



CITY OF NEW ORLEANS

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Tuesday, February 26, 2019

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

Re: **Robert Blanchard Jr. VS.
Department of Police
Docket Number: 8799**

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 - 2/26/2019 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, 12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Shaun Ferguson
Mary Katherine Taylor
Brendan M. Greene
Robert Blanchard

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

ROBERT BLANCHARD, Appellant, vs. DEPARTMENT OF POLICE, Appointing Authority	DOCKET No.: 8799
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I. INTRODUCTION

Appellant, Robert Blanchard, 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, however, does allege that NOPD’s investigation violated the standards required by our Rules and Louisiana Revised Statute § 40:2531 (hereinafter “the Statute”). Therefore, the Commission shall first address Appellant’s procedural claims before assessing the merits of his appeal. At all times relevant to the instant appeal, Appellant served as an Sergeant for NOPD and had permanent status as a classified employee.

On September 18, 2018, a hearing examiner appointed by the Commission presided over an appeal hearing. The undersigned Commissioners have reviewed the Parties’ post-hearing briefs, transcript, and exhibits from this hearing as well as the hearing examiner’s report. Based upon our review, we hereby GRANT the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD suspended Appellant for one day based upon allegations stemming from an incident that occurred on February 10, 2016. (H.E. Exh. 1).¹ According to NOPD, Appellant engaged in misconduct on February 10th when, while operating an unmarked NOPD vehicle in St. Tammany Parish, Appellant activated his emergency lights and siren. NOPD further alleged that Appellant's actions were in furtherance of a feigned traffic stop. Put differently, NOPD alleged that Appellant activated his vehicles emergency lights and siren to scare another motorist who Appellant perceived to be driving recklessly. *Id.* The NOPD rule Appellant allegedly violated was Rule 3: Professional Conduct; Paragraph 1: Professionalism, which reads as follows:

Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or otherwise act in a manner which brings discredit to the employee or the New Orleans Police Department.

Id.

B. NOPD's Investigation

On the morning of February 10th, a civilian (hereinafter "the Complainant") contacted the St. Tammany Parish Sheriff's Office to complain about a police unit operating in a reckless manner. (NOPD Exh. 1). The Complainant provided the St. Tammany Parish Sheriff's Office with the license plate number of the vehicle in question, PYD414. *Id.* Based on this information, the Sheriff's Office was able to determine that the vehicle was registered to NOPD and relayed the complaint information to NOPD.

¹ Originally, the length of the suspension was three days. Prior to the instant appeal hearing, NOPD unilaterally agreed to reduce the suspension from three days to one. (Tr. at 7:12-8:15). For his part, Appellant stipulated that, if the Commission found that he engaged in the alleged misconduct and that such misconduct had an adverse impact on the efficient operations of NOPD, a one-day suspension would be commensurate with his offense. *Id.* at 9:22-10:24.

NOPD Lieutenant Kim Williams received notice of the issue and contacted the Complainant in order to collect a statement. A recording of the Complainant's statement to Lt. Williams is in evidence as "NOPD Exhibit 6." In the recorded statement, the Complainant alleged that, while he was traveling east on highway 190 in Lacombe, he approached a silver car traveling at fifty-five miles per hour (the posted speed limit) bearing the license plate number PYD414. When the Complainant passed the silver car, the operator activated the vehicle's emergency lights and siren and proceeded in very close proximity to the Complainant's vehicle. When the Complainant attempted to slow down, the operator of the vehicle allegedly "straddled" two lanes of traffic before eventually passing the Complainant. The Complainant claimed to have been upset by the incident and believed that the operator of the silver car had abused his authority as a law enforcement officer.

