CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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MITCHELL J. LANDRIEU
MAYOR

Tuesday, November 06, 2012

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Jeffery Winn VS.**
Department of Police
Docket Number: 7873

Dear Mr. Hessler:

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 - 11/6/2012 - filed in the Office of the Civil Service Commission in Room 7W03, City Hall, 1300 Perdido Street, 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,

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Victor Papai
Jay Ginsberg
Jeffery Winn

JEFFREY WINN	**CIVIL SERVICE COMMISSION**
VS.	**CITY OF NEW ORLEANS**
DEPARTMENT OF POLICE	**NO. 7873**

INTRODUCTION

The Department of Police ("Appointing Authority") employed Jeffrey Winn ("Appellant") as a Police Captain with permanent status. By letter dated May 25, 2011, the Appointing Authority terminated the Appellant's employment for violation of internal rules regarding Neglect of Duty (two counts). The Appointing Authority also suspended the Appellant for ten (10) days for violation of internal rules regarding Professionalism.

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 October 11 & 13, 2011. The 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 testified for the prosecution in the federal trial entitled *U.S. v. Warren* – a trial involving several New Orleans Police Officers as defendants. Upon the conclusion of the federal trial, the Appointing Authority initiated an investigation that resulted in the Appellant's termination. [1] Based upon the Appellant's federal trial testimony and the internal investigation that followed, the Appointing Authority determined that the Appellant neglected his duty by failing to report police misconduct in a timely fashion, which is identified in the disciplinary letter as "Count 2." The Appointing Authority also determined that the Appellant neglected his duty by

[1] *U.S. v. Warren* was generally reported in the press as the *"Glover Case."*

withholding information when communicating with Captain Don Curole in November of 2005, which is identified in the disciplinary letter as "Additional Sustained Violation."

Count 2 is a charge based upon undisputed facts requiring legal analysis. Conversely, the Additional Sustained Violation is based upon disputed facts and the credibility of witnesses. The legal issue raised in Count 2 will be addressed first.

I. Neglect of Duty – Count 2

Regarding Count 2, the Appointing Authority terminated the Appellant based upon admissions he made during the internal investigation conducted by PIB. Consequently, there are no disputed questions of fact. Therefore, the Commission must determine whether the Appellant's admissions constituted violations of the Appointing Authority's internal rules and, if so, whether the Appellant provided sufficient explanations to justify, excuse, or mitigate his conduct.

The facts upon which the Appointing Authority took disciplinary action as to Count 2 are found in the third paragraph of the May 25, 2011 disciplinary letter, which provides as follows:

> You neglected your supervisory duties by failing to report police misconduct when you learned from Lieutenant Dwayne Scheuermann that Officer Greg McRae (your direct subordinate at the time of the incident) had set fire to the vehicle which contained the body of Mr. Glover and Officer McRae fired his weapon into the vehicle. Instead, you contacted an attorney, who instructed you not to speak to anyone about the matter. As a Captain with the New Orleans Police Department you were made aware of violations of departmental rules and regulations, as well as criminal violations, and neglected to notify your superior, the Public Integrity Bureau or initiate an investigation which is required of a supervisor who has knowledge of such violations. **(Count 2)**

A. UNDISPUTED FACTS

The relevant facts are not in dispute. The Appellant was the ranking officer at the Habens School on September 2, 2005, where he and other police officers were posted after Hurricane Katrina. On that date, an automobile carrying a dead body with a gunshot wound was brought to that location. The body was later determined to be a Mr. Glover. After confirming that Mr. Glover was dead, the Appellant instructed his subordinates to take the body to the river side of the levee because there was no morgue or other designated location to take the body after the storm.

The Appellant did not know that Mr. Glover had been shot by a police officer when he ordered the body transported behind the levee and had no reason to know or believe that the police officers to whom he entrusted the body would dispose of the body in a criminal manner. Nonetheless, the Appellant retained Eric Hessler as his attorney in December of 2008 after learning of a federal investigation into the Glover case. Though he had no involvement in the death or burning of Mr. Glover's body, he feared he might be subject to prosecution in that case.

