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Tuesday, January 10, 2017

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

Re: **Kandace Vallory VS.
Department of Police
Docket Number: 8465**

Dear Mr Livaccari:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 1/10/2017 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, 12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Kandace Vallory
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

KANDACE VALLORY vs. DEPARTMENT OF POLICE	DOCKET No.: 8465
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I. INTRODUCTION

Appellant, Kandace Vallory, 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. However, Appellant alleges that NOPD’s investigation into her alleged misconduct failed to conform to the procedural requirements established by Louisiana Revised Statute § 40:2531 and our Rules. Therefore, the Commission will first address whether or not NOPD’s investigation was procedurally sound. The undersigned Commissioners have reviewed the transcript of the appeal hearing that occurred on September 28, 2016, the exhibits accepted into the record by the hearing examiner, the hearing examiner’s report and the Parties’ post-hearing briefs. We now render the following decision and judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

Appellant, was a permanent, classified employee serving in the capacity as Police Officer at all times relevant to the instant appeal. NOPD sustained three separate rule/policy violations against Appellant:

- Rule 2: Moral Conduct; Paragraph 1: Adherence to Law, to wit La. Rev. Stat. 14:35.3 relative to Domestic Abuse Battery;
- Rule 5: Restricted Activities; Paragraph 9: Criminal Proceeding Against Member
- Rule 2: Moral Conduct; Paragraph 3: Honesty and Truthfulness

(H.E. Exh. 1). NOPD dismissed Appellant for her alleged violation of Rule 2, and suspended her for fifteen days for her alleged violation of Rule 5. *Id.*¹ It also found that dismissal was warranted for Appellant's violation of Rule 2, Paragraph 3.

The incident that led to Appellant's dismissal occurred on Sunday, October 24, 2014, at 4:49 a.m., when two St. Tammany Parish Sheriff's deputies responded to an "open line" 911 call that captured an argument between two individuals; one of the individuals allegedly threatened to do physical harm to the other. (NOPD Exh. 5 at p. 2-3 or 29).² Upon arriving at the scene, the two deputies encountered Mr. Christopher Cowie who had injuries to his forehead and nose consistent with being struck with a fist or object. *Id.*³ Mr. Cowie indicated that he sustained the

¹ NOPD recognized that Appellant did not serve a fifteen-day suspension as her termination became effective prior to the time she would have served such discipline.

² Sgt. Arlen Barnes investigated this matter on behalf of NOPD and obtained the recording of the 911 call that preceded the deputies' arrival. During the course of NOPD's investigation, Appellant had the opportunity to listen to the 911 recording and stated that it was "probably" her voice on the recording and identified the other voice as Mr. Christopher Cowie's. *Id.* at 10 of 29. According to Sgt. Barnes, he heard a female voice threaten to punch another individual in the face and stated that she was not the ex-wife of another individual. *Id.* at 3 of 29.

³ The Commission observes that the information contained in the investigative summary accepted into evidence as "NOPD Exhibit 5" is layered hearsay. During his investigation, Sgt. Barnes reviewed the incident

injuries during an altercation with his girlfriend whom he identified as Appellant, Kandace Vallory. *Id.*⁴ However, when pressed as to Appellant's whereabouts, Mr. Cowie allegedly told the St. Tammany Parish Sheriff's deputies that he intended to lie about the source of his injuries if the deputies sought to bring charges against Appellant. (NOPD Exh. 5 at p. 2 of 29).

According to reports obtained by NOPD, Appellant denied striking Mr. Cowie and claimed that Mr. Cowie's injuries were self-inflicted. *Id.* at 3 of 29. St. Tammany Parish Sheriff's deputies inspected Appellant's hands and did not observe any "blunt trauma" which presumably would have served as evidence of a physical altercation. *Id.* at 3 of 29. The deputies also observed what they believed to be blood on the trunk of Appellant's white Dodge Charger. *Id.* at 3 of 29. Appellant allegedly told the investigating deputies that she did not know how the blood came to be on her trunk and suggested that Mr. Cowie put the blood there to incriminate her. *Id.* at 3 of 29. The deputies' report states that, due to the lack of Mr. Cowie's cooperation and an inability to corroborate certain facts, they chose not to make an arrest and instead forwarded the investigation to detectives for further investigation. *Id.* at 3 of 29.