NOPD Intake Specialist David Briant processed the initial complaint and completed a form entitled "Initiation of a Formal Disciplinary Investigation" (formerly referred to a DI-1) on February 29, 2016. (NOPD Exh. 1). Through its Public Integrity Bureau ("PIB"), NOPD assigned the investigation to Sergeant James Clarkston. (NOPD Exh. 2). In accordance with the Statute and Civil Service Rules, NOPD requested and received a sixty-day extension to complete its investigation. That moved the deadline for completion from April 29, 2016 to June 28, 2016. On May 20, 2016, Sgt. Blanchard received notice that Sgt. James Clarkston had concluded his investigation and had recommended that NOPD find the allegations "not sustained." (NOPD Exh. 4). Paradoxically, the notice also indicated that there would be a disciplinary hearing regarding the charges Sgt. Clarkston had recommended as not sustained on June 19, 2016. *Id.*

On June 14, 2016, Sgt. Clarkston sent a memorandum to then-Superintendent of Police Michael Harrison summarizing the investigation. (App. Exh. 1). Sgt. Clarkston's supervisors,

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Commander Gwen Nolan and Lieutenant Richard Williams, disagreed with Sgt. Clarkston's recommendation of "not sustained" and Lt. Williams authored a "cover letter" on August 30, 2016 to Superintendent Harrison. (NOPD Exh. 5). In the cover letter, Lt. Williams wrote that the evidence collected during the course of the investigation warranted a finding of "sustained." *Id.*

On January 10 2017, NOPD issued Appellant a "Notice of Disciplinary Hearing." (NOPD Exh. 7). The notice advised Appellant that, 1) Lt. Williams had disagreed with Sgt. Clarkston's recommendation, and 2) Commander Shaun Ferguson would preside over Appellant's pre-disciplinary hearing on January 24, 2017 at 3:00 p.m. Following the January 24th disciplinary hearing, Cmdr. Ferguson recommended that NOPD sustain the allegations against Sgt. Blanchard and issue a three-day suspension. (NOPD Exh. 8). On February 2, 2017, Superintendent Harrison concurred with Cmdr. Ferguson's recommendations. For reasons not explained in the record, NOPD did not actually issue Sgt. Blanchard any discipline until May 2018.

III. APPELLANT'S PROCEDURAL CLAIMS

During the course of the appeal hearing, Appellant lodged two separate procedural challenges. First, Appellant alleged that NOPD violated the Statute by failing to "initiate" its investigation within the fourteen days provided by law. Alternatively, Appellant alleged that the notice he received was insufficient to signal the end of the investigation under the Statute. The Commission addresses each claim in turn.

A. Initiation of NOPD's Investigation

The Statute mandates that law enforcement agencies initiate investigations into alleged misconduct by officers within fourteen days of receiving a "formal, written complaint" against any police employee or law enforcement officer. La. Rev. Stat. 40:2531(B)(7). Appellant alleges that NOPD received a formal written complaint about Appellant's alleged misconduct on February 10,

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2016, but did not initiate its investigation until February 29, 2016. NOPD asserts that it initiated its investigation on February 11, 2016.

Two recent cases out of the Fourth Circuit address when NOPD initiates an investigation for the purposes of the Statute. *Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16, 10), 198 So.3d 250, 256, *writ denied*, 2016-1691 (La. 11/29/16), 210 So.3d 804; see also *Kendrick v. Dep't of Police*, 2016-0037 (La.App. 4 Cir. 6/1/16, 13), 193 So.3d 1277, 1285, *writ denied*, 2016-1435 (La. 11/15/16), 209 So.3d 779. In both *Wilcox* and *Kendrick*, the court held that NOPD initiated its investigation under La. R.S. 40:2531(B)(7) on the date it **completed** the DI-1 form.² Conversely, in *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 17), 165 So.3d 191, 202-03, the court found that NOPD's DI-1 form was the "formal written complaint" for the purposes of the Statute and went on to hold that NOPD initiates an investigation under the Statute when it **initiated** the DI-1 form. *Id.* Specifically, in *Abbot*, the court found that the investigation began on the date listed in the DI-1's "date complaint received" field. *Id.* This is at odds with both *Wilcox* and *Kendrick* wherein the court found that the investigation began on the date entered in the "date form completed" field.

In the matter now before the Commission, NOPD **completed** the DI-1 related to Sgt. Blanchard's alleged misconduct on February 29, 2016 but **initiated** the form on February 11, 2016. (NOPD Exh. 1). The Commission finds that the more recent cases of *Wilcox* and *Kendrick* provide a more accurate view of how NOPD processes allegations against law enforcement personnel. Frequently, an intake specialist with PIB has very limited information regarding allegations of officer misconduct and may not even yet have the identity of the officer involved. In order to provide any subsequent investigator with sufficient information to initiate a formal investigation,

² In *Kendrick*, parties stipulated that investigation started when DI-1 was issued.

