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
TANIA TETLOW
STEPHEN CAPUTO
CLIFTON MOORE, JR.

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Tuesday, October 17, 2017

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **James Cunningham VS.**
Department of Police
Docket Number: 8515

Dear Mr. Hessler:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 10/17/2017 - 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
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Brendan M. Greene
James Cunningham

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

JAMES CUNNINGHAM vs. DEPARTMENT OF POLICE	DOCKET No.: 8515

I. INTRODUCTION

Appellant, James Cunningham, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1. The Appointing Authority, the Police Department for City of New Orleans, (hereinafter "NOPD") does not allege that the instant appeal is procedurally deficient. Appellant challenged the sufficiency of NOPD's investigation into Appellant's alleged misconduct and asserted that NOPD did not adhere to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission's analysis will first address Appellant's procedural claims. If the Commission determines that NOPD's investigation was procedurally sound, we will then consider whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

On Thursday, June 29, 2017, a hearing examiner appointed by the Commission presided over an appeal hearing. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner's report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD terminated Appellant for alleged violations of the following NOPD Rules:

- Rule 2: Moral Conduct; Paragraph 1, Adherence to Law to wit: Violation of R.S. 14-35, Relative to Simple Battery;
- Rule 2: Moral Conduct; Paragraph 1, Adherence to Law to wit: Violation of R.S. 14-62.8, Relative to Home Invasion;
- Rule 3: Professional Conduct, Paragraph 9, Use of Alcohol/Off Duty.

(H.E. Exh. 1).

NOPD alleged that Appellant violated the above-cited rules on January 13, 2015 when he consumed alcoholic beverages, forced entry into his girlfriend's apartment and engaged her in a physical altercation. *Id.*

B. NOPD's Investigation

Appellant claims that NOPD's investigation was procedurally deficient because investigators did not undertake an administrative investigation into his misconduct. Furthermore, Appellant avers that he did not have a meaningful opportunity to respond to the allegations against him.

Louisiana Revised Statute 40:2531 – known colloquially as the "Police Officer's Bill of Rights" – establishes minimum standards for the interrogation of law enforcement personnel and limits the amount of time an appointing authority has to complete an investigation into a law enforcement officer's misconduct. La. R.S. § 40:2531. Pursuant to the Police Officer's Bill of Rights, NOPD would normally have had sixty-days to complete an administrative investigation into Appellant's misconduct. *Id.* However, the corresponding criminal investigation effectively stopped the running of the sixty-day deadline. Only upon completion of the criminal investigation

would the sixty-day countdown continue. *Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16, 11), 198 So.3d 250, 256, *writ denied,* 2016-1691 (La. 11/29/16), 210 So.3d 804. Typically, a final disposition of the criminal charges against an Officer signal the end of the criminal investigation. *E.g.*, *Wilcox, supra* at 256-57; *Michel v. Dep't of Police*, 2016-0623 (La.App. 4 Cir. 2/15/17, 5), 212 So.3d 627, 630 (timeline began when NOPD received notice that officer under investigation had entered a plea of nollo contendre); *Kendrick v. Dep't of Police*, 2016-0037 (La.App. 4 Cir. 6/1/16, 21), 193 So.3d 1277, 1289, *writ denied,* 2016-1435 (La. 11/15/16), 209 So.3d 779 (timeline began when NOPD received notice from District Attorney that his office would not be pursuing criminal charges against officer under investigation).

In the matter now before the Commission, the criminal investigation against Appellant is apparently still ongoing since neither Party introduced evidence to suggest otherwise. Further, NOPD acknowledged, through Sergeant Arlen Barnes, that it never initiated an administrative investigation into Appellant's misconduct. (Tr. at 59:18-25). Sgt. Barnes stated that his investigation was criminal rather than administrative in nature. In fact, once Sgt. Barnes submitted his report to the Orleans Parish District Attorney's Office on January 23, 2015, he took no other investigative steps related to Appellant's alleged rule violations. *Id.* at 75:22-76:1, 78:9-17.

