

PATRICK O'HERN

CIVIL SERVICE COMMISSION

VS.

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 7786

**JUDGEMENT**

**INTRODUCTION**

The Department of Police ("Appointing Authority") employed Patrick O'Hern ("Appellant") as a Police Officer II with permanent status. The Appointing Authority suspended and terminated the Appellant by letter dated October 27, 2010. The parties stipulated that the allegations and conclusions contained in the disciplinary letter were accurate and established legal cause for the disciplinary actions taken.

However, the Appellant contends that alleged violations of La. R.S. 40:2531 (hereinafter "Law Enforcement Officer's Bill of Rights" or "Bill of Rights") that occurred during the course of the internal investigation nullified the disciplinary action and required the Commission to grant the Appellant's appeal as a matter of law. The parties also stipulated to a time line of events starting from the date of the misconduct that occurred on December 12, 2009 through the conclusion of the internal investigation ending on May 6, 2010. (Joint Exh. 1)

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on August 4, 2011. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

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### **FACTUAL BASIS FOR DISCIPLINARY ACTION**

As reflected in the disciplinary letter, on December 12, 2009, while on duty, the Appellant left his assignment and drove his personal vehicle to the roof of #2 Poydras Street where he intentionally discharged his departmental firearm more than twenty times into the front windshield and roof of his vehicle. Police officers assigned to the Eighth Police District arrived on the scene after the Appellant was transported to University Hospital. The police officers dispatched to the scene observed the damage caused to the Appellant's vehicle resulting from the discharge of his weapon. They discovered the Appellant's weapon on the floorboard of his vehicle as well as his departmental issued Taser deployed and laying on the ground near his vehicle. The dispatched officers also found several prescription pill bottles and a bottle of Johnnie Walker Black Label Scotch on the vehicle's front seat.

Police Sergeant Lawrence Jones of the Public Integrity Bureau investigated the incident. On the same date as the incident, Sgt. Jones secured a subpoena duces tecum requesting University Hospital's medical records generated during the period of the Appellant's treatment. The medical records established that the Appellant was legally intoxicated reflecting a blood alcohol content of .105g%. Sgt. Jones also learned that the Appellant ingested approximately one dozen Clonazepam pills during the same period.

### **SUSTAINED VIOLATIONS**

The Appointing Authority terminated the Appellant for violation of the following internal rules:

- (1) Adherence to Law –La. R.S. 14:94 relative to illegal use of a weapon

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- (2) Professional Conduct – Use of Drugs/Substance Abuse
- (3) Professional Conduct – Use of Alcohol on Duty
- (4) Performance of Duty – Devoting Entire Time to Duty

The Appointing Authority suspended the Appellant for violation of the following internal rules:

- (1) Instructions from an Authoritative Source – failure to notify a supervisor of the discharge of a weapon (three day suspension)
- (2) Instructions from an Authoritative Source – Improper use of a Taser (three day suspension)
- (3) Professionalism - failure to act in a professional manner (ten day suspension)

#### **INTERNAL INVESTIGATION**

Based on the events of December 12, 2009, the Appointing Authority directed Sgt. Lawrence Jones of the Public Integrity Bureau to conduct an internal investigation of the Appellant's actions. Sgt. Jones initiated a DI-1 complaint for Adherence to Law based upon the discharge of his weapon on December 12, 2009. On December 16, 2009, Sgt. Jones notified the Appellant that he wanted the Appellant to render a criminal statement, which the Appellant refused to provide.<sup>1</sup> Sgt. Jones testified that he considered the investigation criminal because the acts of misconduct under investigation were criminal in nature and criminal charges were a distinct possibility. As it turns out, Sgt. Jones' assumption was accurate; the Appointing Authority arrested the Appellant for violation of La. R.S. 14:94 and placed him on emergency suspension on January 14,

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<sup>1</sup> The Appellant is constitutionally protected against self-incrimination and the Appointing Authority cannot compel a statement if the statement is used for or is admissible in a criminal proceeding. Hence, in the vernacular of the department, such a statement is referenced as a "criminal statement". Conversely, a "compelled" or "administrative statement" is not admissible in a criminal proceeding. The Appointing Authority has the option of ordering or compelling an employee to provide a statement in an internal investigation for administrative purposes / internal discipline. However, by compelling a statement, the Appointing Authority loses its ability to use the statement for purposes of criminal prosecution.

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2010. The Appointing Authority submitted its criminal investigation to the district attorney's office on January 26, 2010. The investigative file included everything used in the administrative investigation excluding the Appellant's administrative statement which the Appellant was compelled to give on March 11, 2010 after receiving notice on March 5, 2010.

The Appellant appeared on March 11, 2010 with his attorney and provided a lengthy statement regarding the events that transpired on December 12, 2009. The sole allegation of misconduct referenced in the notice of administrative statement received by the Appellant on March 5, 2010 was the adherence to law violation that caused the Appellant's arrest. Sgt. Jones testified that while the other violations were not specifically mentioned in the notice, they all arose from the same set of facts. Sgt. Jones further testified that the Appellant's attorney was present and allowed to represent her client during the interview. However, Sgt. Jones did have to instruct the Appellant's attorney that she could not interfere with his investigation by preventing her client from answering questions that he was compelled to answer. After completing his statement, the Appellant was allowed to review the transcribed statement and make changes and insert comments. While the Appellant was not provided a copy of the tape recording of his statement after making numerous requests, he was provided a transcribed written copy.

