



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
SUITE 900 - 1340 POYDRAS ST.  
NEW ORLEANS LA 70112  
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON  
RONALD P. MCCLAIN, VICE-  
CHAIRPERSON  
JOSEPH S. CLARK  
TANIA TETLOW  
STEPHEN CAPUTO

MITCHELL J. LANDRIEU  
MAYOR

LISA M. HUDSON  
DIRECTOR OF PERSONNEL

Monday, July 3, 2017

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

Re: **Brooke Duncan VS.  
Department of Police  
Docket Number: 8525**

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 - 7/3/2017 - 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 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: Michael S. Harrison  
Elizabeth S. Robins  
Brendan M. Greene  
Brooke Duncan

file

**CIVIL SERVICE COMMISSION**  
**CITY OF NEW ORLEANS**

BROOKE DUNCAN  vs.  DEPARTMENT OF POLICE	DOCKET No.: 8525
--	------------------

**I. INTRODUCTION**

Appellant, Brooke Duncan, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1. The Appointing Authority, the Police Department for City of New Orleans, (hereinafter “NOPD”) does not allege that the instant appeal is procedurally deficient. And, Appellant stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission’s analysis will be limited to whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

On Thursday, February 9, 2017, a hearing examiner appointed by the Commission presided over an appeal hearing. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner’s report. Based upon our review, we render the following judgment.

## II. FACTUAL BACKGROUND

### A. Alleged Misconduct

NOPD issued Appellant a one-day suspension for an alleged violation of NOPD Rule 4: Performance of Duty; Paragraph 4: Neglect of Duty; subparagraph C-8. (H.E. Exh. 1). This NOPD rule reads as follows: “The following acts or omissions to act, although not exhaustive, are considered neglect of duty.... Failing to thoroughly search for, collect, preserve, and identify evidence in an arrest or investigative situation.” *Id.* NOPD alleged that Appellant violated NOPD Rule 4 when, on May 5, 2015 during the course of his investigation into an apparent simple battery, he failed to interview an alleged witness. *Id.* NOPD further alleged that Appellant had ample opportunity to interview the witness but made no attempt to do so and did not secure any identifying information for the witness. *Id.*

### B. May 5, 2015

During the early evening hours of May 5, 2015, Appellant responded to a call for service originating in the French Quarter near Pirate’s Alley. (NOPD Exh. 9 at 0:00-0:31). Upon arriving at the scene, he encountered an individual who claimed to have initiated the call for service (referred to hereinafter as “Mr. B”). Mr. B, who appeared agitated and emotional, immediately began providing Appellant with his version of events. *Id.* at 0:31-1:01. Mr. B claimed that he had observed an individual (referred to hereinafter as “Mr. P”) urinating on a doorway across the street from his residence near the 800 block of Bourbon Street. According to Mr. B, when he told Mr. P to stop urinating, Mr. P responded in an aggressive manner and said “F--- you” to Mr. B. *Id.* at 01:38-2:10. Following this exchange, Mr. B alleged that Mr. P approached in an aggressive manner and punched Mr. B in the face.

Appellant then interviewed Mr. P who admitted to “getting ready” to urinate on the street, but claims that he struck Mr. B only after Mr. B grabbed his shirt. *Id.* at 2:11-3:04. Based upon his interviews with Mr. P and Mr. B, Appellant initially informed both men that they would each receive a summons for “fighting.” *Id.* at 11:51-12:18. During the course of his conversation with Appellant, Mr. B repeatedly alleged that there are witnesses to the incident and asked Appellant to accompany him back to his residence.

Appellant eventually relocated to the area where the incident occurred. *Id.* at 18:14-18:52. When he arrived at the scene, Appellant again encountered Mr. B who was accompanied by an African-American male wearing an orange shirt. Mr. B claimed that the man in the orange shirt was with him during the incident and witnessed the entire exchange. *Id.* at 18:14-18:52. As Appellant spoke with Mr. B, a Caucasian male in a white shirt approached Appellant and asked “did you lose track of him?” *Id.* at 18:14-18:52. The man in the white shirt (referred to hereinafter as “Mr. W”) went on to volunteer that he was on his balcony during the incident and was able to observe the actions of Mr. B and Mr. P. *Id.* at 18:53-18:58.

