



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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DIRECTOR OF PERSONNEL

Thursday, May 13, 2021

Mr. Eric Hessler
PANO 2802 Tulane Avenue #102
New Orleans, LA 70119

Re: **Jason Thomas VS.
Department of Police
Docket Number: 9099**

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 - 5/13/2021 - 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
Renee E. Goudeau
Jay Ginsberg
Jason Thomas

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

JASON THOMAS
Appellant

v.

Docket No. 9099

DEPARTMENT OF POLICE
Appointing Authority

DECISION

Appellant, Officer Jason Thomas, 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 2-day suspension beginning the week of October 6, 2019 (See Exhibit HE-1). At all relevant times, Appellant was employed as a Police Officer and had permanent status (Tr. at 13). A Hearing Examiner, appointed by the Commission, presided over a hearing on May 20, 2020. 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 23, 2020, and controlling Louisiana law.

For the reasons set forth below, Thomas' appeal is DENIED.

I. FACTUAL BACKGROUND

In December of 2018, Officer Thomas was serving as a Field Training Officer (FTO). (Tr. at 13). The FTO Program is Phase II of the Recruit Training Program. (Ex. City-2). A recruit is assigned to work with an FTO one-on-one as the final part of the training program. (Tr. at 8). The goal of the FTO Program is to provide "improvement and professional development in performance areas, while simultaneously assuring that each trainee masters a predetermined set of tasks before completion." (Ex. City-2). "Its goal is to ensure the new officer transitions from the

academic setting of the Education and Training Division to the actual performance of general law enforcement duties.” (Ex. City-2). FTOs are required to submit Daily Observation Reports (DOR) for 112 calendar days. (Ex. City-1 at ¶18(a); Tr. at 10). The FTO submits the DOR, which the Academy Supervisor then signs. (Tr. at 14). This process is all electronic, and any failures generate an email to the FTO Coordinator. (Tr. at 14-15).

Lieutenant Rebecca Gubert served as the FTO Coordinator in the Training Division of the Academy in December of 2018. (Tr. at 8). Lieutenant Gubert trained the FTOs, assigned recruits to FTOs, and managed the observation reports. (Tr. at 8). If the observation reports reflect that a trainee is failing in one area, the FTO Coordinator may assign remedial training. (Tr. at 15).

Near the end of an FTO period, on December 16, 2018, Officer Thomas called Lieutenant Gubert to tell her his assigned trainee was failing the FTO program. (Tr. at 16; Ex. City-1). Phase 2 of the FTO period is four weeks, and Phase 2 of this FTO period began on November 28, 2018. (Tr. at 17). Thomas had failed to submit reports daily, so the FTO Coordinator was unaware the trainee was failing. (Tr. at 15). Lieutenant Gubert instructed Thomas to enter the DORs “right now.” (Tr. at 18). When Lieutenant Gubert logged into the DOR system on December 17, she learned Thomas only entered DORs up to December 8. (Tr. at 21; Ex. City-1). Thomas’ recruit had to re-start FTO. (Tr. at 23).

Lieutenant Gubert recommended discipline against Thomas for failing to submit the reports timely and failure to follow her instruction on December 16 to submit all the overdue reports. (Ex. City-1). Captain Frank Young conducted the disciplinary hearing of Thomas. (Tr. at 48). NOPD determined that Thomas had neglected his duty and failed to comply with instructions from an authoritative source. (Ex. HE-1). Even though the disciplinary matrix for neglect of duty is a five

day suspension, NOPD reduced the discipline to a two-day suspension. (Tr. at 52). Likewise, the penalty for failure to comply with instructions was reduced to an oral warning. (Tr. at 59).

Lieutenant Gubert also recommended that Thomas be removed from the FTO program. (Tr. at 42). Commander Shaun Ferguson, who was then in charge of the Education and Training Division, made the decision to remove Gubert from the FTO program. (Tr. at 41).

A FTO receives special assignment pay of 10% for performing these duties because the officer is compensated for the work of coaching, mentoring, and evaluating a recruit. (Tr. at 38).

I. ANALYSIS

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). 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 and terminating the classified employee and, if so, whether such discipline was commensurate with the dereliction. *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 Commission finds that NOPD has carried its burden of showing that Thomas failed to submit DORs in a timely manner and failed to follow the instruction of Lieutenant Gubert on

December 16 to bring the reports up to date. The Commission further finds that the activity impaired the efficient operation of NOPD. Completion of training was delayed for this trainee, so he was not available to assist with NOPD's manpower needs until he repeated the FTO training. NOPD had to expend additional resources to allow the recruit to undergo Phase 2 of the FTO program a second time when the FTO Coordinator may have been able to intervene and give the trainee additional training during the FTO period ending in December 2018. The Commission also finds that the penalty is commensurate with the infraction.

Thomas also asserts that his due process rights were violated when Lieutenant Gubert recommended that he be removed from the FTO program, resulting in a 10% pay reduction. Rule IV, §2.2 authorizes the Personnel Director to approve an Appointing Authority's request for special assignment pay for "any employee given a special assignment for a limited term within his class of positions . . ." "Special assignments must be beyond the scope of current duties and responsibilities." Rule IV, §2.2(a). At the end of the special assignment, the Appointing Authority is required to reduce the employee's pay back to the rate before the special assignment pay began. Rule IV, § 2.2(c). Under Rule IV, Thomas' receipt of special assignment pay required the performance of the job duties of a FTO. When Commander Ferguson removed Thomas as a FTO, the special assignment pay ended under Rule IV.

Thomas was not entitled to notice and an opportunity to be heard before NOPD removed him as a FTO or his pay was reduced. As the federal Fifth Circuit has recognized, a public employee does not always possess a property interest in his entire salary:

An expectation of employment carries with it some protected expectations as to a salary. In some situations that expectation can encompass an employee's entire salary. *See Eguia v. Tompkins*, 756 F.2d 1130, 1138 (5th Cir.1985); *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir.1983). But the more detailed and conditional the understanding becomes between employer and employee, the weaker the

linkage becomes between those understandings and the Due Process Clause. *See Mangaroo v. Nelson*, 864 F.2d 1202, 1206–08 (5th Cir.1989). At some point the linkage is uncertain enough to justify qualified immunity for an official accused of breaking it.

Williams v. Texas Tech. Univ. Health Scis. Ctr., 6 F.3d 290, 293–94 (5th Cir. 1993). *See also Vicari v. Ysleta Indep. Sch. Dist.*, 546 F. Supp. 2d 387, 425 (W.D. Tex.), *aff'd in part*, 291 F. App'x 614 (5th Cir. 2008) (“Given these circumstances, the Court concludes Vicari did not have a constitutionally-protected property interest in a salary for the 2005–2006 school year which was identical to her salary for the 2004–2005 school year.”); and this Commission’s minute entry from its March 22, 2021, meeting requiring a recoupment of special assignment pay from Octavio Basldassaro when Baldassaro was no longer performing the duties of a captain. Therefore, Thomas was not entitled to notice and an opportunity to be heard before payment of the special rate of pay ceased.

Thomas’s appeal of his suspension is DENIED.

This the 13th day of May, 2021

WRITER:


CJ Moore (May 13, 2021 09:22 CDT)

CLIFTON J. MOORE, JR., VICE-CHAIRPERSON

CONCUR:


J H Korn (May 7, 2021 07:25 EDT)

JOHN KORN, COMMISSIONER


Mark C. Surprenant (May 3, 2021 15:33 CDT)

MARK SURPRENANT, COMMISSIONER