



# CITY OF NEW ORLEANS

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

Friday, March 4, 2022

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

Re: **Nicholas Martin VS.**  
**Department of Police**  
**Docket Numbers: 9248 & 9268**

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 - 3/4/2022 - 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,

A handwritten signature in blue ink that reads "Stacie Joseph".

Stacie Joseph  
Management Services Division

cc: Shaun Ferguson  
Darren Tyus  
Jay Ginsberg  
Nicholas Martin

file

"AN EQUAL OPPORTUNITY EMPLOYER"

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

**NICHOLAS MARTIN,  
Appellant**

**Docket No. 9248 & 9268**

v.

**DEPARTMENT OF POLICE,  
Appointing Authority**

**DECISION**

Appellant, Nicholas Martin, 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 January 20, 2021, emergency suspension, (Ex. HE-1), and his April 20, 2021, termination, (Exhibit HE-2). At all relevant times, Appellant had permanent status as a Police Officer. (Tr. at 7; HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on June 16, 2021. 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 post-hearing briefs submitted by the parties, the Hearing Examiner's report dated October 8, 2021, and controlling Louisiana law.

For the reasons set forth below, Officer Martin's appeal of his emergency suspension is GRANTED, and Officer Martin's appeal of his termination is GRANTED.

**I. FACTUAL BACKGROUND**

**A. Brief Summary of Facts**

Officer Martin tested positive for marijuana metabolites after receiving medical care at Tulane Hospital for smoke inhalation sustained while on duty on January 13, 2021. (Tr. at 9-10).

Officer Martin is unable to explain why he tested positive for marijuana, other than suggesting that he may have unknowingly ingested a cookie or brownie with marijuana at a college party with his girlfriend on the evening January 12, 2021. (Tr. at 130-31). Officer Martin has raised no objection to the chain of custody, the integrity of the sample, or the validity of the test results. Officer Martin testified that he rarely drinks alcohol and that he has never used marijuana or illegal drugs. (Tr. at 125).

**B. Events of January 13, 2021**

On January 13, 2021, Officer Martin, who had been a police officer for over two years, was working as a patrol officer on the B Platoon in the Seventh District. (Tr. at 7, 124). His shift was from 2:25 PM to 11:00 PM. (Tr. at 8). Officer Martin responded to a fire at an apartment building at 6000 Chef Menteur Boulevard. (Tr. at 8). The apartment building was three stories with storage on top, a “huge apartment complex.” (Tr. at 115). Lt. St. Germain, who is in Officer Martin’s chain of command, testified it was the “biggest fire he’d ever seen.” (Tr. at 115). Lt. St. Germain testified that his “entire platoon” was on the scene of the fire. (Tr. at 115). Officer Martin and his partner were the first to arrive on the scene, and Officer Martin remained on the scene for about four hours. (Tr. at 125, 127). Lt. St. Germain explained that “[t]hose officers were going door-to-door, knocking and making sure people evacuated and came out.” (Tr. at 116). Officer Martin inhaled smoke, so he went to Tulane Hospital to “get checked out.” (Tr. at 10). Officer Martin’s superior officer, Sgt. Nguyen, ordered a drug test. (Tr. at 10, 97). Officer Martin was informed that the drug test was positive by the Department of Civil Service on January 20, 2021. (Tr. at 15, 97; Ex. NOPD-2).

**C. NOPD Policy Chapter 13.21**

NOPD Policy Chapter 13.21, titled Alcohol and Drug Use/Testing, paragraph 24(f), reads as follows:

**Non-Crash Accident/Injury** – All members shall be tested when there is **reasonable suspicion to believe that substance abuse may be present and** the member causes or sustains an injury that requires medical treatment away from the scene of the accident if it occurred during the performance of duties or caused substantial damage to property.

(Ex. NOPD-5) (emphasis added). The officer assigned to investigate the complaint against Officer Martin for violation of substance abuse policies, Sgt. Kimberly Hunt, testified that Officer Martin was drug tested because he suffered smoke inhalation at a fire. (Tr. at 50). Officer Hunt testified that if an officer is injured, then NOPD tests the officer for drugs. (Tr. at 52). Deputy Superintendent John Thomas also testified that it is the practice of NOPD to drug test all officers who suffer an injury. (Tr. at 103). Officer Hunt testified that her investigation did not reveal any reasonable suspicion that Officer Martin was under the influence of drugs or engaged in substance abuse. (Tr. at 65). Sgt. Kurt Eischen and Lt. Terence St. Germain, both in Officer Martin's chain of command in the Seventh District, testified that they never suspected that Officer Martin was impaired. (Tr. at 107, 113).

