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Wednesday, February 22, 2017

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

Re: **Kimera Woods VS.
Department of Police
Docket Number: 8412**

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 - 2/22/2017 - 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
Kimera Woods
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

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| KIMERA WOODS vs. DEPARTMENT OF POLICE | DOCKET No.: 8412 |
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I. INTRODUCTION

Appellant, Kimera Woods, 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. However, Appellant alleges that NOPD failed to complete its investigation into Appellant’s misconduct in a timely fashion. The Commission shall first determine if NOPD’s investigation adhered to the standards required by our Rules and La. R.S. § 40:2531. If it did, the Commission will determine whether or not NOPD had sufficient cause to discipline Appellant. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD suspended Appellant for one day without pay effective “the week of June 7, 2015.” (H.E. Exh. 1). The alleged misconduct that prompted Appellant’s one-day suspension occurred on August 18, 2014. On that date, a male complainant made a call for service related to an altercation involving his son. Appellant was the responding officer and the male complainant

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alleged that Appellant was “biased” and omitted important information from the report regarding the incident. *Id.* NOPD did not substantiate the allegations against Appellant pertaining to the contents of the report she prepared. However, NOPD did find that Appellant “acted unprofessionally when [Appellant] discussed [her] findings and suspicions about the complainant with the faculty of [complainant’s son’s] school.” *Id.* As a result of this finding, NOPD suspended Appellant for one day.

In the disciplinary letter to Appellant, NOPD alleges that Appellant violated NOPD Rule 3, Paragraph 1:

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.

(H.E. Exh. 1).

Through the disciplinary notice, NOPD also alleged that Appellant failed to maintain an adequate level of service and cited to Civil Service Rule IX, § 1.1 which requires an appointing authority to “take action warranted by the circumstance to maintain the standards of effective service” when a classified employee:

is unwilling or unable to perform the duties of his/her position in a satisfactory manner, or has committed any act to the prejudice of the service, or has omitted to perform any act it was his/her duty to perform....

Rule IX, § 1.1.

B. August 18, 2014 Incident

On August 18, 2014, Appellant responded to a call for service at Pierre Capdau School. When she arrived on scene, she spoke to a male complainant who alleged that his son had sustained injuries during school. As part of her interview, Appellant collected a statement from

the male complainant. After speaking with the male complainant, Appellant spoke to the school administrator. In her conversation with the school administrator, Appellant allegedly make inappropriate comments regarding her opinion of the complainant's motives in pursuing an incident report. (H.E. Exh. 1). In the view of NOPD, Appellant's actions were inappropriate given that it is not an Officer's place to express his or her opinion as to the motives or merits of a particular complainant. (Tr. at 19:5-25). Further, NOPD asserts that an officer should not discuss his/her opinion as to the possible nefarious motives of a complainant to members of the public as it demeans the complainant. According to NOPD, the degree of Appellant's misconduct was exacerbated by the fact that she engaged the school principal, someone with a clear interest in the disposition of the case and any potential civil suit that may develop. (NOPD Exh. 4). The Commission notes that Appellant did not testify, nor did she produce any evidence or testimony to challenge NOPD's assertions contained in the record.

III. LEGAL STANDARD

A. Sufficient Cause

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued 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. Procedural Requirements of Police Employee Investigation

Appellant alleges that NOPD failed to adhere to statutory deadlines governing investigations into alleged misconduct perpetrated by police employees. Specifically, Appellant alleges that NOPD initially notified Appellant that the PIB investigator had found the allegations of misconduct against Appellant “not sustained,” and such notice should have constituted the end of an investigation pursuant to § 40:2531. In this notice, NOPD made no mention of Rule 3. Yet, according to Appellant, NOPD’s investigation actually concluded when it provided notice to Appellant that it has substantiated an allegation of a violation of Rule 3 against Appellant.

The provisions of Louisiana Revised Statute § 40:2531, known colloquially as the “Police Officers’ Bill of Rights” governs the investigative due process that must be afforded to “police employees” as defined by the statute. It is undisputed that NOPD Officers, like Appellant, are “police employees” pursuant to § 40:2531. Any investigation that does not conform to the due process requirements enumerated in § 40:2531 renders the related discipline “an absolute nullity.”

When a formal, written complaint is made against any police employee or law enforcement officer, the superintendent of state police or the chief of police or his authorized representative shall initiate an investigation within fourteen days of the date the complaint is made. Except as otherwise provided in this Paragraph, each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days.

However, in each municipality which is subject to a Municipal Fire and Police Civil Service law, the municipal police department may petition the Municipal Fire and Police Civil Service Board for an extension of the time within which to complete the investigation. The board shall set the matter for hearing and shall provide notice of the hearing to the police employee or law enforcement officer who is under investigation. The police employee or law enforcement officer who is under investigation shall have the right to attend the hearing and to present evidence and arguments against the extension. If the board finds that the municipal police department has shown good cause for the granting of an extension of time within which to complete the investigation, the board shall grant an extension of up to sixty days. Nothing contained in this Paragraph shall be construed to prohibit the police employee or law enforcement officer under investigation and the appointing authority from entering into a written agreement extending the investigation for up to an additional sixty days. The investigation 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. Nothing in this Paragraph shall limit any investigation of alleged criminal activity.

La. Rev. Stat. § 40:2531(B)(7).

The Fourth Circuit has established that, for the purposes of La. R.S. 40:2531, an investigation begins when NOPD initiates a DI-1 form. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 17); 165 So.3d 191, 202-03; see *Young v. Department of Police*, 13–1596, p. 1, n. 2 (La.App. 4 Cir. 6/25/14), 152 So.3d 193, 194, n. 2. The investigation ends “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(B)(7).

