



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

STEPHEN CAPUTO
CLIFTON J. MOORE, JR.

LATOYA CANTRELL
MAYOR

Friday, October 5, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Corey S. Lloyd
101 W. Robert E. Lee, Suite 402
New Orleans, LA 70124

Re: **Rhett Charles VS.
Department of Police
Docket Number: 8735**

Dear Mr. Lloyd:

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 - 10/5/2018 - 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 cursive script that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Renee E. Goudeau
Jay Ginsberg
Rhett Charles

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

RHETT CHARLES, Appellant, vs. DEPARTMENT OF POLICE, Appointing Authority	DOCKET No.: 8735
--	------------------

I. INTRODUCTION

Appellant, Rhett Charles, 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. Further, the Parties stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and Louisiana Revised Statute § 40:2531. Therefore, the only question before the Commission is whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Sergeant for NOPD and had permanent status as a classified employee.

On March 20, 2018, 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 hereby DENY the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD disciplined Appellant for allegedly violating of the following NOPD Rules:

- Rule 3: Professional Conduct; Paragraph 1, Professionalism (1 day suspension);
- Rule 4: Performance of Duty, Paragraph 4(c)(6) Neglect of Duty, Failing to Comply with Instructions from an Authoritative Source – to wit, NOPD Policy 328 Workplace Discrimination, Harassment/Retaliation Procedure (Demotion);
- Rule 4: Performance of Duty, Paragraph 4(B) Supervisory Neglect of Duty – to wit NOPD Policy 328 Workplace Discrimination, Harassment/Retaliation Procedure (Demotion).

(H.E. Exh. 1).¹

NOPD's policy regarding professionalism states that:

Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or otherwise act in a manner which brings discredit to the employee or the New Orleans Police Department.

Id.

NOPD alleged that Appellant violated this rule when he engaged “in a conversation with another employee of a sexual nature.” *Id.*

The relevant portion of NOPD's workplace harassment policy reads as follows:

The employer is responsible for taking the initiative in preventing sexual harassment in the workplace. Therefore, all employees shall:

- (a) conduct themselves in a professional manner and maintain a professional attitude;
- (b) avoid any type of act or discussion that the employee knows or should know others will regard as offensive;
- (c) cease immediately any behavior or discussion if told that such conduct is offensive.

¹ NOPD took the position that each of Appellant's Rule 4 violations would have warranted demotion as stand-alone infractions.

NOPD alleged that Appellant violated this rule when he engaged “in a conversation with another employee of a sexual nature.” *Id.*

Appellant also allegedly failed to execute his responsibilities as a supervisor. NOPD’s policy regarding personnel with supervisory authority states:

An employee with supervisory responsibility shall be in neglect of duty whenever he fails to properly supervise subordinates, or when his actions in matters relating to discipline fail to conform [to] the dictates of Departmental Rules, Policies and Procedures.

Id.

Appellant allegedly violated this rule when he engaged another employee in a sexually-themed conversation and failed to intervene and stop other sexually-themed conversations conducted by other personnel whom he supervised. *Id.*

B. NOPD’s Investigation

NOPD initiated an investigation into Appellant’s alleged misconduct when NOPD Officer Troy Williams expressed a concern that Appellant had made sexual advances towards female employees within the Alternative Police Response Unit (hereinafter “APR”). (NOPD Exh. 1). Sergeant Christopher Johnson, assigned to NOPD’s Public Integrity Bureau (hereinafter “PIB”), was responsible for the initial investigation and interviewed approximately fifteen NOPD personnel. (Tr. at 121:14-24). Among the individuals Sgt. Johnson interviewed were alleged victims of Appellant’s harassing behavior, Officer Shannon Reeves and Officer Nicole Alcala. Sgt. Johnson also interviewed Appellant. A transcript of Appellant’s administrative statement to Sgt. Johnson is in evidence as “NOPD Exhibit 5.”

