CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Thursday, June 6, 2019

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

Re: **Randi Gant VS.**
Department of Police
Docket Number: 8860

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 - 6/6/2019 - 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: Shaun Ferguson
Elizabeth S. Robins
Brendan M. Greene
Randi Gant

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

RANDI GANT, Appellant, vs. DEPARTMENT OF POLICE, Appointing Authority.	DOCKET No.: 8860

I. INTRODUCTION

Appellant, Randi Gant, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1 and asks the Commission to find that the Police Department for the City of New Orleans (hereinafter "NOPD") did not have sufficient cause to discipline her. At all times relevant to the instant appeal, Appellant served as a Police Sergeant for NOPD and had permanent status as a classified employee. Appellant stipulated that NOPD's investigation into her alleged misconduct conformed to the procedures established by Louisiana Revised Statute article 40:2531. (Tr. at 6:6-20, 7:24-8:6).

A referee, appointed by the Commission, presided over one day of hearing during which both Parties had an opportunity to call witnesses and present evidence. The referee prepared a report and recommendation based upon the testimony and evidence in the record. 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 DENY the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD terminated Appellant due to two separate allegations of misconduct. First, NOPD alleged that Appellant purposefully provided false information on a take-home vehicle form. (H.E. Exh. 1). Second, NOPD alleged that Appellant purposefully entered false information in the City's payroll system in order to benefit from a smaller deduction related to her take-home vehicle. *Id.* According to NOPD, Appellant's actions violated NOPD Rule 6, Paragraph 2 which states in part:

> An employee shall not knowingly make, or cause or allow to be made, a false or inaccurate oral or written record or report of an official nature, or intentionally withhold material matter from such report or statement.

Id.

For the purposes of the instant appeal, the "oral or written record[s] or report[s] of an official nature" at issue are a take-home vehicle form Appellant filled out and the forty-four (44) payroll entries regarding deductions related to Appellant's take-home vehicle. *Id.* Based upon its penalty matrix, NOPD argued that the only discipline available for a violation of the above-quoted rule is termination.

B. Appellant's Work History

Appellant began working for NOPD in June 2004. (Tr. at 181:17-18). After ten years in various assignments, Appellant transitioned to an administrative position within NOPD's Investigation and Support Bureau ("ISB"). *Id.* at 32:20-21. Personnel within ISB coordinate criminal investigations between three major NOPD divisions. The main office of ISB is located at 715 South Broad Street near the intersection of South Broad and Gravier Street.

Appellant's duties at ISB were largely administrative in nature and included the supervision of fleet management, special events, payroll, overtime and other duties assigned to her

by the Deputy Superintendent of ISB. *Id.* at 33:4-10. With respect to her fleet management duties, Appellant was responsible for tracking and reporting the mileage of various city-owned vehicle assigned to ISB personnel. *Id.* at 33:11-19. She was also responsible for monitoring compliance with NOPD's policies regarding take-home vehicles and was well aware of the policy's mandates. *Id.* at 34:4-14. One such mandate was that employees who resided more than forty miles (one-way) from their respective work site were not eligible for a take home vehicle. *Id.* at 37:7-12, 36:15-18.

At all times relevant to the instant appeal, Appellant was married to Victor Gant, who was also a Sergeant with NOPD. *Id.* at 13:18-22.[1] Since 2007, Sgt. V. Gant and Appellant maintained a marital residence at 540 Huseman Lane, Covington, Louisiana (hereinafter "Huseman Lane House"). *Id.* at 36:19-24. The Parties stipulated that the Huseman Lane House was more than forty miles from the ISB offices on South Broad. *Id.* at 38:5-24. At some point in time, Sgt. V. Gant gained access to an apartment located at 350 Emerald Forest Boulevard in Covington, Louisiana (hereinafter "Emerald Forest Apartment"). The Parties stipulated that the Emerald Forest Apartment was less than forty miles from the ISB offices on South Broad. *Id.* at 53:20-54:9.

