



CITY OF NEW ORLEANS

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Friday, July 8, 2022

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

Re: **Michael Sam VS.
Department of Police
Docket Number: 9314**

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 - 7/8/2022 - 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,


Stacie Joseph
Management Services Division

cc: Shaun Ferguson
Tori Howze
Jim Mullaly
Michael Sam

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**MICHAEL SAM,
Appellant**

Docket No. 9314

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

DECISION

Appellant, Michael Sam, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his six-day suspension imposed on October 12, 2021, for an incident on May 24, 2019. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a Police Sergeant. (Tr. at 6; Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on December 14, 2021. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated June 13, 2022, and controlling Louisiana law.

For the reasons set forth below, Sgt. Sam's appeal is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

Sergeant Sam is a 23-year veteran of NOPD. (Tr. at 6). On May 24, 2019, Sergeant Sam was supervising the Third District Day Platoon. (Tr. at 6). Officer Masters, a Third District officer, went to the I-10 Eastbound High Rise to respond to a vehicle accident, but when Officer Masters arrived, the parties had relocated. (Tr. at 8). The radio dispatcher communicated Lt. Ray Byrd's

order that an officer from the Third District investigate the matter at the new location. (Tr. at 6-8). Lt. Byrd supervises the Seventh District, and Lt. Byrd was not Sgt. Sam's direct supervisor. (Tr. at 15). The parties had relocated near the intersection of Chef and America, deep in the Seventh District. (Tr. at 7). According to Sgt. Sam, the second location was a mile deep and two exits into the Seventh District. (Tr. at 9).

Sgt. Sam attempted to have a conversation with Lt. Byrd on a "rank" radio channel (Tr. at 27): "So, I said via the radio 320 to 710. I said can you go on rank." (Tr. at 10-11). Lt. Byrd declined to have this conversation. (Tr. at 14-16). Sgt. Sam testified that "I made an attempt to talk to him. I wanted to clarify the situation." (Tr. at 10). Sgt. Sam also reached out to the Third District Lieutenant, Lt. Bradley Tollefson, Sgt. Sam's direct supervisor. (Tr. at 12, 25). Sgt. Sam testified that the delay caused by this conversation on the radio was "longer than one or two minutes." (Tr. at 12).

Sgt. Sam informed dispatch that the Third District would not handle this call to investigate the vehicle accident. (Tr. at 9). Captain Ryan Lubrano noted that "Commander Lawrence Dupree came on the radio and sent a Seventh District unit to handle the incident so as not to delay the police response any further and inconveniencing citizens from getting a police report." (Ex. NOPD-3. *See also* Tr. at 32).

Lt. Byrd, who initiated the complaint against Sgt. Sam, attempted to withdraw the complaint against Sgt. Sam on two occasions. (Ex. HE-1; Ex. NOPD-3; Tr. at 50).

Following the commanders' hearing, an intermediate step in the disciplinary process, Captain Ryan Lubrano recommended a letter of reprimand for the violation of Rule 3 and a two-day suspension for the violation of Rule 4 by memo dated October 1, 2019. (Ex. NOPD-3; Ex. HE-1).

By letter dated October 12, 2021, NOPD informed Sgt. Sam that he was charged with violating Rule 3 (Professional Conduct) and Rule 4 (Performance of Duty, Instructions from an Authoritative Source). (Ex. HE-1).

According to Deputy Superintendent Paul Noel, Captain Lubrano recommended a lesser penalty because of mitigating factors, but Deputy Superintendent Noel disagreed. (Tr. at 30). Deputy Chief Paul Noel recommended a one day suspension for the violation of Rule 3 and a five day suspension for the violation of Rule 4, the presumptive penalties. (Ex. HE-1; Tr. at 30-31).

Rule 4, paragraph 2, Instructions from an Authoritative Source, provides as follows:

An employee shall professionally, promptly, and fully abide by or execute instructions issued from any authoritative source, including any order relayed from a superior by an employee of the same or lesser rank. If the instructions are reasonably believed to be in conflict with the Rules, Policies and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority. . . .

(Ex. NOPD-1).

II. ANALYSIS

A. Legal Standard

1. The Appointing Authority must show cause for discipline

“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep’t of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.*

“Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.” *Id.* “It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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 (quoting *Cure v. Dep’t of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094).