C. Alleged Harassment

Personnel at NOPD’s APR are responsible for fielding non-emergency calls for assistance. (Tr. at 12:22-13:9). Typically, NOPD assigns Officers who, for a variety of reasons, are not able

to fully perform duties in the field. Officer Reeves had been with NOPD for approximately twenty years when an injury forced her out of her regular position and into the APR on or about August 2015. In January or February 2016, Appellant replaced Michelle Woodfork as APR supervisor and became Officer Reeves's direct supervisor. *Id.* at 14:2-14. Officer Reeves testified that, about a month after Appellant became her supervisor, he began to engage her in inappropriate, sexually-themed conversations.

According to Officer Reeves, Appellant approached her in February 2016 and began a conversation with her that quickly turned explicitly sexual. He began the conversation by telling Officer Reeves to "pretend" he was not her supervisor and then asked Officer Reeves about her "pussy," talked about his past sexual exploits, asked Officer Reeves about the "freakiest" sexual position she experienced and whether or not she had ever had sex while on her period. *Id.* at 19:2-20:19. Officer Reeves claimed that she attempted to deflect Appellant's attention, but to no avail. Appellant allegedly continued the conversation by observing that he lived very close to Officer Reeves and invited her to come to his house because all he does is "walk around the house naked and lay in [his] bed and stroke [himself]." *Id.* at 21:24-23:1. The conversation ended when other members of the APR came close enough to hear what Appellant was saying. *Id.* at 22:14-22.

Officer Reeves testified that she was so troubled by her encounter with Appellant that she missed a substantial amount of work due to her anxiety about encountering him. *Id.* at 24:6-13. Yet she did not report Appellant's conduct because she did not know "who [she] could trust." *Id.* at 24:18-25:4. On her first day back after about a month's absence, Officer Reeves stated that Appellant walked up next to her, put his arm around her and "shook" her. When she asked Appellant why he was shaking her, he responded that he was just checking on his "friends" and looked down Officer Reeves's shirt. *Id.* at 27:5-15. Officer Reeves did not report this interaction

up the chain of command within NOPD but did talk about it with some of her co-workers. *Id.* at 29:11-23. After the second incident, Officer Reeves again missed work because of anxiety related to her interactions with Appellant. *Id.* at 30:5-24.

In the Summer or early-Fall 2016, the APR unit moved from its temporary location at the New Orleans Emergency Communications Center to NOPD Headquarters. Shortly after the move, Appellant called Officer Reeves into his office and allegedly told her that all he sees is “titties.” *Id.* at 33:4-20. Before Appellant could elaborate, another NOPD Officer entered Appellant’s office with a question. After the other Officer left, Appellant resumed his sexually-themed conversation with Officer Reeves by describing – in graphic detail – the techniques he would use if they were to have sex. *Id.* at 36:4-37:10. He also asked Officer Reeves about her nipples and Officer Reeves responded by telling Appellant that her areolas are large because of recent weight gain. *Id.* at 36:18-24.²

The fourth and final incident Officer Reeves discussed as part of her testimony occurred about a month later when Appellant asked Officer Reeves to come into his office. When she complied with Appellant’s instruction, he told her that he “just wanted to see y’all walk in.” *Id.* at 49:13-19. Officer Reeves interpreted Appellant’s comment of “y’all” to be a reference to her breasts. *Id.* at 49:20-21.

Officer Reeves asserted that Appellant’s conduct was deeply offensive and caused her a great deal of stress and anxiety. On cross-examination, Officer Reeves admitted that she had sent

² Allegedly acting on the advice of friends and family, Officer Reeves clandestinely recorded a portion of this conversation using her personal cell phone. NOPD introduced the recording as “NOPD Exhibit 6.” The sound quality is very poor and while the undersigned Commissioners accept that Appellant identified his own voice on the recording, we cannot make out what he is saying. Officer Reeves’s statement about her areolas is audible, but the second half of any conversation cannot be heard with a sufficient degree of clarity. Tellingly, the individual responsible for transcribing Appellant’s administrative statement noted that he/she could not hear the interaction between Appellant and Officer Reeves because of “lots of background conversation.” (NOPD Exh. 5 at p. 4). Therefore, the Commission does not rely upon the recording in making any findings of fact.

