



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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CITY CIVIL SERVICE COMMISSION  
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MARK SURPRENANT  
RUTH WHITE DAVIS

Monday, August 8, 2022

AMY TREPAGNIER  
DIRECTOR OF PERSONNEL

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

Re: **Kevin Thompson VS.**  
**Department of Police**  
**Docket Number: 9347**

Dear Mr. Livaccari:

Attached is the amended 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 - 8/8/2022 - 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: Shaun Ferguson  
Elizabeth S. Robins  
Jim Mullaly  
Kevin Thompson

file

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

**KEVIN THOMPSON,  
Appellant**

**Docket No. 9347**

v.

**DEPARTMENT OF POLICE,  
Appointing Authority**

**AMENDED DECISION**

This decision is amended to correctly reflect that the reduced discipline, a 45-day suspension, is 45 working days. The previous decision erroneously calculated the date of reinstatement based on a 45 calendar day suspension.

Appellant, Kevin Thompson, 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 December 9, 2021, termination. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a Police Sergeant. (Tr. at 35; Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on January 26, 2022. 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 22, 2022, and controlling Louisiana law.

For the reasons set forth below and as the hearing officer recommends in the attached Hearing Examiner Report, Sgt. Thompson's appeal is GRANTED in part and DENIED in part.

## I. FACTUAL BACKGROUND

Sergeant Thompson is a 17-year veteran of NOPD with no prior discipline. (Tr. at 35, 41). On March 1, 2021, while off-duty, Sgt. Thompson was driving under the influence of alcohol in Slidell, Louisiana, resulting in Sgt. Thompson crashing his girlfriend's vehicle into a ditch. (Ex. HE-1). Sgt. Thompson was convicted on July 21, 2021, of misdemeanor DWI in City Court of East St. Tammany, and was sentenced to six months in jail and \$600 in court costs. (Ex. HE-1). The court suspended the jail sentence and placed Sgt. Thompson on 12 months of supervised probation. (Ex. HE-1). The City Court of East St. Tammany Parish terminated Sgt. Thompson's probation on December 15, 2021. (Ex. Appellant-3). The court expunged the conviction on December 22, 2021. (Ex. Appellant-5).

The parties stipulated that the violation occurred, and that the only issue before the Commission was whether the penalty of termination was commensurate with the violation. (Tr. at 5-6). The presumptive penalty for a DWI conviction (Level E on the disciplinary matrix) is a 45-day suspension. (Ex. City-1 at 3; Tr. at 15). NOPD may reduce the penalty to a 30-day suspension if mitigating factors are present and may aggravate the penalty to a 60-day suspension or dismissal if aggravating factors are present. (Ex. City-1 at 3; Tr. at 15). In this case, NOPD aggravated the penalty under four of the factors listed in the Disciplinary Matrix/Penalty Schedule. (Ex. City-1 at 4; Ex. HE-1). In particular, NOPD aggravated the penalty for the following four reasons:

- (b) the nature and seriousness of the violation and its relationship to the employee's duties, position, and responsibilities;
- (h) the notoriety of the offense or its impact upon the reputation of the Police Department;
- (r) where the violation resulted in criminal conviction or arrest;
- (f) the effect of the violation upon management's confidence in the employee's future job performance

(Ex. HE-1 at 3). As for aggravating factor (b), NOPD aggravated this factor because Sgt. Thompson should have known the dangers of DWI. (Ex. HE-1; Tr. at 18). NOPD applied aggravating factor (h), the notoriety of the offense, because outside agencies were involved. (Ex. HE-1 at 3; Tr. at 24). NOPD applied aggravating factor (r), conviction or arrest, because Sgt. Thompson was convicted of DWI. (Ex. HE-1 at 3; Tr. at 16). NOPD applied aggravating factor (f) because of the potential for credibility concerns if Sgt. Thompson were to testify in court. (Ex. HE-1 at 3; Tr. at 12). Based on these aggravating factors, NOPD terminated the employment of Sgt. Thompson. (Ex. HE-1).

