



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
ROOM 7W03 CITY HALL
NEW ORLEANS LA 70112
(504) 658-3500
FAX NO. (504) 658-3599

CITY CIVIL SERVICE COMMISSION

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Friday, October 26, 2012

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

Re: **Herman Franklin VS.
Department of Police
Docket Number: 7879**

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 - 10/26/2012 - filed in the Office of the Civil Service Commission in Room 7W03, City Hall, 1300 Perdido Street, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in cursive script that reads "Germaine Bartholomew".

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Victor Papai
Jay Ginsberg

HERMAN FRANKLIN

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 7879

Herman Franklin (“Appellant”) is employed by the Department of Police (“Appointing Authority”) as a Police Officer II with permanent status. The Appellant received 1) a one day suspension for violation of the Appointing Authority’s internal regulation concerning Neglect of Duty and 2) a letter of reprimand for violation of the Appointing Authority’s internal regulation concerning Instructions from an Authoritative Source. The factual bases for the violations are contained in the second and third paragraphs of the June 3, 2011 disciplinary letter, which provides as follows:

The investigation determined that on August 8, 2009, at about 11:36 p.m., you investigated a hit and run incident at Lizardi and Marais Streets. At the scene of the accident you observed keys to the hit and run vehicle in the vehicle’s ignition. You elected to have the hit and run vehicle towed but you failed to attempt to notify or contact the owner of the hit and run vehicle prior to having the vehicle towed...

Additionally, you failed to document on the Hit and Run, State of Louisiana Uniform Motor Vehicle Traffic Crash Report that a video or lack of recording was made of this incident. Sergeant Scanio observed that NOPD incident report H-11052-09, written by you, did not indicate if the incident was videoed or not...

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 11, 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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Neglect of Duty

The Appellant testified that he and his partner were dispatched to investigate a hit and run accident. The Appellant learned that the perpetrator of the hit and run accident fled the scene leaving the vehicle behind with the keys in the ignition and the motor running. The Appellant determined that the vehicle causing the accident had been stolen and obtained the name and address of the owner of the vehicle. The Appellant testified that neither he nor his partner could leave the scene to notify the owner that his vehicle was stolen and involved in an accident. The Appellant stated that he contacted other police units and asked whether they were available to go to the owner's home and notify him of the incident. However, no other units were available. Consequently, the Appellant secured the vehicle by having it towed.

The owner retrieved his vehicle from the auto pound, but was unhappy that he had to pay for the retrieval of his vehicle. He made a formal complaint that was investigated by Sgt. Joseph Scanio, the Appellant's supervisor. Sgt. Scanio testified that he sustained the violation of neglect of duty because the Appellant failed to take the proper steps to notify the owner of the vehicle prior to having it towed. He stated that the Appellant should have contacted another unit to notify the owner because the Appellant and his partner could not leave the scene. Sgt. Scanio admitted that he was unaware that the Appellant did make efforts to enlist other units to assist but none were available. He conceded that the Appellant did everything he could do and that under the circumstances towing the vehicle was his only option.

Based upon the foregoing, the Appointing Authority has failed to establish that the Appellant neglected his duty.

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Instructions from an Authoritative Source

The Appellant testified that he was unaware that the Appointing Authority had created a rule requiring that he notate in his investigative report whether or not the incident he was dispatched to investigate had been videotaped. The Appellant testified that he learned after the fact that the Appointing Authority had recently adopted this rule.

Sgt. Scanio testified that the Appellant would not have been aware of the rule at the time of the violation because the new rule had not yet been communicated by him to his subordinates. Sgt. Scanio further testified that the rule is rarely followed unless the use or non-use of a video camera has some relevance to the investigation. In those cases, police officers are expected to make the relevant information part of their report.

Based upon the foregoing, the Appointing Authority has failed to establish that the Appellant violated the internal rule regarding Instructions from an Authoritative Source. The Appointing Authority cannot hold the Appellant responsible for the violation of a rule for which the Appellant has not received adequate notice.

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.*

Considering the foregoing, the Appellant's appeal is GRANTED.¹ The Appointing Authority is ordered to return to the Appellant one day of back pay with all

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emoluments, and to remove the letter of reprimand from his disciplinary record.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 26th DAY OF
OCTOBER, 2012.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION


AMY L. GLOVINSKY, COMMISSIONER

CONCUR:


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


DEBRA S. NEVEU, COMMISSIONER

¹ The Appointing Authority also violated the Police Officer's Bill of Rights by failing to complete its investigation within 60 days.