In a subsequent interview with a detective in the St. Tammany Parish Sheriff's office, Mr. Cowie allegedly admitted that he was "very intoxicated" on the night of October 24, 2014 and did not recall what happened. *Id.* at 6 of 29. According to Mr. Cowie, his friends told him that he was involved in an altercation at a local bar. *Id.* at 7 of 29. As the interview progressed, Mr. Cowie allegedly made several contradictory statements and eventually claimed that

report generated by the deputies who reported to the scene. NOPD did not introduce or offer into evidence the deputies' report itself.

⁴ NOPD seeks to rely upon Mr. Cowie's statements for the truth of the matter asserted therein. Yet, Mr. Cowie's statements are "triple hearsay." Put differently, Sgt. Barnes's memorandum regarding his investigation is hearsay, and it summarizes the contents of the deputies' incident report, which is double hearsay, and the incident report contains Mr. Cowie's allegations against Appellant, which makes such allegations triple hearsay. To make matters worse, Mr. Cowie may or may not have been drinking and later allegedly told the deputies he intended to lie about Appellant's actions on the night of October 24th. Given all this, the Commission gives very little weight to Mr. Cowie's account of Appellant's actions.

Appellant struck him. *Id.* at 7 of 29. At the end of the interview, the detective provided Mr. Cowie with an “Intent to Withdraw Criminal Investigation” form, which Mr. Cowie allegedly signed “without hesitation.” *Id.* at 7 of 29. At no point in time did the St. Tammany Parish Sheriff’s Office arrest Appellant, and appears to have completed its investigation into the matter on November 3, 2014.

NOPD initiated its own investigation into Appellant’s alleged misconduct on November 24, 2014. (NOPD Exh. 4). As part of this investigation, Sgt. Arlen Barnes conducted an interview of Appellant in the presence of her counsel. (NOPD Exh. 2). During this interview, Sgt. Barnes communicated to Appellant her right against self-incrimination pursuant to the United States Constitution and the Louisiana Constitution. *Id.* Appellant refused to waive any of her constitutional rights and Sgt. Barnes subsequently stated that he was “terminating the criminal investigation.” *Id.* Given that the alleged criminal conduct at issue occurred in St. Tammany Parish, the Commission is at a loss as to what criminal investigation Sgt. Barnes addressed when he made this statement. NOPD failed to introduce any evidence that it was engaged in a criminal investigation regarding Appellant’s misconduct. Based upon the documents and testimony before us, NOPD’s investigation was purely administrative in nature. As the hearing examiner noted, NOPD would not have had jurisdiction to investigate an alleged crime that occurred entirely within St. Tammany Parish absent specific extenuating circumstances that are not present in this case.

During her interview with Sgt. Barnes, Appellant recalled speaking with sheriff’s deputies regarding Mr. Cowie’s allegations that Appellant had struck him in the face. (NOPD Exh. 2). Appellant again denied striking Mr. Cowie and stated that Mr. Cowie had been “belligerently drunk” on the night in question and Appellant had decided to relocate to a friend’s

house as a result. *Id.* NOPD completed its administrative investigation into Appellant's alleged conduct on March 2, 2013. (NOPD Exh. 3).

III. APPELLANT'S PROCEDURAL CHALLENGE

A. Applicable Statute and Case Law

The provisions of Louisiana Revised Statute § 40:2531, known colloquially as the "Police Officers' Bill of Rights" govern the investigative due process that NOPD must afford to "police employees" as defined by the statute. It is undisputed that NOPD Officers, like Appellant, are "police employees" pursuant to § 40:2531. Any investigation that does not conform to the due process requirements enumerated in § 40:2531 renders the related discipline "an absolute nullity." The Commission reproduces the pertinent portions of § 40:2531 below:

When a formal, written complaint is made against any police employee or law enforcement officer, the superintendent of state police or the chief of police or his authorized representative shall initiate an investigation within fourteen days of the date the complaint is made. Except as otherwise provided in this Paragraph, each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter ***shall be completed within sixty days....*** The investigation shall be considered complete upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint. ***Nothing in this Paragraph shall limit any investigation of alleged criminal activity.***

La. Rev. Stat. § 40:2531(B)(7)(emphasis added). We are bound by Fourth Circuit case law interpreting the sixty-day deadline contained within La. Rev. Stat. § 40:2531.

