



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
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JOSEPH S. CLARK
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STEPHEN CAPUTO

MITCHELL J. LANDRIEU
MAYOR

Monday, July 3, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Raymond C. Burkart, III
19407 Front Street
Covington, LA 70433

Re: **Byron D. Corley VS.
Department of Police
Docket Number: 8234**

Dear Mr. Burkart, III:

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 - 7/3/2017 - 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 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: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Byron D. Corley

file



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MAYOR

Monday, July 3, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Byron D. Corley VS.
Department of Police
Docket Number: 8391**

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 - 7/3/2017 - 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 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: Michael S. Harrison
Shawn Lindsay
Jim Mullaly
Byron D. Corley
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

BYRON CORLEY vs. DEPARTMENT OF POLICE	DOCKET Nos.: 8391 & 8234
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I. INTRODUCTION

Appellant, Byron Corley, 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. And, Appellant stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission’s analysis will be limited to 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 June 7, 2016, 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 alleges that, on September 22, 2013, Appellant drove his car while intoxicated. (H.E. Exh. 1). NOPD further alleged that Appellant operated his vehicle in a careless manner in violation of state law. *Id.* As a result of Appellant's alleged misconduct, NOPD suspended him for a total of forty-one days. In the suspension notice issued to Appellant, NOPD cited four (4) separate rule violations, each of which allegedly warranted a specific level of discipline. They are:

- 1) 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 = 30-day suspension;
- 2) Violation of NOPD Rule 2: Moral Conduct ¶ 1 – Adherence to Law to wit: Louisiana Revised Statute 32:58, Careless Operation = 3-day suspension;
- 3) Violation of NOPD Rule 3: Professional Conduct ¶ 1 – Professionalism = 3-day suspension; and
- 4) Violation of NOPD Rule 3: Professional Conduct ¶ 9 – Use of Alcohol/Drugs Off Duty = 5-day suspension.

H.E. Exh. 1.¹

B. Sunday, September 22, 2013

Appellant was off duty on Sunday, September 22, 2013. At approximately 10:30 a.m. on 22nd, he began preparing a seafood pasta dish to bring to a birthday celebration for one of his co-workers. (Tr. at 123:10-12). After completing his preparations, Appellant left his home and arrived at what was then known as the Night Court Lounge near the intersection of Tulane Avenue and South White Street, where the birthday party was already underway. *Id.* at 122:14-22, 140:11-15.

¹ NOPD also placed Appellant on emergency suspension following Appellant's arrest. Ultimately, Appellant served a five-day emergency suspension that was subsumed within the forty-one-day suspension issued by NOPD as final discipline. Appellant appealed both his emergency suspension and the final, forty-one-day suspension. The Commission consolidated the appeals as they arose out of a common nucleus of operative fact.

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Appellant believes that he arrived at the party between 1:00-1:30 p.m. and ordered “half a pint” of vodka with various mixers. (App. Exh. 2 at p. 12). Appellant claims that he “nursed” two or three drinks before halftime but drank only water thereafter. (Tr. at 124:5-11; App. Exh. 2 at p. 12).

Appellant left the Night Court Lounge at approximately 5:30 p.m. and stopped at the Popeye’s franchise located at 1301 Veterans Boulevard before proceeding North on the Causeway. (App. Exh. 3; Tr. at 124:12-15). The vehicle Appellant was operating at all times relevant to this incident was a 2008 silver Infiniti G-35 with a license plate number of ***-719. (App. Exh. 2 at p. 9).

As Appellant was driving North on the Causeway, the Causeway Police Dispatcher received a call from a motorist that a silver Infiniti – later identified as Appellant’s – was swerving in the Northbound lanes. (NOPD Exh. 2 at p. 8). Corporal Matt Haley, of the Causeway Police, was stationed at a crossover on the Causeway and was able to make visual contact with Appellant’s car and began following it. *Id.* As Cpl. Haley followed Appellant’s car, he observed it “swerving in the roadway” and crossing the centerline multiple times. *Id.* Based upon his observations, Cpl. Haley activated his emergency lights and pulled the Infiniti over. *Id.* Appellant admits that he was “inattentive” as he was proceeding North on the Causeway, but denied that his swerving was a result of impairment. Instead, Appellant attributed his vehicle’s erratic movement to his attempt to clean up a beverage he had spilled during the course of his trip. *Id.* at 125:22-126:4.

Shortly after Cpl. Haley pulled over the silver Infiniti, Officer Chris Painter, also of the Causeway Police, arrived at the scene. During his testimony, Officer Painter identified Appellant as the driver of the silver Infiniti Cpl. Haley had pulled over. *Id.* at 27:13-23. Upon arriving at the scene, Officer Painter immediately noticed a very strong odor of alcohol emanating from Appellant. *Id.* at 28:16-20. According to Officer Painter, Appellant was also slurring his speech

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and appeared slightly unsteady on his feet. As a result of his observations, Officer Painter suspected that Appellant was intoxicated and proceeded to conduct a “standardized field sobriety test[].” *Id.* at 28:21-29:5.

