



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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Monday, December 30, 2024

Mr. Eric Hessler  
PANO 320 N. Carrollton Avenue #202  
New Orleans, LA 70119

Re: **Bob Finkelstein VS.**  
**Department of Police**  
**Docket Number: 9512**

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 - 12/30/2024 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, 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: Anne E. Kirkpatrick  
James M. Roquemore  
Jay Ginsberg  
Bob Finkelstein  
file

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

**BOB FINKELSTEIN,  
Appellant**

**Docket No. 9512**

v.

**DEPARTMENT OF POLICE,  
Appointing Authority**

**DECISION**

Appellant, Bob Finkelstein, brings this sex discrimination appeal pursuant to Article X, § 8(B) of the Louisiana Constitution and this Commission's Rule II, § 4.6 seeking relief from his probationary period failure as a Police Investigative Specialist communicated by letter dated September 7, 2023. (Ex. CNO-8). A Hearing Examiner, appointed by the Commission, presided over a hearing on July 10, 2024. 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 October 29, 2024, and controlling Louisiana law.

For the reasons set forth below, Mr. Finkelstein's appeal is DENIED.

**I. FACTUAL BACKGROUND**

The Department of Police hired Mr. Finkelstein on May 7, 2023, as a civilian investigative specialist. (Ex. CNO-1). The Department of Police terminated his employment on September 7, 2023, during his probationary period. (Ex. CNO-8). Mr. Finkelstein alleges that the Department of Police discriminated against him by failing to assign investigations to him, while assigning investigations to three similarly situated female police investigative specialists. (Tr. at 10, 17-18).

Mr. Finkelstein also alleged the Department of Police treated him differently as to the provision of resources. Mr. Finkelstein testified that the three female employees, who were hired soon after him, had an office, a phone, and a computer, even though the Department of Police failed to provide him with this equipment. (Tr. at 16). Mr. Finkelstein also alleged that he was assigned menial tasks, such as shredding, filing, and scanning documents. (Tr. at 21).

As for resources, the three female investigative specialists shared an office, and the Department of Police provided them with a phone and a computer. (Tr. at 42, 164). Mr. Finkelstein testified that the Department of Police provided a desk and a computer to him, but that there was no phone at his desk. (Tr. at 26-27). According to Mr. Finkelstein, the Department of Police never assigned a mobile phone to him. (Tr. at 28). Sgt. Bruce and Captain Waguespack both testified that Mr. Finkelstein failed to set up the mobile phone assigned to him. (Tr. at 100, 162). Sgt. Bruce also testified that Sgt. Kennelly reported to her that he was unable to get Mr. Finkelstein to set up his phone. (Tr. at 185). Following the testimony of Captain Waguespack and Sgt. Bruce, Mr. Finkelstein testified that the Department of Police never programmed the mobile phone assigned to him, and that it was of no use to him. (Tr. at 194).

Sgt. Claudia Bruce, who was assigned to Sex Crimes day watch in Special Victims Division (SVD) and served as the administrative sergeant for the SVD, testified that she interviewed Mr. Finkelstein and recommended that the Department of Police hire him. (Tr. at 136-37). The Domestic Violence Unit, Sex Crimes Unit, Child Abuse Unit, and Registered Sex Offender Unit comprise the Special Victims Division. (Tr. at 57). Sgt. Bruce was initially Mr. Finkelstein's immediate supervisor. (Tr. at 138).

Following a three-week training, the Department of Police assigned Mr. Finkelstein to the Domestic Violence "Gone on Arrival" unit. (Tr. at 139). Sgt. Patrick Kennelly became Mr.

Finkelstein's supervisor. (Tr. at 138). Captain Joseph Waguespack, who supervised the Special Victims Division, testified that Mr. Finkelstein's duties were to assist with police investigations and draft reports. (Tr. at 26, 61-62; *See also* Ex. NOPD-2 (job description)). Capt. Waguespack testified that each civilian investigator is assigned to a sergeant, and the sergeant assigns five investigations to each investigator per week. (Tr. at 56, 72). Over a period of four and one-half months, the group of investigators authored 226 reports, and Mr. Finkelstein authored zero reports. (Tr. at 72; Ex. CNO-10). The sergeant supervising the investigator was responsible for quarterly evaluations addressing the progress, deficiencies, and training needed by the investigator. (Tr. at 62).