On March 2, 2016, Deputy Superintendent Rannie Mushatt directed Appellant to appear at a disciplinary hearing where he would be "afforded an opportunity to present any mitigating circumstance, justification or explanation" for the rule violations Appellant allegedly perpetrated. (NOPD Exh. 6). On advice of counsel, Appellant declined to attend the disciplinary hearing as the criminal charges against him were still pending. (Tr. at 260:23-261:12). NOPD argued that it had all of the information it needed through the criminal investigation to conclude that Officer Cunningham had violated NOPD Rules. (NOPD Exh. 5).

The Louisiana Supreme Court has recognized that an administrative investigation begins when a law enforcement entity informs an officer that his statement is "required." *O'Hern v. Dep't of Police*, 2013-1416 (La. 11/8/13, 4), 131 So.3d 29, 31. However, NOPD never asked Appellant for a statement as part of its administrative investigation. Instead, it concluded its investigation on December 14, 2015 when it notified Appellant of a pre-disciplinary hearing. (NOPD Exh. 5).[1] Thus, the question becomes whether or not NOPD was required to initiate an administrative investigation prior to substantiating the allegations against Appellant.

Based upon the Commission's understanding of Louisiana Revised Statute 40:2531, there is no requirement that NOPD collect an administrative statement from an Officer accused of misconduct. During the course of the investigation into Appellant's misconduct, NOPD investigators believed that it was not necessary to interview Appellant. From Sgt. Barnes's perspective, there was never an administrative aspect to the investigation into Officer Cunningham's actions. However, NOPD notified Officer Cunningham that its investigation into his misconduct ended on December 9, 2015 and directed him to attend a disciplinary hearing related to the sustained allegations against him. The Commission does not find that NOPD's reliance entirely on the criminal investigation into Appellant's actions violated Louisiana Revised Statute 40:2531. The remaining issue is whether or not Appellant had a meaningful opportunity to respond to the allegations against him.

[1] An investigation into officer misconduct, "shall be considered complete upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint." La. R.S. § 40:2531.

Pursuant to Civil Service Rule IX, § 1.2[2] and the United States Supreme Court's holding in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985), the Louisiana Court of Appeal for the Fourth Circuit has concluded that "an employee is entitled to advance notice of the charges and evidence against him prior to his pre-termination hearing." *Williams v. Sewerage & Water Bd.*, 2004-0025 (La.App. 4 Cir. 5/19/04, 7–8), 876 So.2d 117, 122; *see also Regis v. Dep't of Police*, 2016-0821 (La.App. 4 Cir. 5/24/17, 18)(appointing authority failed to provide terminated employee with adequate notice of allegations against her). The reason for the advance notice is to afford the employee with an opportunity to present a defense against the charges against him. *Regis v. Dep't of Police*, 2016-0821 (La.App. 4 Cir. 5/24/17, 17), 221 So.3d 165, 175.

NOPD was bound by the United States Constitution, Civil Service Rules and Louisiana case law to provide Officer Cunningham with advance notice of the charges and evidence against him and an opportunity to respond to those charges. NOPD satisfied this requirement through the pre-disciplinary hearing notice issued to Officer Cunningham on March 6, 2016. Officer Cunningham declined to attend the hearing upon advice of counsel, which was his right to do. However, his refusal does not change the fact that NOPD provided him an opportunity to respond to the allegations.