Appellant then asked Mr. W to provide him with an account of what he observed. According to Mr. W, he observed Mr. P urinating on a doorway across the street from where Mr. B was sitting. He then saw/heard Mr. B tell Mr. P to stop. Once Mr. P had finished urinating, he crossed the street and confronted Mr. B. Mr. W claimed that Mr. P then initiated physical contact with Mr. B. *Id.* at 19:31-21:17. After receiving Mr. W’s account of the incident, Appellant asked Mr. W if he would be willing to serve as a witness in the criminal proceeding. Mr. W answered “yes” and Appellant secured his contact information.

Because Mr. W corroborated Mr. B’s account, Appellant informed Mr. B that only Mr. P will receive a summons. However, Appellant encouraged Mr. B to appear in court on the date of

the summons to serve as a witness against Mr. P. At no point in time during Appellant's investigation in this matter did he attempt to interview the man in the orange shirt.

### **C. NOPD's Investigation**

NOPD initiated an investigation into Appellant's conduct on May 5, 2015 based upon an complaint filed by Mr. B regarding the manner in which Appellant spoke to him during the investigation. (Tr. at 12:2-7). Sergeant Jonathan Bulliung was responsible for the initial investigation. As part of his investigation, Sgt. Bulliung reviewed the body-worn camera (hereinafter "BWC") footage captured by Appellant on May 5, 2015. Based upon his review of the BWC footage, Sgt. Bulliung recommended that NOPD dismiss the allegations against Appellant pertaining to professionalism, but sustain the allegation regarding neglect of duty. *Id.* at 12:18-23. Sgt. Bulliung testified that, based upon NOPD policy, Appellant should have interviewed the man in orange. *Id.* at 16:16-24. While he acknowledged that Appellant did speak to a witness, and did corroborate Mr. B's account, Appellant still should have spoken to the man in orange. According to Sgt. Bulliung, "if a witness is made known to [an officer], ideally [the officer] would speak to that person, because it may affect the investigation or outcome." *Id.* at 19:1-4.

Commander Paul Noel presided over Appellant's disciplinary hearing regarding the underlying allegations of misconduct. Cmdr. Noel viewed Appellant's actions as misconduct due to the potential impact on the subsequent prosecution of criminal actions. *Id.* at 33:17-23. The impact, as articulated by Cmdr. Noel, was that a criminal conviction could be overturned due to an officer's failure to conduct a thorough investigation.<sup>1</sup>

---

<sup>1</sup> We agree with the hearing examiner that the evidence in question, namely any statements by the man in orange, likely do not constitute "Brady material." See *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*

“At the very least,” Cmdr. Noel expected Appellant to obtain the name and contact information for the man in orange in case it became necessary to conduct a follow-up investigation. *Id.* at 33:7-12. Finally, Cmdr. Noel stated that Appellant’s failure to collect a witness statement from the man in orange sent a “bad message to the confidence of the criminal justice system.” *Id.* at 35:15-17.

On cross-examination, Cmdr. Noel acknowledged that the matter Appellant was investigating on May 5th was “relatively minor in nature” which is why he only recommended a one-day suspension. *Id.* at 36:25-37:6.

Appellant testified that when he arrived on the scene, Mr. B was behaving erratically and was difficult to interview. *Id.* at 55:23-56:1. Appellant also suspected that Mr. B had been drinking. Based upon Mr. B’s appearance and behavior, Appellant had doubts as to Mr. B’s credibility as well as the witness Mr. B presented. However, Appellant judged Mr. W to be a credible witness because he had no apparent association with Mr. B and had an excellent vantage point of the incident. *Id.* at 56:2-7. Once Appellant corroborated Mr. B’s account through the statement of Mr. W, he issued Mr. P a summons and considered the matter closed.

On cross-examination, Appellant acknowledged that he did not attempt to speak to the man in orange or otherwise collect any identifying information. *Id.* at 77:1-11. However, according to Appellant, he had a complete picture of the incident and there was no ambiguity in his mind that the victim’s account of the incident was accurate. *Id.* at 78:10-21.

---

at 87. One of the three elements of a Brady violation is that the prosecution “suppressed” evidence. *State v. Collins*, 2001-1459 (La.App. 4 Cir. 8/21/02, 18), 826 So.2d 598, 611, *writ denied*, 2002-2490 (La. 6/27/03), 847 So.2d 1254. However, if the evidence does not exist, the State likely cannot suppress it. Having said that, the Commission notes that a savvy defense counsel could use the failure to interview all witnesses as an effective line of cross-examination. However, such a line a questioning likely is not advisable when talking about a witness offered to the investigating officer by the victim of the underlying crime.

