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# CITY OF NEW ORLEANS

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Thursday, December 01, 2016

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

Re: **Sean Carrigan VS.  
Department of Police  
Docket Number: 8553**

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 - 12/1/2016 - 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  
Matthew D. Fraser  
Brendan M. Greene  
Sean Carrigan  
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file

**CIVIL SERVICE COMMISSION**

**CITY OF NEW ORLEANS**

SEAN CARRIGAN	
vs.	DOCKET No.: 8553
DEPARTMENT OF POLICE	

**I. INTRODUCTION**

Appellant, Sean Carrigan, 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. Similarly, Appellant conceded that NOPD’s investigation into his alleged misconduct conformed to the procedural requirements established by Louisiana Revised Statute § 40:2531 and our Rules. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause. The undersigned Commissioners have reviewed the transcript of the appeal hearing that occurred on October 4, 2016 as well as the exhibits accepted into the record by the hearing examiner. After reviewing such testimony and evidence, we render the following decision and judgment.

**II. FACTUAL BACKGROUND**

**A. Alleged Misconduct**

Appellant, was a permanent, classified employee serving in the capacity as Police Officer at all times relevant to the instant appeal. NOPD suspended Appellant for two days in connection with Appellant’s alleged failure to report for duty on May 10th and 11, 2015. (H.E. Exh. 1).

NOPD alleges that Appellant's failure to report for duty violated NOPD Rule 4: Performance of Duty; Paragraph 1: Reporting for Duty. This section of NOPD's rules reads as follows:

A member *shall promptly report for duty* at the time and place required by assignment or orders. In the event of inability to perform or to begin punctually, he/she shall notify his/her commanding officer or a member of his/her unit authorized to receive such information before the designated time for commencement.

(H.E. Exh. 1).

Several important facts in this case are not in dispute:

- Appellant was not originally scheduled for duty on May 10th and 11, 2015 according to a schedule published by NOPD on April 11, 2015.
  - An event requiring coverage by NOPD's Fourth District personnel, originally scheduled for April 17, 2015, was rescheduled to May 10, 2015.
  - Appellant was either off duty or assigned to training away from the Fourth District between May 1, 2015 and May 9, 2015.
  - Appellant did not report to work at all on May 10, 2015.
  - On May 11, 2015, Appellant did eventually report to work, but not at the start of his shift.
- Therefore, this case boils down to when/if Appellant knew that his schedule had changed.

And, if he did not know about his schedule change, should he have.

### **B. Schedule Change and Notice of Schedule Change**

NOPD's Fourth District encompasses neighborhoods on the Westbank, including Algiers. The personnel of the Fourth District are responsible for providing security and supervision for a wide variety of public events, including parades. The Westbank Mohawk Hunters, a Mardi Gras Indian group, had scheduled its "Super Sunday" parade on April 17, 2015 within an area covered by the Fourth District. Unfortunately, weather caused the event to be cancelled.

At the time, Commander Shaun D. Ferguson was the commanding officer at the Fourth District and sent the following email to his subordinates on April 17, 2015:

The Westbank Mohawk Hunters (Super Sunday) scheduled for Sunday, April 19, 2015 has been cancelled and is tentatively rescheduled for Sunday, May 10, 2015 (Mother's Day). Please make plans to be working this day. I know this is a huge inconvenience and I apologize in advance. We tried everything that we could to make this happen this weekend but to no avail. Again, my apologies for any inconveniences.

(NOPD Exh. 6)(emphasis added). Cmdr. Ferguson testified that there was no indication that any problem occurred in the transmission of this email to Fourth District personnel. (Tr. at 66:6-16).

NOPD provides each officer with an email address and expects officers to check emails while on duty. *Id.* at 23:17-19. Appellant testified that he was aware of this policy but claims he never received Cmdr. Ferguson's April 17th email. *Id.* at 103:20-104:20. Part of his excuse for never having received or reviewed the April 17th email had to do with access to a computer. Appellant testified that he only checked his work email while on duty at the Fourth District and was either not scheduled to work, on approved leave, or at the NOPD Academy for training between April 17, 2015 and May 10, 2015. However, the record shows that Appellant was on duty at the Fourth District on April 29th and 30, 2015. (NOPD Exhs. 7, 9).

