



MITCHELL J. LANDRIEU
MAYOR

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

CITY CIVIL SERVICE COMMISSION

REV. KEVIN W. WILDES, S.J.,
CHAIRMAN
AMY L. GLOVINSKY
JOSEPH S. CLARK
COLEMAN D. RIDLEY, JR.

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Friday, November 01, 2013

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

Re: **Robert Hurst VS.**
Department of Police
Docket Number: 7960

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 - 11/1/2013 - 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,

A handwritten signature in cursive script, reading "Germaine Bartholomew".

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Gregory Brumfield
Jay Ginsberg

ROBERT HURST

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

DOCKET NO. 7960

I. INTRODUCTION

The Department of Police ("Appointing Authority") employs Robert Hurst ("Appellant") as a police officer with permanent status. The Appointing Authority suspended the Appellant for eighteen days. The Public Integrity Bureau Investigator Sgt. Lawrence Jones reported the violations detailed below, which were considered by Deputy Superintendent Darryl Albert. After conducting a pre-disciplinary hearing, Deputy Superintendent Albert determined that the Appellant violated internal rules regarding Instructions from an Authoritative Source, Chapter 41.10 Uniform Specifications (Three Days), and Professionalism (Five Days). The factual bases for these violations are contained in the second and third paragraphs of the disciplinary letter which provide as follows:

This investigation determined that on February 25, 2011, at approximately 123:30 a.m., you were photographed inside of "Fat Harry's Bar", located at 4330 St. Charles Avenue partially attired in your New Orleans Police Department uniform pants holding a plastic cup, which you admitted in your administrative statement contained an alcoholic beverage.

Additionally, you allowed a female named, "Kim" to wear your N.O.P.D. police shirt after you removed the badge, name plate and collar brass. Nevertheless, the police shirt displayed the New Orleans Police Department patch on both sleeves. You also travelled to two other bars with the female and she drank alcoholic beverages while attired in the N.O.P.D. shirt that you allowed her to wear. As such, you violated Rule 3: Professional Conduct, paragraph 1 – Professionalism and Rule 4: Performance of Duty, paragraph 2 – Instructions from an Authoritative Source to wit: Chapter 41.10 Uniform Specifications, paragraph 1.

As also reflected in the disciplinary letter, and made part of Joint Stipulations submitted by the parties, the Appointing Authority increased the suspension by ten days finding an additional violation of internal rules regarding Use of Alcohol off Duty. As reflected in fourth paragraph of the Joint Stipulation:

Superintendent Serpas is the Appointing Authority for the New Orleans Police Department. On September 28, 2011, Superintendent Serpas reviewed the Disciplinary Hearing Disposition form completed following Robert Hurst's disciplinary hearing on the matter bearing PIB Control # 2010-204-R by Deputy Superintendent Darryl Albert on September 6, 2011. Upon review, Superintendent Serpas concurred with the recommendation of Deputy Superintendent Albert. In addition to the disciplinary actions recommended by Deputy Superintendent Albert, Superintendent Serpas also sustained a violation of Rule III, Professional Conduct, Paragraph 10, Use of Alcohol Off-Duty and instituted an additional ten (10) day suspension for that violation...

The factual base for the additional violation is contained on the second page of the disciplinary letter as follows:

You admitted that you visited a fraternity party in the 700 block of Broadway on Friday, February 25, 2011, and that while attired in your N.O.P.D. uniform, including badge, name, assignment insignia and firearm you consumed alcohol and "chugged a beer" in a challenge with a fraternity pledge in the presence of other fraternity members. This separate and additional activity took place before you met the female civilian, removed your shirt before visiting the bars, the wearing of your uniform pants and the female wearing your uniform shirt inside the bar.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on December 13, 2012 and March 28, 2013. Testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil

Service Commission have reviewed a copy of the transcript and all documentary evidence.

The Appellant admits the factual allegations that form the basis for the disciplinary actions. However, he raises two legal challenges. According to the Appellant:

1. More than 120 days elapsed between the initiation of the internal, administrative investigation and the issuance of the Disciplinary Hearing Notification.
2. The Appointing Authority sustained a violation of Rule 3, Professional Conduct, Paragraph 10, Use of Alcohol Off Duty and implemented an additional 10 day suspension in violation of Civil Service Rule IX, Section 1.2.

