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

MITCHELL J. LANDRIEU
MAYOR

CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
RONALD P. McCLAIN, VICE-CHAIRPERSON
JOSEPH S. CLARK
TANIA TETLOW
CORDELIA D. TULLOUS

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Monday, May 09, 2016

Mr. Kevin Boshea
2955 Ridgelake Dr., Suite 207
Metairie, LA 70002

Re: **Keyalah Bell VS.**
Department of Police
Docket Number: 8047

Dear Mr. Boshea:

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 - 5/9/2016 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Keyalah Bell

CIVIL SERVICE DEPARTMENT
CITY OF NEW ORLEANS

KEYALAH BELL vs. DEPARTMENT OF POLICE	DOCKET NO.: 8047

I. INTRODUCTION & PROCEDURAL BACKGROUND

This matter comes before the Commission following a remand by the Court of Appeal for the Fourth Circuit of Louisiana. *Bell v. New Orleans Police Dept.*, 2013-1529 (La. 4th Cir. May 21, 2014). In *Bell*, the Fourth Circuit considered an appeal filed by the New Orleans Police Department (hereinafter "NOPD"). In its appeal to the Fourth Circuit, NOPD alleged that the Commission erred in overturning discipline issued to Appellant in the form of termination. Specifically, NOPD challenged the Commission's finding that NOPD failed to complete its administrative investigation into Appellant's misconduct within the timeframe established by La. R.S. 40:2531(B)(7).

The Fourth Circuit reviewed the Commission's decision and found that a recent Louisiana Supreme Court decision, *O'hern v. New Orleans Police* Dept., 12-1416 (La. 11/8/13), shifted the legal landscape upon which the Commission rested its original decision. Based upon the holding in *O'hern*, the Fourth Circuit vacated the Commission's decision reinstating Appellant. However, the Fourth Circuit also noted that the Commission's ruling was based entirely on the procedural defect and not the actual merits of the case. Bearing this in mind, the

Fourth Circuit remanded the matter back to the Commission "for further proceedings on the merits of [Appellant's] appeal."

The original appeal hearing in this matter took place over the course of two days during which the Parties presented evidence and testimony with respect to both the process that led to Appellant's discipline as well as the merits. (See generally transcripts of Feb. 20, 2013 and Feb. 28, 2013). The Commission finds that it is not necessary to remand the matter back to a referee for further proceedings on the merits as the undersigned commissioners have reviewed the transcript and evidence submitted by the parties. Thus, based upon a careful review of the testimony and evidence regarding the instant appeal, the undersigned Commissioners make the below findings of fact and render the following judgment

II. FACTUAL BACKGROUND

Before exploring the factual background in connection with this matter, the Commission summarizes the record before it since its decision is limited to the facts contained with that record:

> The commission or board has a duty to independently decide, ***from the facts presented***, whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction.

Morris v. City of Minden, 50,406 (La.App. 2 Cir. 3/2/16)(citing *Walters v. Dept. of Police of New Orleans*, 454 So.2d 106 (La.1984); *City of Bossier City v. Vernon*, 12–0078 (La.10/16/12), 100 So.3d 301)(emphasis added). The exhibits that are part of the instant record are listed below:[1]

- Hearing Examiner Exhibit #1: July 31, 2012 letter from NOPD Superintendent Serpas to Appellant re: dismissal (4 pages).

[1] Attached to NOPD's post-hearing brief were several documents that were not part of the Commission's record during the course of the appeal hearing. The Commission is not authorized, nor would it be appropriate, to consider or review documents containing allegations of fact not properly introduced by a party and accepted into evidence by the Commission's designated referee.

- NOPD Exhibit #1: DI-1 Form completed May 9, 2011 (2 pages)
- NOPD Exhibit #2: Nolle Prosequi documentation re: Appellant (1 page)
- NOPD Exhibit #3: PIB 60-day extension request (1 page)
- NOPD Exhibit #4: Notice of pre-disciplinary hearing to Appellant (1 page)

- Appellant Exhibit #1: Phone records of Appellant for May 6, 2011 (1 page)
- Appellant Exhibit #2: Nolle Prosequi documentation re: Appellant (1 page)
- Appellant Exhibit #3: PIB 60-day extension request (1 page)

On the evening of May 5, 2011 Officer Bell was with a group of friends; while Appellant was celebrating her passage of a nursing examination, she was also anxious about the possibility that she would be called as a witness in a federal criminal case against a former fellow NOPD Officer. (Tr. 76:21-77:16). Appellant acknowledged that she had been drinking during the course of the evening and at approximately 12:00 a.m. on May 6, 2011, Appellant chose to drive her vehicle home. At approximately 12:03 a.m. on May 6, 2011, Appellant struck a parked vehicle. (NOPD Exh. 1).

