



CITY OF NEW ORLEANS

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Tuesday, July 16, 2024

Mr. Kevin Boshea
2955 Ridgelake Dr., Suite 207
Metairie, LA 70002

Re: **Sabrina Richardson VS.
Department of Police
Docket Number: 9406**

Dear Mr. Boshea:

Attached is the decision of the City Civil Service Commission in the above-referenced 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 - 7/16/2024 - 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 purple ink that reads "Stacie Joseph".

Stacie Joseph
Management Services Division

cc: Anne E. Kirkpatrick
William R. H. Goforth
Jay Ginsberg
Sabrina Richardson

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**SABRINA RICHARDSON,
Appellant**

Docket No. 9406

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

DECISION

Appellant, Lieutenant Sabrina Richardson, brings this sex discrimination appeal pursuant to Article X, § 8(B) of the Louisiana Constitution and this Commission's Rule II, § 4.6 seeking relief from her probationary period failure as a Police Captain on October 5, 2022. (Exhibit HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on February 7, 2024, and February 27, 2024. 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 parties' post-hearing memoranda, the Hearing Examiner's report dated June 22, 2024, and controlling Louisiana law.

For the reasons set forth below, Richardson's appeal is DENIED.

I. FACTUAL BACKGROUND

The Commission set forth the facts underlying Lt. Richardson's discipline for secondary employment violations in its September 13, 2023, decision in the companion appeal *Richardson v. Dep't of Police*, No. 9409, as amended on October 2, 2023. The Fourth Circuit Court of Appeal reversed the Commission decision on July 10, 2024, reinstating the discipline imposed by the

Department of Police, a 119 day suspension. *Richardson v. Dep't of Police*, 2023-CA-0757 (La. App. 4 Cir. 7/10/24).

The Commission adopts the attached Hearing Examiner's thorough statement of facts.

Former Superintendent of Police Shaun Ferguson, the decisionmaker in Lt. Richardson's probationary period failure, testified that he relied on the recommendation of Lt. Richardson's immediate supervisor, former Chief Deputy Superintendent Christopher Goodly. (2/27/24 Tr. at 16-17, Ex. R-2). Chief Ferguson explained that he believed Lt. Richardson brought discredit to the Public Integrity Bureau because she was the commanding officer of PIB at the time of some of the violations. (2/27/24 Tr. at 21). Chief Ferguson explained that "[m]y thought at the time was just that that the credibility of the department, the credibility of that bureau, and I just thought there would be issues or challenges if I'm not holding an individual at the PIB at the time of the violations to a standard in which is expected of them given they are considered to be the **police of the police.**" (2/27/24 Tr. at 27; emphasis added). Superintendent Ferguson also testified that neither of the comparators offered by Lt. Richardson, Kendrick Allen and Eric Gillard, were charged with leaving a detail early. (2/27/24 Tr. at 104). Notably, the issue in the underlying disciplinary appeal as to leaving the Fairgrounds detail early was whether Lt. Richardson was required to inform the Office of Police Secondary Employment that she was leaving the detail. *Richardson v. Dep't of Police*, No. 9409 (Civil Service Commission 10/2/23). The evidence offered at the prior hearing established through license plate camera evidence that Lt. Richardson received payment for time she did not work at the Fairgrounds. *Richardson v. NOPD*, No. 9409, p. 9 (Civil Service Commission 10/2/23).

II. ANALYSIS

A. Standard for Sex Discrimination Appeal

Richardson has failed to carry her burden of proof to show sex discrimination under Civil Service Rule II, § 4.6. In disciplinary actions where the classified employee alleges discrimination, the burden of proof on appeal, **as to the factual basis for the discrimination**, is on the employee. La. Const. art. X, § 8(B); *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12), 87 So. 3d 925, 927 (quoting *Goins v. Dep't of Police*, 570 So.2d 93, 94 (La. App. 4th Cir.1990)). *See also* Civil Service Rule II, §§ 4.4, 4.8. In 1983, the Fourth Circuit Court of Appeal held the Commission erred by relying on the Title VII *McDonnell-Douglass* burden-shifting framework for discrimination claims under Article X, Section 8(B) of the Louisiana Constitution. *Mixon v. New Orleans Police Dep't*, 430 So. 2d 210, 212 (La. App. 4 Cir. 1983) (“we conclude the Commission erred in applying the federal burden of proof standard instead of the burden specified in LSA–Const. Art. 10 § 8(B).”). Recently, the Fourth Circuit Court of Appeal, in a plurality opinion, applied the *McDonnell Douglass* framework in a mixed motive whistleblower appeal by a probationary employee. *Balancier v. Sewerage & Water Board of New Orleans*, No. 2022-0255 (La. App. 4 Cir. 10/19/22), 2022 Westlaw 11119572.