Prior to the start of each shift, officers and supervisors within the Fourth District participate in roll call. Roll call serves as a briefing for each shift, and NOPD expects all personnel to pay close attention during roll call. (Tr. at 98:1-8). NOPD's records show that Appellant was present for roll call on both April 29th and April 30, 2015. *Id.* During the April 29th roll call, supervising officers reviewed "COMSTAT Notes." *Id.* at 95:2-10. NOPD introduced the relevant COMSTAT Notes, and Item #8 in the Notes reads: "Remember that our Super Sunday is scheduled for May 10, 2015, therefore all hands are on deck for that day." (NOPD Exh. 8).

Appellant's supervising sergeant during the relevant period of time was Sergeant Berwick Nero. (Tr. at 77:6-17). Sgt. Nero testified that he posted the schedule for Fourth District personnel every month at the District station. Sgt. Nero posted the original schedule reflecting personnel

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assignments for the month of May on April 11, 2015. (NOPD Exh. 10; Tr. at 87:2-5). Sgt. Nero could not recall when he posted the change in schedule to reflect the new Super Sunday date of May 10th and 11, 2015, but claims to have posted it sometime during his 2:25-11:00 shift on April 30, 2015. (Tr. at 91:6-11). Appellant claims that it was his practice to always check the schedule prior to departing for any lengthy period of time and claims that, when he looked at the schedule on April 30th, it still showed Appellant off duty on May 10th and 11th. *Id.* at 106:7-107:20.

After April 30, 2015, both Appellant's original and revised work schedule had him out of the Fourth District between May 1st and 9, 2015. (NOPD Exh. 10; App. Exh. 1). From Monday, May 4th through Friday, May 9, Appellant participated in training at the NOPD Academy. *Id.* During this time, he spoke to Fourth District Supervisors, Sgt. Nero and Lieutenant Allison regarding issues related to the proper reporting of Appellant's time. Neither Sgt. Nero nor Lt. Allison ever brought up the schedule change. (Tr. at 102:6-103:19).

Appellant left town for a previously planned trip following his training on May 9, 2015 and did not report for duty on May 10, 2015.<sup>1</sup> Appellant did not return to his residence until early in the morning on May 11, 2015. On May 11, 2015, members of the St. Tammany Parish Sheriff's Office roused Appellant from sleep and notified him that his supervisors had been trying to reach him. (Tr. at 100:16-101:9). Appellant eventually reported for duty on May 11, 2015, but well after the start of his shift. *Id.* at 73:11-17.

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<sup>1</sup> NOPD spent a significant portion of the hearing pointing out that Appellant had failed to bring his personal cell phone with him and did not respond to calls allegedly made by supervisors. Given that NOPD did not discipline Appellant for an alleged violation of any NOPD policy regarding an officer's responsibility to maintain contact with his supervisors, the undersigned Commissioners find that testimony regarding NOPD's inability to reach Appellant via phone to be irrelevant.

### III. LEGAL STANDARD

An appointing authority may only discipline a permanent classified employee if there exists sufficient cause for such discipline. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline is not supported by 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.

### IV. ANALYSIS

#### A. Occurrence of the Complained of Activities<sup>2</sup>

NOPD alleges that Appellant’s supervisors notified him of his revised schedule through three different mediums. First, through Cmdr. Ferguson’s April 17th email, then through roll call announcements on April 29, 2015, and, finally, through a posted schedule change on April 30,

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<sup>2</sup> Officer Carrigan denied that he “intentionally” missed work on May 10-11, 2015. This is irrelevant. NOPD need not establish intent in order to sustain a violation of the rule at issue here. If it did, every time an officer was late he/she would merely have to allege that he/she accidentally overslept. Such a requirement would lead to absurd results.