II. LEGAL ANALYSIS

a. La. R.S. 40:2531

LSA 40:2531(b)(7) requires that all administrative investigations of law enforcement officers employed by municipal police departments be completed within 60 days. The statute further allows for an extension of that time limit to include an additional 60 days, for a total of 120 days. The Appellant contends that the "Notice to Accused Law Enforcement Officer Under Investigation of a Pre-Disciplinary Hearing or a Determination of an Unfounded or Unsustained Complaint" received by the Appellant on June 27, 2011 does not meet the requirements of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) because it does not provide the Appellant with sufficient notice and an opportunity to respond to all of the charges that may form the basis for disciplinary action. The Appellant also relies upon the recent Fourth Circuit appellate decision, *Mulvey v. Dept. of Police*, 108 So. 3d 891 (La.App. 4 Cir. 1/30/13) where the

court found that "...a notice that does not timely alert an officer as to whether a disciplinary hearing is definitely required is deficient, dilatory and fails to sufficiently alert an officer of the status of his or her investigation." *Id. at 897*

First, Appellant's reliance on *Loudermill* is misplaced. *Loudermill* applies to terminations. The Appellant is appealing a suspension where the notice requirements do not apply. Second, *Mulvey* is distinguishable. In *Mulvey*, the notice received by the Appellant provided no date for a pre-disciplinary hearing. In the instant case, the June 27, 2013 notice provided an August 17, 2011 disciplinary hearing date. While the record suggests that the hearing did not occur on the original date stated, it satisfied the concerns expressed in *Mulvey*. It alerted the Appellant that a disciplinary hearing was required thus signaling the end of the disciplinary investigation.

b. Civil Service Rule IX, Sec. 1.2.

Civil Service Rule IX, Sec. 1.2 states "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." The Appellant contends that the Appointing Authority's decision to add an additional ten day suspension after the disciplinary hearing occurred violates our rules. Relying on *Riggins v. Dep't of Sanitation*, 617 So.2d 112 (La.App. 4 Cir. 1993), the Appellant contends that Rule IX, Sec. 1.2 applies to lesser forms of discipline other than termination. However, *Riggins* concerned the appeal of a termination. *Riggins* did not address the issue raised by the Appellant, and offers no support for the Appellant's argument. In its analysis, the court

merely noted that the Louisiana Supreme Court in *Bell v. Department of Health and Human Resources*, 483 So2d 945 (La. 1986) held that “where an employee is demoted [ie. a disciplinary action less severe than dismissal] [La. Const.] Art. X, Section 8(a), as well as the Civil Service Rules, require that there be pre-discipline notice and writing setting forth the cause for the action, and a hearing.” *Id. at 115*. Further, the Appellant’s reliance on *Montgomery v. Dep’t of Streets*, 593 So.2d 1352 (La.App. 4 Cir. 1992), is misplaced. The portion of the decision cited by the Appellant regarding the purpose of notice concerns the written notice requirements for the post-hearing disciplinary letter, not the pre-disciplinary notice of hearing.

III.LEGAL PRECEPTS

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide independently, based on the facts presented, whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters v. Department of Police of New Orleans, supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which

the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

IV. FINDINGS

The Appointing Authority has established by a preponderance of evidence that it disciplined the Appellant for cause. The Appellant admitted all violations contained in the disciplinary letter. The Appointing Authority complied with La. R.S. 40:2531(b)(7). The notice of pre-disciplinary hearing form received by the Appellant sufficiently alerted the Appellant that a disciplinary hearing would occur and that the investigation phase was

R. Hurst
#7960

concluded. Finally, the requirements of Civil Service Rule IX, Sec. 1.2 are not applicable to suspensions.

Considering the foregoing, the Appellant's appeal is DENIED.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 1st DAY OF NOVEMBER,
2013.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION


AMY L. GLOVINSKY, COMMISSIONER

CONCUR:


JOSEPH S. CLARK, COMMISSIONER


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