On April 27, 2010, Sgt. Jones provided the Appellant written notice of the completion of the internal investigation and the sustained charges of misconduct. Sgt. Jones' final investigative report post-dates the notice of sustained charges. According to Sgt. Jones, his supervisors instructed him to make certain non-substantive changes to his

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report (i.e. grammatical changes and/or typographical errors) that delayed his final report until May 6, 2010.

**ALLEGED VIOLATIONS OF LA. R.S. 40:2531**

Based upon stipulations by the parties, the Appointing Authority has established by a preponderance of evidence that it disciplined the Appellant for cause and that termination was an appropriate disciplinary action. However, the Appellant contends that the Commission should grant his appeal primarily because the Appellant failed to complete the internal investigation within the time restraints dictated by state statute. He also contends that the internal investigation was flawed because the Appointing Authority failed to provide a copy of his recorded statement, failed to apprise him of all of the charges against him at the commencement of his statement, and failed to allow him the full benefit of counsel while providing a compelled statement.

**1. Whether the Appointing Authority's Internal Investigation Exceeded Sixty days**

The Appellant contends that the Commission should grant his appeal because the investigation that resulted in his termination exceeded the sixty day time restriction allowed for an internal investigation. The Appellant makes no distinction between a criminal and an administrative investigation. Conversely, the Appointing Authority contends that the sixty days for investigation did not begin until it notified the Appellant that he was compelled to provide an administrative statement. The Appointing Authority considers the investigation purely criminal and not subject to the sixty day restriction until it chose to compel the Appellant's statement, which it contends triggered an administrative investigation that ran concurrently with the criminal investigation.

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The specific provision of La. R.S. 40:2331(B) cited by both parties in support of their respective position provides as follows:

(7) When a formal and 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. However, in each municipality which is subject to a Municipal Fire and Police Civil Service law, the municipal police department may petition the Municipal Fire and Police Civil Service Board for an extension of the time within which to complete the investigation. The board shall set the matter for hearing and shall provide notice of the hearing to the police employee or law enforcement officer who is under investigation. The police employee or law enforcement officer who is under investigation shall have the right to attend the hearing and to present evidence and arguments against the extension. If the board finds that the municipal police department has shown good cause for the granting of an extension of time within which to complete the investigation, the board shall grant an extension of up to sixty days. Nothing contained in this Paragraph shall be construed to prohibit the police employee or law enforcement officer under investigation and the appointing authority from entering into a written agreement extending the investigation for up to an additional 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. Further, nothing in this Paragraph shall limit any investigation of alleged criminal activity.

We have previously recognized that there is a difference between a criminal and administrative investigation. In *Franklin v. Department of Police*, Case No. 7681, we ruled that an administrative investigation can convert to a criminal investigation tolling the Sixty Day Rule pending the completion of the criminal investigation. Recently, the Louisiana Fourth Circuit Court of Appeal affirmed the Commission's determination in *Franklin v. Department of Police*, Case No. 2010-CA-1581 (La. App. 4 Cir 04/06/11). The Louisiana Fifth Circuit Court of Appeal made the same distinction in *Harahan Municipal Fire and Police Civil Service Board*, 06-81 (La. App. 5 Cir 7/25/06). Support for this conclusion is found in the last sentence of paragraph 7 which provides that **“nothing in this Paragraph shall limit any investigation of alleged criminal activity.**

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In the instant case, the Appointing Authority chose not to delay final disciplinary action pending the conclusion of a criminal investigation. Instead, it chose to compel the Appellant's administrative statement by serving notice on March 5, 2010. The Appointing Authority concluded its administrative investigation on April 27, 2010 by providing the Appellant written notice of the completion of the internal investigation and the sustained charges of misconduct, which was within sixty days of its commencement. The Appointing Authority's disciplinary investigation conformed to the requirements of the Law Enforcement Officer's Bill of Rights. Based upon the foregoing, we conclude that the Appellant has failed to establish that the Appointing Authority violated the Sixty Day Rule.

**2. Whether the Appointing Authority's provision of a transcript of the Appellant's administrative statement satisfies requirements of the Law Enforcement Officers' Bill of Rights**

The Appellant contends that La. R.S. 40:2531 requires the production of a recording of a statement taken during the course of an internal disciplinary investigation upon request by the subject of the investigation. The Appellant argues that, because the Appointing Authority failed to provide him with a recording of his administrative statement instead of a transcript of the recording, the disciplinary action taken is unlawful and the Commission must grant his appeal. Conversely, the Appointing Authority contends that providing the Appellant with a transcript of the recorded statement is sufficient and satisfies the requirements of the statute.