For the purposes of calculating the deadlines contained within § 40:2531, an investigation begins when NOPD initiates a DI-1 form. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 17); 165 So.3d 191, 202-03; see *O'Hern v. Dep't of Police*, 2013-1416 (La. 11/8/13, 7); 131 So.3d 29, 33. ("the sixty-day period within which to complete an investigation [does] not begin until the start of the administrative investigation."); *Young v. Department of Police*, 13-1596, p. 1, n. 2 (La. App. 4 Cir. 6/25/14), 152 So.3d 193, 194, n. 2. And, the

investigation ends “upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint.” La. Rev. Stat. § 40:2531(B)(7). But, if the misconduct allegedly perpetrated by a “police employee” is also subject to a criminal investigation, the Louisiana Supreme Court has held that the time limitation for completing the administrative investigation is tolled until the criminal investigation is complete. *Kendrick v. Dep't of Police*, 2016-0037 (La. App. 4 Cir. 6/1/16, 18), 193 So.3d 1277, 1287, *writ denied*, 2016-1435 (La. 11/15/16) (citing *O'Hern, supra*). When the criminal investigation ends, so too does the tolling of the sixty-day deadline. *Wilcox v. Dep't of Police*, 2015-1156 (La. App. 4 Cir. 8/10/16, 11), 198 So.3d 250, 257, *writ denied*, 2016-1691 (La. 11/29/16)(notice of a *nolle prosequi* signaled the completion of the criminal investigation and ended the tolling related to that criminal investigation).

As it has in many other previous cases, NOPD argues here that, because the allegations against Appellant involved criminal conduct, the timelines contained within § 40:2531(B)(7) do not apply at all. (NOPD Post-Hearing Brief)(citing to *O'Hern, supra*, and *McMasters v. Dep't of Police*, 2013-2634 (La. 2/28/14, 2), 134 So.3d 1163, (Mem)–1164, *reh'g denied* (May 2, 2014), *reh'g denied*, 2013-2634 (La. 5/2/14), 138 So.3d 1236.

The Commission observes that NOPD made the exact same argument in *Kendrick*; “[i]n essence, the Department's argument is that because it alleged criminal misconduct in its investigation, the sixty-day limit is totally inapposite.” *Kendrick, supra* at 1287. The Fourth Circuit rejected this argument and found that “the Supreme Court in *O'Hern* held that the [criminal investigation] exception provides for a tolling of the sixty day period, not an elimination of that period. *Id.* at 1289. (emphasis added); *see also Liang v. Dep't of Police*, 2013-1364 (La. App. 4 Cir. 8/20/14, 2), 147 So.3d 1221, 1230 (statutory deadline not tolled

where accused officer's alleged rule violations were not related to the investigation of criminal activity allegedly perpetrated by other officers); *Adams v. Dep't of Police*, 2013-0200 (La. App. 4 Cir. 12/18/13, 12), 131 So.3d 378, 386, *writ granted*, 2014-0140 (La. 3/21/14), 135 So.3d 624 (sixty-day period applied to an administrative investigation following criminal investigation). Therefore, the Commission finds that that the sixty-day limit does apply in the matter now before us. Thus, we now turn to whether or not NOPD completed its investigation within this timeline following the conclusion of any criminal investigation into Appellant's alleged misconduct.

B. NOPD's Investigation

The Commission makes the following findings of fact:

1. NOPD began its investigation into Appellant's alleged misconduct on November 24, 2014 when it initiated a DI-1 form. (NOPD Exh. 4).
2. NOPD did not request an extension of time to complete its investigation beyond the sixty days prescribed by Louisiana Revised Statute § 40:2531. (Tr. at 6:7-17).
3. The alleged criminal activity in which Appellant engaged occurred at 208 Somerset Drive, Slidell, Louisiana. (H.E. Exh. 1).⁵
4. On Monday, November 24, 2014, Sgt. Barnes spoke with Lieutenant George Cox of the St. Tammany Parish Sheriff's Office. Lt. Cox informed Sgt. Barnes that the St. Tammany Parish Sheriff's Office would not be filing criminal charges against Appellant. (NOPD Exh. 4 at p. 2 of 2). Thus signaling the end of the St. Tammany Parish Sheriff's criminal investigation into Appellant's alleged misconduct.
5. On March 2, 2015, NOPD issued Appellant notice that it had substantiated the allegations of misconduct against her and directed her to attend a disciplinary hearing on April 3, 2015. (NOPD Exh. 3). Thus signaling the end of NOPD's investigation. La. Rev. Stat. § 40:2531(B)(7).
6. NOPD did not conduct a criminal investigation regarding Appellant's alleged misconduct.

⁵ The Commission takes judicial notice of the fact that the scene of Appellant's alleged criminal activity is entirely within St. Tammany Parish, Louisiana. *State v. Richard*, 245 La. 465, 480, 158 So.2d 828, 833 (1963) ("It is well settled that the court or jury can take judicial notice of geographical facts.").