Sgt. V. Gant, who was assigned to NOPD's SWAT team, would occasionally stay at the Emerald Forest Apartment in order to better respond to emergency calls to report to duty. *Id.* at 24:1-18, 178:15-179:4. Appellant was aware that her husband had access to the Emerald Place Apartment and that he was listed as a lessee. Sgt. V. Gant also provided Appellant with a remote control in order to access the parking lot of the Emerald Forest Apartment complex. While Appellant never stayed at the Emerald Forest Apartment, she would occasionally park her vehicle there.

[1] In order to avoid confusion, the Commission shall refer to Sergeant Victor Gant as "Sgt. V. Gant" in its decision.

In 2015, Sgt. V. Gant lost access to the Emerald Forest Apartment but claimed that he never informed Appellant. *Id.* at 25:24-26:3. He also never requested that Appellant return the remote control that gave her access to the apartment complex's parking lot. *Id.* at 26:22-27:9. Appellant testified that she did not realize her husband no longer had access to the Emerald Forest Apartment and believed he was still on the lease as of 2016. *Id.* at 170:19-171:8. She also claimed that the remote control for the gate still worked. *Id.* at 178:15-179:21.

Finally, the Commission notes that, prior to the alleged misconduct that led to her termination, Appellant had received only one other formal disciplinary action. That prior discipline was related to Appellant's failure to report a traffic stop outside of Orleans Parish. (Tr. at 181:19-182:3).

C. Appellant's Take-Home Vehicle Form

In 2010, the City of New Orleans revised its policy governing city-owned vehicles used by city employees to commute to and from work assignments (commonly referred to as "take-home vehicles"). (NOPD Exh. 4). The primary purpose of the 2010 policy was to ensure that employees authorized to use take-home vehicles "share[d] in the operating expenses of the vehicle through changes and/or increases in the current Take-Home Vehicle Personal Use Charge." *Id.* At the time of Appellant's alleged misconduct, the "Take-Home Vehicle Personal Use Charge" was $24.04 for those employees who lived 0-20 miles from their primary work site (one-way) and $72.12 for those employees who lived 20 miles or greater from their primary work site (again, one-way). (NOPD Exh. 5).

NOPD also adopted a policy governing the use of take-home vehicles that expanded upon the one promulgated by the City. (NOPD Exh. 3). NOPD's policy explicitly states that, "[a] take-home vehicle shall not be assigned to an employee when the one-way driving distance from the

employee's actual domicile to the employee's primary reporting to work site is greater than 40 miles." *Id.* Every NOPD employee assigned a take-home vehicle must fill out a form issued by NOPD.

Appellant filled out a take-home vehicle form on June 30, 2016. (NOPD Exh. 2). On the form, Appellant listed her address as 350 Emerald Forest, Covington, Louisiana 70433. *Id.* In doing so, Appellant also affirmed that she was aware of the City's policy regarding take-home vehicles, that she was authorized to take a city-owned vehicle home, and that "the one-way driving distance from [her] actual domicile to [her] primary reporting for work site [was] 37.4 miles." *Id.* The take-home vehicle Appellant used was an unmarked, 2015 model. *Id.*

In 2018, an employee in ISB made a complaint to NOPD's Public Integrity Bureau (hereinafter "PIB"). In her complaint, the employee alleged that Appellant and her supervising Commander, Rannie Mushatt, had engaged in inappropriate and retaliatory conduct. Among the allegations the employee made was that Appellant had made inappropriate entries in NOPD's payroll system regarding her take-home vehicle. *Id.* at 57:9-21. Lieutenant Precious Banks was responsible for the initial investigation.

During her investigation, Lt. Banks confirmed that Appellant did not reside at the Emerald Forest Apartment. *Id.* at 75:15-23. Appellant explained to Lt. Banks that she believed that, because her husband had access to the apartment, she could list it as her address on the take-home vehicle form. *Id.* at 75:15-23. Appellant admitted that she had not listed the Emerald Forest Apartment as her address on any other form submitted to NOPD and used the Emerald Forest Apartment address as a "workaround" in order to avoid the forty-mile limit in NOPD's take-home vehicle policy. *Id.* at 44:19-22.