NOPD admittedly failed to consider two mitigating factors:

(c) The employee's past disciplinary and work record, including whether he or she has any commendations;

(e) The employee's longevity with the department, and what he or she has contributed to the Department throughout employment;

Deputy Chief John Thomas testified that NOPD "didn't take the person into consideration," even though Chief Thomas considered Sgt. Thompson an "outstanding leader in this police department" and a "[g]ood employee, every well liked, never had any problems with him. . . ." (Tr. at 21).

## II. ANALYSIS

### A. Due Process under *Loudermill*

Appellant raised the issue of a lack of notice of the possibility of termination, resulting in an alleged violation of Appellant's due process rights under *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532 (1985). As the hearing examiner correctly determined, Appellant received timely notice of his pre-termination hearing and was afforded an opportunity to be heard on December 9, 2021.

Because Sgt. Thompson has a property right in continued employment, NOPD cannot deprive him of this property interest without due process. *Loudermill*, 470 U.S. at 538; *Lange v. Orleans Levee Dist.*, 2010-0140 (La. 11/20/10), 56 So. 3d 925, 930. However, because Louisiana Constitution, article X, section 12(B) and Civil Service Rule II, section 4.1 grant Sgt. Thompson a full hearing following his termination, with the possibility of reinstatement under Rule II, section 4.16, the pre-termination hearing “need not be elaborate.” *Loudermill*, 470 U.S. at 546-48. “When a civil service employee is entitled to a full evidentiary hearing after termination, and retroactive relief such as reinstatement is available, pre-termination due process is satisfied by notice and an opportunity to be heard. *Lange*, 56 So. 3d at 931. “[O]nly the *barest* of a pre-termination procedure is required when an elaborate post-termination procedure is involved.” *Id.*

On December 3, 2021, NOPD provided Sgt. Thompson with a description of the March 1, 2021, conduct resulting in the DWI and the subsequent conviction on July 21, 2021, along with the sustained NOPD rule violations. (Ex Appellant-1). NOPD conducted a pre-disciplinary hearing on December 9, 2021, and Appellant was able to respond to the charges against him at that time. (Tr. at 27, 40). Therefore, NOPD provided Sgt. Thompson with appropriate pre-termination due process.

## **B. Legal Standard for Commission’s Review of Discipline**

### **1. The Appointing Authority must show cause for discipline**

“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep’t of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The

Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.* “Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.”” *Id.* “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).

In this case, the parties agreed that the conduct occurred and that it impaired the efficient operation of NOPD.

**2. The Appointing Authority must show the discipline was commensurate with the infraction**

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 the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Durning v. New Orleans Police Dep’t*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 538, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195; *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 Appointing Authority has the burden of showing that the discipline was

reasonable and not arbitrary or capricious. *Neely v. Dep't of Fire*, 2021-0454 (La. App. 4 Cir. 12/1/21), 332 So. 3d 194, 207 (“[NOFD] did not demonstrate . . . that termination was reasonable discipline”); *Durning*, 294 So. 3d at 540 (“the termination . . . deemed to be arbitrary and capricious”).

**a. Factors considered by Commission**

“In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee’s work record and previous disciplinary record.” *Matusoff v. Dep't of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), 2020 Westlaw 2562940, *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313. The Commission considers the nature of the offense, the employee’s work ethic, prior disciplinary records, job evaluations, and any grievances filed by the employee.” *Honore v. Dep't of Pub. Works*, 14-0986, pp. 8-9 (La. App. 4 Cir. 10/29/15), 178 So. 3d 1120, 1131, *writ denied*, 2015-2161 (La. 1/25/16), 185 So. 3d 749

**b. Commission’s authority to affirm, reverse, or modify discipline**

If, after considering these factors, the Commission finds the discipline is arbitrary or capricious, “[t]he Commission ‘has the duty and authority to affirm, reverse, or *modify* the action taken by the Appointing Authority.’” *Durning*, 294 So. 3d at 538 (quoting *Honore v. Dep't of Pub. Works*, 179 So. 3d at 1127) (emphasis added).

The Fourth Circuit has issued conflicting decisions about whether the Commission may reduce a penalty when the Appointing Authority has carried its burden of showing cause for the discipline. “However, the authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty.” *Pope v. New Orleans Police Dep't*, 2004-1888 (La. App. 4 Cir. 4/20/05), 903 So. 2d 1 5 (citing *Branighan v. Dep't of Police*, 362 So. 2d 1221, 1223 (La.