### III. LEGAL STANDARD

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline without sufficient cause, he/she may bring an appeal before this Commission. *Id.* It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, an 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 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, it must then determine if that discipline “was commensurate with the infraction.” *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

### IV. ANALYSIS

#### A. Occurrence of the Complained of Activities

NOPD policy requires that all officers collect, preserve, and identify evidence in an arrest or investigative situation. (H.E. Exh. 1). On May 5, 2015 Appellant was engaged in an “investigative situation” related to alleged criminal conduct. During the course of that investigation, the victim of the alleged crime, Mr. B, produced an individual whom he claims witnessed the crime. Based upon Appellant’s prior experiences with Mr. B, he did not believe that

either Mr. B or any witness produced by Mr. B would be a reliable source of information. Therefore, Appellant chose to rely upon statements of a witness who appeared to be “independent” from Mr. B. At no point in time during his investigation did Appellant attempt to speak with the witness produced by Mr. B.

The burden NOPD policy placed on Appellant in the matter now before the Commission appears to be relatively light. Given that he had secured the statement and identification of at least one witness to the underlying criminal conduct, Appellant need only have acquired enough information from the man in orange to identify him as a witness should the need arise at some point in the future. He failed to do so. A witness statement constitutes “evidence” in the context of a criminal investigation and Appellant did not “collect, preserve or identify” the man in orange’s statement. Therefore, NOPD has established that Appellant engaged in the misconduct identified in the disciplinary notice.

### **B. Impact on NOPD’s Efficient Operations**

Cmdr. Noel testified that Officer Duncan’s failure to collect a statement or contact information from the man in orange compromised the efficient operations of NOPD because it deprived investigators of evidence of criminal conduct. (Tr. at 57:9-19). This in turn could have had a possible negative impact on the ability of the Orleans Parish District Attorney to prosecute the crime in question. *Id.* Yet, in the matter now before the Commission, there was no testimony regarding the outcome of the court case. Thus, Appellant’s misconduct had little practical effect on NOPD’s efficient operations. Cmdr. Noel himself testified that he believed that Officer Duncan’s misconduct was “relatively minor.”

As a paramilitary organization, NOPD must promulgate lawful policies and procedures. All officers have an obligation to follow those lawful policies and procedures. Any failure to do



so compromises NOPD's ability to create uniform standards of performance across all districts. Thus, there is a general adverse negative impact on NOPD's efficient operations if it is unable to promulgate and enforce policies pertaining to the investigation of crimes.

Based upon the foregoing, the Commission finds that NOPD has established the Appellant's misconduct had an adverse impact on the efficient operation of the Department. However, the extent of the impact was minor.

### **C. Was the Discipline Commensurate with Appellant's Offense**

In conducting its analysis, the Commission must determine if Appellant's suspension was "commensurate with the dereliction;" otherwise, the discipline would be "arbitrary and capricious." *Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (citing *Staehe v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

NOPD's penalty matrix includes a range of a letter of reprimand to a five-day suspension for any Officer found responsible for a "Category 1" neglect of duty first offense. (NOPD Exh. 8). The Commission is not bound by the penalty matrix developed by NOPD and must conduct an independent analysis of the facts present in any appeal. However, the clear delineation of a penalty matrix serves to put employees on notice that certain conduct carries with it specific consequences. Publishing such a matrix and issuing discipline consistent with such a matrix militates against a finding that discipline is/was arbitrary.

Cmdr. Noel testified that he recommended what he considered to be a minor form of discipline because he viewed Appellant's misconduct as minor. A one-day suspension is a relatively minor form of discipline, but one that will remain in Appellant's personnel file. While a written reprimand likely would have served as a sufficient deterrent in the matter now before the

B. Duncan  
No. 8525

Commission, NOPD's decision to issue a one-day suspension does not appear to be arbitrary or capricious as it is also on the lower end of the disciplinary spectrum and consistent with NOPD's penalty matrix.

#### **V. CONCLUSION**

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant's appeal.

**THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK.**

**SIGNATURES APPEAR ON THE FOLLOWING PAGE.**

Judgment rendered this 3rd day of July, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

  
\_\_\_\_\_  
TANIA TETLOW, COMMISSIONER

6/28/17  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
RONALD P. McCLAIN, VICE-CHAIRMAN

6/26/17  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
MICHELLE D. CRAIG, COMMISSIONER

6-27-2017  
\_\_\_\_\_  
DATE