While the Commission was unable to find Louisiana case law directly on point, cases from the Third and Eleventh United States Circuit Courts of Appeals are informative. *Gniotek v. City of Philadelphia*, 808 F.2d 241, 245 (3d Cir.1986); *Harrison v. Wille*, 132 F.3d 679, 684 (11th Cir.1998), *as amended* (Apr. 1, 1998). In each case, a former public law enforcement employee

[2] "In 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."

facing discipline invoked his Fifth Amendment right against self-incrimination. And, in both cases the employee was terminated. In arguing that the pre-termination hearing was procedurally deficient, the employees claimed that, because their responses in the pre-termination hearings could have been used against them during a criminal trial, they were not given a meaningful opportunity to respond to the allegations. The courts rejected this argument and found that the employees' choice to exercise Fifth Amendment privileges did not change the fact that the employer gave the employees' an opportunity to respond. *Id.*

Based upon the facts and prevailing case law, the undersigned Commissioners find that Appellant had a meaningful opportunity to respond to the allegations against him. The fact that he chose to invoke his Fifth Amendment right against self-incrimination does not change the fact that NOPD offered Appellant to present a response to the allegations against him through a pre-disciplinary hearing.

B. January 13, 2015

In February or March 2014, Appellant began dating a woman the Commission will refer to throughout this decision as Ms. B. (Tr. at 199:16-200:5). Appellant and Ms. B's relationship progressed over the following months and they made the decision to move in together. *Id.* at 200:6-24. As a result, Appellant began making arrangements to move out of the apartment he rented on Esplanade Avenue – near the intersection of Esplanade and North Prieur Street. Sometime prior to January 13, 2015, he notified his landlord that he would be moving out. (App. Exh. 3). Appellant also began moving some of his personal belongings to the apartment Ms. B rented on Patterson Drive on the West Bank. For her part, Ms. B had given Appellant keys to the Patterson Drive apartment sometime prior to January 13, 2015.

On the evening of Monday, January 12, 2015, Appellant was hosting a female friend who was visiting from out of town. (Tr. at 205:10-20). Appellant, his friend and Ms. B went out to watch live music, eat and have drinks. *Id.* As the evening wore on, the three individuals decided to go to Buffa's Restaurant and Bar located on Esplanade Avenue on the edge of the French Quarter. *Id.* at 205:18-20. While there, Appellant and Ms. B had a verbal dispute regarding one of Ms. B's ex-boyfriends. *Id.* at 206:4-10. Ms. B became upset and left Buffa's. After a few moments, Appellant exited Buffa's and tried to find Ms. B, but was unsuccessful.

Instead of returning to the apartment he rented a few blocks away, Appellant decided to go to the Patterson Drive apartment to look for Ms. B. *Id.* at 206:10-19. Appellant was motivated to go to Patterson Drive in large part because his female visitor was staying at the Esplanade Ave. apartment and Appellant was concerned that Ms. B would not appreciate it if he spent the night in the same apartment as his female friend. *Id.* at 206:20-207:1, 207:12-208:1.

When he arrived at the Patterson Drive apartment, Appellant used the keys Ms. B had given him to unlock the door and the deadbolt lock. Yet, when he tried to open the door, Appellant discovered Ms. B had engaged two security latches that prevented the door from opening. *Id.* at 209:18-210:23. The latches were similar to those found in hotels and allowed for a narrow opening between the door itself and the frame. Appellant knew that Ms. B had installed the latches because she was concerned about a prior incident during which someone had broken into her house. *Id.* at 208:22-25. Through the opening, Appellant called out for Ms. B, but Ms. B did not respond. Appellant then decided to force his way into the Patterson Drive apartment because he wanted to sleep on the couch instead of outside. *Id.* at 211:21-212:3. To gain entrance to the apartment, Appellant used his hip and legs to break through the security latches. During his testimony, Appellant acknowledged that it was poor judgment to force his way into the Patterson Drive

apartment, but Appellant had been drinking and believed he could repair the damage in the morning. *Id.* at 211:15-17, 212:4-13. Pictures of the door introduced into evidence show extensive damage to the door frame where the security latches had been fastened. (NOPD Exh. 2).

