CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Tuesday, June 26, 2018

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Kevin Pozzo VS.**
Department of Police
Docket Number: 8689

Dear Mr. Hessler:

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 - 6/26/2018 - 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Stephanie Dovalina
Brendan M. Greene
Kevin Pozzo

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

KEVIN POZZO vs. DEPARTMENT OF POLICE	DOCKET No.: 8689

I. INTRODUCTION

Appellant, Kevin Pozzo, 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. Appellant challenged the sufficiency of NOPD's investigation into Appellant's alleged misconduct and asserted that NOPD did not adhere to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission's analysis will first address Appellant's procedural claims. If the Commission determines that NOPD's investigation was procedurally sound, we will then consider 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 February 22, 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 render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD terminated Appellant for an alleged violation of the following NOPD Rule:

- Rule 2: Moral Conduct; Paragraph 1, Adherence to Law to wit: Violation of R.S. 14:35.3, Relative to Domestic Abuse Battery;

(H.E. Exh. 1).[1]

NOPD alleged that Appellant violated the above-cited rule on December 11, 2015 when he; 1) pushed a chair occupied by his then-fiancé (referred to hereinafter as "Ms. M") that caused Ms. M to fall to the ground, and 2) "aggressively forced" a door against Ms. M. *Id.*

B. NOPD's Investigation

Appellant claims that NOPD's investigation was procedurally deficient because the primary investigator, NOPD Sergeant Kimberly Hunt, failed to complete her investigation by the deadline established by Louisiana Revised Statute 40:2531 (hereinafter "the Law"). Pursuant to the Law, a law enforcement entity has sixty-days to complete an administrative investigation into an accused officer's misconduct (120 days if an extension is granted by the applicable civil service body). However, an ongoing criminal investigation effectively tolls the running of the sixty-day deadline. Only upon completion of the criminal investigation would the sixty-day countdown continue. *Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16, 11), 198 So.3d 250, 256, *writ denied,* 2016-1691 (La. 11/29/16), 210 So.3d 804. Typically, a final disposition of the criminal charges against an Officer signals the end of the criminal investigation. *E.g.*, *Wilcox, supra* at 256-57; *Michel v. Dep't of Police*, 2016-0623 (La.App. 4 Cir. 2/15/17, 5), 212 So.3d 627,

[1] During the course of the appeal hearing, Appellant withdrew his challenge to a five-day suspension related to a secondary rule violation relative to the consumption of alcohol off-duty. (Tr. at 99:3-8).

630 (timeline began when NOPD received notice that officer under investigation had entered a plea of nollo contendre); *Kendrick v. Dep't of Police*, 2016-0037 (La.App. 4 Cir. 6/1/16, 21), 193 So.3d 1277, 1289, *writ denied,* 2016-1435 (La. 11/15/16), 209 So.3d 779 (timeline began when NOPD received notice from District Attorney that his office would not be pursuing criminal charges against officer under investigation).

In the matter now before the Commission, the criminal investigation against Appellant ended on June 24, 2016 when a court of competent jurisdiction found Appellant "not guilty" of battery and domestic abuse battery. (NOPD Exh. 4). Because NOPD did not request an extension, its administrative investigation into Appellant's misconduct was due to be complete no later than August 25, 2016. For the purposes of the Law, an investigation is "complete" when the officer under investigation receives notice "of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint." La. R.S. 40:2531.

On August 12, 2016, Sgt. Hunt contacted Appellant via phone to notify him that NOPD had tentatively scheduled a pre-disciplinary hearing for September 12, 2016. (NOPD Exh. 6). Appellant signed an acknowledgement that he received the notice on August 17, 2016. *Id.* There is no dispute that Appellant received notice of the pre-disciplinary hearing prior to the running of the deadline. What is at issue is whether or not NOPD's investigation was actually complete.