The first test Officer Painter administered to Appellant was the “horizontal gaze nystagmus” test (hereinafter the “HGN test”). *Id.* at 38:4-5. An individual administering an HGN test holds an object – typically a pen – in front of the test subject and moves the object from side to side. The purpose of the HGN test is to assess the impairment level of an individual suspected of being intoxicated. *Id.* at 54:17-55:8. Officer Painter testified that Appellant effectively failed to cooperate during the administration of the HGN test because Appellant kept moving his head which compromised the results of the test. *Id.* at 38:6-10. Based upon Officer Painter’s understanding of “state policy,” he believed Appellant’s “refusal” to cooperate with the HGN test constituted a failure of each of the field sobriety tests. *Id.* at 57:10-23. Appellant claims that Officer Painter was moving the pen too fast to effectively gauge any impairment and was therefore not administering the HGN test properly. *Id.* at 127:12-21.

As a result of Appellant’s constructive failure of the field sobriety tests, alleged strong odor of alcohol and slurred speech Officer Painter placed Appellant under arrest. *Id.* at 57:25-58:6. After placing Appellant under arrest, Officer Painter issued Appellant a notice of withdrawal of driving privileges. At that time, Officer Painter attempted to contact Appellant’s wife so that she could make arrangements to retrieve Appellant’s vehicle. (Tr. at 42:23-43:1). However, all attempts to contact Appellant’s wife were unsuccessful. *Id.* According to Appellant, he did not like the way Officer Painter had treated him during the arrest and therefore purposely provided Officer Painter with an incorrect phone number for his wife. *Id.* at 128:13-22.

After placing Appellant under arrest, Officer Painter transported Appellant to Causeway Police Station L where he offered Appellant an “Intoxilyzer” test. Appellant refused. Ultimately, Officer Painter was unable to determine the degree to which Appellant was impaired due to Appellant’s alleged failure to cooperate with the field sobriety test and refusal of the “Intoxilyzer” test. *Id.* at 29:24-30:4.²

Instead of pursuing criminal charges against Appellant, the St. Tammany Parish District Attorney’s Office invited Appellant to apply for the “DI Pre-Trial Intervention (Diversion) Program.” (App. Exh. 4). Appellant successfully completed the Diversion Program and the District Attorney’s Office dismissed all criminal charges. (App. Exh. 1).

C. NOPD’s Investigation

Appellant promptly reported his arrest to NOPD Sergeant Walter Powers, who in turn notified one of Appellant’s supervising officers. *Id.* at 68:2-10.³ NOPD subsequently initiated a disciplinary investigation.

Sergeant Arlen Barnes was responsible for conducting the formal disciplinary investigation into Appellant’s misconduct. *Id.* at 66:3-9. In conducting his investigation, Sgt. Barnes reviewed the following: 1) video and audio of the initial traffic stop performed by the Causeway Police, 2) the DWI paperwork prepared and submitted by the Causeway Police, and 3) the arrest warrant from the St. Tammany Parish Sheriff’s office. *Id.* at 66:15-24. When he reviewed the video of

² The Commission notes that Officer Painter testified that Appellant was “swaying” and believed that such swaying indicated that Appellant was impaired. (Tr. at 36:21-25). Appellant argued that he was having difficulty remaining stationary because he had recently had knee surgery and urgently had to urinate. The Commission finds that there is insufficient evidence to attribute Appellant’s swaying to his alleged level of impairment.

³ Appellant is a twenty-eight-year veteran of the NOPD, and, prior to the forty-one-day suspension at issue here, NOPD had never sustained an allegation of misconduct against him. *Id.* at. 121:21-122:11.

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Cpl. Haley following Appellant's vehicle, Sgt. Barnes testified that, in his opinion, Appellant caused a dangerous situation by swerving into other lanes of traffic. *Id.* at 77:16-80:25.

As part of his investigation, Sgt. Barnes also interviewed Appellant; the transcription of this interview is in evidence as "Appellant Exhibit 2." During the interview, Appellant claims that he ordered "a half a pint" of vodka with mixers and made two or three drinks out of the half pint over the course of two or three hours. (App. Exh. 2 at 12).⁴ Appellant claims that he did not consume any alcohol after approximately 3:00 p.m. on September 22, 2015. *Id.*

Based upon his review of the above-mentioned items and his interview with Appellant, Sgt. Barnes believed that there was sufficient evidence to sustain all allegations of misconduct against Appellant and recommended that NOPD conduct a formal disciplinary hearing. *Id.* at 93:1-14. Following the disciplinary hearing, NOPD suspended Appellant for a total of forty-one days. Deputy Superintendent Darryl Albert testified that Appellant's enrollment and successful completion of a pre-trial diversion program did not have an impact on his recommendations.

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

⁴ In his administrative statement, Appellant wrongly claimed that half a pint is "four ounces." The Commission takes judicial notice that there are sixteen (16) fluid ounces in a U.S. pint and eight (8) ounces in a half-pint.