Appellant contends that, when her vehicle hit the parked car, she struck her head and does not recall much of what happened following the accident.[2] Appellant acknowledges that her car was at least one block away from the accident scene. NOPD did not call any witnesses to the accident, but instead relied upon accounts contained in written statements provided by others in alleging that Appellant got out of her car, surveyed the damage, and then got back into her car and left the scene. There is no dispute that at approximately 12:20 a.m., Appellant called NOPD's Fourth District and informed NOPD that she had been involved in an accident. There is also no dispute that Appellant was at the scene of the accident when NOPD officers arrived.

When NOPD responded to the accident scene, two different investigative tracks regarding Appellant's alleged misconduct began. The first track was criminal in nature. As

[2] Appellant was brought to the hospital at approximately 6:00 a.m. on May 6, 2011 but was not admitted and there is no record of treatment administered in connection with Appellant's alleged head injury. (Tr. v. 1 at 82:21-83:3).

NOPD acknowledges, Appellant declined a Breathalyzer test during the course of the criminal investigation, but did submit to a Breathalyzer test as part of NOPD's administrative investigation. H.E. Exh. 1. Thus, while Appellant's Breathalyzer results were inadmissible in the criminal case against her, NOPD may rely upon them in determining whether or not Appellant violated NOPD rules.[3]

III. POSITION OF PARTIES

A. Appointing Authority

NOPD emphasizes that an officer need not be convicted of a crime to be found liable for a violation of NOPD rules. And, NOPD argues that the evidence collected in the course of its administrative investigation confirms that Appellant, drove her car while impaired with intoxicating beverages, struck a parked vehicle as a result of her impairment and intentionally left the scene of the accident she caused. Thus, based upon the totality of her conduct, Appellant's termination was warranted.

B. Appellant

During the course of the appeal hearing, Appellant did not deny that she had been drinking prior to striking a parked vehicle with her car. However, she argues that NOPD cannot establish that she violated La. R.S. § 14:100(A) regarding hit and run. Therefore, NOPD is left only with an allegation that Appellant violated NOPD rules by driving while intoxicated, a crime that the district attorney chose not to prosecute. Appellant also suggests that the discipline imposed by NOPD was not commensurate with her alleged misconduct.

[3] Sergeant Darryl Watson testified that he was present at NOPD's DWI office when Officer Vernell Brown Jr. administered a breathalyzer test on Appellant and confirmed that the result was more than twice the legal limit. (Tr. v. 1 at 23:25-24:6, 42:11-14).

III. LEGAL STANDARD

A. General Standard

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.

B. Standard When Appellant is Accused of Violating a Law

An additional consideration that the Commission must address is whether or not an allegation that an Appellant violated a criminal statute – and thus violated NOPD rules – changes NOPD's standard of proof. Put simply, the Commission must answer the question, do NOPD's allegations that Appellant violated La. R.S. 14:100 and 14:98 change the standard from "preponderance" to "beyond a reasonable doubt"? We find that it does not.

In *Bailey v. Dep't of Pub. Safety & Corr.*, 2005-2474 (La.App. 1 Cir. 12/6/06, 10); 951 So.2d 234, 240, Mr. Bailey, a sergeant in the Louisiana State Police, was arrested for violation of La. R.S. 14:98 (operating a vehicle while intoxicated) and 32:58 (careless operation of a vehicle).

Mr. Bailey was eventually acquitted of the criminal charges but the appointing authority terminated him for, among other things, violating Louisiana State Police rules and regulations that prohibit employees from breaking the law. *Id.* at 239. Mr. Bailey appealed his termination to the Louisiana State Police Commission.[4] In his appeal, Mr. Bailey argued that, because his termination was based upon an allegation that he committed a criminal act, and he was subsequently acquitted of that criminal act, his termination is invalid. *Id.* The State Police Commission rejected this argument and found that:

> [U]nlike a criminal proceeding in which the state must prove beyond a reasonable doubt all the elements of the charged crime, the appointing authority in an administrative proceeding need only prove by a preponderance of the evidence that the complained of action occurred and that it impaired the efficient operation of the public service.