In her investigative report, Sgt. Hunt included excerpts from Ms. M's testimony at Appellant's criminal trial. (NOPD Exh. 5 at pp. 29-33). Sgt. Hunt admitted that she did not have the transcript until November but claimed to have based her initial assessment of Ms. M's credibility at trial on information she received from the Assistant District Attorney assigned to the case. (Tr. at 124:18-125:8). NOPD did not seek to introduce Sgt. Hunt's original report, so it is difficult to assess this claim.

Both Sgt. Hunt and her supervisor, Lieutenant Darryl Watson, acknowledged that investigators may not add anything to a report after it has been submitted. The distinction NOPD attempted to make in this case was that its investigation did in fact end on August 12, 2016 and Sgt. Hunt's subsequent references to the trial transcript were merely a clarification as to why Sgt. Hunt did not believe that Ms. M's trial testimony was credible.

Ultimately, the Commission finds that NOPD did complete its investigation into Appellant's alleged misconduct by August 12, 2016, but later added items to buttress the claims made in the investigative report. Therefore, the Commission finds that any material added after August 12, 2016 is inadmissible with respect to the instant appeal. Had NOPD believed that obtaining the transcript was going to be a problem, it could have requested an extension of the sixty-day deadline. It did not. The Commission is concerned that allowing NOPD to add exhibits and details to its investigation following notice to an accused officer would essentially render the sixty-day deadline moot. NOPD's own policy requires any and all clarifications or questions regarding investigations be addressed prior to the sixty-day deadline. (Tr. at 289:6-23).

The Commission finds that NOPD adhered to the requirements of the Law with the exception of adding elements after August 12, 2016. Therefore, the Commission will disregard any portion of Ms. M's trial transcript or Sgt. Hunt's report that references Ms. M's testimony during the criminal trial.

B. Bias of P.I.B. Investigator

In addition to the procedural deficiencies Appellant alleged during the course of his appeal, Appellant asserted that NOPD's investigation was tainted by Lt. Watson's involvement. Lt. Watson, according to Appellant, was biased against Appellant as a result of a complaint Appellant had made against Lt. Watson seven months earlier. Specifically, Appellant, who was himself

under investigation in connection with an automobile accident, alleged that Lt. Watson had been drinking (or was intoxicated) while on the job. Per NOPD policy, Lt. Watson and his supervisor relocated to a substance abuse testing facility in order to determine if Lt. Watson's blood alcohol content was above the prescribed limit. According to Lt. Watson, his breathalyzer test revealed that there was no alcohol in his system.

Lt. Watson denied that he bore any ill will towards Appellant and pointed out that he did not initiate the investigation into Appellant's actions on December 11th, but was simply the supervising lieutenant on duty at the time the call came in regarding Appellant's alleged battery. (Tr. at 348:4-7, 12-22).

Appellant suggested that Lt. Watson should have recused himself from the investigation due to the prior allegations. The Commission observes that this would be an extremely slippery slope and worries that NOPD would see an influx of preemptive complaints against PIB personnel if an investigator would have to recuse him/herself merely because an employee levied a complaint against the investigator. The decision to remove an investigator from an investigation should be the result of a fact-specific inquiry that takes into account a variety of factors, including whether or not the underlying complaint had a rational basis. Here, the Commission accepts Lt. Watson's representations that he was not biased towards Appellant.

We do not find that Lt. Watson's involvement in the investigation into Appellant's alleged misconduct violated Appellant's due process rights or resulted in a tainted investigation.

B. December 11, 2015

On the afternoon of December 11, 2015, Appellant and Ms. M were sharing a drink after a day of work when an acquaintance of Ms. M invited the couple across the street to an open house party. (Tr. at 26:21-24). At the time, Appellant and Ms. M had been dating for about nine months

and had moved in together at Street in the Lakeview neighborhood of New Orleans. (NOPD Exh. 14 at p. 19; Tr. at 299:17:24). Both Ms. M and Appellant had consumed a couple of drinks by the time they went across the street. (NOPD Exh. 14 at p. 18; Tr. at 15:17-25). Appellant decided to leave the party after he became upset when he observed Ms. M speak with other men at the party. (Tr. at 43:19-44:3). Appellant soon returned and confronted at least one man. During that confrontation, Appellant referred to the man as a "bitch." (*See* tr. at 47:4-8). The hosts of the party were understandably alarmed at Appellant's behavior and asked that Appellant leave. (NOPD Exh. 14 at p.2).