2. The Appointing Authority must show the discipline was commensurate with the infraction

The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep’t*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *Abbott v. New Orleans Police Dep’t*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984). The Appointing Authority has the burden of showing that the discipline was reasonable and not arbitrary or capricious. *Neely v. Dep’t of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

a. Factors considered by Commission

“In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee’s work record and previous disciplinary record.” *Matusoff v. Dep’t of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 Westlaw 2562940, *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313. The Commission considers the nature of the offense, the employee’s work ethic, prior disciplinary records, job evaluations, and any grievances filed by the employee.” *Honore v. Dep’t of Pub. Works*, 14-0986, pp. 8-9 (La. App. 4 Cir. 10/29/15), 178 So. 3d 1120, 1131, *writ denied*, 2015-2161 (La. 1/25/16), 185 So. 3d 749

b. Commission’s authority to affirm, reverse, or modify discipline

If, after considering these factors, the Commission finds the discipline is arbitrary or capricious, “[t]he Commission ‘has the duty and authority to affirm, reverse, or *modify* the action taken by the Appointing Authority.’” *Durning*, 294 So. 3d at 538 (quoting *Honore v. Dep’t of Pub. Works*, 179 So. 3d at 1127) (emphasis added).

The Fourth Circuit has issued conflicting decisions about whether the Commission may reduce a penalty when the Appointing Authority has carried its burden of showing cause for the discipline. “However, the authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty.” *Pope v. New Orleans Police Dep’t*, 2004-1888 (La. App. 4 Cir. 4/20/05), 903 So. 2d 1 5 (citing *Branighan v. Dep’t of Police*, 362 So. 2d 1221, 1223 (La. App. 4 Cir. 1978); *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572. *See also Jenkins v. New Orleans Police Dep’t*, 2022-CA-0031 (La. App. 4 Cir.

6/22/22).¹ “Unless the Commission determine[s] that there was insufficient cause for the appointing authority to impose the [six] day suspension, the penalty must stand.” *Whitaker*, 863 So. 2d at 575.

Despite this precedent, the Fourth Circuit has reversed the Commission’s failure to modify a penalty, even though the Appointing Authority carried its burden of showing legal cause: “Although the record provides a rational basis for determining that the Department had legal cause to take the disciplinary action against Honore, we find the record does not provide a rational basis for the Commission’s conclusion that termination was the appropriate disciplinary action, commensurate with the offense.” *Honore v. Dep’t of Public Works*, 178 So. 3d at 1129. *See also Hills v. New Orleans City Council*, 98-1101 (La. App. 4 Cir. 12/9/98) (“Although the record evidence is sufficient to prove that the counsel fiscal office had good and lawful cause for taking disciplinary action against Ms. Hills, it is insufficient to prove that the punishment chosen—i.e. dismissal—is commensurate with the offense.”) Likewise, the Fourth Circuit has affirmed the Commission’s decision to reduce a termination to an 80-day suspension, even though the Fourth Circuit found the Commission correctly determined that a police officer “committed the offense of reporting to work under the influence of alcohol and with the smell of alcohol on his breath” and “such a violation undoubtedly endanger[ed] him/her, his/her co-workers, and the general public.” *Durning*, 294 So. 3d at 539-40. The Commission reduced the penalty based on error in NOPD’s application of the mitigating and aggravating circumstances. *Id.* at 540.

¹ This decision is not yet final.

B. NOPD has shown cause for discipline

The Appointing Authority has met its burden of showing the occurrence of the complained-of activity. Sgt. Sam admitted that Lt. Byrd is an authoritative source and that he refused to dispatch a Third District Officer to the second location after receiving the instruction from Dispatch. (Tr. at 9, 17). This conduct impaired the efficiency of NOPD, as Sgt. Sam failed to follow a lawful order given by a superior officer on the main dispatch channel. (Tr. at 31-32, 34). This conduct undermined the authority of the supervisor and harmed the good order and discipline of NOPD. (Tr. at 38).

C. The discipline was arbitrary and capricious

The Appointing Authority has not met its burden of showing the discipline was reasonable, especially in light of the attempted withdrawal of the complaint. *Neely*, 332 So. 3d at 307. The penalty is not commensurate with the dereliction and is arbitrary and capricious. *Durning*, 294 So. 3d at 540. Like the facts in *Honore*, the Commission finds that there was “no evidence in the record that [Sam’s] actions on that date were egregious or representative of a broader pattern of behavior such that [a six day suspension] would be justified.” *Honore*, 178 So. 3d at 1132. The undersigned Commissioners find that NOPD improperly rejected the mitigating factors relied on by Captain Lubrano, including Sgt. Sam’s good-faith attempt to work out the conflict with Lt. Byrd and Lt. Byrd’s attempts to withdraw the complaint that he initiated against Sgt. Sam. *Durning*, 294 So. 3d at 540.