1. *McDonnell Douglass* burden-shifting

a. *Prima facie* case of discrimination

In order to show a *prima facie* case of discrimination under the *McDonnell Douglass* framework, Richardson must show that (1) she is a member of a protected class; (2) she was qualified for her position; (3) she suffered an adverse employment decision; and (4) similarly situated male employees were treated more favorably. *Guidry v. Glazer's Distributors of Louisiana, Inc.*, 2010-218 (La. App. 3 Cir. 11/3/10), 49 So. 3d 586, 590–91. Lt. Richardson has

shown that she is a member of a protected class, that she was qualified, and that she suffered an adverse employment action. Lt. Richardson has failed to show that similarly situated male employees were treated more favorably. The standard for “similarly situated” is high:

Employees with different supervisors, who work for different divisions of a company or who were the subject of adverse employment actions too remote in time from that taken against the plaintiff generally will not be deemed similarly situated. Likewise, employees who have different work responsibilities or who are subjected to adverse employment action for dissimilar violations are not similarly situated. This is because we require that an employee who proffers a fellow employee as a comparator demonstrate that the employment actions at issue were taken “under nearly identical circumstances.” The employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories. And, critically, the plaintiff’s conduct that drew the adverse employment decision must have been “nearly identical” to that of the proffered comparator who allegedly drew dissimilar employment decisions. If the “difference between the plaintiff’s conduct and that of those alleged to be similarly situated *accounts for* the difference in treatment received from the employer,” the employees are not similarly situated for the purposes of an employment discrimination analysis.

Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 259–60 (5th Cir. 2009). Lt. Richardson seeks to compare her violation history to male captains who received negotiated settlements of secondary employment violations. As the Fourth Circuit held in the companion appeal, a “substantial difference” exists between negotiated settlements and charges following a full investigative process. *Richardson v. Dep’t of Police*, No. 2023-CA-0757, p. 5 (La. App. 4 Cir. 7/10/24). Therefore, Lt. Richardson cannot rely on comparators who received negotiated settlements because their violation histories are not comparable. In addition, former Superintendent Ferguson testified that the male employees to whom Lt. Richardson compared herself were not charged with leaving a detail early and were not commanding the Public Integrity Bureau at the time of the violation. (2/27/24 Tr. at 27, 104). As set forth in the facts, the offense of leaving a detail early

included the receipt of wages from the Fairgrounds for time not worked, a serious offense for the leader of the Public Integrity Bureau. Unlike the overlap violations, leaving a detail early could not be inadvertent or a data entry mistake, as Lt. Richardson argued in her own disciplinary appeal of the overlap violations.

b. NOPD's legitimate non-discriminatory reason for the probationary period failure

Assuming, *arguendo*, that Lt. Richardson has made a *prima facie* case, the burden shifts to NOPD to offer a legitimate non-discriminatory reason for the difference in treatment. *Majors v. Dillard Univ.*, 2022-0789 (La. App. 4 Cir. 5/8/23), 368 So. 3d 116, 121. In its post-hearing brief, NOPD states that the legitimate, non-discriminatory reason for the probationary period failure is that Lt. Richardson's misconduct was different in character and quantity than the misconduct of the two comparators. Supt. Ferguson testified that "it was the totality of things, the number of violations, the type of violations, and her position at the time of these violations." (2/27/24 Tr. at 27). Richardson was in a leadership position at PIB at the time of the violations. (2/27/24 Tr. at 27). Lt. Richardson was charged with leaving a detail early, a charge not levied against the two comparators. (2/27/24 Tr. at 104).

c. Whether NOPD's legitimate non-discriminatory reason was pretextual or unworthy of credence

Lt. Richardson is unable to show that the NOPD's legitimate non-discriminatory reason is pretextual. In *McDonnell Douglass* burden-shifting, if the employer meets its burden of articulating a legitimate non-discriminatory reason for the adverse employment action, the employee then must show that the reason is a pretext for discrimination. *Robinson v. Bd. of Supervisors for Univ. of Louisiana Sys.*, 2016-2145 (La. 6/29/17), 225 So. 3d 424, 431. "This may be accomplished either directly, by showing that a discriminatory reason more than likely

motivated the employer, or indirectly, by showing that the asserted reason is unworthy of credence.” *Id.*

