



CITY OF NEW ORLEANS

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Monday, July 3, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Sean Carrigan VS.
Department of Police
Docket Number: 8563**

Dear Mr. Hessler:

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 - 7/3/2017 - 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
Brendan M. Greene
Sean Carrigan

file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

SEAN CARRIGAN vs. DEPARTMENT OF POLICE	DOCKET No.: 8563
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I. INTRODUCTION

Appellant, Sean Carrigan, 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. And, Appellant stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission’s analysis will be limited to whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee.

On Thursday, January 12, 2017, a hearing examiner appointed by the Commission presided over an appeal hearing. 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 render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD issued Appellant the following discipline related to specific alleged policy violations:

- **Letter of Reprimand:** Violation of NOPD Rule 3: Professional Conduct; Paragraph 1: Professionalism.
- **Letter of Reprimand:** Violation of NOPD Rule 4: Performance of Duty; Paragraph 2: Instructions from an authoritative source, to wit, NOPD Procedure Policy 410.7 Transporting Civilians.
- **Letter of Reprimand:** Violation of NOPD Rule 4: Performance of Duty; Paragraph 2: Instructions from an authoritative source, to wit, NOPD Policy 600.2(b) Collecting Evidence.
- **Fifteen-Day Suspension:** Violation of NOPD Rule 4: Performance of Duty; Paragraph 2: Instructions from an authoritative source, to wit, NOPD Policy 41.3.10 Body Worn Camera, Paragraph 30: Cessation of Recording.

(H.E. Exh. 1).¹

1. Professionalism

The relevant portion of NOPD Rule 3 regarding professionalism reads as follows:

Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or

¹ 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.”

otherwise act in a manner which brings discredit to the employee or the New Orleans Police Department.

Id.

NOPD alleged that Appellant violated this policy when he stated “those people are a pain in the ass” in the presence of an alleged perpetrator he was transporting to a different location. *Id.*

2. Transporting Civilians

The relevant portion of NOPD Policy 410.7 reads as follows:

Department employees on duty are authorized to use department vehicles to transport civilians away from hazardous and/or dangerous places or situations, and relocate those persons to a place of greater safety....When transporting any civilian, employees shall notify the dispatcher of their activity, giving the starting odometer reading, destination, number of passengers upon leaving the scene and the ending odometer reading upon arrival at their destination, along with recording the incident on their Daily Activity Report.

Id.

NOPD alleged that Appellant violated Policy 410.7 when he transported an alleged perpetrator from the scene of a confrontation to an unknown location without advising NOPD dispatch or documenting the transport on his daily activity log. *Id.*

3. Collection of Evidence

The relevant portion of Policy 600.2 requires an officer to “collect any evidence” if the information gathered at a scene indicates that a crime has occurred. *Id.* NOPD alleged that Appellant violated Policy 600.2 when he failed to retrieve video evidence of an alleged crime. Specifically, NOPD alleged that an individual on the scene informed Appellant that she had a video of the incident between the alleged perpetrator and victim and Appellant “felt that [he] did not need to retrieve the video since both parties gave the same recollection (sic) of the incident.”

Id.

4. NOPD's Body Worn Camera Policy

The relevant portion of NOPD Policy 41.3.10, Paragraph 30 reads as follows:

Once the BWC system is activated, it shall remain on and shall not be turned off until an investigative or enforcement contact or incident has concluded. For purposes of this section, conclusion of an incident has occurred when an officer has terminated contact with an individual, cleared the scene of a reported incident, or has completed transport of a civilian or an arrestee. In any instance in which cessation of the recording prior to the conclusion of the incident may be permitted, the officer must seek and obtain supervisory approval prior to deactivating the BWC. If supervisory approval cannot be reasonably obtained, officers must document on the BWC the reason for termination of the recording prior to deactivation of the BWC.

Id.

NOPD alleged that Appellant violated Policy 41.3.10 by shutting off his body worn camera ("BWC") during the transport of an alleged perpetrator. *Id.* NOPD further alleged that Appellant's cessation of recording was intentional. *Id.*

B. May 24, 2015

During the late afternoon hours of May 24, 2015, NOPD dispatched Appellant and Officer Daniel Plustache to the Crown and Anchor Pub in Algiers Point to investigate an alleged bar fight. Appellant arrived on scene first. (Tr. at 105:5-8). Prior to arriving, Appellant activated his BWC by pressing a button on the front of the device. (NOPD Exh. 6 at 00:30). Upon arriving on scene, Appellant encountered several individuals who appeared to be intoxicated. (Tr. at 105:9-14). One of the individuals (referred to hereinafter as "Mr. K.") claimed that he had been struck in the face by another individual who was known to him (referred to hereinafter as "Mr. M."). *Id.* at 105:16-18, 106:3-8. Appellant claims that many of the bar patrons were loud and interfered with his attempts to interview Mr. K. *Id.* at 105:18-106:21.

Eventually, Appellant took Mr. K aside and was able to get an account of the incident. According to Mr. K, he observed Mr. M and his wife engaged in a heated argument in the presence

of Mr. M's young daughter; when Mr. K attempted to intervene, Mr. M struck him twice in the face. (NOPD Exh. 6 at 1:25-2:15). During Appellant's initial interview with Mr. K, several bar patrons can be observed interjecting their own accounts of the incident.