First, Chief Noel testified he disagreed with Captain Lubrano’s conclusion that mitigating factors were present. (Tr. at 30). Captain Lubrano advised Deputy Superintendent Noel by memo that “[a]lthough Sgt. Sam tried to rectify the situation by attempting to have Lt. Byrd go to a rank channel to explain his reasoning behind the refusal, Sgt. Sam refused to follow the instructions

given by Lt. Byrd . . . although Sgt. Sam did disregard instructions from Lt. Byrd, this complaint should have been avoided if both districts could have worked together on a solution regarding high-rise incidents.” (Ex. NOPD-3). Captain Lubrano further stated in his October 1, 2019, memo that “I feel that this incident should not have reached the level of disciplinary action taken and should have been handled on a district level as a training issue.” (Ex. NOPD-3). Paragraph 14 of Chapter 11 of NOPD Policy provides that “[i]f the legality of an order is in doubt, the affecting member shall ask the issuing supervisor to clarify the order or shall confer with a higher authority.” Paragraph 14 further provides that “[r]esponsibility for refusal to obey rests with the member, who shall subsequently be required to justify the refusal.” (Ex. Appellant-1). The Commission finds that NOPD should have applied the mitigating factor of Sgt. Sam’s good faith effort to resolve the conflict, in compliance with NOPD Rules 4 and 11.

Second, Chief Noel failed to consider a mitigating factor. Deputy Superintendent Noel testified that Sgt. Sam should have handled his conflict with Lt. Byrd by contacting his lieutenant:

If the sergeant had an issue with that order, what he should have, then, done was contact his lieutenant, who was working, and then those two lieutenants should have worked that out.

(Tr. at 47). Chief Noel testified he was “not aware” that Sgt. Sam attempted to contact his lieutenant. (Tr. at 47). Therefore, Sgt. Sam attempted to resolve this problem in the way Chief Noel would have recommended, but Chief Noel did not consider this mitigating factor when making the decision to apply the presumptive penalty. (Tr. at 47).

Third, although Deputy Superintendent Noel testified that he did not aggravate the penalty, Chief Noel also testified that he believed aggravating factors were present. (Tr. at 31). It is unclear whether Chief Noel believed the mitigating and aggravating factors canceled each other out or whether Chief Noel did not apply the aggravating factors.

Fourth, Chief Noel testified that one of the aggravating facts was that “people were waiting for an accident to be investigated.” (Tr. at 31-32). However, according to Captain Lubrano’s memo, Captain Dupree resolved the issue by ordering a Seventh District Unit to handle the incident over the radio. (Ex. NOPD-3). The only testimony about the length of the delay was Sgt. Sam’s testimony that the delay was longer than one or two minutes. (Tr. at 12). Notably, Lt. Burns did not testify at the hearing. Therefore, no record evidence exists of the length of the delay experienced by the citizens who requested police assistance.

Fifth, Captain Lubrano also noted that “Lt. Ray Byrd attempted to get this complaint withdrawn and a permanent solution put in place to avoid any future conflicts do [sic] to incidents that occur on the high-rise portion of I-10. The request to withdraw the complaint was denied by Deputy Chief Arlinda Westbrook stating the request was ‘outside the policy limitations’” (Ex. NOPD-3).

Sixth, Sgt. Sam testified he believed that under the Unity of Command, Lt. Tollefson had the sole authority to direct him to respond. (Tr. at 23, 25; Ex. Appellant-1). This understanding, although mistaken, reflects good faith on the part of Sgt. Sam. In addition, Chief Noel’s opinion that Sgt. Sam should have reached out to his lieutenant reflects that the involvement of Lt. Tollefson would have been preferred by NOPD.

For all the reasons stated above, NOPD has offered insufficient cause for the imposition of the assessed penalty. *Pope*, 903 So. 2d at 5; *Whitaker*, 863 So. 2d at 575.

Therefore, based on the mitigating factors, the discipline for the violation of Rule 3 is reduced to a letter of reprimand and the discipline for the violation of Rule 4 is reduced to a two-day suspension.

NOPD shall reimburse Sgt. Sam for all back pay for four of the days he was suspended,
along with all emoluments of employment.

This the 8th day of July, 2022.

WRITER:

Mark C. Surprenant
Mark C. Surprenant (Jul 7, 2022 13:58 CDT)

MARK SURPRENANT, COMMISSIONER

CONCUR:

J H Korn
J H Korn (Jul 7, 2022 15:29 CDT)

JOHN KORN, VICE-CHAIRPERSON

Ruth White Davis
Ruth Davis (Jul 7, 2022 19:07 CDT)

RUTH DAVIS, COMMISSIONER