Lt. Richardson has failed to show that Supt. Ferguson was motivated by discriminatory animus or that the legitimate non-discriminatory reason offered by him is unworthy of credence. One reason given by Deputy Superintendent Goodly for the recommendation to Supt. Ferguson to return Lt. Richardson to the position of lieutenant was the number of charges against Lt. Richardson and the severity of the penalty. (2/7/24 Tr. at 24; Ex. R-2). As discussed below, this result was caused, in large part, by decisions made by individuals in the Public Integrity Bureau, including Deputy Superintendent Westbrook’s decision to assign a separate investigator to the complaint against Lt. Richardson. Lt. Richardson has not alleged that any of the individuals upon whom Supt. Ferguson relied were motivated by discriminatory animus. *See Hartley v. Univ. of Holy Cross*, 2022-0840 (La. App. 4 Cir. 7/19/23), 370 So. 3d 1151, 1164, *writ denied*, 2023-01144 (La. 11/15/23), 373 So. 3d 76 n.19 (mentioning “cat’s paw” theory of retaliatory or discriminatory animus).

The decisionmaker, Supt. Ferguson, testified that because the complaint against Lt. Richardson was a public complaint, the Department could not offer her a negotiated settlement. (2/27/24 Tr. at 34). The numerous negotiated settlements, including the application of a matrix, were handled by Lt. Lawrence Jones, with input from the Office of Independent Police Monitor and approval by Deputy Superintendent Westbrook of PIB. (2/7/24 Tr. at 90-92; 2/27/24 Tr. at 32). These settlements did not receive the same attention from Supt. Ferguson as did the complaint against Lt. Richardson, but Lt. Richardson has not offered any evidence that this difference in treatment was based on her sex. Deputy Superintendent Christopher Goodly, Lt. Richardson’s immediate supervisor during her probationary period, testified that he was on the chief’s


committee to review the recommended discipline against Lt. Richardson, and he requested information about the penalties imposed on other officers through the settlement process. (2/7/24 Tr. at 16). NOPD failed to provide this information to Deputy Superintendent Goodly. (2/7/24 Tr. at 35). Supt. Ferguson ultimately relied on Deputy Superintendent Goodly's recommendation to return Lt. Richardson to the position of lieutenant. (2/27/24 Tr. at 17-19).

Deputy Superintendent Westbrook had recused PIB from the investigation of Lt. Richardson and assigned an investigator from the Field Operations Bureau to the complaint. (2/7/24 Tr. at 56-57, 145-46). This investigator performed a thorough investigation of the public complaint of leaving the Fairgrounds detail early, ultimately substantiating this complaint with license plate reader evidence. (2/27/24 Tr. at 34). In addition, the investigator treated each overlap violation as a separate charge, unlike the method used by PIB to treat each type of violation as a separate charge. (2/7/24 Tr. at 57). Therefore, the recommended discipline against Lt. Richardson was much harsher than the discipline imposed through the negotiated settlements. (2/7/24 Tr. at 58-61). Lt. Richardson has not offered evidence that Deputy Superintendent Westbrook, the investigator, or Deputy Superintendent Goodly were motivated by discriminatory animus. Therefore, Lt. Richardson has failed to carry her burden of showing pretext.

Even under the more lenient *McDonnell Douglass* standard, Lt. Richardson has failed to meet her burden of proof to show the facts constituting the discrimination. La. Const. art. X, § 8(b).


Therefore, Lt. Richardson's appeal based on sex discrimination is denied.

WRITER:


Brittney Richardson (Jul 15, 2024 19:39 CDT)
BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:


J H Korn (Jul 15, 2024 21:33 CDT)
JOHN KORN, VICE-CHAIRPERSON


Ruth Davis (Jul 13, 2024 15:09 CDT)
RUTH DAVIS, COMMISSIONER

SABRINA RICHARDSON

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 9406

REPORT OF THE HEARING EXAMINER

I. INTRODUCTION AND PROCEDURAL HISTORY

A. Nature of Appeal

The New Orleans Police Department employed Sabrina Richardson ("Appellant") as a Police Captain with probationary status. On October 5, 2022, while she was under investigation for violating internal rules concerning secondary employment, the Appointing Authority returned the Appellant to her classified position of Lieutenant. Had the Appellant attained permanent status as a Captain, the Appointing Authority's penalty matrix would not have allowed for demotion as a penalty for the violations for which the Appellant was ultimately disciplined.¹ (Tr. Vol. II. at p. 72; Ex. Richardson 15). Thus, the Appointing Authority had to demote the Appellant prior to her attaining permanent status. Otherwise, the penalty would not have been commensurate with the violation based upon the department's own rules.