Appellant's version of what happened after he gained entry to the Patterson Drive apartment differs from Ms. B's. During the 911 call between Ms. B and the 911 Operator, Ms. B claimed that Appellant broke into her apartment and began attacking her. *Id.* Ms. B also told the 911 operator that it was "hard to say" where Appellant had struck her but claimed that she was "very well equipped to handle" herself. (NOPD Exh. 3). Appellant claimed that, once he was in the Patterson Drive apartment, Ms. B attacked him by scratching and hitting him. To support his version of events, Appellant introduced two photographs taken by NOPD crime scene technicians that show Appellant with severe lacerations to his face and mouth. (App. Exhs. 4, 5). There is no dispute that Ms. B is an experienced boxer with numerous accomplishments and accolades in the sport. (Tr. at 218:18-23).

As a result of Ms. B's call to 911, several NOPD Officers arrived on scene at approximately 4:30 a.m. (NOPD Exh. 1). Detective Arlen Barnes was among the NOPD Personnel who arrived on scene after Ms. B's 911 call. At the time, Det. Barnes was responsible for investigating NOPD Officers accused of criminal conduct. (Tr. at 20:23-21:6). Upon arriving at the scene, Det. Barnes observed damage to the door frame of Ms. B's Patterson Drive apartment consistent with someone forcing entrance into the apartment. *Id.* at 32:8-13.

When Det. Barnes interviewed Ms. B, he observed that she had "some type of injury to her hand." *Id.* at 32:8-13. Det. Barnes also observed that Appellant had sustained scratches to his face. The injuries were consistent with Det. Barnes's assessment that the two had been involved in a

physical altercation. Det. Barnes did not see any signs that Ms. B had been the victim of a battery and crime scene technicians did not take any photographs of Ms. B. *Id.* at 100:3-14.

Finally, Appellant admits that during the course of the evening he and Ms. B were drinking. One of the NOPD Sergeants who arrived on the scene at 4:30 a.m. noted that Appellant smelled strongly of alcohol. *Id.* at 134:7-13. And, Det. Barnes believed that Ms. B was intoxicated during his interview with her. *Id.* at 96:4-10. Appellant submitted to a breathalyzer examination to determine his blood alcohol content ("BAC"). The time of the test was 7:22 a.m. on January 13, 2015, almost three hours after NOPD Officers arrived on the scene and placed Appellant in custody. The breathalyzer test resulted in a determination that Officer Cunningham's BAC was 0.125%. (NOPD Exh. 4). This is well in excess of the maximum allowable level of BAC (0.08%) under Louisiana's driving while intoxicated statute. La. R.S. § 14:98(A)(1).

III. LEGAL STANDARD

A. General Standard

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline without sufficient cause, he/she may bring an appeal before this Commission. *Id.* It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, an Appointing Authority has the burden of proving, by a preponderance of the evidence; 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has

met its initial burden and had sufficient cause to issue discipline, it must then determine if that discipline "was commensurate with the infraction." *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

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 Louisiana Revised Statutes 14:35 and 14:68.2 change the standard from "preponderance" to "beyond a reasonable doubt"? We find that they do 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.[3] 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:

[3] 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.

> [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 yet-to-be-adjudicated criminal charge does not change the outcome. As established by above-cited precedent, an acquittal would not have relieved Appellant from the underlying allegations of misconduct. NOPD's burden in establishing a violation of the law in an administrative context remains "by a preponderance of the evidence." Alternatively, a conviction would have served to establish the underlying misconduct, but the Commission would still have had to analyze the second two prongs of the three-pronged test.