**D. Officer Martin's Job Performance**

Sgt. Eischen testified about Officer Martin's good job performance, and Lt. St. Germain testified that he recommended Officer Martin receive an award for his life-saving work on January 13, 2021. (Tr. at 115). Sgt. Eischen, who supervised Officer Martin, testified Officer Martin is "completely stand-up officer" and that "[Officer Martin] was one of my favorites" (Tr. at 105). Sgt. Eischen said Officer Martin was always on time and was always "professional and courteous on scene." (Tr. at 105). Sgt. Eischen further stated, "I never had an issue with him at all, not once."

(Tr. at 105). Lt. St. Germain also testified that it was his understanding that Officer Martin does not drink. (Tr. at 113).

**E. Drug testing integrity**

NOPD called Jeffrey Mendler, the owner of Toxicology and Drug Analysis Lab (TDAL). (Tr. at 33). Mr. Mendler collected the urine from Officer Martin. (Tr. at 38). Sgt. Nguyen requested the testing about 10:02 PM, and Mr. Mendler went to Tulane Hospital to collect the sample from Officer Martin and three other officers. (Tr. at 43-44).

NOPD called the Technical Director of Alere Toxicology, David Golz, who testified about the testing procedure for Officer Martin's urine sample and the chain of custody. (Tr. at 19-32). Mr. Golz testified that the initial test was presumptive positive for marijuana, and the confirmation test was 78 nanograms/ml. (Tr. at 29, 31).

**F. NOPD's Discipline of Martin**

NOPD placed Officer Martin on an emergency suspension on January 20, 2021. (Tr. at 134; Ex. HE-2). NOPD terminated Officer Martin's employment on April 20, 2021. (Ex. HE-1). In the termination letter, NOPD stated that Officer Martin was terminated for violating the following rule: "An employee shall not report to duty under the influence of any drug, medication or other substance impairing his/her normal sensory and/or motor body functions." (Ex. HE-1 at 2). NOPD stated in the termination letter that "*You violated this rule when you tested positive for the marijuana metabolite.*" (Ex. HE-1 at 2) (emphasis in original).

**I. ANALYSIS**

**A. Cause for Discipline**

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).

**1. Occurrence of the Complained-of Conduct**

NOPD has failed to carry its burden of showing by a preponderance of the evidence that the complained-of conduct occurred. First, The New Orleans Police Department Policy (Chapter 31.21) did not authorize drug testing of Officer Martin in a non-crash accident in the absence of reasonable suspicion. (Ex. NOPD-5). Therefore, NOPD failed to follow its own policy when it ordered Officer Martin to be drug tested. Just as in the drug-testing appeal decided by this Commission in May 2021 and affirmed by the Fourth Circuit, “the appointing authority in this case violated its own operational procedures.” *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 2021 WL 5629269 (concerning Appointing Authority’s failure to follow procedures following Appellant’s failure to produce sufficient urine). The undersigned Commissioners acknowledge that Civil Service Rule V, section 9.13, authorized the testing of Officer Martin based on its definition of “accident,” but NOPD officers should be able to rely on NOPD following its own policy.

Second, during the hearing of this matter, NOPD clarified that it terminated Officer Martin for on-duty conduct. In the letter of termination, NOPD quotes the policy against working while under the influence of a prohibited substance: “An employee shall not report to duty under the influence of any drug, medication or other substance impairing his/her normal sensory and/or motor body functions.” (Ex. HE-1). Deputy Superintendent Thomas testified that NOPD terminated Officer Martin’s employment for testing positive for marijuana metabolites while on duty. (Tr. at 85, 91). Deputy Superintendent Thomas specifically testified that NOPD did not terminate Officer Martin’s employment for off-duty conduct under CAO Policy Memorandum 89, (Exhibit NOPD-7), while conceding that no evidence existed that Officer Martin was under the influence of marijuana while working. (Tr. at 85, 92). NOPD has offered no evidence that Officer Martin was impaired while on duty, even though NOPD terminated Officer Martin’s employment for on-duty conduct. Just as in *Matusoff v. Dep’t of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313, concerning legal use of CBD oil by a firefighter, and *Neely*, 2021-0454 (La. App. 4 Cir. 12/1/21), NOPD failed to meet its burden of proving by a preponderance of the evidence that Officer Martin was terminated for being under the influence of a drug impairing his normal sensory or motor body functions *while on duty*.

The undersigned Commissioners have significant doubt that Officer Martin knowingly ingested marijuana off-duty. Officer Martin and Lt. St. Germain testified that Officer Martin does not drink. (Tr. at 113). Officer Martin testified that he has never used illegal drugs. (Tr. at 125). Further, Officer Martin testified he knew that he would be drug tested if he received medical attention for smoke inhalation, (Tr. at 129), yet Officer Martin did not decline treatment. Other officers, although coughing from smoke inhalation, elected not to seek treatment. (Tr. at 122). Two subsequent tests, one by the NOPD and one funded by Officer Martin on January 22, 2021, did

not show evidence of THC in his system. (Tr. at 16, 62). Although these tests were performed sometime later, even the test of his hair was negative. (Tr. at 16).