Appellant a “Happy Father’s Day” text message, but claimed that it was merely an attempt to avoid being “blackballed” by Appellant or his friends in NOPD. *Id.* at 56:15-19, 57:16-20. She did not elaborate on this concern. Officer Reeves also claimed that she did not know the proper channels through which she could have pursued a harassment claim against Appellant. *Id.* at 61:21-62:9.

Another alleged victim of Appellant’s harassment was Officer Nicole Alcalá. Officer Alcalá worked at the APR for approximately one month in August or September 2016. *Id.* at 63:9-16. During her time at APR, she reported directly to Appellant. *Id.* at 64:1-9. According to Officer Alcalá, Appellant would occasionally make sexually-themed comments that made her uncomfortable. *Id.* at 67:5-14. In one instance, Appellant made a comment to Officer Alcalá about “back breaking” or “breaking back” that Officer Alcalá later learned was a reference to good sex. *Id.* at 67:15-68:14. Appellant also allegedly asked Officer Alcalá about her favorite sexual position *Id.* at 75:10-15.

On cross-examination, Officer Alcalá acknowledged that she once sought out Appellant at a Drake concert. Appellant, who was working a security detail at the concert, told Officer Alcalá that he would be working and invited her to contact him so that he could provide better access to the stage. Officer Alcalá took Appellant up on this offer. This was after Appellant allegedly talked with Officer Alcalá about the outfit she was planning on wearing to the concert.

C. Appellant’s Responses

During his testimony, Appellant strenuously denied that he ever engaged co-workers or subordinates in inappropriate, sexually themed conversations. He specifically denied asking Officer Reeves about her favorite sexual positions or making any reference to Officer Reeves about her “pussy.” *Id.* at 144:7-23. Appellant further claimed that the conversation between him and Officer Reeves that included a reference to Officer Reeves’s areolas was about exercise and

R. Charles
No. 8735

working out rather than sex. *Id.* at 148:6-149:2. Appellant went on to assert that it was Officer Reeves who initiated the conversation about her breasts rather than Appellant. *Id.* at 149:3-15. Appellant denied referring to Officer Reeves's breasts as his "friends" and denied shaking Officer Reeves in order to observe her breasts. Finally, Appellant denied ever asking Officer Alcala about her favorite sexual position. *Id.* at 153:3-13.

Appellant's testimony differs in certain important aspects to the statement he provided Sgt. Johnson during NOPD's initial investigation into Appellant's alleged misconduct. When Sgt. Johnson asked Appellant, "Have you ever inquired to a female employee as to their (sic) favorite sexual position?" Appellant's initial response was:

A: Meaning what? I don't, I don't understand the question, because is it, is it a question where me and a female was (sic) engaged in a conversation? Or is it something that as a supervisor, I initiated that's, I mean, what's, what's the question?

(NOPD Exh. 5 at p. 5).

The Commission finds that Appellant's response to this question to be evasive and non-responsive.

Sgt. Johnson rephrased his initial, seemingly straight-forward question:

Q: While on duty in the APR Unit, have you ever inquired to a female employee of yours, that was under your supervision, as to their (sic) favorite sexual position?

And Appellant finally responded, "No." *Id.* Appellant proceeded to deny that he ever initiated sexually-themed conversations with female employees, but did acknowledge that he did talk with Officer Reeves about the size of her breasts. Appellant took the position that Officer Reeves initiated the conversation and he merely responded to her comments.