The Appellant appeals her demotion pursuant to Rule II, § 4.5 – the provision of the Civil Service Rules that prohibits discrimination based upon

¹ The Appellant appealed the disciplinary action taken by the Appointing Authority, which was heard in *Richardson v. Department of Police*, Case No. 9409 (2023). The allegations of gender discrimination were not considered in the prior hearing.

gender. She contends that she was treated differently than her male counterparts. Specifically, she contends that she was subjected to a different standard for the assessment of discipline than her counterparts, and, as a consequence, that the discipline that she received – a long-term suspension was more severe than warranted providing the Appointing Authority with the justification to demote her.

The Appellant alleges that her male counterparts, Kendrick Allen and Eric Gillard, received minor discipline for similar acts of misconduct, allowing them to complete their probationary periods and become permanent captains. The Appellant maintains that if the Appointing Authority had investigated and disciplined her based upon the same standards as her male counterparts, she would have received similar discipline and would not have been demoted.

B. Underlying Investigation

The investigation uncovered the following facts that were adjudicated in *Richardson v. Police, Case No. 9409 (2023)*. The incidents in question occurred between January of 2019 and November of 2021, resulting in disciplinary action taken on October 17, 2022 for violations of three Chapters of departmental policy 22.08 – Police Secondary Employment. The alleged acts of misconduct occurred while the Appellant held different classifications with different responsibilities.

In January of 2019, the Appellant was a lieutenant with permanent status assigned to the Special Victims Unit (SVU). On March 31, 2019, the Appellant was appointed to the unclassified position of Police Commander, which changed to provisional Captain on or about November 7, 2019. In November of 2021, following a competitive examination administered by the Civil Service Department, the Appointing Authority promoted the Appellant to Captain.²

At the time she was investigated for prior alleged acts of misconduct, the Appellant was the Commander of the Public Integrity Bureau (PIB). As noted above, on October 5, 2022, prior to taking final disciplinary action, and during the Appellant's probationary period as a Captain, the Appointing Authority returned the Appellant to her classified position of Lieutenant.

By letter dated October 17, 2022, the Appointing Authority notified the Appellant that its internal investigation found violations of three Chapters of departmental policy 22.08 – Police Secondary Employment.

1. 22.08; Subsection 32 (Violations 4, and 22 – 38)

The Appointing Authority found eighteen (18) violations of Chapter 22.08; Subsection 32 for which the Appointing Authority determined that a single letter of reprimand was commensurate with the violation. The Appellant received the

²The Appellant's promotion to Police Commander was a non-competitive appointment for which she did not hold permanent status. The change to Provisional Captain resulted from a determination that the Appointing Authority did not have the authority to create an unclassified Police Commander position. All impacted employees who were promoted to the unclassified position of Police Commander from the classified position of police lieutenant were deemed provisional Captains until a competitive examination occurred and actual promotions were made pursuant to Civil Service rules.

letter of reprimand for working too many hours between paid details and police assignments during twenty-four-hour periods. The Appellant acknowledged the violations and stipulated that her appeal did not challenge the Appointing Authority's determination as to this disciplinary action.

2. 22.08; Subsection 25 (Violations 5 – 21)

The Appointing Authority found seventeen (17) violations of Chapter 22.08; Subsection 25 for which the Appellant received a seven-day suspension for each violation. Subsection 25 states:

Members authorized to work police secondary employment may perform or engage in authorized assignments only during the hours they are off duty. Members may accept and work a police secondary employment opportunity when not on duty or while on authorized leave.

The presumptive penalty was a five- day suspension, but the Appointing Authority determined that a seven-day suspension for each violation was an appropriate penalty because of bad press and the position that she held with PIB.

However, the Commission modified the penalty to a two working day suspension stating:

For Violations 5-21 pursuant to Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source to wit NOPD Chapter 22.08. Subsection 25 Working details while on NOPD, the undersigned Commissioners grant Richardson's appeal of all violations except the four violations when Richardson was an hourly employee...

Richardson's appeal is denied as to the four (violations 5-8) of the 17 instances when Richardson was a Lieutenant in the Special Victims Unit. NOPD has carried its burden of showing that Richardson, while employed by NOPD as a non-exempt employee eligible for overtime compensation, had a duty to ensure her hours worked were accurate in the ADP timekeeping system...

The Commission finds that the penalty of a seven-day suspension for each violation is not commensurate with the violation. In at least one previous decision, the Fourth Circuit Court of Appeal has held that a penalty was commensurate with the violation when "[o]ther officers who committed the same infraction as Capt. Waguspach received the same discipline." *Waguspach v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13), 119 So. 3d 976, 978. Other officers who had more the six instances of overlapping hours (Tr., Vol. III, at 16). Based on this comparison, the penalty of a 28-day suspension for two instances of a four-hour overlap and two instances of a one-hour overlap during March of 2019 is not commensurate with the violation. The 28 working day suspension for violations 5-8 is reduced to a two working day suspension.