Sgt. Kennelly noted in Mr. Finkelstein's July 25, 2023, evaluation that Mr. Finkelstein was having "difficulty with the technological and report writing aspects of the job." (Ex. CNO-3). Mr. Finkelstein acknowledged during the hearing of this matter that he had difficulty with the electronic police reporting system. (Tr. at 32). Sgt. Kennelly also stated that "Sergeant Kennelly has given Investigator Finkelstein administrative tasks that are more suitable for him, however, Sergeant Kennelly will continue to work with him to develop his skills in S.V.D." (Ex. CNO-3). Overall, Sgt. Kennelly rated Mr. Finkelstein as "needs improvement." (Ex. CNO-3).

On September 8, 2023, Sgt. Kennelly rated Mr. Finkelstein's performance as "unsatisfactory." (Ex. NOPD-6). In addition to other deficiencies, Sgt. Kennelly checked a box that read as follows: "Written work is often incomplete and contains errors. Usually cannot adequately express ideas verbally or in writing." (Ex. CNO-6). Mr. Finkelstein denied Sgt. Kennelly ever communicated these deficiencies to him, but Sgt. Bruce testified that Sgt. Kennelly asked for her advice when Mr. Finkelstein refused to sign the July 25, 2024, evaluation during a face to face meeting. (Tr. at 152,155; Ex. CNO-4). Sgt. Kennelly also prepared a memo requesting

permission from Superintendent Woodfork to terminate Mr. Finkelstein's employment. (Ex. CNO-7)

Sgt. Bruce, as the administrative sergeant in the Special Victims Division, received all the evaluations of probationary investigators. (Tr. at 149). Sgt. Bruce talked to Sgt. Kennelly about his evaluations: "[H]im and I would definitely speak and collaborate about their evaluations." (Tr. at 149). According to Sgt. Bruce, initially, Sgt. Kennelly assigned Mr. Finkelstein police reports and call-backs to victims. (Tr. at 139-40). After Sgt. Kennelly observed Mr. Finkelstein perform a call-back, Sgt. Kennelly did not feel comfortable assigning additional call-backs to Mr. Finkelstein. (Tr. at 139-40). Sgt. Bruce also testified that Sgt. Kennelly returned Mr. Finkelstein's first report to him two or three times for corrections, and Mr. Finkelstein refused to perform the corrections. (Tr. at 140).

Sgt. Bruce testified that according to Detective Poland, Sgt. Kennelly asked Det. Poland to help train Mr. Finkelstein (Tr. at 141). Det. Poland related to Sgt. Bruce that Mr. Finkelstein told Det. Poland her report was "garbage." (Tr. at 141). Det. Poland refused to work with Mr. Finkelstein following this incident. (Tr. at 141-42).

Sgt. Bruce also testified that because Mr. Finkelstein could only complete reports away from the office, Sgt. Kennelly believed another person was completing the report, raising confidentiality concerns. (Tr. at 144). Sgt. Kennelly also believed Mr. Finkelstein took a hard copy of the report out of the office. (Tr. at 143).

At the request of Sgt. Bruce, Sgt. Kennelly put his concerns about Mr. Finkelstein's performance in an email to her. (Tr. at 149). Sgt. Kennelly stated in this August 7, 2023, email that Mr. Finkelstein was "unable to operate a computer with any proficiency." (Ex. CNO-11). Sgt.

Kennelly also stated that “[h]is report writing skills are below standard,” and “[h]e has trouble communicating on the telephone with outside agencies.” (Ex. CNO-11).

Sgt. Bruce was invested in retaining Mr. Finkelstein, so when she became aware of the deficiencies in his performance as recorded by Sgt. Kennelly, she looked for another position for him. (Tr. at 145). Because of his limitations with technology, Sgt. Bruce was unable to find another assignment for Mr. Finkelstein. (Tr. at 147).

## II. ANALYSIS

### A. Standard for Sex Discrimination Appeal

Mr. Finkelstein has failed to carry his burden of proof to show sex discrimination under Civil Service Rule II, § 4.6. In disciplinary actions where the classified employee alleges discrimination, the burden of proof on appeal, **as to the factual basis for the discrimination**, is on the employee. La. Const. art. X, § 8(B); *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12), 87 So. 3d 925, 927 (quoting *Goins v. Dep't of Police*, 570 So.2d 93, 94 (La. App. 4th Cir.1990)). *See also* Civil Service Rule II, §§ 4.4, 4.8. In 1983, the Fourth Circuit Court of Appeal held the Commission erred by relying on the Title VII *McDonnell-Douglass* burden-shifting framework for discrimination claims under Article X, Section 8(B) of the Louisiana Constitution. *Mixon v. New Orleans Police Dep't*, 430 So. 2d 210, 212 (La. App. 4 Cir. 1983) (“we conclude the Commission erred in applying the federal burden of proof standard instead of the burden specified in LSA–Const. Art. 10 § 8(B).”). Recently, the Fourth Circuit Court of Appeal, in a plurality opinion, applied the *McDonnell Douglass* framework in a mixed motive whistleblower appeal by a probationary employee. *Balancier v. Sewerage & Water Board of New Orleans*, 2022-0255 (La. App. 4 Cir. 10/19/22), 351 So. 3d 439. The Commission applied this

framework in *Richardson v. Department of Police*, No. 9406 (Civil Service Commission 7/16/24), appeal filed 7/17/24.<sup>1</sup>

