



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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Thursday, January 13, 2022

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

Re: **Brian Stanley VS.**
Department of Police
Docket Number: 9241

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 - 1/13/2022 - 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,


Stacie Joseph
Management Services Division

cc: Shaun Ferguson
Darren Tyus
Jay Ginsberg
Brian Stanley
-
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**BRIAN STANLEY,
Appellant**

Docket No. 9241

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

DECISION

Appellant, Brian Stanley, 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 8, 2021 one-day suspension. (Ex. HE-1). At all relevant times, Appellant had permanent status as a Police Officer. A Hearing Examiner, appointed by the Commission, presided over a hearing on March 18, 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 May 13, 2021, and controlling Louisiana law.

For the reasons set forth below, Stanley's appeal is GRANTED.

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 disciplining 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 May 13, 2021, report from the Hearing Examiner attached to this decision clearly sets forth the pertinent facts and contentions. Therefore, they will not be repeated herein.

After thoroughly reviewing the entire record in this matter, the undersigned Commissioners find that the Appointing Authority has carried its legally imposed burden of proving by a preponderance of the evidence that it had good and lawful cause for imposing the one day suspension because Appellant's comment about the alleged incompetence of the Veterans Administration was unprofessional; that misconduct impaired the efficiency of the police department; and the one day suspension was commensurate with the misconduct.

Of particular importance, as evidenced by the post hearing memoranda filed by the parties, is whether the Appointing Authority failed to comply with La. R. S. 40:2532 (B)(7) when it initiated the investigation on January 22, 2019, so as to render the suspension a complete nullity pursuant to La. R.S. 40:2531 (C). The parties' post hearing memoranda present two conflicting scenarios as to what event constituted the "formal, written complaint" required by La. R.S. 40:2531(B)(7), triggering the need for the investigation to be initiated within 14 days therefrom. The Appellant contends that the December 14, 2018, email complaint about the Appellant's

unprofessional statement, which NOPD Captain Hans Ganthier received from Robert Kenyon, Chief of Police Services for Southeast Louisiana Veterans Health Care System (“VA”), set in motion the investigation initiation deadline of December 28, 2018, in accordance with La. R.S. 40:2531 (B)(7). Appellant’s argument proceeds that, since the investigation was not initiated on or before December 28, 2018, the one day imposed suspension is an absolute nullity based on La. R.S. 40:2531(C). In contrast, the Appointing Authority takes the position that the January 16, 2019, Supervisor Feedback Log triggered the 14 day deadline for initiating the investigation, which deadline was allegedly complied with on January 22, 2019, when the DI-1 form was completed.

There is no contention by the Appellant in his post hearing memorandum that the investigation was not timely completed even if we assume *arguendo* that December 14 and 28 are the key dates. Basically, given the Appointing Authority’s timely January 23, 2019, requested sixty day extension to complete the investigation (made within 30 days from December 28, 2018) and granted on January 29, 2019, the investigation had to be completed on or before April 27, 2019, using the December 14 and 28 dates. The investigation was actually completed on April 3, 2019. So, whether we use December 28 or January 22 as the investigation initiation date, the investigation was timely completed.

This Commission is legally bound to follow controlling precedent from the Louisiana Fourth Circuit Court of Appeal. In *Abbott v. New Orleans Police Department*, 165 So. 3d. 191 (La. App. 4th Cir. 2015), the Court clearly determined that the completion of the DI-1 initiated the investigation required by La. R.S. 40:2531(B)(7). In *Dupree v. Department of Police*, Docket Number 9114 (City of New Orleans Civil Service Commission 12/18/20), *aff’d*, No. 2021-CA-0134 (La. App. 4 Cir. 10/27/21), 2021 WL 4987924, this Commission made a similar

determination given the Court's holding in *Abbott*. Therefore, in the present case, the key question is whether the January 22, 2019 DI-1 was completed within 14 days from the date of the "formal, written complaint" referred to in La. R. S. 40:2531 (B)(7).

La. R.S. 40:2531 (B)(7) does not define what constitutes the statutorily required "formal, written complaint." The Appointing Authority contends the January 16, 2019 Supervisor Feedback Log was the "formal, written complaint," while the Appellant contends it was the December 14, 2018, email from Robert Kenyon with the VA. The undersigned Commissioners conclude that the December 14, 2018, email constituted the "formal, written complaint." Therefore, the DI-1 should have been completed by the Appointing Authority on or before December 28, 2018. La. R.S. 40:2531 (C) dictates that the suspension is a complete nullity unless all statutory requirements are met. As the statute clearly sets forth: "Any discipline, demotion, dismissal, or adverse action of any sort whatsoever taken against a police employee or law enforcement officer **without complete compliance with the foregoing minimum standards is an absolute nullity.**" (emphasis added). Since the Appointing Authority failed to comply with the requirements of La. R.S. 40:2531 (B)(7) as to timely initiation of the investigation, the one day suspension is an absolute nullity, despite the fact that the investigation was timely completed.

