



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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MAYOR

Thursday, December 20, 2012

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Gary Gremillion VS.
Department of Police
Docket Number: 7894**

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 - 12/20/2012 - 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,

A handwritten signature in cursive script, appearing to read "Germaine Bartholomew".

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Victor Papai
Jay Ginsberg

GARY GREMILLION

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 7894

Gary Gremillion (“Appellant”) is employed by the Department of Police (“Appointing Authority”) as a Police Captain with permanent status. The Appellant received a fifteen day suspension for violation of the Appointing Authority’s internal rules concerning Security Records. The factual basis for the violation is contained in the second paragraph of the September 19, 2011 disciplinary letter, which provides as follows:

This investigation determined that on Tuesday, December 14, 2010, the NOPD Public Integrity Bureau received transcripts from the Federal Court trial of U.S. v. Warren et al, documenting testimony rendered by you that you provided retired New Orleans Police Lieutenant Robert Italiano with a copy of a police report that is in fact a public document. You provided the report to retired Lieutenant Italiano who was not investigating the matter in connection with his employment with the State Attorney General’s Office. Furthermore, Lieutenant Italiano was involved in the case and was eventually indicted and tried in the case. He was acquitted of the charges brought against him for obstruction of justice for allegedly putting together a misleading and false report. The investigator proved that you provided retired Lieutenant Italiano with a copy of a report, which is a violation of Rule 6: Official Information, paragraph 1, Security Records.

Prior to taking disciplinary action, the Appointing Authority assigned a panel to conduct a pre-disciplinary hearing. The panel determined that the Appellant’s provision of a copy of the incident report to Robert Italiano was a Category 2 (Moderate) violation of internal rules that justified an enhanced penalty based upon the Appointing Authority’s penalty schedule.¹

¹ A Category 1 (Minor) violation carries a maximum recommended penalty of a five day suspension. It, by definition, does not affect the rights or liberties of another. A Category 2 (Moderate) violation carries a maximum recommended penalty of a twenty day suspension. It, by definition, may affect the rights or liberties of another.

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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 April 26, 2012 and May 10, 2012. 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.

Commander John Thomas of the Public Integrity Bureau conducted the internal investigation. He testified that his determination was based upon information provided to him by the Appellant during the course of the investigation. Commander Thomas determined that during May of 2009, the Appellant, while assigned as the Commander of the Homicide Division, received from a subordinate copies of two reports dating back four years. The reports related to a September of 2005 incident that occurred in the Fourth Police District concerning the discharge of a weapon by Police Officer David Warren. One report was a Use of Force report that contained the Appellant's signature and the other was an Incident Report that contained Lt. Italiano's signature as the reviewing supervisor. Shortly after receiving the reports, the Appellant had lunch with one of his co-workers and Lt. Italiano. During lunch, the reports came up in discussion. Lt. Italiano asked the Appellant if he could get a copy. The Appellant thereafter faxed a copy on NOPD Homicide Division letterhead to the Louisiana Attorney General's office where Lt. Italiano was employed as an investigator.

Commander Thomas concluded that the Appellant failed to follow proper protocol for the release of a public record. He testified that, while Lt. Italiano was entitled by law to a copy of the record, the Appellant should have instructed Lt. Italiano

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to use formal channels by either making a public records request or going to the records room and obtaining a copy by the same method as any private citizen.

Commander Thomas testified that his investigation provided no evidence that the Appellant's sustained violation impacted anyone's rights or liberties. He also determined that the Appellant had no unlawful or disreputable motive for providing a copy of the report to Lt. Italiano. In fact, the Appellant had no knowledge that Lt. Italiano was or was to become a subject of a federal investigation. He accepted the Appellant's explanation that he provided the document to Lt. Italiano as a courtesy to a retired police officer in good standing working for another law enforcement agency.

Dep. Supt. Kirk Bouyelas was a member of the appeal panel that recommended a fifteen day suspension. Dep. Supt. Bouyelas testified that the Appellant's actions may have affected the rights of another, in this case meaning the victim of a crime or the victim's family. Dep. Supt. Bouyelas was also concerned that the document was provided while a federal investigation regarding the same incident was in progress and that Lt. Italiano was a subject of the investigation.

The Appellant testified without challenge that he came into possession of the incident report while commander of the homicide division. He testified that his subordinate, Lt. Fred Austin, found the reports and told him that, "they discovered some reports from the Fourth District and your [Appellant's] name is on one of them and Lt. Italiano's name is on the other." Lt. Austin gave him copies of the reports, both of which related to the discharge of a weapon in the Fourth District. The Appellant had lunch with Sgt. Catalanotto and Lt. Italiano a few days later. Lt. Italiano was retired from the NOPD, but still in law enforcement with the Louisiana Attorney General's office as an

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investigator. Lt. Italiano mentioned that he heard that a report had surfaced in the Fourth District involving David Warren, the police officer that discharged his weapon in the incident report. The Appellant confirmed that and told Lt. Italiano that he had two reports. Lt. Italiano requested a copy of the report and the Appellant later faxed a copy of the report to him “as a convenience”.

The Appellant testified that he saw nothing wrong with providing the report because it was a public record that Lt. Italiano was entitled to have and that Lt. Italiano was a retired police officer in good standing who was working for another law enforcement agency. Further, at the time of the request, he had no reason to believe that Lt. Italiano was the subject of an investigation by the FBI. With regard to the FBI investigation, the Appellant testified that he was informed by Capt. David Kirsch, the former commander of the Fourth District, that the FBI interviewed both him and Lt. Italiano as potential witnesses only. The Appellant also met with the FBI. He gave them copies of the reports and informed the FBI that he provided Lt. Italiano with a copy also.

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 of proof 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.*

CONCLUSION

The Appellant contends that he did not violate an internal rule by providing Lt. Italiano with a copy of the incident report. He also contends that, even assuming a violation, there was no evidence that the provision of the report may have affected the rights or liberties of another.

The Appointing Authority, while arguably establishing a technical violation of an internal rule, has failed to establish by a preponderance of evidence that the violation impacted the efficient operation of the department. The Appellant provided a copy of a report he had in his personal possession to a retired police officer in good standing working for another law enforcement agency. The report was a public record to which

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the retired police officer was entitled. The Appellant provided the report openly and reported his actions to the FBI shortly after his actions when questioned.²

Considering the foregoing, the Appellant's appeal is GRANTED. The Appointing Authority is ordered to pay the Appellant fifteen days of back pay and all emoluments of employment.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 20th DAY OF
DECEMBER, 2012.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION



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

CONCUR:


JOSEPH S. CLARK, COMMISSIONER

DISSENT:

I dissent from the majority opinion that the violation did not "affect[] the rights and liberties of another." I further dissent on grounds that even though Lt. Italiano may have been entitled to the report, he was only entitled to such through the proper channels of either making a public records request or going to the records room to obtain a copy by the same method as a private citizen. Based on these grounds, I would have denied the appeal filed by the Appellant.


DANA M. DOUGLAS, VICE-CHAIRMAN

² Because the Appointing Authority has not met its burden of proof for taking disciplinary action, it is not necessary to address whether the enhanced penalty was justified. Nevertheless, we find that the Appointing Authority provided no evidence to justify an enhanced penalty.