**1. *McDonnell Douglass* burden-shifting**

**a. *Prima facie* case of discrimination**

In order to show a *prima facie* case of discrimination under the *McDonnell Douglass* framework, Mr. Finkelstein must show that (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment decision; and (4) similarly situated female employees were treated more favorably. *Guidry v. Glazer's Distributors of Louisiana, Inc.*, 2010-218 (La. App. 3 Cir. 11/3/10), 49 So. 3d 586, 590–91. Mr. Finkelstein has shown that he is a member of a protected class and he suffered an adverse employment action. Mr. Finkelsein has failed to show that he was qualified or that similarly situated female employees were treated more favorably.

Sgt. Kennelly's evaluations of Mr. Finkelstein reflecting his inability to use the computer, talk on the phone to outside agencies, or write reports illustrate that Mr. Finkelstein was not qualified for the position of Police Investigative Specialist. To the extent Mr. Finkelstein's testimony differs from the testimony Sgt. Bruce or the content of the evaluations and other communications authored by Sgt. Kennelly, the Commission credits Sgt. Kennelly's evaluations and Sgt. Bruce's testimony.

In addition, Mr. Finkelstein was not treated differently than similarly situated female Police Investigative Specialists. The standard for "similarly situated" is high:

This is because we require that an employee who proffers a fellow employee as a comparator demonstrate that the employment actions at issue were taken "under nearly identical circumstances." The employment actions being compared will be

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<sup>1</sup> The Commission's decision is available publicly at [Decision - Sabrina Richardson v. NOPD #9406.pdf](#).

deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories. And, critically, the plaintiff's conduct that drew the adverse employment decision must have been "nearly identical" to that of the proffered comparator who allegedly drew dissimilar employment decisions. If the "difference between the plaintiff's conduct and that of those alleged to be similarly situated *accounts for* the difference in treatment received from the employer," the employees are not similarly situated for the purposes of an employment discrimination analysis.

*Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009). Mr. Finkelstein's job performance, including his refusal to take direction from Sgt. Kennelly or Det. Poland, accounts for the difference in treatment received from the Department of Police. Therefore, Mr. Finkelstein cannot state a prima facie case of discrimination.

**b. NOPD's legitimate non-discriminatory reason for the probationary period failure**

Assuming, *arguendo*, that Mr. Finkelstein has made a *prima facie* case, the burden shifts to NOPD to offer a legitimate non-discriminatory reason for the difference in treatment. *Majors v. Dillard Univ.*, 2022-0789 (La. App. 4 Cir. 5/8/23), 368 So. 3d 116, 121. 27). The Department of Police has offered ample evidence that Mr. Finkelstein's job performance was unsatisfactory.

**c. Whether NOPD's legitimate non-discriminatory reason was pretextual**

Mr. Finkelstein is unable to show that the NOPD's legitimate non-discriminatory reason is pretextual. In *McDonnell Douglas* burden-shifting, if the employer meets its burden of articulating a legitimate non-discriminatory reason for the adverse employment action, the employee then must show that the reason is a pretext for discrimination. *Robinson v. Bd. of Supervisors for Univ. of Louisiana Sys.*, 2016-2145 (La. 6/29/17), 225 So. 3d 424, 431. "This may be accomplished either directly, by showing that a discriminatory reason more than likely



motivated the employer, or indirectly, by showing that the asserted reason is unworthy of credence.” *Id.*

Mr. Finkelstein has failed to show that the Department of Police’s legitimate non-discriminatory reason for his probationary period failure, unsatisfactory performance, was pretextual.

### III. CONCLUSION

Even under the evidentiary less stringent *McDonnell Douglass* burden-shifting framework, Mr. Finkelstein is unable to carry his burden of proof to show discriminatory animus motivated the Department of Police when it determined he had failed his probationary period. In the absence of this framework, Mr. Finkelstein has also failed to carry his burden of proof of showing that the Department of Police discriminated against him. Mr. Finkelstein’s appeal is DENIED.

WRITER:



Brittney Richardson (Dec 21, 2024 08:33 CST)

BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:



JOHN KORN, VICE-CHAIRPERSON



Andrew Monteverde (Dec 20, 2024 16:31 CST)

ANDREW MONTEVERDE, COMMISSIONER