D. Appellant's Payroll Entries

During all times relevant to the instant appeal, Appellant used the log-in credentials of a subordinate to access NOPD's payroll system and make entries regarding her time and the time of co-workers. *Id.* at 47:21-48:13.[2] Among the information Appellant entered regarding her own time and pay was the mileage associated with her take-home vehicle. From a drop-down menu in the payroll system's online user interface, Appellant had the option of selecting an entry of 0-20 miles (which would result in a $24.04 deduction in Appellant's bi-weekly paycheck), and an entry of 20-40 miles (which would result in a $72.12 deduction). Although Appellant acknowledged that the address she used on the take-home vehicle form was 37.4 miles, she selected the 0-20 entry resulting in lesser bi-weekly deduction. *Id.* at 49:7-23. Appellant made this entry on forty-four (44) separate occasions and in doing so avoided approximately $2,000 in deductions. *Id.* at 186:8-21.

Appellant denied that she had purposefully entered the wrong mileage and claimed that the lesser deduction was not an "economic benefit," even though Appellant's avoided paying $2,000 less than she otherwise should have over the course of forty-four pay periods. Part of Appellant's reasoning appears to be based upon the fact that she took affirmative steps to pay the difference between the two deductions after she had provided her administrative statement to Lt. Banks. Finally, Appellant claimed that she would not have risked her career or reputation for such a small amount of money. *Id.* at 175:2-25.

[2] NOPD initially identified Appellant's use of a co-workers log-on credentials as misconduct but ultimately decided not to pursue discipline. This is likely because the co-worker who provided Appellant with her log-in information did so voluntarily in order to avoid a task (payroll data entry) that she was not performing satisfactorily.

III. LEGAL STANDARD

An appointing authority may discipline an employee with permanent status in the classified service for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that an appointing authority issued discipline without sufficient cause, he/she may bring an appeal before this Commission. *Id.* It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, an Appointing Authority has the burden of proving, by a preponderance of the evidence; 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (La. Ct. App. 2014)(quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, it must then determine if that discipline "was commensurate with the infraction." *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

IV. ANALYSIS

A. Occurrence of the Complained of Misconduct

A violation of NOPD Rule 6, Paragraph 2 regarding false or inaccurate reports has two elements. First, there must be a "false or inaccurate oral or written record or report of an official nature." Second, an employee must have knowingly made such a false or inaccurate report.

In the matter now before the Commission, NOPD alleges that Appellant violated this rule through the submission of a false take-home vehicle form and the entry of incorrect mileage

deductions in NOPD's payroll system. Appellant denies that the take-home vehicle form and payroll system are "records or reports of an official nature." She further denies that she knowingly entered the inaccurate payroll data.

1. Appellant's Take-Home Vehicle Form

The ability to take home a city-owned vehicle is a perk enjoyed by many NOPD personnel. It benefits the employee by allowing him/her to avoid the wear and tear that regular commuting causes to a personal vehicle. NOPD also benefits to some degree by ensuring that emergency personnel have functioning vehicles available to respond to emergency calls for service. Not surprisingly, the City requires that employees with take-home vehicle privileges contribute to the care and maintenance of a take-home vehicle through a modest payroll deduction. In order to limit the toll commuting has NOPD's fleet of vehicles, and to maximize the responsiveness of those employees with take-home vehicles, NOPD limits the maximum commuting distance for take home vehicle to forty miles (80 miles round trip).

Appellant, who managed ISB's fleet of vehicles, was well aware of the mileage limitation on city-owned vehicles. So, when Appellant listed the Emerald Forest Apartment as her address, she was purposefully trying to work around the forty-mile limit so that she could have the benefit of using a city-owned vehicle for her commute. With all due respect to Deputy Superintendent Mushatt, the Commission does not agree that Appellant's take-home vehicle use benefitted NOPD more than Appellant. Over the course of two years, Appellant likely avoided putting more than 20,000 on her personal vehicle.