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2015. Appellant denies that he received Cmdr. Ferguson's email, denies that he heard the COMSTAT Notes during roll call on April 29th, and claims that Sgt. Nero did not post the revised schedule until after Appellant had already checked the original schedule to confirm he was off duty on May 10th and 11th.

The Commission finds that Appellant could have, and should have, checked his work emails during his shift on April 29th and 30th. Had he done so, he would have seen Cmdr. Ferguson's email asking Fourth District personnel to "make plans to work" on May 10, 2015. Appellant tried to make much of the fact that Cmdr. Ferguson noted that the Super Sunday event was "tentatively scheduled" for May 10th. While this may have been true, the next sentence of the email specifically asked all staff to plan on working May 10th. (NOPD Exh. 6). The Commission agrees with Sgt. Nero that Cmdr. Ferguson's email communicated to Fourth District personnel that all Fourth District officers should have reported to work on May 10th unless otherwise directed.

Appellant's claim that he did not hear the COMSTAT Notes during roll call on April 29, 2015 is unfortunate, but does not relieve him of responsibility. NOPD has established, through evidence and testimony, that supervisors reminded Fourth District personnel that the Super Sunday event was happening on May 10, 2015 and that all staff needed to be present. Appellant points out that not all Fourth District personnel reported for duty on May 10, 2015. However, those who did not had previous approval from District supervisors.

Appellant made much of the fact that NOPD could not establish when on April 30th Sgt. Nero posted the revised schedule. Appellant asserts that the new schedule was not posted until after he had already checked it. However, NOPD posted the original schedule on April 11, 2015, six days before the Super Sunday event was canceled and a new date of May 10, 2015 established.

Had Appellant checked his emails or paid attention during roll call on April 29th, he would have been aware of the schedule change before April 30th. And, since Appellant had a duty to check his email and pay attention during roll call, the Commission finds that Appellant should have been aware of the schedule change. Therefore, the Commission finds that NOPD has established that Appellant failed to report for duty on May 10th and 11, 2015 “at the time and place required by assignment or orders.”

### **B. Impairment of Efficient Operation of Appointing Authority**

The impairment of the efficient operation of NOPD when an officer is absent and does not notify his supervisor of that absence in advance is clear. Such misconduct adversely impacts NOPD’s ability to fully staff a particular shift or event placing added stress on the officers who do report for duty and putting members of the community at risk. The Commission finds that Appellant’s misconduct did impair the efficient operation of the NOPD.

### **C. Discipline Commensurate with Offense**

In conducting its analysis, the Commission must determine if the 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).

Cmdr. Ferguson provided NOPD Superintendent Michael Harrison with the recommendation that Officer Carrigan receive a day of suspension for each absence. Rather than recommend a harsher penalty for Appellant’s absence on May 11th, Cmdr. Ferguson stated that he did not believe the circumstances warranted a higher level of discipline because the misconduct arose out of the same set of facts and investigation. Cmdr. Ferguson testified that he contemplated



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recommending a lesser penalty (letter of reprimand), but believed that such a minor level of discipline would actually serve to encourage officers to miss assignments rather than act as a deterrent. (Tr. at 61:3-12). The Commission recognizes that all appointing authorities, but in particular the NOPD, must deter unanticipated absences that are not related to illness or other exigent personal circumstance. Therefore, we find that the two-day suspension NOPD issued to Appellant was commensurate with Appellant's misconduct.

#### **V. CONCLUSION**

Based upon the foregoing, the Commission hereby DENIES Appellant's appeal.

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**Signatures appear on the following page.**

S. Carrigan  
No. 8553

Judgment rendered this 30th day of November, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

  
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MICHELLE D. CRAIG, CHAIRPERSON

11/15/2016  
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DATE

  
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JOSEPH S. CLARK, COMMISSIONER

11/30/16  
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DATE

  
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RONALD McCLAIN, VICE-CHAIRMAN

11/15/16  
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DATE