule therefore lists 19 non-exclusive factors (listed as a-s) that may be considered by way of both aggravation and mitigation. *Id.*

It is uncontested that this case involves a Level E (on a scale of B-G) First Offense violation and that the range of discipline was (1) 30 day suspension, (2) 45 day suspension, (3) 60 day suspension, and (4) dismissal; the ***30 day*** suspension being the ***lowest*** possible penalty, ***the 45 day***

suspension being the presumptive penalty, and the 60 day suspension and dismissal being the available if there are sufficient aggravating circumstances. Tr. at 15:1-12.

Therefore, it is uncontested that, per the Policy entered into the record, NOPD Policy 26.2.1, Chief Thomas and the Disciplinary Committee were required to recommend a ***45 day suspension*** unless aggravating or mitigating factors, expressed in the record, militated in favor of an upward or downward departure.

Out of the 19 non-exclusive mitigating and aggravating factors listed in Policy 26.2.1, Chief Thomas admitted that he considered not a single one of the mitigating factors. This despite the fact that by all accounts the Appellant was an exemplary employee, that was liked by all, showed leadership, and had an otherwise pristine disciplinary record over his 19 years of service to the NOPD.

On the contrary, Chief Thomas testified that he considered four of the aggravating factors in deciding to recommend termination in lieu of the otherwise mandatory presumptive penalty, namely: *(b) the nature and seriousness of the violation and its relationship to the employee's duties, position and responsibilities;(h) the notoriety of the offense or its impact upon the reputation of the Police Department; (r) where the violation resulted in a criminal conviction or arrest;(f) the effect of the violation upon management's confidence in the employee's future job performance.* The Hearing Examiner will take them separately.

Regarding (b) *the nature and seriousness of the violation and its relationship to the employee's duties, position and responsibilities*, the reason given, that as a DWI certified police officer, the Appellant knows first-hand the dangers that exist when someone knowingly consumes alcohol and drives, is nonsensical. Every Police Officer, indeed every rational human being knows

of the dangers of driving while intoxicated. That is why, as Chief Thomas conceded, it is a Level E offense. The fact that it is a "serious" offense is *inherent*, it is not an aggravating factor.

Relative to (h) *the notoriety of the offense or its impact upon the reputation of the Police Department*, the Appointing Authority came nowhere near meeting its burden of proof. There was no evidence presented at all about any notoriety that the Appellant's now expunged DWI gained or how it impacted the NOPD. As above, the issue is whether the Appointing Authority "demonstrated by a preponderance of the evidence" that the Appellant's DWI arrest and conviction… ***did in fact*** impair the otherwise efficient operation of the [New Orleans] Police Department, which is a mandatory showing for cause when terminating civil service employees. *Lensey v. Shreveport Mun. Fire & Police Bd.*, 839 So.2d 1032, 1038 (La. App. 2 Cir. 2003) (emphasis added). "Complaints, publicity and gossip in themselves do not constitute legal cause for discharge. Notoriety is something a police officer, or any public employee, or official for that matter, cannot control. There must be more than mere notoriety, for that in and of itself proves nothing." *Lensey*, 839 So.2d at 1037; citing *Reboul v. Department of Police*, 420 So.2d 491, 495 (La.App. 4 Cir.1982). The Appointing Authority failed in its burden.

Factors *(r) where the violation resulted in a criminal conviction or arrest;* and *(f) the effect of the violation upon management's confidence in the employee's future job performance* can be taken together. First, the mere fact that the DWI resulted in a conviction does not itself warrant departing from the presumptive penalty of a 45 day suspension to termination according to the NOPD Policy entered into the record. Further, every DWI involves an arrest, as Chief Thomas admitted. What is more, and concomitantly, the fact that the arrest resulted in a conviction is not an absurd unforeseen result. The Hearing Examiner believes that Chief Thomas' application of this factor is fallacious. He reads it to mean that if an arrest results in a conviction then the

conviction is an aggravating factor. Again, in this case, as Chief Thomas seems to have conceded, the fact that the offense is a Level E offense already accounts for the seriousness of the violation. To make the basis of the offense an aggravating factor would be redundant, arbitrary, and capricious.

Further, with regard to the speculative reason for aggravation that the DWI conviction might at some point cause credibility issues for the Appellant and impair his ability to testify in criminal proceedings, the Appointing Authority simply did not meet its burden by any measure. There was no evidence presented whatsoever that this could be, let alone was in fact, an issue. Chief Thomas' speculation on issues of law is not evidence. Further, no explanation was given as to why this would not be true for every Level E violation involving a DWI. What is more, and for what it is worth, the matter was made moot less than two weeks after the Appellant was fired when the record was expunged.

Lastly, any reference to Judge Haggerty's comment that there were "credibility issues" is not evidence and cannot be considered. For one, it is improper, incompetent hearsay evidence. Secondly, and more importantly, there was no evidence presented that the Judge was referring to the Appellant. Thirdly, and more importantly yet, Chief Thomas acknowledged that the Appellant was not "charged with [an] honesty and truthfulness" violation per NOPD policy, nor determined to have lied by any law enforcement agency or court. *Id.* at 16:19-20; 26:19-27:1.

The Hearing Examiner finds that the discipline imposed was arbitrary and capricious. Based upon the record before the Hearing Examiner, which was markedly scant, the Appointing Authority failed to prove the existence of aggravating circumstances warranting an upward departure from the presumptive penalty for the subject offense per the NOPD's own policy. Further, there was a plethora of evidence of mitigating factors that would justify a downward

departure. The Hearing Examiner recommends that the present appeal be granted in part and denied in part. The Hearing Examiner recommends that the Appellant be reinstated subject to a 45 day suspension, the presumptive penalty for the subject violation per NOPD Policy.

SUBMITTED BY: JIM MULLALY SUBMISSION DATE: 6/22/2022