App. 4 Cir. 1978); *Whitaker v. New Orleans Police Dep't*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572. *See also Jenkins v. New Orleans Police Dep't*, 2022-CA-0031 (La. App. 4 Cir. 6/22/22).<sup>1</sup> “Unless the Commission determine[s] that there was insufficient cause for the appointing authority to impose the [six] day suspension, the penalty must stand.” *Whitaker*, 863 So. 2d at 575.

Despite this precedent, the Fourth Circuit has reversed the Commission’s failure to modify a penalty, even though the Appointing Authority carried its burden of showing legal cause: “Although the record provides a rational basis for determining that the Department had legal cause to take the disciplinary action against Honore, we find the record does not provide a rational basis for the Commission’s conclusion that termination was the appropriate disciplinary action, commensurate with the offense.” *Honore v. Dep’t of Public Works*, 178 So. 3d at 1129. *See also Hills v. New Orleans City Council*, 98-1101 (La. App. 4 Cir. 12/9/98) (“Although the record evidence is sufficient to prove that the counsel fiscal office had good and lawful cause for taking disciplinary action against Ms. Hills, it is insufficient to prove that the punishment chosen—i.e. dismissal—is commensurate with the offense.”) Likewise, the Fourth Circuit has affirmed the Commission’s decision to reduce a termination to an 80-day suspension, even though the Fourth Circuit found the Commission correctly determined that a police officer “committed the offense of reporting to work under the influence of alcohol and with the smell of alcohol on his breath” and “such a violation undoubtedly endanger[ed] him/her, his/her co-workers, and the general public.” *Durning*, 294 So. 3d at 539-40. The Commission reduced the penalty based on error in NOPD’s application of the mitigating and aggravating circumstances. *Id.* at 540.

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<sup>1</sup> This decision is not yet final.



**C. The discipline was arbitrary and capricious**

The Appointing Authority has not met its burden of showing the discipline was reasonable, especially in light of the expungement of the conviction. *Neely*, 332 So. 3d at 307. The penalty is not commensurate with the dereliction and is arbitrary and capricious. *Durning*, 294 So. 3d at 540. The undersigned Commissioners agree with the hearing officer that NOPD improperly failed to consider the mitigating factors of Sgt. Thompson's 17 years of service and lack of any prior discipline. *Durning*, 294 So. 3d at 540.

As the hearing officer correctly determined, NOPD erroneously applied four aggravating factors. All drivers are aware of the danger of DWI, so NOPD erroneously applied the aggravating factor of the relationship of the violation to Sgt. Thompson's job duties. DWI's are likely to involve outside agencies, so the enhancement of the penalty based solely on the involvement of the Slidell Police Department and the Louisiana State Police is in error. Because a DWI is a level E offense, the arrest and conviction is already a factor in the level of discipline, as Deputy Chief Thomas conceded, so enhancement on this basis is inappropriate. (Tr. at 22). To the extent that NOPD enhanced the penalty because Sgt. Thompson exercised his right to a trial, the Commission finds that this enhancement was in error. (Tr. at 31). Further, Sgt. Thompson informed NOPD during his pre-disciplinary hearing on December 9, 2021, that he had moved for expungement of the conviction, and the court granted this expungement on December 22, 2021. (Tr. at 27, Ex. Appellant-5). Therefore, because NOPD did not charge Sgt. Thompson with untruthfulness, (Tr. at 26), and the conviction has now been expunged, the enhancement based on Sgt. Thompson's future credibility is in error.

Therefore, for these reasons, the Commission reduces Sgt. Thompson's discipline to the presumptive penalty, a 45-day suspension. NOPD shall reinstate Sgt. Thompson with back pay and other emoluments of employment from February 12, 2022, to present.

This the 8<sup>th</sup> day of August, 2022.

WRITER:

*BR*  
Brittney Richardson (Aug 7, 2022 21:17 CDT)  
BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:

*J H Korn*  
J H Korn (Aug 5, 2022 16:24 CDT)  
JOHN KORN, VICE-CHAIRPERSON

*Mark C. Surprenant*  
Mark C. Surprenant (Aug 2, 2022 16:29 CDT)  
MARK SURPRENANT, COMMISSIONER