Richardson v Department of Police, Case No. 9409

3. 22.08; Subsection 21 (Violations 1 and 39 – 46)

The Appointing Authority found nine (9) violations of Chapter 22.08; Subsection 22 for which the Appellant received a five-day suspension for each violation. Subsection 21 states:

Should a member working a police secondary employment assignment be required to leave a police secondary employment location before the scheduled end time for exigent circumstances, the member shall be responsible for notifying [the Office of Police Secondary Employment] as to the reason and exact time he/she left the assignment as soon as possible.

The Appointing Authority determined that a five-day suspension for each violation was an appropriate penalty.

The Commission denied the Appellant's appeal as to these violations ruling that:

The discipline imposed by NOPD is commensurate with the violation. NOPD imposed the presumptive penalty of five working days for each of the nine separate incidents. The Commission denies Lt. Richardson's appeal of the 45 working day suspension.

Id.

4. Disciplinary Action After Partial Grant of Appeal

As reflected in the disciplinary letter, the Superintendent's Disciplinary Committee recommended a total of 164 working days of suspension without pay: 119 days for the 17 violations of Subsection 25 and 45 days for the nine violations of Subsection 21. However, Civil Service Rule IX, section 1.1 places a cap on the number of days, allowing no more than 120. Consequently, the Appellant's initial appeal was for the 120 days that she served. However, the Commission reduced the total discipline to 47 days without pay: 2 days for the 4 violations of Subsection 25 and 45 days for the nine violations of Subsection 21.

II. PERTINENT UNDISPUTED FACTS

1. In November of 2021, an audit was conducted by the Professional Standards and Accountability Bureau (PSAB) regarding Secondary Employment Police Details for overlapping shifts and working too many hours during a 24-hour period.
2. Based upon the audit, formal Investigations were initiated by the Public Integrity Bureau (PIB).
3. On or about November 22, 2021, PIB added an additional violation based upon an anonymous public complaint alleging

that the Appellant was leaving her detail before the end of her shift.

4. On December 13, 2021, PIB determined that 11 accused officers were eligible for a Negotiated settlement, including Captains Kendrick Allen and Eric Gillard, the alleged male counterparts.
5. Pursuant to negotiated settlements, Allen received a two-day suspension and Gillard received a two-day suspension and letter of reprimand.
6. Both Allen and Gillard completed their probationary period and became permanent captains.
7. The Appellant was not eligible for a negotiated settlement because of the added charge originating from the anonymous public complaint. Public complaints are not, by definition, minor infractions. (NOPD Operations Manual Chapter 52.2, Definitions, Minor violation/infraction).
8. The remaining accused officers' cases were investigated by PIB, except for the Appellant.
9. The Appellant's case was investigated by Captain Nicholas Gernon, who was assigned to the Investigative Services Bureau, Homicide Division.
8. PIB investigators' reports treated each incident where a police officer's secondary employment assignment overlapped with that police officer's departmental assignment as part of a single violation of internal policy.
9. Consequently, the maximum penalty assessed by the Appointing Authority, regardless of the number of incidences, was a five-day suspension – the presumptive penalty.
10. Captain Gernon's report treated each incident where the Appellant's secondary assignment overlapped with her departmental assignment as a separate violation. He followed the same procedure for reporting the other policy violations.

11. Consequently, each incident was treated as a separate violation for which the Bureau Chief Disciplinary Panel recommended, and the Appointing Authority assessed, a separate penalty for each separate violation, resulting in a 119-day suspension as opposed to 5 days.
12. Stella Cziment is the Independent Police Monitor. Her office is an independent branch of City government which monitors the police department.
13. Ms. Cziment met with department leadership and submitted written recommendations informing the Appointing Authority and its deputies that PIB investigators were consolidating charges while investigators from other bureaus were not. She warned that there would be inconsistencies in discipline if the investigations were not presented in the same manner. (Tr. Vol I. at 55 – 61).
14. The Departmental leadership failed to respond to Ms. Cziment's written warning and allowed the investigations to proceed without coordination. (Tr. Vol I. at 65 – 69; Richardson Ex.'s 5, 6 & 7).
15. Chief Deputy Superintendent Christopher Goodley participated in the Appellant's Bureau Chief Hearing. During deliberations, he raised concerns that other officers with similar charges were under investigation by PIB. He requested guidance from PIB as to how to render similar or the same discipline for the same violations consistent with policy. New Orleans Departmental Operations Manual Chapter 26.2, paragraph 45 states "that PIB shall provide information regarding the discipline that has been imposed on other NOPD employees across all Bureaus for similar violations." PIB informed Goodley that it could not provide the requested information because PIB was "recused".