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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. 32:58 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

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Louisiana State Police Commission.⁵ 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 diversion program and *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 prosequi* 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,

⁵ 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.

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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

A. Occurrence of the Alleged Misconduct

1. *Driving While Intoxicated*

The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, when either of the following two 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. § 14:98(A)(1).

The following factors support NOPD’s contention that Appellant violated La. Rev. Stat. § 14:98:

- Video footage from Cpl. Haley’s cruiser showing Appellant was swerving in his lane.
- Reports from at least one motorist complaining about a silver Infiniti driving erratically.
- Officer Painter’s observation that Appellant was slurring his speech and smelled strongly of alcohol.
- Appellant’s admission that he had consumed alcohol prior to traveling North-bound on the Causeway.

Appellant denies drinking more than two or three drinks but admits that he was “inattentive” during his drive home because he had spilled a beverage. While Appellant attempted

to provide explanations for what the Causeway Police observed on the 22nd, the Commission finds that the simplest and most plausible explanation was that Appellant was under the influence of alcohol at the time.⁶

2. Careless Operation of a Motor Vehicle

Under Louisiana law, an individual engages in the careless operation of a motor vehicle when he or she fails to drive in a careful and prudent manner, endangering the life, limb, or property of any person. La. Rev. Stat. § 32:58. From a review of the video evidence, it is clear that Appellant operated his car in a careless manner that endangered the property and lives of other motorists. The evidence shows that Appellant's vehicle did not stay in one lane and frequently swerved into adjoining lanes. On at least two occasions, Appellant came dangerously close to striking other vehicles. That Appellant attributes his erratic driving on a spilled beverage has no bearing upon the Commission's evaluation of this particular allegation of misconduct. We have all experienced instances where a driver, completely free of alcohol or drugs, operates a car in a dangerous manner. Based upon the evidence before us, we find that NOPD has established that Appellant carelessly operated his car on September 22, 2013.

3. Professionalism

NOPD suspended Appellant three days for violating NOPD Rule 3: Professional Conduct; Paragraph 1 Professionalism. (H.E. Exh. 1). This rule 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

⁶ Appellant's reasoning for not giving Officer Painter the correct phone number for his wife borders on the ridiculous. During the initial traffic stop, Appellant appears to provide Officer Painter with two different numbers, neither of which worked. According to Appellant, he gave Officer Painter incorrect phone numbers because he did not like the way Officer Painter had treated him. But, in his administrative statement, Appellant claimed that he gave Officer Painter a 504 number and a 985 number. At no point in his interview with Sgt. Barnes does Appellant suggest that he purposefully gave Officer Painter an incorrect phone number. This tends to undercut Appellant's credibility in the eyes of the Commission.

otherwise act in a manner which brings discredit to the employee or the New Orleans Police Department.

Id. According to Sgt. Barnes and Deputy Superintendent Albert, Appellant was unprofessional when he identified himself as an NOPD Officer during the September 22nd traffic stop. Sgt. Barnes believed that such an action represented an attempt by Appellant to curry special treatment from the Causeway Police.

The Commissioners disagree that there is sufficient evidence to establish that Appellant was seeking special treatment. However, the Commission does find that, when a police officer consumes alcohol to the extent that it impairs his ability to safely operate a vehicle, but nevertheless proceeds to operate a vehicle, he brings discredit upon himself. Therefore, we find that NOPD has established that Appellant engaged in unprofessional behavior on September 22, 2015.

4. Off-Duty Consumption of Intoxicating Beverages

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). The Commission finds that Appellant consumed enough alcohol on the afternoon of September 22, 2015 to impair his ability to safely operate a vehicle. Despite his impairment, Appellant attempted to drive his own vehicle home endangering fellow motorists and eventually leading to his arrest. The Commission finds that Appellant's actions constituted offensive behavior that brought discredit to Appellant. Therefore, NOPD has established a violation of Rule 3, ¶ 9.

B. Impact on NOPD's Efficient Operations

As we have observed in many previous cases, 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. NOPD Officers carry with them the expectations of the community to competently and professionally execute vital public safety functions. Compromising those expectations makes work more difficult for all NOPD personnel, from Officers just graduating from the academy to the Superintendent of Police. Based upon the foregoing, we find that Appellant's misconduct did negatively impact NOPD's efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's suspension 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. NOPD has a responsibility to deter such misconduct through discipline. In fact, the Commission recognizes that there have been several instances where NOPD has terminated employees for similar misconduct. However, prior to the matter now before us, Appellant maintained an exemplary record with NOPD free from any sustained allegations of misconduct. This is an impressive accomplishment considering Appellant's twenty-eight-year career.

Based upon the foregoing, we find that a forty-one-day suspension is an appropriate level of discipline.

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V. CONCLUSION

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

Judgment rendered this 3rd day of July, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



TANIA TETLOW, COMMISSIONER

6/28/17

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

6/26/17

DATE



STEPHEN CAPUTO, COMMISSIONER

6-26-17

DATE