Ms. M and Appellant left the party together around 7:00 p.m. and returned to Street where Appellant, upset and jealous, engaged Ms. M in a heated argument. (Tr. at 48: 11-18; NOPD Exh. 13 at p. 12). During the argument, Appellant threw a glass beer bottle against an interior wall causing it to shatter; he also threw pillows and a back pack. *Id.* at 49:10-13. Appellant admitted that he threw these items around the house, but claimed he did not throw them at Ms. M. What happened next is disputed by the Parties.

According to Appellant's administrative statement, Ms. M was seated in a chair during their argument and began to doze off. This prompted Appellant to push the chair, which startled Ms. M and prompted her to run towards the front door. (NOPD Exh. 13 at pp. 22-23). During his testimony at the instant appeal hearing, Appellant claimed that he "kind of shook" Ms. M's chair but denied that Ms. M fell out of the chair as a result. (Tr. at 50:5-17). For her part, Ms. M initially told NOPD investigators that Appellant pushed over the chair in which she was sitting, causing her to fall. (NOPD Exh. 14 at pp. 3-5). Ms. M also told investigators that she believed Appellant's actions were due to the fact that he was mad at her for talking to other men at the party. *Id.* During

her testimony at the appeal hearing, Ms. M stated that she recalled Appellant putting his hand on the chair in which she was sitting, but did not recall what happened as a result. (Tr. at 304:7-15).

Ms. M went on to testify that after she got out of the chair, she grabbed her car keys, notified Appellant that she was leaving with the keys, and attempted to leave the house. (Tr. at 304:7-305:22). She admitted that she was "somewhat intoxicated" at the time. *Id.* at 302:12-19. Ms. M claimed that she believed Appellant was trying to prevent her from leaving because he did not want her to operate a vehicle while intoxicated. *Id.* at 306:18-21. This claim, however, is inconsistent with the statement she provided to investigators on the night of December 11th when she indicated that she attempted to leave the house to "defuse" the situation and Appellant was trying to prevent her from leaving because he wanted to continue to talk to her. (NOPD Exh. 14 at p. 17). Appellant claimed that he attempted to stop Ms. M from leaving the residence because he was concerned that she may have attempted to operate a vehicle, which would have been dangerous given what he described as Ms. M's "heavily intoxicated" state. (Tr. at 51:4-8).

Video footage captured by a security camera located in the residence shows an apparently frightened Ms. M rushing towards the front door, opening it and getting partially outside. (NOPD Exh. 1 18:59). Appellant then enters the frame and attempts to force the door closed while Ms. M is half inside and half outside. *Id.* Eventually, Ms. M "squeezes" through the door and goes outside.

Though not captured on camera, there is no dispute that, when Ms. M made it outside, she encountered a letter carrier. Whether prompted by Ms. M's appearance or from a direct request by Ms. M herself, the letter carrier called 911. A recording of the 911 call is in evidence as "NOPD Exhibit 9." During the call, Ms. M sounds extremely upset. She requests that the police come to her residence. In response to the following question posed by the 911 Operator – "did he hurt you,

do you need EMS" – Ms. M responded that, "he hurt me, but I don't need an ambulance." (NOPD Exh. 9).

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.