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 14:35 relative to Simple Battery;

2) Violation of NOPD Rule 2: Moral Conduct ¶ 1 – Adherence to Law to wit: Louisiana Revised Statute 14:62.8 relative to Home Invasion; and

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

A. Occurrence of the Complained of Activities

i. Violation of La. R.S. 14:35 (Simple Battery)

Louisiana Law defines "simple battery" as a "battery committed without the consent of the victim." La. R.S. § 14:35. "Battery" is "the intentional use of force or violence upon the person of another." La. R.S. § 14:35. NOPD alleged that Appellant committed a battery upon Ms. B when he attacked her during the early morning hours of January 13, 2015. However, the Parties offer very different accounts of what happened after Appellant forced his way into the Patterson Drive apartment. Ms. B and NOPD alleged that Appellant "attacked" Ms. B, but the details of that "attack" are not clear. Appellant denies that he raised his hands against Ms. B and claims he consciously took a beating from Ms. B.

As a preliminary matter, both Appellant and Ms. B were drinking during the course of the evening. Three hours after the incident itself, Appellant's BAC was still well over the limit established by law for DWI. And, based upon Det. Barnes's assessment, Ms. B was similarly impaired.

During her 911 call, Ms. B sounds calm but her speech pattern is sluggish and irregular as she tells the 911 operator that she had an "incident" with her boyfriend. (NOPD Exh. 3). Ms. B went on to allege that Appellant "attacked" her and that she defended herself. Ms. B did not initially state that Appellant hit her, and it was only after the 911 operator asked Ms. B where she was hit, that Ms. B stated that she found it "hard to say where" Appellant had hit her. She also expressed concern that she would be arrested for battery in connection with an earlier confrontation between herself and Appellant "because there were too many marks on him." (NOPD Exh. 3).

Ms. B added that she was "well equipped to defend [her]self." *Id.* Finally, Ms. B declined medical attention when the 911 Operator offered to call an ambulance. *Id.*

None of the NOPD Officers who reported to the scene noticed any injuries on Ms. B's person save for the cut on her hand. In contrast, Appellant's injuries were obvious and gruesome. Photos taken at the scene show several bloody scratches on Appellant's face and lips. (App. Exhs. 4, 5). Appellant denied striking Ms. B and claims that he kept his hands down by his side during the entire interaction with Ms. B. (Tr. at 215:9-18). Given the conflicting testimony, evidence and compromised state of both Appellant and Ms. B, the Commission cannot determine if Appellant actually perpetrated a battery upon Ms. B. The Commission finds it more likely that Ms. B reasonably perceived that she was under a threat of imminent harm when Appellant broke through the security latches and proceeded to defend herself.

ii. Violation of La. R.S. § 14:62.8 (Home Invasion)

Under Louisiana Law, the crime of "home invasion" is:

> [T]he unauthorized entering of any inhabited dwelling, or other structure belonging to another and used in whole or in part as a home or place of abode by a person, where a person is present, with the intent to use force or violence upon the person of another or to vandalize, deface, or damage the property of another.

La. R.S. § 14:62.8

Thus, there are four elements NOPD must establish in order to establish that Appellant engaged in a home invasion under Louisiana Law:

- Appellant entered the Patterson Drive apartment;
- The apartment was an inhabited dwelling or a structure used in whole or in part as a home or place of abode;
- Appellant was not authorized to enter the apartment;
- The apartment did not belong to Appellant; and finally

- Appellant acted with specific intent to use force or violence upon the person of another or to vandalize, deface, or damage the property of another.

See State v. Ellis, 2012-0540 (La.App. 4 Cir. 1/16/13, 6), 109 So.3d 944, 948.

The Commission finds that NOPD established the first four elements of the crime of Home Invasion.[4] However, NOPD did not prove by a preponderance of the evidence that Appellant acted with the specific intent to harm Ms. B or to damage her property.

Appellant's motivation for breaking through the security latches was likely the strong desire to sleep indoors. In his inebriated condition, Appellant believed himself to be in a Catch-22. If he slept at his Esplanade Ave. apartment – where his female visitor was staying – his relationship with Ms. B would suffer. If he did not find a way into the Patterson Drive apartment, he would have to sleep outside. Appellant's choice was a very poor one fueled by a long night of drinking. However, we agree with the hearing examiner that NOPD did not establish that Appellant had the specific intent to do harm to Ms. B or damage her belongings.

iii. Violation of NOPD Rule 3, ¶ 9 (Off-Duty Use of Alcohol)

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).