The specific provision of La. R.S. 40:2331(B) cited by both parties in support their position provides as follows:

- (4) All interrogations of any police employee or law enforcement officer in connection with the investigation shall be recorded in full. The police employee

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or law enforcement officer shall not be prohibited from obtaining a copy of the recording or transcript of the recording of his statements upon his written request.

We agree with the Appointing Authority's interpretation of the statute. The statute does not compel the Appointing Authority to make a duplicate copy of a tape recording and deliver it to the Appellant. The statute gives the Appointing Authority the option of providing "a copy of the recording or transcript of the recording of his statement". The option is reasonable and the Appointing Authority's failure to provide a recording is immaterial in light of the fact that he received a detailed and accurate transcript of the proceedings. Further, considering that the facts are undisputed in the instant case, we see no value in the Appellant receiving the actual tape recording.

Thus, the Appellant's technical argument is without merit and does not justify the grant of his appeal.

**3. Whether the Appointing Authority is required to provide the Appellant with written notice of all potential violations that it may sustain prior to compelling the Appellant to provide an administrative statement**

The Appellant contends that the Commission must grant his appeal because the notice provided to him by the Appointing Authority prior to taking his compelled statement only listed the charge of adherence to law for discharging his weapon. Conversely, the Appointing Authority contends that the Appellant received sufficient notice of the nature of the charges against him when compelled to give a statement.

The specific provision of La. R.S. 40:2331(B) cited by both parties in support of their respective position provides as follows

(1) The police employee or law enforcement officer being investigated shall be informed, at the commencement of interrogation, of the nature of the investigation and the identity and authority of the person conducting such investigation; and at the commencement of any interrogation, such officer shall be informed as to the identity of

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all persons present during such interrogation. The police employee or law enforcement officer shall be allowed to make notes.

The statute does not require a detailed listing of the charges that may be sustained. It merely requires that the Appointing authority inform the Appellant of the nature of the investigation. In the instant case, the Appellant was clearly aware that the Appointing Authority was investigating the incident that occurred on December 12, 2009. Perhaps the investigating officer could have included the additional charges that were ultimately sustained and resulted in the Appellant's termination. However, the additional charges of substance abuse and devoting entire time to duty were obvious to all parties, and were not necessary to inform the Appellant sufficiently of the nature of the investigation being conducted.

The Appointing Authority complied with this provision of the Law Enforcement Officers' Bill of Rights. Accordingly, the Appellant's argument does not merit the grant of his appeal.

**4. Whether the Appointing Authority denied the Appellant the assistance of counsel**

The Appellant contends that his attorney was prevented from making statements on the record during his compelled administrative statement. As a consequence, he asks the Commission to grant his appeal. It should be noted that the Appellant does not contend that he was denied the right to counsel. He does not contend that the Appointing Authority prevented his attorney from providing advice. The record clearly establishes that the Appellant's attorney actively participated in the process and was given every opportunity to confer with her client. The Appellant does not contend that he was

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prejudiced in any way. Instead, he relies on an extremely narrow reading of the relevant statute that provides as follows:

(c) The law enforcement officer's representative or counsel shall be allowed to offer advice to the officer and make statements on the record regarding any question asked of the officer at any interrogation, interview, or hearing in the course of the investigation.

Sgt. Jones credibly testified that the Appellant was compelled to answer his questions and that at certain points his attorney was impeding the process by interjecting at inappropriate times. Notwithstanding Sgt. Jones' admonishments, the Appellant's attorney fully participated in the process, and was not prevented from advising her client.

An investigator must have the ability to compel truthful, complete, and accurate responses from police officers under investigation balanced against the police officer's right to seek advice from legal counsel. In the instant case, the Appellant's attorney was not impeded in her representation.

Consequently, the Appointing Authority complied with this provision of the Law Enforcement Officers' Bill of Rights and the Appellant's argument does not merit the grant of his appeal.

#### **LEGAL PRECEPTS**

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

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The Civil Service Commission has a duty to decide independently from the facts presented whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters, v. Department of Police of New Orleans, supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

The Appointing Authority has established by a preponderance of evidence that it

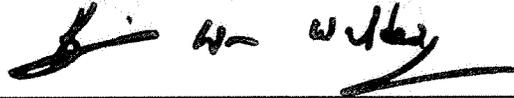
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disciplined the Appellant for cause. Further, the Appellant's arguments that the Appointing Authority violated the Law Enforcement Officer's Bill of Rights are without merit.

Based upon the foregoing, the Appellant's appeal is DENIED.

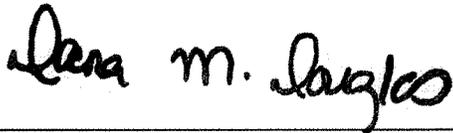
RENDERED AT NEW ORLEANS, LOUISIANA THIS 20TH DAY OF FEBRUARY,  
2012.

CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS



REV. KEVIN W. WILDES, S.J., CHAIRMAN

CONCUR:



DANA M. DOUGLAS, VICE-CHAIRMAN



AMY L. GLOVINSKY, COMMISSIONER