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the intake specialist must collect enough evidence that would allow NOPD to identify the alleged perpetrator(s), as well as the law, policy or regulation at issue along with an initial list of witnesses. Once PIB has collected all of this information, it sends the form, along with any exhibits, to an investigator. Often, there is a delay between the completion of the form and a formal assignment.

In the matter now before the Commission, Sgt. Clarkston, who was responsible for the investigation, did not receive notice of his assignment to the investigation until March 7. That does not change the fact that NOPD, through PIB, initiated a formal investigation into Sgt. Blanchard's actions on February 29, 2016. For internal NOPD investigations, the Commission finds that when a PIB completes the form entitled "Initiation of a Formal Disciplinary Investigation" NOPD formally initiates its investigation. In practice, this often means that NOPD often initiates an investigation on the same day it receives the formal written complaint.³

When considering extension requests by PIB personnel, this hearing examiner relies on the "date form completed" entry in determining the timeliness of the request as well as the required completion date. To shift to the earlier "date complaint received" entry would drastically alter the time line of extension requests.

As a result of the above findings of fact and law, the Commission finds that NOPD initiated its investigation into Appellant's alleged misconduct within fourteen days of receiving a formal, written complaint in compliance with the Statute.

³ The Commission also observes that, when determining whether or not an investigator's request for an extension is timely for the purposes of the Statute, we consider the form completion data as the initiation date. To change the consideration to the date PIB received the complaint would dramatically alter the Commission's approach to extensions.

B. Sufficiency of NOPD's Notice to Appellant

For the purposes of the Statute, an investigation into a law enforcement officer's alleged misconduct ends when the officer receives notice "of a pre-disciplinary hearing **or** a determination of an unfounded or unsustained complaint." La. R.S. 40:2531. (emphasis added) In *Mulvey v. Dep't of Police*, 2012-1041 (La.App. 4 Cir. 1/30/13, 7), 108 So.3d 891, *writ denied*, 2013-0484 (La. 4/5/13), 110 So.3d 591, an officer challenged the sufficiency of a notice issued by NOPD that purportedly signaled the end of the investigation. *Id.* at 895. The notice did not contain a specific date for a pre-disciplinary hearing but instead notified the officer that he "would be notified if a disciplinary hearing is required." *Id.* at 895. It was not until after the sixty-day deadline that NOPD notified the officer of the date for the pre-disciplinary hearing. The Louisiana Court of Appeals for the Fourth Circuit found that NOPD's notice did not meet the statutory requirements because "NOPD had not yet determined whether the allegations against [the officer] merited holding a pre-disciplinary hearing." *Id.* at 896.

Following the *Mulvey* decision, NOPD revised the notice it provided to officers under investigation. In *Hurst v. Dep't of Police*, 2014-0119 (La.App. 4 Cir. 7/23/14, 7-8), 146 So.3d 857, NOPD issued a revised notice to an officer under investigation. Through the notice, NOPD informed the officer that; 1) the investigation was complete, 2) the investigator had recommended a "sustained" disposition, 3) a pre-disciplinary hearing would occur on August 17, 2011, and 4) the Superintendent of Police had final authority as appointing authority. *Id.* at 681. The court found that NOPD's revised notice "was sufficient to provide meaningful notice [to the officer] that the charges against him **had been sustained** and that a pre-disciplinary hearing was scheduled in compliance with [the Statute]." *Id.* at 861. (emphasis added)

Similarly, in *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 22), 165 So.3d 191 the court found that notice to accused officers satisfied the requirements of the Statute because it informed them that the complaint was sustained, that the investigation was complete, and provided a hearing date. *Id.* at 205. In addition, the court did not find a violation of the Statute where NOPD rescheduled the pre-disciplinary hearing from February 2012 to May 2012. *Id.* at 205.