[4] Appellant and Ms. B may have been in the process of moving in together, but by January 13, 2015, they had not yet completed that process. Appellant still had about two weeks left on a month-to-month lease on his Esplanade apartment and had moved only some clothes, toiletries and documents to Ms. B's apartment. Prior to January 13th, Ms. B had given Appellant keys to her apartment and authorization to enter her apartment. However, by engaging the security latches, Ms. B had revoked Appellant's authorization to enter the Patterson Drive apartment. Appellant likely would have appreciated and respected this revocation had he not been impaired by alcohol.

Appellant was still well above the legal limit of intoxication more than three hours after his last drink. Hence, we find that Appellant consumed intoxicating beverages to the extent he was impaired.

NOPD's policies do not define "obnoxious or offensive" behavior, but the Commission finds that, whatever the definition, drunkenly kicking through a door is both obnoxious and offensive. To make matters worse, Appellant knew that Ms. B had been the victim of a break-in and decided to break through the security latches anyway. Ms. B cannot be blamed if she perceived this as a threat and defended herself. Appellant had repeatedly called for Ms. B to let him in, but she did not reply. Instead of recognizing the futility of his situation and calling it a night, Appellant decided to kick in the door and enter the Patterson Drive apartment. Appellant himself acknowledged that his actions represented poor judgment. Appellant's actions were arguably criminal but undoubtedly foolish.

As a result of Appellant's actions, NOPD dispatched numerous personnel to the Patterson Drive apartment. Upon arriving at the scene, Appellant was disheveled, beaten and intoxicated. The Commission finds that Appellant's actions brought discredit to himself. Therefore, we find that NOPD has established that Appellant violated NOPD Rule 3, ¶ 9.

B. Impact on NOPD's Efficient Operations

In an ideal world, every resident would avoid consuming intoxicating beverages to the extent that it resulted in offensive or obnoxious behavior that brings discredit upon the resident. However, we do not live in an ideal world and even responsible adults have moments of weakness when they consume too much alcohol and engage in offensive and obnoxious behavior. But NOPD rightfully holds its employees to a higher standard than the average resident. In order for NOPD Officers to function as agents for effective community policing, they must have both the trust and

respect of the residents of New Orleans. When an Officer consumes alcohol to the extent that he or she becomes extremely intoxicated and subsequently engages in inappropriate or violent behavior, it compromises not only that Officer's ability to perform his job, but the ability of his fellow Officers. Based upon the foregoing, we find that Appellant's misconduct had an adverse impact on NOPD's efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if 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).

NOPD argued that each one of Appellant's rule violations warranted termination. However, NOPD only carried its burden with respect to Appellant's off-duty intoxication. The Commission has already found that NOPD has an interest in establishing a certain standard of conduct for its employees, even those who are not on duty. Given the wide range of poor outcomes possible when one drinks to excess, NOPD's rules against off-duty intoxication are reasonable.

Here, not only did Appellant drink to the extent that he became inebriated, he subsequently caused extensive damage to the door of his girlfriend's apartment and became involved in a physical altercation for which he bears a substantial amount of responsibility. This is precisely the type of behavior NOPD sought to deter through its policy.

Appellant's actions on January 13, 2015 clearly violated a reasonable standard of conduct established by NOPD. While other disciplinary options were available to NOPD, including a suspension and counseling, we cannot say that termination was arbitrary and/or capricious.

V. CONCLUSION

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

Judgment rendered this 17th day of October, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

Ronald P. McClain
RONALD P. McCLAIN, VICE-CHAIRMAN — 10-12-2017 DATE

STEPHEN CAPUTO, COMMISSIONER — 10-11-2017 DATE

MICHELLE D. CRAIG, CHAIRPERSON — 10-16-2017 DATE