In his administrative statement to Sgt. Johnson, Appellant admitted that, while he never initiated conversations with "sexual overtones," he did observe other employees in the APR unit having such conversations. He would "participate" in these conversations for a brief time and then

return to his duties. (NOPD Exh. 5 at pp. 7-8). Appellant insisted that any comments of a sexual nature were playful joking and never initiated by him. At no point during his administrative statement does Appellant mention “working out” or physical fitness as the motivation for conversations about Officer Reeves’s breasts. This is odd given that, during the appeal hearing, “working out,” physical fitness and weight-lifting routines featured prominently in Appellant’s defense of his conversations with Officer Reeves about her breasts. Eventually, Appellant did acknowledge that he and Officer Reeves would talk about “sexual stuff.” (NOPD Exh. 5 at 8-9). As previously noted, this differs from his appeal hearing testimony during which he insisted that his conversations with Officer Reeves were about working out and losing weight. *Id.* at 169:10-24, 170:2-14.

III. LEGAL STANDARD

A. General 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

i. Neglect of Duty: Workplace Discrimination, Harassment/Retaliation

NOPD policy contains very general requirements regarding employee conduct, and requires employees from avoiding “any type of act or discussion that the employee knows or should know others will regard as offensive.” The policy goes on to mandate that employees cease any discussion if told by another employee that it is offensive. (H.E. Exh. 1). The Commission notes that this policy does not define sexual harassment, nor does it provide examples of prohibited conduct.

Thankfully, there is a great deal of guidance from courts and the EEOC regarding sexual harassment. In analyzing sex discrimination claims brought by employees under Title VII, courts have defined “sexual harassment” as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 171 (5th Cir. 2018)(unreported)(quoting *Simmons v. Lyons*, 746 F.2d 265, 270 (5th Cir. 1984)). And, the EEOC has promulgated regulations that establish that harassment is actionable under Title VII “when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a).

There is no question that the conduct Officer Reeves and Alcala described in their testimony constituted “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” Appellant presented a two-part defense to the allegations against him. First, Appellant denied the most egregious allegations regarding references to Officer Reeves’s anatomy and questions regarding female employees’ preferred sexual positions. Secondly, Appellant argued that the conversations he did have with Officer Reeves and others were initiated by someone else. In other words, the comments were “welcomed.”

The Commission must weigh the credibility of the witnesses in order to make a determination regarding the first prong of the sufficient cause analysis. The Hearing Examiner found Officer Reeves and Officer Alcala to be credible witnesses. He further noted, as do the undersigned Commissioners, that Appellant failed to introduce evidence suggesting that either Officer Alcala or Reeves had any motivation to lie about their interactions. We further find that Appellant was evasive and inconsistent in his testimony during the instant appeal hearing and when he was answering Sgt. Johnsons questions during NOPD’s investigation. Finally, the Commission finds that any reasonable employee in Appellant’s situation should know that conversations regarding a fellow employee’s anatomy or sex life are offensive.

Based upon the record before us, the Commission finds that it is more likely than not that Appellant violated NOPD’s policy prohibiting sexual harassment.

ii. Supervisory Neglect of Duty: Workplace Discrimination, Harassment/Retaliation

NOPD alleged that Appellant engaged in a sexually-themed conversation with a subordinate and failed to stop other subordinates from having sexually-themed conversations when he became aware of them. Such conduct, argued NOPD, violated Appellant’s duty to properly supervise his subordinates. For his part, Appellant admitted that he observed APR employees,

whom he supervised, engage in conversations with “sexual overtones.” Further, he admitted to engaging Officer Reeves in a conversation that was sexual in nature. Such actions constitute a failure to properly supervise. Appellant’s status as a supervisor, however, serves more as an aggravating factor in weighing appropriate discipline rather than a stand-alone violation.

iii. Professionalism

NOPD’s rule regarding professionalism requires employees to act “with the utmost concern for the dignity of the individual with whom they are interacting” and to refrain from “unnecessarily” demeaning any individual. Appellant was not conducting himself in a respectful or professional manner when he engaged Officer Reeves in a discussion about her anatomy and sex life. The same is true for Appellant’s conversation and comments to Officer Alcalá about breaking her back and her favorite sexual positions. In fact, such conversations evinced a disregard for Officer Reeves’s and Officer Alcalá’s dignity and were certainly demeaning.