IV. ANALYSIS

In the matter now before the Commission, NOPD initiated the DI-1 form on September 23, 2014. (NOPD Exh. 2). On October 21, 2014, a hearing examiner appointed by the Commission denied NOPD’s request for an extension of time in which to complete its investigation into Appellant’s misconduct. Thus, pursuant to La. R. S. § 40:2531(B)(7), NOPD had until November 22, 2014 to complete its investigation.

There were two specific rule violations alleged within the DI-1 form:

- Rule 4, Performance of Duty, Paragraph 4 Relative to Neglect of Duty, to wit; NOPD Policy 344.1.1 Relative to report Preparation, failing to properly document the incident report, and
- Rule 5, Restricted Activities, Paragraph 7 Relative to Acting Impartially.

(NOPD Exh. 2).

Appellant received the first notice of the recommended disposition of the investigation into her misconduct and date of her pre-disciplinary hearing on November 19, 2014. (NOPD Exh. 3). The notice identifies the same two rules contained within the DI-1. *Id.* Then, on November 20, 2014, Deputy Superintendent Robert Bardy sent a memorandum to Superintendent Michael Harrison. (NOPD Exh. 4). Bardy concurred with the PIB investigator that the facts surrounding the incident did not support an allegation that Appellant had violated NOPD Rule 4 or Rule 5. However, Bardy identifies *an additional* NOPD Rule violation that neither the DI-1 form nor the hearing notice references – Rule 3, Professional Conduct, Paragraph 1, Professionalism.

There was no testimony or evidence alleging that Appellant received a copy of what is in evidence as NOPD Exhibit 4. In fact, we find that it was not until February 25, 2015 that Appellant received notice she allegedly violated Rule 3. (App. Exh. 3). Bardy acknowledged that the alleged violations of Rule 4 and Rule 5 were “the two infractions that were originally cited in the DI-1.” (Tr. at 13:14-20). Nevertheless, NOPD argued that the allegation that Appellant violated Rule 3 was “not something new.” On the contrary, adding a new alleged rule violation is in fact “something new” and something for which Appellant was entitled to prepare. Deputy Superintendent Bardy acknowledged that a new rule violation discovered while in the

process of assessing an investigator's initial assessment would "require further investigation in a separate hearing." *Id.* at 39:9-12.

Both Parties cite to *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 22); 165 So.3d 191, 205, in support of their respective arguments. In *Abbot*, the court found that notice to an NOPD Officer accused of misconduct was "sufficient to provide meaningful notice that the charges against [him] had been sustained and that a pre-disciplinary hearing had been scheduled in compliance with La. R.S. 40:2531(B)(7)." Appellant argues that the November 19, 2014 notice to Appellant did not appraise her of any substantiated allegations and was thus deficient. In contrast, NOPD argues that the finding of "not substantiated" contained within the November 19th notice was preliminary as only the Superintendent had the authority to render a final decision. And, since Appellant had notice of a specific date upon which a disciplinary hearing would be held, such notice was sufficient under Fourth Circuit jurisprudence.

In *Hurst v. Dep't of Police*, 2014-0119 (La.App. 4 Cir. 7/23/14, 7); 146 So.3d 857, 861 the notice to an accused NOPD officer of a disciplinary hearing included the "investigator's recommended dispositions." Such notice was sufficient to satisfy the requirements of La. R.S. 40:2531(B)(7) since it appraised the officer of the charges NOPD had substantiated. Here, notice to Appellant also contained the investigator's recommended dispositions in connection with two charges. The Commission finds that such notice would have satisfied the requirements of La. R.S. 40:2531(B)(7) **if the notice NOPD provided to Appellant actually pertained to the charges Appellant would face at her disciplinary hearing.** Instead, Appellant received a one-day suspension for violating Rule 3, a charge left off of the November 19th notice.

NOPD's argument that the investigation and charges all arose out of the same incident is of little relevance. Whether or not Appellant received adequate notice of the conclusion of NOPD's investigation turns on what charges Appellant faced as a result of her conduct during August 18, 2014. According to the November 19th notice, there were two charges, a violation of Rules 4 and 5. It was not until February that NOPD put Appellant on notice that there was a third charge.

The Commission keeps returning to the fact that the November 19th notice did not appraise Appellant of a charge that she had violated Rule 3. Since a key requirement of the notice signaling the end of an investigation is that it sufficiently appraises the accused police employee of the charges against him or her, the November 19th notice did and could not signal the end of NOPD's investigation. Therefore, we find that the investigation into the allegation that Appellant violated Rule 3 did not conclude until she received a revised disciplinary hearing notice on February 25, 2015, well after the sixty-day deadline and in violation of the Police Officers' Bill of Rights. To find otherwise would give NOPD the unfettered ability to continue to add charges and rule violations up until the date of the disciplinary hearing.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS Appellant's appeal. NOPD failed to complete its investigation in accordance with La. Rev. Stat. Ann. § 40:2531(B)(7) rendering the one-day suspension issued as a result of its investigation an absolute nullity. NOPD shall remit to Appellant all back pay and emoluments related to the one-day suspension referenced in Hearing Examiner Exhibit 1. In rendering this decision, the Commission does not condone Appellant's actions and strongly encourages Appellant to be far more professional in her interactions with the public.

K. Woods
No. 8412

Judgment rendered this 22nd day of February, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

2-21-2017

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

2-21-17

DATE



TANIA TETLOW, COMMISSIONER

2-22-17

DATE