Based upon the record, it is clear that Appellant intentionally provided false information regarding her address on the take-home vehicle form in order to enjoy a benefit to which she was not otherwise entitled.

The Commission next turns to question of whether or not a take-home vehicle form is a "record or report of an official nature." This appears to be a matter of first impression for both the Commission and NOPD. Deputy Superintendents Mushatt and Thomas, along with Lt. Banks, confirmed that, in their experience, only police reports and daily activity sheets have been the subject of disciplinary proceedings involving NOPD Rule 6, Paragraph 2. The rule itself does not define "of an official nature," but take-home vehicle forms are records maintained by NOPD in the normal course of business. NOPD uses the forms to keep track of its fleet and to ensure that those with a city-owned vehicle are authorized to have them.

Appellant takes the position that the form does not impact NOPD's law enforcement functions and is thus not intended to be covered by the rule. But, in other NOPD rules, when NOPD intends to address information specifically related to an investigation, it includes such language directly in the rule. For example, NOPD's rule requiring honesty and truthfulness covers knowingly false statements that are "material," and defines a material statement as one that could impact "the course or outcome of an investigation or official proceeding."

Appellant asks the Commission to read into the rule on false or inaccurate reports NOPD's definition of "material." In other words, Appellant argues that a report or record is not covered by the rule unless such a report or record could impact the course of an investigation or official proceedings. In reality, the rule is not so restrictive. NOPD Rule 6, Paragraph 2 states:

> An employee shall not knowingly make, or cause or allow to be made, a false or inaccurate oral or written record or report of an official nature, or intentionally withhold material matter from such report or statement.

The second independent phrase in the rule is disjunctive and makes a distinction between conduct where an employee knowing makes a false statement and when an employee intentionally withholds information. When it comes to withholding information, NOPD added the word

"material" presumably to create a distinction between unimportant information that an employee leaves out for the sake of brevity or convenience, and information that has a direct bearing on an investigation or proceeding. When an employee knowingly makes a false statement, NOPD did not include a requirement that the statement be material.

Based upon the record, the Commission finds that Appellant knowingly included false information on a record or an official nature when she listed her address as 350 Emerald Forest Boulevard.

2. Appellant's Payroll Entries

On forty-four (44) separate occasions, Appellant selected the incorrect mileage amount for her payroll deduction. As a result, the City deducted about $2,000 less that its policy required from Appellant's salary over the course of two years. Appellant insists that her error was unintentional and attempted to downplay the amount of money involved in this matter by pointing out that she took steps to pay it back following her interview with Lt. Banks. This is not a particularly convincing defense.

Appellant was responsible for fleet management and payroll within ISB and had been performing administrative tasks within the Bureau for the past five years. In her position, Appellant monitored and enforced NOPD's take-home vehicle policy and monitored deductions for accuracy. The number of errors combined with the financial benefit and Appellant's role within ISB make it more likely than not that Appellant purposefully selected the lesser mileage deduction.

As we have noted above, NOPD Rule 6, Paragraph 2 is broad enough to include documents or reports that are not necessarily involved in the execution of police powers. Here, the records at issue are payroll records that Appellant knowingly falsified.

Based upon the record, the Commission finds that NOPD has established Appellant violated NOPD Rule 6, Paragraph 2 when she entered the wrong mileage deduction on forty-four separate occasions.

B. Negative Impact on the Appointing Authority's Efficient Operations

Appellant knowingly submitted false information on her take-home vehicle form in order to reap a benefit for which she was not eligible. Her conduct was particularly troubling given her role in ISB involved managing a fleet of vehicles and enforcing the very policies she violated. Her actions compromised NOPD's ability to fairly and consistently enforce policies and sent a terrible message to other employees. Her conduct also diminished her supervisor's faith in her ability to perform her duties in a truthful and ethical manner.

