



CITY OF NEW ORLEANS

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Monday, March 27, 2017

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

Re: **Ananie Mitchell VS.
Department of Police
Docket Number: 8478**

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 - 3/27/2017 - 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,


Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Jim Mullaly
Ananie Mitchell

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

ANANIE MITCHELL vs. DEPARTMENT OF POLICE	DOCKET No.: 8478
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I. INTRODUCTION

Appellant, Ananie Mitchell, 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. Similarly, Appellant conceded that NOPD’s investigation into his alleged misconduct conformed to the procedural requirements established by Louisiana Revised Statute § 40:2531 and our Rules.¹ Therefore, the Commission’s analysis will be limited to whether or not NOPD had sufficient cause to discipline Appellant. The undersigned Commissioners have reviewed the transcript of the appeal hearing that occurred on Thursday, February 18, 2016, the Hearing Examiner’s report, and the exhibits accepted into the record by the hearing examiner. Based upon our review, we render the following decision and judgment.

¹ Appellant stipulated to the procedural sufficiency of NOPD’s investigation. (Tr. at 4:6-16).

II. FACTUAL BACKGROUND

A. Alleged Misconduct

Appellant, was a permanent, classified employee serving in the capacity as Police Officer in NOPD's street gang unit at all times relevant to the instant appeal.

NOPD suspended Appellant for one day after substantiating an allegation that Appellant violated NOPD Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source, to wit; Policy 447.3 BWC Activation. The relevant portion of NOPD Rule 4, Paragraph 2 reads as follows:

An employee shall professionally, promptly, and fully abide by or execute instructions issued from any authoritative source, including any order relayed from a superior by an employee of the same or lesser rank. If the instructions are reasonably believed to be in conflict with the Rules, Policies and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon execution of the instructions which are reasonably believed to be in conflict with Department Rules, Policies, and Procedures, the employee receiving the instructions shall have the right to request and is entitled to receive, IMMEDIATELY, said instructions in writing, except in cases of emergency as determined by the supervisor. The issuing authority shall be held responsible should any conflict materialize; however, no instructions shall be issued or executed which are in violation of law.

Id. NOPD takes the position that its rules, policies and procedures constitute "orders from an authoritative source." Such policies include NOPD Policy 447.3 which requires an Officer to activate his/her Body-Worn Camera (hereinafter "BWC") during, all field contacts involving actual or potential criminal conduct within video or audio range, all calls for service, arrests/transport, physical or verbal confrontations or use of force, and vehicle searches. *Id.*

NOPD alleged that, on February 9, 2015 Appellant and his partner rendered assistance to detectives in the street gang unit who were in the process of interacting with subjects. *Id.* NOPD alleged that Appellant violated the above-cited Rule and Policy when he failed to activate, or even have on his person, his BWC during the interaction with the subjects. *Id.* A supervising sergeant

within NOPD's street gang unit, Octavio Baldassaro, initiated the complaint against Appellant. (NOPD Exh. 1). And Sergeant Daniel McMullen was responsible for conducting the investigation into the complaint. (Tr. at 5:7-21).

B. February 9, 2015

At approximately 12:42 p.m. on February 9, 2015 Sgt. Baldassaro and two detectives within the street gang unit were in the process of making an arrest in Algiers when they requested assistance from Appellant and his partner. (Tr. at 7:8-19). During the arrest, the detectives recovered a gun and made multiple apprehensions. *Id.* at 7:22-24. Other NOPD personnel on the scene did activate BWC's and captured footage of the incident in question. *Id.* at 8:1-3. However, neither Appellant nor his partner activated a BWC during the incident. Sgt. McMullen confirmed that, on April 10, 2014, Appellant had received training regarding the operation of a BWC. *Id.* at 9:5-20.

As part of his investigation, Sgt. McMullen interviewed Appellant and his partner. *Id.* at 6:2-6. And, according to Sgt. McMullen, both Officers admitted, 1) that they were aware of the NOPD policy regarding the use of BWC, and 2) that they did not have their BWCs during the incident on February 9, 2015. *Id.* at 6:6-10. The Officers explained to Sgt. McMullen that they had both been working Mardi Gras parades earlier and had left their BWCs in a charging dock. *Id.* at 6:11-20. Appellant further claimed that he had been meeting with an Assistant United States Attorney at a Federal Courthouse and was prohibited from bringing his BWC into the courthouse. *Id.* at 10:14-11:2.

Ultimately, Sgt. McMullen did not find Appellant's excuse for not wearing his BWC convincing and recommended that Appellant receive a one-day suspension for failing to activate his BWC during an arrest. *Id.* at 11:25-12:5.

NOPD Commander Frank Young presided over a hearing at which Appellant had an opportunity to formally respond to the allegations against him. *Id.* at 14:16-18. Cmdr. Young testified that Appellant's failure to wear or activate his BWC impaired the efficient operation of NOPD in two ways. First, Appellant's actions constituted a violation of NOPD Policy, and NOPD establishes such policies with the expectation that all Officers will follow them. *Id.* at 16:15-17:2. Second, by failing to activate his BWC, Appellant deprived NOPD and the public of an interaction between Officers and arrested subjects. *Id.* at 17:3-5. On cross-examination, Cmdr. Young acknowledged that other NOPD personnel on the scene had recorded BWC footage. *Id.* at 18:17-22. However, Cmdr. Young pointed out that Appellant's failure deprived NOPD of a different perspective and vantage point. And, while there are some exigent circumstances that would excuse an Officer's failure to activate a BWC, such circumstances were not present on the afternoon of February 9, 2015. *Id.* at 19:20-20:1.