In May of 2009, Lt. Dwayne Scheuermann told the Appellant that Officer Greg McRae burned the body that the Appellant had ordered moved to the river side of the levee. During this conversation, Lt. Scheuermann also indicated that he thought the Appellant knew that Officer McRae had burned the body. The Appellant testified that Lt. Scheuermann's version of events caused him great concern because his version of events varied from that of Lt. Scheuermann and suggested that he was a part of a cover up. He met with Mr. Hessler again following Scheuermann's disclosure to seek legal advice.

Mr. Hessler testified that he feared the federal government intended to indict his client based upon threats from federal prosecutors and communications he had received from the U.S. Attorney's office related to the potentially incriminating statement from Lt. Scheuermann to his client. Based on these concerns, he advised his client to invoke his Fifth Amendment privilege against self-incrimination and not report the conversation.

B. ANALYSIS

The Appellant concedes that under normal circumstances he would have reported the violations made known to him by Lt. Scheuermann. However, based upon advice of counsel, the Appellant chose not to report the conversation and instead invoked his Fifth Amendment privilege against self-incrimination. Thus, based upon the unique facts presented in this particular case, the sole issue as to Count 2 is whether reliance upon advice of counsel is a defense or otherwise excuses the Appellant from performing his duty as a police officer to report admitted misconduct by another police officer.

The Appointing Authority argues that the Appellant as a high ranking experienced police officer could not have reasonably relied upon Mr. Hessler's advice based upon *Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).* In *Garrity,* during an Attorney General investigation, a police officer was told that any statement might be used against him in a criminal proceeding and that he had the privilege to refuse to answer, but that such refusal would subject him to forfeiture of office. He made a statement and his statement was used over objection in a subsequent prosecution. The court excluded the evidence, holding that the state cannot use the threat of discharge to secure incriminating statements from an employee, even a police officer. The Supreme Court further clarified the *Garrity* decision, in *Gardner v. Broderick,* 392 U.S. 273, 88 S.

Ct. 1913, 20 L. Ed. 2d 1082 (1968). In *Gardner*, a police officer was discharged because he refused to waive immunity from prosecution based on his answers in a grand jury investigation, after being told he would be discharged if he did not sign the waiver. Observing that the officer was presented with a choice between surrendering his constitutional rights or his job, the court held that the state cannot discharge an employee for refusing to waive a constitutionally guaranteed right. The court noted, however, that a police officer owes his entire loyalty to the state and that the privilege would not bar his dismissal for refusal to answer questions relating specifically, directly, and narrowly to his official duties, if he was not required to waive immunity with respect to use of the answers or the fruits thereof in a subsequent criminal prosecution.

In the instant case, the Appointing Authority contends that the Appellant was not the subject of a criminal investigation and that, even if he feared prosecution for a criminal offense, he knew or should have known that he could have come forward with potentially incriminating information without waiving immunity from prosecution by electing to provide an "administrative statement." An administrative statement is a vehicle through which the Appointing Authority can compel a police officer to provide otherwise incriminating information as part of an administrative investigation. As noted in *Gardner*, under those circumstances the Appellant would not have been required to waive immunity and there would have been no potential for self-incrimination.

We find that the Appointing Authority has established that it had legal cause to terminate the Appellant's employment for Neglect of Duty based on Count 2. As noted in *Gardner*, the Appellant owed his entire loyalty to the State. While the Appellant may have had concern that he would be prosecuted, at the point in time when he met with his

counsel, it was only a concern. It was the Appellant's responsibility to find a way to protect his personal interests while continuing to perform his duties as a police officer. Those are the instructions he should have provided Mr. Hessler when seeking advice. If his counsel was unable to provide a viable plan, he should have sought another opinion.

II. NEGLECT OF DUTY – ADDITIONAL SUSTAINED VIOLATIONS

There is no need to address the additional violation because we have determined that discharge was appropriate for the reasons stated above.

III. PROFESSIONALISM

The suspension for violation of the internal rule regarding professionalism was predicated upon the Appellant's neglect of duty. Based upon our determination that the Appellant neglected his duty, the Appointing Authority has established by a preponderance of evidence that the Appellant violated internal rules regarding Professionalism.

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 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.*

CONCLUSIONS

Based upon the foregoing, the Appellant's appeal is DENIED.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 6th DAY OF NOVEMBER, 2012.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION

Dana M. Douglas

DANA M. DOUGLAS, VICE-CHAIRMAN

CONCUR:

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

AMY L. GLOVINSKY, COMMISSIONER