Appellant's false entries in NOPD's payroll system are arguably a worse offense given that she reaped a direct financial benefit. The City maintains its fleet of vehicles with public funds. It is therefore accountable to residents of New Orleans to spend such funds in a responsible and ethical manner. There can be no serious question that take-home vehicle privileges are a substantial fringe benefit for NOPD personnel. But the daily wear-and-tear of a commute impacts the life-span of vehicles, and the City has decided to offset this impact by mandating that any employee with take-home vehicle privileges contribute a portion of their compensation to the maintenance and upkeep of the vehicle. Appellant skirted this requirement for almost two years, paying $98 less a month than she should have. Through Appellant's intentional actions, she deprived the City of $2,000. The fact that Appellant repaid the money after learning she was the target of an investigation does not mitigate the impact of her actions.

For the above-stated reasons, the Commission finds that Appellant's misconduct had an adverse impact on NOPD's efficient operations.

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); *see also*, *Clark v. Dep't of Police*, 2018-0399 (La.App. 4 Cir. 10/10/18, 7); 257 So.3d 744, 749.

NOPD's published penalty matrix lists "Dismissal" as the only disciplinary sanction for violations of NOPD Rule 6, Paragraph 2. NOPD grounds its reasoning behind this severe form of discipline in U.S. Supreme Court precedent. The two primary cases are *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In *Brady*, the U.S. Supreme Court found that a prosecutor suppressed evidence that was "material either to guilt or to punishment." 373 U.S. at 87. As a result, the Court held that the State had violated the criminal defendant's due process rights in violation of the Fourteenth Amendment. *Id.* The Court in *Giglio* again addressed evidence suppressed by the State and held that, "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting [the witness's] credibility falls within [the rule established by *Brady*]." 405 U.S. at 154 (internal citations omitted).

Based upon these two cases and their progeny, law enforcement entities must be cautious when employing personnel who have in their past substantiated allegations of misconduct involving truthfulness or lying. It is reasonable to believe that such substantiated misconduct could

directly impact an Officer's credibility. This in turn could compel prosecutors to disclose such misconduct to criminal defendants in any matter in which the Officer in question was going to be called to testify. This is typically referred to in case law as a "Giglio impairment."

Deputy Superintendent Mushatt argued that *Giglio* did not apply to Appellant's misconduct because internal forms are not covered. With all due respect to Deputy Superintendent Mushatt, the Commission does not find that *Giglio* limited mandatory disclosures to misconduct directly related to criminal investigations.

In *United States v. Dvorin*, 817 F.3d 438, 451 (5th Cir. 2016), the U.S. Court of Appeals for the Fifth Circuit affirmed a district court holding that prosecutors violated *Brady* and *Giglio* by withholding evidence. *Id.* at 451. The evidence at issue was the fact that a witness for the prosecution had signed a plea agreement with the State. The Fifth Circuit found that the plea agreement constituted evidence that affected the credibility of a key governmental witness. *Id.* at 450. The up-shot of the *Dvorin* case is that any fact that potentially impacts the credibility of a witness must be disclosed. In *Dvorin*, the defense was not aware of the plea bargain and did not have an opportunity to cross-examine the witness about it and make the jury aware that the witness had received something in exchange for his cooperation with the prosecution.

The Commission finds that it is more likely than not that, should Appellant serve as a material witness in a criminal prosecution, prosecutors would have to disclose to the defense Appellant's falsification of the take-home vehicle form and forty-four inaccurate deduction entries. As Deputy Superintendent Thomas observed, such disclosure would be "problematic" for the prosecution and compromises NOPD's ability to rely upon Appellant as a resource in criminal investigations.

V. CONCLUSION

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

Judgment rendered this 6th day of June, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

BRITTNEY RICHARDSON, COMMISSIONER — DATE 5/31/19

CONCUR

CLIFTON J. MOORE, Jr., VICE-CHAIRPERSON — DATE 5/27/19

MICHELLE D. CRAIG, CHAIRPERSON — DATE 5/31/19