The appeal is GRANTED. The Department of Police shall remove the one-day suspension from Stanley's record and reimburse Stanley all back pay and other emoluments of employment flowing from the one-day suspension.

This the 13th day of January, 2022

WRITER:

Mark C. Surprenant
Mark C. Surprenant (Jan 12, 2022 13:03 CST)

MARK SURPRENANT, COMMISSIONER

CONCUR:

J H Korn
J H Korn (Jan 12, 2022 12:59 CST)

JOHN KORN, VICE-CHAIRPERSON

Ruth White Davis
Ruth Davis (Jan 12, 2022 20:23 CST)

RUTH DAVIS, COMMISSIONER

BRIAN STANLEY

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 9241

REPORT OF THE HEARING EXAMINER

I. INTRODUCTION

Brian Stanley ("Appellant") is employed by the Department of Police ("Appointing Authority") as a Police Officer with permanent status. The Appointing Authority suspended the Appellant for one (1) day for violating Rule 3, Professional Conduct, Paragraph 1, Professionalism.

While the Appellant acknowledges that he made the comment that resulted in disciplinary action, he contends: 1) that he was not unprofessional and 2) assuming he violated the internal rule, he is not subject to disciplinary action because PIB failed to initiate an investigation within 14 days of the cognizance date and, as a consequence of the delay, failed to complete its investigation within the time restraints mandated by LA RS 40:2531.

II. FACTS

On December 13, 2018, the Appellant responded to a call for service for a mental disturbance. He and Police Officer James Vanderhorst investigated the call and, after obtaining the necessary paperwork from the subject's family, transported the subject to the local Veterans Administration (VA) medical facility. (Tr. at 6 – 8).

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Upon arrival at the VA medical facility, the Appellant engaged with members of the VA facility staff to facilitate the transfer of the subject into the VA facility's custody for medical treatment. According to the Appellant, the VA facility staff was indecisive and uncooperative. In fact, one of the VA facility staff members said, "I'm not dealing with this" and walked away. While waiting for the VA facility staff to process the subject, the Appellant commented to Officer Vanderhorst, "I am a veteran and I refuse to use the VA service because of the level of incompetence". Although the comment was part of a conversation with his co-worker, members of the VA facility staff overheard the Appellant's comment and took offense. (Tr. at 9 – 12).

On December 14, 2018, by email communication, Robert W. Kenyon, Chief of Police Service for the Southeast Louisiana Veterans Health Care System, complained to the Appellant's ranking officers about the Appellant's comments directed towards the VA facility. Chief Kenyon's complaint was addressed informally by the Appellant's supervisors. Ultimately, the Appellant was counseled by his supervisor, Sgt. Miroslav Brekalo, on December 17, 2018. The counseling session was memorialized in the Supervisor Feedback Log. In the Feedback log, Sgt. Brekalo stated in the portion of the log for a gist:

An email was sent from the VA hospital police chief regarding a negative interaction of VA medical staff and Officer Stanley. Sgt. Brekalo reviewed the BWC and noted that Officer stated "as a veteran I don't come here because of the incompetence". Sgt. Brekalo counseled Officer Stanley that while his past experience

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was unfortunate, this was not the venue to complain about the past.

(Appellant Exh. 1 and 2).

Sgt. Sylvia Martin is assigned to the Public Integrity Bureau (PIB). Part of her responsibility is to audit the Supervisor Feedback Logs. On January 16, 2019, Sgt. Martin came upon Sgt. Brekalo's Supervisor Feedback log documenting the Appellant's comments at the VA facility and the subsequent counseling session with his supervisor. Because the complaint originated from the public, informal counseling in lieu of formal discipline is not available as a supervisory tool. According to Sgt. Martin, the Appellant's supervisors should have notified PIB to allow for the initiation of a formal investigation because a formal complaint followed by a formal investigation is required, regardless of the seriousness of the offense. Sgt. Martin initiated a formal complaint on January 22, 2019. She conducted a formal investigation, sustaining a violation of Rule 3, Professional Conduct, Paragraph 1, Professionalism. (Tr. at 26 – 28; 35).

Capt. Preston Bax, Jr. conducted a commander's hearing, recommending the presumptive penalty of a one-day suspension. (Tr. at 50).

III. Legal Analysis

A. Was the Formal Investigation Completed Within the Time Limitations Mandated By LA RS 40:2531?

The Appellant's argument, if accepted, would require the Commission to grant the Appellant's appeal, regardless of the evidence supporting disciplinary

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action. New Orleans Police Departmental Policy Chapter 52.1.1, titled "Misconduct Complaint Intake and Investigation", governs the reporting, receipt, classification, assignment, processing, investigation, and disposition of complaints regarding allegations of misconduct against employees. The policy includes, under the heading *Formal Disciplinary Investigation Due Date Calculation* found in paragraphs 82 and 83, the time restraints under which PIB must operate. The policy provides as follows:

82. An administrative investigation shall be completed within the time limitation mandated by LA RS 40:2531, which requires every investigation to be initiated within fourteen (14) days of the Cognizance Date. The date when a PIB investigation is initiated is known as the Classification Date. All due dates are calculated upon the Classification Date.