## **2. Impairment of Efficient Operation**

NOPD has failed to show that Officer Martin's positive drug test impaired its efficient operation. If, in fact, Officer Martin unknowingly ingested marijuana off-duty, then the positive drug screen alone is insufficient to show that Officer Martin's conduct impaired the efficient operation of NOPD. Just as in *Neely*, NOPD "fails to demonstrate how the non-occurrence of an offense by an employee impairs its efficient operation." *Neely*, 2021-0454 at 17. No testimony was offered that Officer Martin was impaired on January 13, 2021 (or at any other time). To the contrary, Officer Martin performed life-saving work on January 13, 2021.

## **3. Discipline Commensurate with Violation**

Last, NOPD failed to consider Officer Martin's job performance as a mitigating factor. (Tr. at 82-83, 91). Sgt. Eischen, who supervised Officer Martin, testified Officer Martin is "completely stand-up officer" and that "[Officer Martin] was one of my favorites" (Tr. at 105). Sgt. Eischen said Officer Martin was always on time and was always "professional and courteous on scene." (Tr. at 105). Sgt. Eischen further stated, "I never had an issue with him at all, not once." (Tr. at 105). Lt. St. Germain testified he recommended Martin for a life-saving award for Officer Martin's efforts to get residents out of harm's way during the fire. (Tr. at 115). In addition to supporting mitigation of the penalty, these facts lend credence to Officer Martin's assertion that he did not intentionally ingest marijuana.

## **B. Police Officer Bill of Rights**

In addition, NOPD's emergency suspension violated the Police Officer Bill of Rights, La. R.S. 40:2531. NOPD failed to provide Officer Martin with a pre-disciplinary hearing prior to his



emergency suspension on January 20, 2021. (Tr. at 134; Ex. HE-2). The Fourth Circuit has held that a failure to provide a pre-disciplinary hearing before an unpaid emergency suspension violates the firefighter bill of rights. *Hampton v. Dep't of Fire*, 2016-1127 (La. App. 4 Cir. 5/3/17), 220 So. 3d 111, 116. The Commission has applied this ruling to unpaid emergency suspensions of police officers, holding that an emergency suspension prior to the conclusion of an investigation of a police officer violates the police officer bill of rights and is an absolute nullity under La. R.S. 40:2531. *See, e.g., Durning v. Dep't of Police*, Nos. 8837, 8875 (City of New Orleans Civil Service Commission 8/28/19), *aff'd on other grounds, Durning v. New Orleans Police Dep't*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195.

**B. Due Process**

NOPD also failed to provide due process to Officer Martin prior to his suspension and termination. Officer Martin, “as a permanent employee, acquired a vested property right in his employment with [NOPD] and was entitled to due process in the disciplinary process.” *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21). “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985). Not only must NOPD provide Officer Martin with an opportunity to respond to the charges against him, NOPD must provide a meaningful pre-termination hearing. *Neely*, 2021-0454 at 20. By automatically relying on CAO Memorandum No. 89, requiring termination of employment for working under the influence of prohibited substances, (Tr. at 84-85, 91), and failing to consider the explanation offered by Officer Martin, NOPD failed to provide a meaningful pre-termination hearing. *Neely*, 2021-0454 at 20.

In most cases, a positive drug test indicates the employee knowingly used illegal drugs. In this case, Officer Martin offered a reasonable explanation at his pre-termination hearing for the presence of marijuana in his urine. (Tr. at 82-83). At a minimum, NOPD should have considered the explanation offered by Officer Martin. The PIB investigator testified that she felt Officer Martin's explanation was "not uncreditable." (Tr. at 63). However, Deputy Superintendent Thomas testified that he "did not determine [Officer Martin's explanation] to be false or true." (Tr. at 93). Deputy Superintendent Thomas explained that he is concerned about a slippery slope if all officers who test positive for drugs can claim that the drug was not knowingly ingested. (Tr. at 82-83). NOPD should at least consider the possibility that the employee did not knowingly ingest an illegal substance and evaluate all the evidence and the circumstances of each case. Deputy Superintendent Thomas did not evaluate Officer Martin's statements during his pre-termination hearing, thereby denying Officer Martin a meaningful opportunity to be heard. (Tr. at 82-83).

Therefore, Officer Martin's appeal of his emergency suspension and his termination is GRANTED. NOPD shall reinstate Officer Martin and reimburse him all back pay and emoluments of employment from January 20, 2021, to present.

This the 4<sup>th</sup> day of March, 2022

WRITER:

J. H. Korn

J. H. Korn (Feb 24, 2022 14:07 CST)

JOHN KORN, VICE-CHAIRPERSON

CONCUR:

CJ Moore

CJ MOORE (Mar 4, 2022 14:14 CST)

CLIFTON J. MOORE, JR., COMMISSIONER

*Ruth White Davis*

Ruth Davis (Feb 25, 2022 19:32 CST)

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RUTH DAVIS, COMMISSIONER