B. Impact on NOPD’s Efficient Operations

Because all of Appellant’s misconduct arises out of the same set of facts, the Commission will analyze the impact of such misconduct as a whole. First and foremost, the Commission observes that Appellant’s actions had a dramatic and negative impact on Officer Reeves’s ability to perform her duties at the APR. She testified that, as a result of Appellant’s harassment, she suffered from bouts of severe anxiety and missed several weeks of work. Officer Alcalá testified that Appellant’s actions made her uncomfortable, but she tried to put it out of her mind because her assignment at APR was not permanent. That is not the sentiment any employee, let alone a supervisor, should engender among his co-workers.

Appellant’s status as a supervisor exacerbated the adverse impact of his misconduct. He occupied a position of power at APR and potentially exposed NOPD to vicarious liability for his

Appellant's status as a supervisor exacerbated the adverse impact of his misconduct. He occupied a position of power at APR and potentially exposed NOPD to vicarious liability for his harassment. As a supervisor, Appellant should have served as a resource to his subordinates who were experiencing any difficulty at work. Instead, he was the source of that difficulty and put his subordinates in a very difficult position when they were contemplating reporting his actions.

As a result of the foregoing, we find that Appellant's conduct had an adverse impact on the efficient operations of NOPD.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's discipline 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 *Staehle v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033). The Commission will first address Appellant's demotion as it was the primary focus of the disciplinary notice and underlying appeal hearing.

NOPD has an interest and obligation to deter sexual harassment in the workplace. Its first line of prevention and enforcement is its supervisors. By engaging in the precise type of conduct he is responsible for preventing, Appellant compromised NOPD's ability to enforce its own rules and policies. The severity and explicit nature of his comments also reflects an utter disregard for standards of professional conduct.

In its disciplinary notice to Appellant, NOPD alleged that the allegations against Appellant constituted a "3rd Offense." Yet, there was no evidence of any prior sustained allegations against Appellant related to sexual harassment. Nevertheless, Deputy Superintendent Noel testified that, even if this were Appellant's first offense, he would have recommended demotion due to his belief

that Appellant had lost the ability to supervise employees. Appellant suggested that demotion was outside of the prescribed level of discipline contained within NOPD's penalty matrix. As this Commission has observed in previous cases, it is not bound by a discipline schedule established by an appointing authority. While such a schedule provides useful guidance, they cannot and do not account for every aggravating and/or mitigating factor in any given case. The Commission accepts Deputy Superintendent Noel's testimony that NOPD had lost faith in Appellant's ability to competently lead.

Therefore, we find NOPD's decision to remove Appellant from a supervisory position via demotion to be appropriate.

The Commission is left with a consideration of whether or not a one-day suspension was commensurate with Appellant's violation of NOPD's professionalism rule.

In this case, according to NOPD, the same conduct that constituted a violation of its rule regarding professionalism was the same conduct that constituted a violation of its sexual harassment policy. Namely, Appellant's conversation "of a sexual nature" with another employee. In fact, NOPD reproduces the conduct, verbatim, in its disciplinary notice for both violations. It is not clear how Appellant's egregious conduct towards Officer Reeves and Officer Alcala can warrant a demotion on the one hand, but only a one-day suspension on the other. There is no question that sexual harassment constitutes a dramatic breach of professionalism. But NOPD already has a rule that addresses sexual harassment, albeit in a relatively circumspect manner. By tacking on a professionalism allegation, NOPD needlessly complicates an already complicated case. Nevertheless, the Commission finds that a demotion and one-day suspension are appropriate given the nature and severity of Appellant's misconduct.

V. CONCLUSION

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

Judgment rendered this 5th day of October, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



STEPHEN CAPUTO, COMMISSIONER

10-1-18
DATE

CONCUR


MICHELLE D. CRAIG, CHAIRPERSON

10-2-18
DATE


RONALD McCLAIN, VICE-CHAIRPERSON

9/13/18
DATE