In the instant matter, the notice to Appellant that purportedly signaled the end of the investigation contained Sgt. Clarkston's recommendations that NOPD "not sustain" the allegations. (NOPD Exh. 3). This is a substantial distinction from the notices that issued in the *Abbot* and *Hurst* where the investigator had recommended that NOPD sustain the allegations. The initial notice issued by Sgt. Clarkson has far more in common with the notice the court found to be deficient in *Mulvey*. Here, as in *Mulvey*, there was no indication that a disciplinary hearing would be necessary since NOPD does not conduct disciplinary hearings when the final recommendation is "not sustained." (Tr. at 52:18-23). The Commission appreciates that the notice clearly indicated that Sgt. Clarkston's recommendations of "not sustained" were not final, and supervisors within NOPD had the authority to overrule recommendations submitted by PIB investigators. But, it was not until January 9, 2017 that NOPD notified Appellant that Lt. Williams had disagreed with Sgt. Bankston and recommended that NOPD sustain one of the allegations of misconduct. (NOPD Exh. 7).

In this case, Lt. Williams reviewed the evidence collected by Sgt. Clarkston and came to a different conclusion. This is entirely appropriate and within Lt. Williams's purview as a supervisor, but Lt. Williams's review and cover letter make clear that the investigation into Sgt. Blanchard's alleged misconduct continued after May 20, 2016. NOPD cannot rely on the May 20,

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2016 correspondence as notice of a pre-disciplinary hearing **or** notice of an unsubstantiated allegation because it purported to do **both**. It was not until January 10, 2017 that NOPD issued Sgt. Blanchard notice that the allegations against him were substantiated and that a pre-disciplinary hearing would occur.

The purpose of the Statute was to provide officers under investigation with clear notice and some level of confidence regarding the next stage of the process. Appellant went from May 20, 2016 to January 10, 2017 believing that the investigation was concluded and that there would be no need for a pre-disciplinary hearing.

C. Effect of NOPD's Failure to Timely Complete Investigation

As noted above, NOPD requested and received an extension that would have allowed it to complete its investigation by June 28, 2016. For reasons not in the record, Sgt. Clarkston did not submit his recommendation and findings to his supervisors until June 14, 2016. Lt. Williams did not have an opportunity to review the matter and summarize his recommendation until August 20, 2016 and it was not until January 9, 2017, well after the 120-day deadline, that Appellant received final notice that he would be subject to a disciplinary hearing.⁴ Had Lt. Williams reviewed Sgt. Clarkston's recommended disposition prior to Sgt. Clarkston's notice to Appellant, it is possible that he would have been able to remedy any issue with timeliness.

The Statute provides that any, "discipline, demotion, dismissal, or adverse action of any sort whatsoever taken against a police employee or law enforcement officer" in violation of the due process protections contained in the statute "is an absolute nullity." La. Rev. Stat. 40:25:31(C).

⁴ Presumably, Lt. Williams did not take issue with Sgt. Clarkston's recommendation that NOPD not sustain the alleged "abuse of power" rule violation. For this allegation then, the May 20, 2016 notice signaled the end of NOPD's investigation as there are no other notices in the record pertaining to the second allegation.

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Since NOPD failed to complete its investigation into Appellant's conduct in a timely manner, the one-day suspension issued is an absolute nullity.

IV. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the appeal. NOPD shall rescind the one-day suspension referenced above and remit to Appellant all appropriate back pay and emoluments.

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Judgment rendered this 26th day of February 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

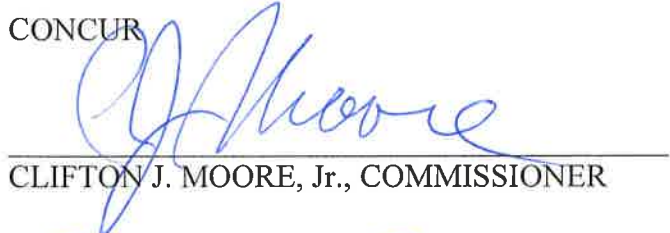


MICHELLE D. CRAIG, CHAIRPERSON

2/25/2019

DATE

CONCUR



CLIFTON J. MOORE, Jr., COMMISSIONER

2/25/19

DATE



BRITTNEY RICHARDSON, COMMISSIONER

2-25-19

DATE