Id. (citing *Walters v. Department of Police of New Orleans,* 454 So.2d 106, 113 (La.1984)). The State Police Commission went on to find that the appointing authority had sufficient cause to terminate Mr. Bailey's employment. *Id.* The First Circuit affirmed the State Police Commission's decision and noted with approval that the State Police Commission recognized that it was "not their role to determine whether Mr. Bailey was guilty or innocent as to the ***crime*** of driving while intoxicated and that [Mr. Bailey's] acquittal, for whatever reason, by the Court in Calcasieu Parish of DWI, is interesting but certainly not dispositive of his disciplinary action before this tribunal." *Id.* at 240-41 (emphasis in original).

The fact that the instant appeal involves a *nolle prosequi* entered by the district attorney rather than an acquittal does not change the outcome. In *Sanders v. Dep't of Police*, 2008-0917 (La.App. 4 Cir. 1/28/09, 7-8); 4 So.3d 891, 895, a NOPD officer was arrested and charged with second degree cruelty to a juvenile. And, while the assistant district attorney entered a *nolle*

[4] While the Louisiana State Police Commission is organized under a different Part of the Louisiana Constitution (Art. X, § 43) the burden of proof on appeals is the same as appeals before this Commission.

preosequi regarding the charge, this Commission found that NOPD had established that the officer's conduct violated its internal policy requiring adherence to the law. *Id.* at 893, 895; *see also Dep't of Pub. Safety & Corr., Louisiana State Penitentiary v. Hooker*, 558 So.2d 676, 679 (La. Ct. App. 1st Cir. 1990)("[I]t must follow that if an *acquittal* on a criminal charge does not preclude a civil service disciplinary action on the same facts, a *nolle prosequi* on a criminal charge does not preclude such an action either.").

IV. ANALYSIS

In the termination notice issued to Appellant, there are three rule violations cited, each of which NOPD identified as sufficient grounds for termination. They are:

1) Violation of NOPD Rule 2: Moral Conduct ¶ 1 – Adherence to Law to wit: Louisiana Revised Statute 14:100 relative to Hit and Run;

2) Violation of NOPD Rule 2: Moral Conduct ¶ 1 – Adherence to Law to wit: Louisiana Revised Statute 14:98 relative to operating a vehicle while intoxicated;

3) Violation of NOPD Rule 3: Professional Conduct ¶ 9 – Use of Alcohol/Drugs Off Duty.

H.E. Exh. 1.

A. Occurrence of the Complained of Activities

i. Violation of La. R.S. 14:100 (Hit and Run)

> Hit and run driving is the intentional failure of the driver of a vehicle involved in or causing any accident, to stop such vehicle at the scene of the accident, to give his identity, and to render reasonable aid.

La. Rev. Stat. Ann. § 14:100(A)[5]

[5] For the purposes of this statute, "accident" means an incident or event resulting in damage to property or injury to person. La. Rev. Stat. Ann. § 14:100(B)(4).

Appellant testified that she had struck her head in the course of the accident and one of the officers arriving on scene stated that both vehicles were "totaled" or otherwise severely damaged. During the course of its administrative investigation, NOPD determined that Appellant had the actual intent to leave the scene of the accident in violation of La. R.S. 14:100.

However, the Commission does not find that Appellant violated La. R.S. § 14:100(A) regarding hit and run accidents. Under Louisiana law, hit and run is a crime of intent and the evidence before the Commission does not support NOPD's allegation that Appellant intentionally failed to:

1. to stop her vehicle at the scene of the accident,
2. to give her identity, or
3. to render reasonable aid.

Appellant testified that she struck her head and does not recall how her vehicle came to rest two blocks from the accident scene. NOPD did not offer any evidence calling into question this testimony. Appellant also testified that she contacted the Fourth District Police station and advised NOPD that she had been involved in an accident. This testimony is supported by Appellant's phone records. (App. Exh. 1). After making this call, Appellant remained near her vehicle until other NOPD personnel arrived. Even under the preponderance of evidence standard applicable to administrative hearings, NOPD has failed to meet its burden with respect to the hit and run allegation.[6]

ii. Violation of La. R.S. 14:98 (DWI).