83. Every investigation must be completed within sixty (60) days of the Classification Date unless an extension of sixty (60) days is granted by Civil Service. The Civil Service extension extends the final due date to 120 days from the classification date. Within that time frame, the investigator's written investigation (accompanied by exhibits), the various levels of supervisory review which may necessitate corrections/additions/clarifications, the final approvals at every level, and the verbal and/or written "Notice to Accused Law Enforcement Officer Under Investigation of a Pre-Disciplinary Hearing or a Determination of an Unfounded or Not Sustained Complaint" (NOPD Form #308) must be completed.

New Orleans Police Departmental Policy Chapter 52.1.1 includes, under the heading *Definitions*, the definitions of Cognizance Date and Classification Date. The relevant definitions are as follows:

Cognizance date—The date on which an NOPD supervisor, whether assigned to PIB or assigned to another bureau, receives a complaint of alleged employee misconduct from any source, observes employee

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misconduct, or gains knowledge from any source of employee misconduct.

Classification date—The date on which PIB determines the complaint will be investigated as a public complaint; internally generated complaint; minor infraction resolved through counseling or training; or NFIM.

The Appellant contends that upon receipt of the complaint from the VA facility, the Appointing Authority was cognizant of the violation. Consequently, the fourteen-day period for initiating a formal complaint began on that date, rather than the date that PIB became cognizant of the violation and initiated a formal investigation.

The Appellant contends that the Appointing Authority violated LA RS 40:2531, and that his appeal must be granted regardless of whether in fact he violated internal rules that would otherwise subject him to disciplinary action. As provided in LA RS 40:2541(C):

There shall be no discipline, demotion, dismissal, or adverse action of any sort taken against a police employee or law enforcement officer unless the investigation is conducted in accordance with the minimum standards provided for in this Section. Any discipline, demotion, dismissal, or adverse action of any sort whatsoever taken against a police employee or law enforcement officer without complete compliance with the foregoing minimum standards is an absolute nullity.

Conversely, the Appointing Authority contends that the investigation was conducted within the required time restraints relying upon LA RS 40:2541(B)(7), which provides that "when a formal, written complaint is made against any police employee or law enforcement officer, the superintendent of state police

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or the chief of police **or his authorized representative** shall initiate an investigation within fourteen days of the date the complaint is made. [Emphasis Added]. The statute is silent regarding who is considered the chief of police's authorized representative, but the Appointing Authority contends that the Public Integrity Bureau is the authorized representative because PIB is the entity that initiates formal investigations. The Appointing Authority reasons that the fourteen-day deadline does not begin until PIB becomes cognizant of the complaint. In the instant case, the cognizance date would be when Sgt. Martin reviewed the Supervisor Feedback Log and discovered the public complaint.

The Appointing Authority's internal rules appear to define "authorize representative" broadly, including not only PIB, but any NOPD supervisor who receives a complaint from any source. See *New Orleans Police Departmental Policy Chapter 52.1.1 Definitions- Cognizance date*. Based upon a literal reading of the Appointing Authority's own definition, it did not initiate an administrative investigation within the time limitation mandated by LA RS 40:2531, which requires every investigation to be initiated within fourteen (14) days of the Cognizance Date.

However, notwithstanding the Appointing Authority's failure to follow its own rules regarding cognizance, and based upon the facts presented in this appeal, the Appointing Authority has established that it completed its investigation in a sufficiently timely manner to satisfy LA RS 40:2531 as written.

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The Appointing Authority has tasked PIB with reviewing the Supervisory Feedback Logs to assure that the district supervisors adhere to internal rules, requiring that they notify PIB when they receive public complaints. PIB's review assures that the Appointing Authority is cognizant of all public complaints and that a formal investigation is initiated once it becomes aware through its authorized representative as required by LA RS 40:2531.

B. Did the Appointing Authority Establish That the Appellant Violated Rule 3, Professional Conduct, Paragraph 1, Professionalism and Was the Penalty Commensurate with The Violation?

The Appellant does not dispute that he made the comment for which he was disciplined. As reflected in Sgt. Brekalo's counseling session, the VA facility was not the proper venue for the Appellant to complain about his past experiences as a patient at the VA. The Appellant was in uniform and on duty. He was reacting to the VA facility staff's failure to take charge of his subject. His comments were directed towards them and it was objectively unprofessional to comment as he did. Based upon the foregoing, the Appointing Authority has established by a preponderance of evidence that the Appellant violated Rule 3, Professional Conduct, Paragraph 1, Professionalism.

While informal counseling seemed an effective supervisory tool for addressing the Appellant's conduct, the Appointing Authority's internal rules do not give the Appellant's supervisors that discretion. A public complaint requires a formal investigation, and a sustained violation requires formal disciplinary

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action. The Appellant received the presumptive penalty of a one-day suspension, which is commensurate with the violation.

C. CONCLUSION

Based upon the foregoing, the Appellant's appeal should be DENIED.

May 13, 2021
DATE

s/ Jay Ginsberg
HEARING EXAMINER