III. TESTIMONY

A. Christopher Goodley

Christopher Goodley, former Chief Deputy Superintendent of Police, recommended the Appellant's demotion prior to the Appointing Authority taking final disciplinary action. His reasons are reflected in an October 12, 2022 interoffice correspondence to Shawn Ferguson, the Superintendent of Police. He testified that his recommendation was based upon the disciplinary investigation for which the Appellant received the maximum number of suspension days for secondary employment sustained violations. (Tr. Vol I. at 9 – 11; Richardson Ex. 2).

Goodley confirmed that he had concerns about not having information regarding the investigation of other members of the department charged with the same of similar acts of misconduct. (Tr. Vol I at 16 – 18).

When questioned concerning Eric Gillard and Kendrick Allen, Goodley testified that only Gillard was in his chain of command. Goodley stated that he took no actions to prevent Gillard's promotion because he was not provided with any information regarding his investigation to suggest serious misconduct. (Tr. Vol. 1 at 42 -46).

B. Shawn Ferguson

Shawn Ferguson was the Superintendent of Police during the relevant period. It was his decision to return the Appellant to her classified position. (Tr. Vol II. at 6; Richardson Ex. 1). Ferguson testified that he conferred with the Appellant's immediate supervisor Goodley and made his decision based upon

Goodley's recommendation. According to Ferguson, while the Appellant "had done a great job" in her probationary captain position, the ultimately sustained secondary rule violations caused him to conclude that the Appellant should not attain permanent status as a Captain. (Tr. Vol. II. at 15 – 25; Richardson Ex. 2).

Ferguson expressed concerns that those violations occurred primarily while the Appellant was assigned to the Public Integrity Bureau. He stated that the decision was based on the totality of the circumstances including the number of violations, the type of violations, and the position she held during the period that the violations occurred. He stated that gender was not a factor. (Tr. Vol. II. at 26 – 28).

Ferguson stated that he was vaguely aware of the Allen and Gillard investigations. He knew that both were probationary captains who attained permanent status. When questioned regarding their investigations, Ferguson testified as follows:

Q. At the time, while Kendrick Allen and Eric Gillard were probationary captains, were you aware of the fact that they had received negotiated settlement agreements for overlapping 16-hour violations?

A. ... there were so many names that received negotiated settlements. I really didn't pay attention to all of them. I just know there were numerous negotiated settlements based on the threshold that had been agreed upon between PIB and other independent monitors. So that was [sic] the recommendations

presented to me, negotiated settlement, and that is what I pretty much agreed with.

Q. ...from your perspective, did the negotiated settlement agreements that those individuals, Allen and Gillard received, did that affect either of their probationary statuses?

A. No, it did not...

HEARING EXAMINER:

Why did it not impact your decision making?

THE WITNESS:

I looked at everything based on what was presented to me at the time. Their negotiated settlement was not as in-depth as her [Richardson's] full- fledged investigation, and that was the trigger with everything for me. It was a more thorough investigation, a detailed investigation as opposed to being -- had she been a negotiated settlement, she probably ... more than likely still be a captain, a permanent captain right now. But given the gravity of the thorough investigation and everything that was presented to me through that investigation, evidence and all, I had the ability to have a more in-depth look at her situation. It seemed to be a little bit more egregious than theirs.

BY MR. GOFORTH:

Q. Do you know why Richardson did not receive a negotiated settlement agreement?

A. It was a public complaint, so that's against policy. You cannot have a negotiated settlement on a public complaint.

(Tr. Vol. II, at 32 – 33).

Ferguson testified that neither Dep. Supt. Arlinda Westbrook nor Dept. Supt. Otha Sanderfer alerted him to the concerns raised by the Independent Police Monitor Stella Cziment concerning the different manner that the Appellant's violations were investigated and the potential for more severe

penalties for the same violations for the Appellant. Ferguson stated that Cziment's concerns should have been brought to his attention. (Tr. Vol. II. at 92 – 96, 110 -112).

Ferguson also testified that he was not aware that the Public Integrity Bureau withheld information from Goodley and those participating in the Chief's Disciplinary Committee regarding how others under investigation were disciplined compared to the Appellant. He stated that the information should have been provided to Goodley when requested to assure discipline was fair and consistent. (Tr. Vol. II. at 96 – 99).