B. Standard When Appellant is Accused of Violating a Law

An additional consideration that the Commission must address is whether or not an allegation that an Appellant violated a criminal statute – and thus violated NOPD rules – changes NOPD's standard of proof. Put simply, the Commission must answer the question, does NOPD's

allegation that Appellant violated Louisiana Revised Statute 14:35.3 change the standard from "preponderance" to "beyond a reasonable doubt"? As we have noted in numerous prior decisions, we find that they do not.

In *Bailey v. Dep't of Pub. Safety & Corr.*, 2005-2474 (La.App. 1 Cir. 12/6/06, 10); 951 So.2d 234, 240, Mr. Bailey, a sergeant in the Louisiana State Police, was arrested for violation of La. R.S. 14:98 (operating a vehicle while intoxicated) and 32:58 (careless operation of a vehicle). Mr. Bailey was eventually acquitted of the criminal charges but the appointing authority terminated him for, among other things, violating Louisiana State Police rules and regulations that prohibit employees from breaking the law. *Id.* at 239. Mr. Bailey appealed his termination to the Louisiana State Police Commission.[2] In his appeal, Mr. Bailey argued that, because his termination was based upon an allegation that he committed a criminal act, and he was subsequently acquitted of that criminal act, his termination is invalid. *Id.* The State Police Commission rejected this argument and found that:

> [U]nlike a criminal proceeding in which the state must prove beyond a reasonable doubt all the elements of the charged crime, the appointing authority in an administrative proceeding need only prove by a preponderance of the evidence that the complained of action occurred and that it impaired the efficient operation of the public service.

Id. (citing *Walters v. Department of Police of New Orleans,* 454 So.2d 106, 113 (La.1984)). The State Police Commission went on to find that the appointing authority had sufficient cause to terminate Mr. Bailey's employment. *Id.* The First Circuit affirmed the State Police Commission's decision and noted with approval that the State Police Commission recognized that it was "not their role to determine whether Mr. Bailey was guilty or innocent as to the ***crime*** of driving while

[2] While the Louisiana State Police Commission is organized under a different Part of the Louisiana Constitution (Art. X, § 43) the burden of proof on appeals is the same as appeals before this Commission.

intoxicated and that [Mr. Bailey's] acquittal, for whatever reason, by the Court in Calcasieu Parish of DWI, is interesting but certainly not dispositive of his disciplinary action before this tribunal." *Id.* at 240-41 (emphasis in original).

The fact that the instant appeal involves a criminal charge for which a court of competent jurisdiction found Appellant not guilty of does not change the outcome. As established by above-cited precedent, an acquittal does not relieve Appellant from the underlying allegations of misconduct. NOPD's burden in establishing a violation of the law in an administrative context remains "by a preponderance of the evidence." Alternatively, a conviction would have served to establish the underlying misconduct, but the Commission would still have had to analyze the second two prongs of the three-pronged test.

IV. ANALYSIS

A. Occurrence of the Complained of Activities

i. Violation of La. R.S. 14:35.3 (Domestic Abuse Battery)

Louisiana Law defines "domestic abuse battery" as "the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member." La. R.S. 14:35.3(A). For the purposes of the statute, "household member" includes "any person presently or formerly living in the same residence with the offender and who is involved or has been involved in a sexual or intimate relationship with the offender." La. R.S. 14:35.3(B)(5).

Ms. M and Appellant had been involved in an intimate relationship for about nine months as of December 11, 2015 and resided together at [redacted] Street. Therefore, the Commission finds that Ms. M was a member of Appellant's household for the purpose of the applicable state law.

Thus, the remaining question is whether or not Appellant intentionally used force or violence against Ms. M on December 11, 2015.

NOPD alleged that Appellant twice used force or violence against Ms. M. Once when he pushed a chair in which Ms. M was sitting, causing her to fall to the ground and then again when he attempted to push a door closed while Ms. M was wedged between the door and the door frame. The Commission addresses each of these allegations in turn.