At no point in time during the course of the instant hearing did NOPD establish that it conducted a criminal investigation.⁶ Indeed, since none of the alleged criminal activity occurred in Orleans Parish, NOPD did not have jurisdiction over such an investigation. Furthermore, no NOPD personnel ever spoke with the alleged victim of Appellant's alleged criminal activity.

NOPD's report indicates that, due to "Appellant's refusal to provide a criminal statement, Sergeant Barnes terminated the criminal investigation and began a Departmental Internal Administrative Investigation." (NOPD Exh. 5 at pp. at p. 9 of 29). It is not clear from the record what "criminal investigation" NOPD was investigating on February 10, 2015. NOPD clearly does not have jurisdiction to investigate an alleged incident of domestic battery in St. Tammany Parish, and the notice to Appellant regarding her discipline references only the October 24, 2014 alleged domestic battery that occurred in St. Tammany Parish. (H.E. Exh. 1).

The Parties stipulated that NOPD did not request an extension pursuant to § 40:2531, and Appellant received notice that NOPD had concluded its investigation and found substance to the allegations against her on March 2, 2015. (NOPD Exh. 3).

C. Timeliness of NOPD's Investigation

NOPD initiated its investigation into Appellant's misconduct on November 24, 2014. The Police Officer's Bill of Rights required NOPD to complete such investigation no later than January 24, 2015. La. Rev. Stat. § 40:2531(B)(7). Instead, NOPD completed its investigation on March 2, 2015, more than a month after the statutory deadline. Therefore, in order to find that NOPD's investigation was procedurally sound, the Commission must determine if one of the following three exceptions to the sixty-day deadline applies:

⁶ In its post-hearing brief, NOPD does not argue that it conducted a criminal investigation and instead relies upon an argument that the only operative fact is that a criminal investigation did occur and thus the sixty-day timeline contained in § 40:2531 is inapposite. As noted in earlier in this decision, the Fourth Circuit has repeatedly and soundly rejected this argument.

1. The Civil Service Commission granted NOPD an extension to complete the investigation;
2. The Parties reached an agreement to extend the investigation period; or
3. An investigation into alleged “criminal activity” tolled the deadline.

See Kendrick v. Dep't of Police, supra at 1285.

NOPD stipulated that it did not request an extension, and the Parties did not introduce any evidence showing that there was an agreement to extend the investigation period. Therefore, the Commission must determine if any criminal investigation tolled the sixty-day deadline. *Id.* at 1287. And, “in order for the third exception to apply, there must be ***both*** a criminal ***and*** an administrative investigation of the officer in question.” *Id.* at 1289 (emphasis added).

We find that the St. Tammany Parish Sheriff’s Office did conduct a criminal investigation into Appellant’s actions on the night of October 24, 2014. However, that investigation ended on or about November 3, 2014 following Detective Hudson’s interview with Mr. Cowie. NOPD was aware that the St. Tammany Parish Sheriff’s Office did not intend to file any criminal charges against Appellant on November 24, 2014 when Lt. Cox communicated that fact to Sgt. Barnes.

In *Wilcox*, the Fourth Circuit found that notice to NOPD of an entry of *nolle prosequi* regarding criminal charges pending against an officer signaled the end of the tolling period provided by statute. *Wilcox*, supra at 256. Here, NOPD’s notice that criminal charges against Appellant would not be forthcoming corresponded with the date it initiated its administrative investigation. Meaning that the St. Tammany Parish Sheriff’s Office criminal investigation did not serve to toll or otherwise disturb the original sixty-day deadline.

Finally, NOPD did not offer any objective excuse for its delay in completing the administrative investigation into Appellant’s alleged misconduct. It certainly did not make any

K. Vallory
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attempt to blame the St. Tammany Parish Sheriff's criminal investigation as a source of delay. Which makes sense given that NOPD received notice that the investigation ended on the same day it initiated the DI-1 form. The Commission does not believe that this timing was a coincidence.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the Appellant's appeal. The Commission finds that NOPD's investigation into Appellant's alleged misconduct exceeded the sixty days established by La. Rev. Stat. § 40:2531(B)(7). Accordingly, the discipline issued to Appellant was an absolute nullity.

We hereby order NOPD to reinstate Appellant with all back pay and emoluments of employment related to the discipline identified in "Hearing Examiner Exhibit 1" and expunge any record of this discipline from her record.

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Signatures appear on the following page.

Judgment rendered this 9th day of January, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

1-9-2017
DATE



JOSEPH S. CLARK, COMMISSIONER

1-9-2017
DATE



RONALD McCLAIN, VICE-CHAIRMAN

1-9-2017
DATE