Unfortunately for Appellant, there is evidence that she operated her vehicle while intoxicated on the night of May 5, 2011. While the Commission appreciates the enormous stress

[6] In its post-hearing brief, NOPD seeks to introduce testimony in the form of a recorded statement from Mrs. Cheryl Varnado who claims to have observed Appellant immediately following the accident. This testimony was not introduced during the course of the appeal hearing itself and Appellant did not have an opportunity to cross-examine Mrs. Varnado. Furthermore, NOPD chose not to call Mrs. Vernado as a witness.

the Appellant experienced as a witness in a federal prosecution of fellow NOPD officers, and recognizes that such stress was likely magnified by the fact that a new trial had been ordered in a matter Appellant had hoped was over, it does not justify the series of poor choices Appellant made on that night.

The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, when any of the following conditions exist:

> (a) The operator is under the influence of alcoholic beverages.
>
> (b) The operator's blood alcohol concentration is 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood.

La. Rev. Stat. Ann. § 14:98(A)(1). Appellant admits to consuming alcoholic beverages during the course of the day and evening on May 5, 2011 before striking a parked vehicle. Furthermore, the NOPD officers who reported to the scene of the accident observed Appellant exhibiting obvious signs of intoxication. While it is possible to attribute some of these signs to Appellant's alleged head injury, the fact that her Breathalyzer result was nearly twice the legal limit makes it more likely than not that Appellant was intoxicated while operating a vehicle on the night of May 5, 2011. Therefore, NOPD has satisfied its burden with respect to this allegation.

iii. Appellant Violated NOPD Rule 3.

NOPD Rule 3, ¶ 9 reads in pertinent part that:

> An employee while off duty shall refrain from consuming intoxicating beverages ... to the extent [it] results in impairment, intoxication, obnoxious or offensive behavior that discredits him/her, the Department, or render the employee(s) unfit to report for his/her next regular tour of duty.

(H.E. Exh. 1). Given that the Commission finds that there was sufficient evidence that Appellant failed to faithfully adhere to the law regarding the operation of a vehicle while intoxicated, it follows that the same must hold true for Appellant's violation of Rule 3. Here, NOPD does not

have to establish that Appellant violated the law. Instead, NOPD must merely show that Appellant consumed intoxicating beverages to the extent that it resulted in "impairment, intoxication, obnoxious or offensive behavior that discredits him/her [or] the Department."

NOPD has established that Appellant consumed alcoholic beverages on May 5, 2011, was intoxicated, and seriously damaged her car and that of another while driving home late at night. Thus, NOPD has proved, by a preponderance of the evidence, that Appellant was impaired and engaged in offensive behavior that discredited her.

B. Appellant's Misconduct Impaired the Efficiency of the NOPD

The Commission finds that when NOPD Officers violate the very laws that they are charged with monitoring and enforcing, it necessarily impairs NOPD's ability to efficiently execute its purpose. Former NOPD Superintendent Ronal Surpas testified that NOPD had developed a discipline matrix based upon different types and degrees of rules infractions. After NOPD determined that Appellant's misconduct was a "category 3" level of Rule violation. This finding was based upon the fact that Appellant's misconduct infringed upon the rights of another. (Tr. v. 2 at 35-36.) Based upon the record before the undersigned Commissioners, it is clear that Appellant's violation of Rule 2 (related to DWI) and Rule 3 (drinking to the extent that Appellant was severely impaired) adversely impacted the efficiency of NOPD.

C. Appellant's Termination was Commensurate with her Offense

Since NOPD has established that Appellant engaged in misconduct and that her misconduct compromised the public service provided by the Appointing Authority, the Commission now turns to whether or not termination is the appropriate level of discipline for such misconduct. In performing its analysis, the Commission must determine if the Appellant's termination 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 976, 978 (citing *Staehle v. Dept. of Police,* 98–0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

After considering the testimony provided by witnesses and documents submitted by the Parties, the undersigned Commissioners find that Appellant's misconduct was extremely serious and must be deterred through discipline. Bearing this in mind, there is no evidence that suggests that termination is too severe a penalty for Appellant's misconduct. Therefore, we find that termination is the appropriate level of discipline.

V. CONCLUSION

Upon considering the testimony and evidence submitted in connection with the instant appeal, the Commission finds that there was sufficient cause to terminate Appellant. Therefore, her appeal is DENIED.

Judgment rendered this 6th day of May, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON — DATE May 6, 2016

RONALD P. McCLAIN, VICE-CHAIRMAN — DATE May 5, 2016

JOSEPH S. CLARK, COMMISSIONER — DATE May 4, 2016

Tania Tetlow
TANIA TETLOW, COMMISSIONER

4/29/16
DATE

Cordelia D. Tullous
CORDELIA D. TULLOUS, COMMISSIONER

May 5, 2016
DATE