Both Ms. M and Appellant admit that Appellant was angry and jealous of Ms. M's actions while at the party. So angry, in fact, that he shattered a beer bottle in his own home. The Commission does not believe that, in the context of a heated argument where one party is throwing objects (including a glass beer bottle) that one of the parties to that argument would have "dozed" off. The Commission also does not find credible Appellant's shifting descriptions of the physical contact he made with Ms. M's chair. Given the context of the incident, the Commissioners find that Ms. M's original account is closer to the truth. Namely that, during the course of their argument, an angry Appellant – whose anger had already manifested itself in a physical manner – grabbed the chair in which Ms. M was sitting and forced it over, causing Ms. M to fall to the ground. This constituted a use of force or violence against a household member and violated state law.

Ms. M provided PIB investigators with a statement one or two hours after her interaction with Appellant on the night of December 11th. And, the investigators found her to be coherent and calm when answering their questions. Ms. M's testimony during the appeal hearing was at times inconsistent with her original statement. She also stated that she had forgotten much of what happened on the night of the 11th. As a result, the undersigned Commissioners find that her original statement better reflects the undisputed facts and Appellant's own admissions.

The Commission next turns to the Appellant's alleged use of force or violence involving the front door. From the video, it is clear that Ms. M had not quite made it out of the door when Appellant entered the frame. He proceeded to place both hands on the door and appeared to put his weight against the door. Ms. M appeared frightened in the footage and is wedged partly outside of the door. Video evidence shows that Appellant forced the door onto Ms. M's person. It was only after Appellant released the pressure he was applying on the door that Ms. M was able to exit the residence. Given evidence before us, the undersigned find that it is more likely than not that Appellant used force against Ms. M when he pushed the front door of the residence closed on her person. Appellant's willingness to shut the door on Ms. M – pinning her in place for what he alleges was out of an interest for her safety – provides some evidence of his willingness to use force against her just seconds prior when she was sitting in a chair.

As a result of the above findings, the undersigned Commissioners hold that NOPD has established, by a preponderance of the evidence, that Appellant violated Louisiana Revised statute 14:35.3.

B. Impact on NOPD's Efficient Operations

In prior decisions, the Commission has observed that, when NOPD Officers violate the law, it brings discredit to both the Officer and NOPD. This in turn compromises NOPD's credibility in the community and diminishes the Officer's ability to fully perform his/her policing duties. In the matter now before us, Appellant's actions were not only violent, but involved a member of his household. NOPD does not have to establish widespread knowledge or media coverage of Appellant's misconduct to show an adverse impact on NOPD's operations. It is enough Appellant has betrayed the trust of his fellow officers and supervisors.

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 termination 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).

NOPD has an interest and an obligation to hold its personnel to high standards both on and off duty. Any failure on the part of NOPD to enforce such high standards would eventually erode the public's trust in NOPD to effectively and efficiently execute its primary function as a law enforcement agency. Residents routinely rely upon NOPD Officers to enforce domestic violence laws. Moreover, the Commission takes judicial notice of a Consent Decree entered into between U.S. Department of Justice and the City of New Orleans in which NOPD committed to ensure that Officers are trained to fully and faithfully investigate domestic violence allegations. (¶¶ 212-222). Given the attention NOPD has dedicated to the issue of domestic violence over the past years, each officer should have ample notice that the commission of any offense involving domestic violence could result in termination.

Appellant's actions on December 11, 2015 were precisely the type of behavior that NOPD sought to deter through the establishment of severe disciplinary sanctions. By engaging in prohibited conduct, especially toward a household member, Appellant forced NOPD's hand. While Appellant may have been a valued member of NOPD's SWAT team, his deplorable behavior on December 11, 2015 warranted termination.

V. CONCLUSION

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

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 26th day of June, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

Tania Tetlow
TANIA TETLOW, COMMISSIONER — 6/15/18 DATE

CONCUR

STEPHEN CAPUTO, COMMISSIONER — 6-22-18 DATE

MICHELLE D. CRAIG, CHAIRPERSON — 6-22-18 DATE