C. Sabrina Richardson/Appellant

The Appellant contends that her demotion was based on her gender, providing the following testimony in support of her position.

Q. We filed a discrimination action in connection with this particular matter. I want you to explain to this honorable court why you believe you were discriminated against and be specific.

A. ... from its inception, my allegations were handled ...different from my two colleagues at the time, who were similarly situated, those two colleagues being Captain Eric Gillard and Captain Kendrick Allen, both African American males...

The first and foremost thing was that my case was handled as a form of disciplinary investigation, whereas theirs were handled as negotiated settlements, ... They were given those opportunities. I was not.

There were aggravating factors that would apply to me that were not applied to those two individuals. ... My assignment as the Public Integrity Bureau captain was used as an aggravating factor against

me, although none of the violations occurred while I was the probationary captain of the Public Integrity Bureau. However, those same factors were not applied to Captain Kendrick Allen, who was the sitting captain of the Public Integrity Bureau... However, in this case, the actions that were taken against me by the New Orleans Police Department, the aggravating factors that were applied to me by the New Orleans Police Department simply were not applied to my male counterpart.

And, when you lay it all out on the table, when you look at everything that was provided, everything that was investigated, the allegations on my end were handled via counts. And, although Chief Sandifer in his recommendations, or during the hearing process of that previous case, stated that, oh, well, we didn't know PIB had recused themselves, which that itself is another manner in which - they recused themselves from me, Sabrina Richardson, but they did not recuse themselves from the current sitting captain of PIB who was Kendrick Allen. So, they had to recuse from me, the only female, and then it was fine for them to investigate the current captain of PIB.

The manner in which the investigations proceeded were handled differently. Of course, my discipline, they were offered two days and a letter of reprimand that they didn't even serve the two-day suspension, because they were allowed to ...use furlough days, so they actually never served any suspension days, versus my case being handled per counts, whereas, theirs was not.

Each count received an aggravated penalty, theirs were not. Theirs were not even fully investigated. However, when you look at it, ...we all had violations of the OPSE policy that were the same level in regards to the NOPD approved penalty matrix. So, ... although it may have been different paragraphs, it was all a violation of the OPSE policy.

IV. ANALYSIS

A. McDonnell-Douglas Framework

The Louisiana Fourth Circuit Court of Appeal in *Balancier v. Sewerage & Water Board of New Orleans*, 2022-0255 (La. App. 4 Cir 10/19/22), 351 So. 3d 439, 444-445, confirmed that “this Court employs the *McDonnell Douglas* framework for discrimination cases where there is a ‘mixed-motive’ as to the employer’s reason for terminating an employee.”

The McDonnell-Douglas Framework is well settled and provides for a motive shifting analysis:

- 1) The Prima facie case –
 - a. Member of a protected class,
 - b. adverse employment action,
 - c. a similarly situated individual was given better treatment.
- 2) The employer must articulate a legitimate non-discriminatory reason for the challenged action.
- 3) The employee must demonstrate pretext – the non-discriminatory reason given for its actions are not true reasons and are actually pretext for the exercise of prohibited discriminatory intent based on the employee’s protected classification.

B. Appellant’s Prima Facie Case

In the instant case, the Appellant has established a *prima facie* case. She is a member of a protected class based upon her gender - female. She suffered an adverse employment action – demotion from captain to lieutenant with a reduction in pay and status. Conversely, similarly situated male captains were not demoted.

C. Comparison with Male Counterparts

The third prong of Appellant's *prima facie* - the counterparts require a more in-depth analysis. The Appellant was demoted while in a probationary status, based upon the Appointing Authority's determination that she violated internal policy regarding secondary employment, resulting in a 164-day suspension, reduced by the New Orleans Civil Service Commission to 47 days. The Appellant's contention is that she was subjected to a higher level of scrutiny and punished more severely than her male counterparts for the same violations. She contends that had she been investigated in the same manner, her punishment would have been similar to that of her counterparts, and she would have achieved permanent status as a captain.

Ferguson's inconsistency in discipline was in part based upon his subordinates' (Westbrook and Sandifer) failure to heed warning from the Independent Police Monitor that the Appellant's investigation was based upon a different method than that applied to other individuals under investigation for the same violations. Ferguson conceded that he was unaware of the Independent Police Monitor's concerns. The New Orleans Civil Service Commission has already confirmed the department's error in *Richardson v Department of Police*, Case No. 9409 (2023) and reduced the Appellant's discipline as a consequence.