Appellant testified that he had been working with the street gang unit since 2012, and on February 9, 2015 he was conducting research at NOPD Headquarters for a U.S. Attorney who was preparing an indictment for members of a local gang. *Id.* at 21:1-23. While he was conducting research, Appellant left his BWC docked on a mobile charger in his NOPD vehicle. *Id.* at 22:14-18. At some point in time during the late-morning hours of February 9th, Appellant's supervisor, Sergeant Bradley, instructed Appellant and Appellant's partner to render assistance to Sgt. Baldassaro's "crew." *Id.* at 23:4-10. Sgt. Bradley did not specify why Sgt. Baldassaro's crew needed assistance.

Appellant and his partner proceeded to the Fourth District (Westbank/Algiers) and fielded a radio call from a member of Sgt. Baldassaro's team who provided a more specific location and asked that Appellant "hurry up." *Id.* at 23:19-24. When Appellant arrived on the scene, he

observed that there were three individuals outside of a car and two of those individuals were in handcuffs. *Id.* at 24:2-4. Sgt. Baldassaro asked Appellant for another pair of handcuffs, which Appellant provided. *Id.* at 24:5-7. Appellant acknowledged that he had left his BWC in his vehicle during the entirety of the incident but offered two reasons for doing so. First, Appellant stated that he did not know the reason for Sgt. Baldassaro's request for assistance. Appellant believed this to be important because there are some interactions with residents that members of the street gang unit do not record with BWCs. These include interactions with confidential informants and some federal investigations. *Id.* at 25:11-19. Second, Appellant believed that there was some urgency to the call because one of the detectives working with Sgt. Baldassaro told Appellant to "hurry up, step it up." *Id.* at 24:20-23.

III. LEGAL STANDARD

An appointing authority may only discipline a permanent classified employee if there exists sufficient cause to support such discipline. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline is not supported by 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-

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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 Activities

There is no dispute that NOPD's policy requires an Officers to wear and activate a BWC during the following situations:

- All field contacts involving actual or potential criminal conduct within video or audio range;
- Traffic stops;
- Arrests and transports;
- Physical or verbal confrontations or use of force;
- Seizure of evidence;
- Any other contact that becomes adversarial after the initial contact in a situation that would not otherwise require recording.

(NOPD Exh. 1).

The Commission finds that any of the above scenarios could have applied to the scene Appellant encountered on the afternoon of February 9, 2015. For his part, Appellant did not argue that NOPD Policy 447.3 did not apply. Instead, he offered two justifications for failing to wear or activate his BWC. First, he alleged that he believed he was responding to an emergency situation based upon the radio call from a detective working with Sgt. Baldassaro. The Commission does not find this excuse persuasive.

During his testimony, Appellant described coming upon a static scene that did not appear to be out of control or dangerous. However, it was clear to Appellant that Sgt. Baldassaro's team

was effecting an arrest and possible search of a vehicle. Appellant's BWC was within arm's reach in the vehicle he used to travel to the scene in question. He could have quickly retrieved the BWC from its dock, attached it to his person and activated it without putting himself or the members of Sgt. Baldassaro's team in jeopardy. The effort required to comply with Policy 447.3 was minimal.

The second excuse offered by Appellant was that there were some encounters during which members of NOPD's street gang unit would not use or wear BWCs. These situations include interactions with confidential informants and federal investigations. While the Commission appreciates that Appellant did not know the precise nature of Sgt. Baldassaro's request for assistance, there was nothing to suggest that Appellant could leave his BWC in his vehicle.

Based upon the foregoing, the undersigned Commissioners find that NOPD has established that Appellant's failure to wear/activate his BWC on February 9, 2015 violated NOPD Policy 447.3.

B. Impairment of Efficient Operation of Appointing Authority

It is vital that all NOPD personnel recognize and put into practice policies promulgated by NOPD. The Commission notes that NOPD has placed a particular emphasis on its policy regarding the use of BWCs. NOPD established its BWC policy with the goal of promoting officer safety, improving prosecution of crimes, protecting officers from false allegations and preventing misconduct and racial profiling. (NOPD Exh. 2). NOPD has committed to the use of BWC and provided all Officers with training and notice regarding such use. The Commission finds that BWCs provide a degree of transparency and accountability that New Orleans residents demand and deserve.

Therefore, we find that Appellant's failure to adhere to the BWC Policy had an adverse effect on NOPD's efficient operations.

C. Discipline Commensurate with Offense

In conducting its analysis, the Commission must determine if the Appellant's suspension 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 suspended Appellant one day for his violation of the BWC policy. (H.E. Exh. 1). Cmdr. Young testified that NOPD's penalty matrix provides a one-day suspension for first-time violations of the BWC Policy. Tr. at 17:6-9. While the Commission is not bound by penalty matrices developed by appointing authorities, such matrices provide a degree of transparency regarding the issuance of discipline. Given the emphasis NOPD has placed on the use of BWCs by its Officers, it reasonable to anticipate the issuance of substantial discipline to those Officers who fail to follow the BWC policy.

While the undersigned Commissioners recognize that NOPD had a variety of corrective actions available to address Appellant's misconduct, we do not find that the issuance of a one-day suspension is so severe as to constitute an arbitrary or capricious action. Therefore, we hold that NOPD has met its burden in showing that Appellant's discipline was commensurate with is offense.

V. CONCLUSION

Based upon the foregoing, the Commission hereby DENIES Appellant's appeal.

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Judgment rendered this 27th day of March, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



MICHELLE D. CRAIG, CHAIRPERSON

3-23-17

DATE



STEPHEN CAPUTO, COMMISSIONER

3-24-17

DATE



RONALD McCLAIN, VICE-CHAIRMAN

3-27-17

DATE