At least one of the same subordinates (Westbrook) also failed to provide Goodley with requested information regarding how others were disciplined for

the same violations during the pre-disciplinary hearing. Goodley recommended the Appellant's demotion based upon the "seriousness of the violations" without knowing that others were disciplined based upon a different standard. Ferguson conceded that Goodley should have been provided the requested information prior to making his recommendations.

D. The Appointing Authority's Shifting Burden in Response to Appellant's Prima Facie Case

These glaring errors cannot be ignored, and the burden must shift to the Appointing Authority to articulate a legitimate non-discriminatory reason for the demotion. The Department of Police could not explain its errors because those individuals that caused the errors were not called as witnesses by either party. Nevertheless, the Appointing Authority has still met its shifting burden.

The Appellant was demoted because of multiple violations of two separate secondary employment policies. One policy concerned overlaps in time between her secondary employment job and her job as a police officer. This policy was also violated by her male counterparts. Undoubtedly, had that been the only violation, the Appellant's case would have been far more compelling.

However, the Appellant had a second violation that the male counterparts did not have. The second violation concerned an investigation and a determination that the Appellant left her paid detail before the end of

her shift without permission, as defined by departmental rules. The investigation resulted from a public complaint. A public complaint requires a formal investigation and cannot be the subject of a negotiated settlement. Ferguson and Goodley both testified that this violation was serious (45-day suspension) and at least in part caused them to determine that the Appellant should not continue as a captain. The New Orleans Civil Service Commission denied the Appellant's appeal concerning this violation and the 45-day suspension remains as part of her record. Thus, the Appointing Authority has articulated a non-discriminatory reason for the decision to demote.

E. Pretext and Discriminator Intent

The final burden shifts back to the Appellant to demonstrate that the Appointing Authority's articulated reason for demotion was pretextual and calculated to conceal discriminatory intent. In the instant case, there is no evidence of discriminatory intent on the part of the primary decisionmakers. Not by Goodley, who made the recommendation and nor by Ferguson, who accepted it.

In *Graham v. Department of Police*, Case No. 5531 (1997), the New Orleans Civil Service Commission credited the Appellant's testimony that she was treated differently than two male counterparts when her district commander Captain Gerald Ursin initiated an investigation against her for failure to enter and lock her platoon payroll records for a two-day period and

not also against the two male sergeants to whom the responsibility had been delegated.³ To support the specific allegation that the Appellant's discipline was motivated by gender discrimination, Appellant relied upon her own testimony and the testimony of others that there was bias against women at her work assignment and that female police officers were continually singled out and disciplined for relatively minor mistakes. The Commission considered the evidence, explaining as follows:

Though the vague testimony of these two witnesses was something less than convincing, its limited probative value is sustained by the fact that it was unrebutted. Captain Ursin (the alleged perpetrator of the discrimination) did not appear and testify.

Graham at p. 3.

In attempted rebuttal, the Appointing Authority called Major James Treadaway who handled disciplinary matters and made recommendations to the Appointing Authority. As in the instant case, Treadaway testified that he had no independent knowledge of disparate treatment and made his decision based upon a determination that the Appellant violated departmental rules.

The Commission granted the Appeal ruling as follows:

After reviewing the record, we find no direct evidence that Major Treadaway was biased against Appellant in recommending a letter of reprimand to Captain Ursin. Nevertheless, weakness in the Appointing Authority's rebuttal of the evidence presented by Appellant, particularly its failure to explain why Captain Ursin

³ This Appeal was heard prior to the Commission changing its rules, by order of the Louisiana Fourth Circuit Court of Appeal, to include reprimands as appealable formal discipline. Thus, the Appellant had to allege discrimination to appeal her reprimand.

initiated a DM-1 [investigation] against Appellant but not also the sergeants who were equally if not more culpable convinces us that Appellant has presented a prima facie case of gender discrimination. The Police Department certainly has the right to compel its officers to comply with its rules, but when long standing non-compliance has been common and system-wide, discipline should be uniform and not sporadic as in this case.

Id. at 5.

Graham illustrates where the Appellant has fallen short. An Appointing Authority can be held liable for the discriminatory acts of its subordinate employees; particularly where discriminatory animus has been articulated by the Appellant and the Appointing Authority has failed to respond. Here, while the Appellant was treated differently as a consequence of questionable decisions by Ferguson's subordinates, the Appellant has not pointed its finger at any particular person. Thus, unlike *Graham*, there are no claims of discriminatory animus for the Appellant to rebut.

Based upon the foregoing, the Appellant has failed to establish that she was demoted because of her gender and her appeal should be Dismissed.

June 22, 2014

DATE

/s/ Jay Ginsberg

HEARING EXAMINER