Shortly after his initial interview with Mr. K, Mr. M appeared on the scene and was initially very apologetic and admitted to striking Mr. K. (NOPD Exh. 6 at 7:37-8:40). Appellant proceeded to place Mr. M in the back of his police vehicle and continued to interview Mr. K. During this subsequent interview, Mr. K repeated his desire to press charges against Mr. M. In response, Appellant called his supervisor, Sergeant Chris Johnson, who instructed Appellant to issue Mr. M a summons as opposed to transporting Mr. M to central lock up. During his conversation with Sgt. Smothers, Appellant indicated that Mr. M lived a short distance from the bar and notes that he could give Mr. M a ride home. (NOPD Exh. 6 at 11:00-13:00).

Appellant notified Mr. K that he has issued Mr. M a summons to appear in court and that Mr. K will also need to appear on the date listed in the summons or the charge against Mr. M would likely be dropped. As he informed Mr. K of the summons, a female bar patron notified Appellant that she captured some of the incident with her cell phone and asked Appellant if he would like to see it. In response, Appellant told the female bar patron that "they" usually do not collect video evidence in cases like these and that there is no need for the video because Mr. M and Mr. K had essentially the same account of the incident. (NOPD Exh. 6 at 21:12-21:28).

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 Activities

1. Professionalism

Appellant’s alleged violation of NOPD Rule 3, Paragraph 1 occurred when he said “those people are a pain in my ass.” (H.E. Exh. 1). There is no dispute that Appellant used these words and was referring to witnesses and Mr. K when he did so. Further, Appellant made this statement in the presence of Mr. M, a civilian who had apparently perpetrated a simple battery upon Mr. K.

The statement itself was unprofessional and had the effect of agitating Mr. M who was effusive and vulgar in his response to Appellant’s statement. (NOPD Exh. 6 at 21:35-21:57). The Commission finds that Appellant’s statement, made in the presence of a civilian, was demeaning and brought discredit to Appellant and NOPD since it was made in the course of Appellant’s work

as an NOPD Officer. Therefore, we find that NOPD has established that Appellant violated the above-cited rule.

2. Transporting Civilians

NOPD permits Officers to transport civilians in a variety of scenarios, including evacuation from a “hostile area.” Appellant testified that he was concerned for Mr. M’s safety due to the agitated state of the inebriated patrons and the nature of the incident itself. Therefore, Appellant decided to drive Mr. M a few blocks away from the Crown and Anchor as a precaution. The Commission finds that this, in and of itself, was an appropriate exercise of Appellant’s discretion.

Unfortunately, Appellant failed to document his transportation of Mr. M and did not notify NOPD dispatch that he was transporting a civilian. NOPD Policy is explicit and clear in the steps an Officer must take when transporting a civilian. Appellant did not take any of these steps. In an attempt to justify his actions, Appellant points out that he only drove Mr. M a few blocks before letting him out of the NOPD vehicle. Yet the policy does not make any exceptions for transports that are of an extremely short duration. Based upon the evidence before us, we find that NOPD has established that Appellant violated NOPD Policy 410.7.

3. Collecting Evidence

Just as with the prior two allegations of misconduct, the facts surrounding NOPD’s allegation that Appellant failed to collect evidence at the scene of the simple battery on May 24, 2015 are not in dispute. A female witness notified Appellant that she had a video of the alleged incident and offered it to Appellant. Appellant told the witness that NOPD did not collect video evidence under such circumstances and that he did not need to look at the video because the two parties to the incident had substantially similar stories.

NOPD policy requires an officer to collect any evidence when the officer believes a crime has been committed. Given that Appellant had issued a summons at the direction of Sgt. Johnson, the possibility that a crime had occurred was real. It would have taken a minimal amount of effort for Appellant to direct the witness on how to submit the video evidence to NOPD. Collecting the cell phone video may also have been prudent given the various stages of intoxication exhibited by the witnesses, Mr. K and Mr. M. Appellant himself opined that many of the individuals, including Mr. M, had been drinking.

The Commission differentiates Appellant's refusal to collect existing evidence in the form of the cellphone video, with the requirement to actively create evidence by taking pictures. In the matter now before us, the video evidence existed and constituted "any" evidence of the potential crime. The Commission appreciates Appellant's experienced judgment with respect to whether or not such evidence would eventually be useful, but NOPD Policy removes such discretion for an Officer. Therefore, we find that NOPD has established that Appellant violated Policy 600.2.

4. Cessation of BWC Recording

Cmdr. Ferguson and the other NOPD officials investigating Appellant's alleged misconduct believed that Appellant purposefully ceased recording the transport of Mr. M. As support for their belief, they bring the Commission's attention to Appellant's hand motion at the 21:55 minute mark of what was entered into evidence as "NOPD Exhibit 6." Appellant claims that he did not purposefully deactivate his BWC and noticed that the green light was flashing on his BWC soon after reentering his vehicle to transport Mr. M away from the scene. A flashing green light indicates that the BWC is on but not recording.

In response to questions posed by the hearing examiner, Cmdr. Ferguson explained that, when a user first begins recording with a BWC, there is thirty-seconds of video-only footage that

precedes the physical act of pressing the “record” button on the front of the BWC. After this thirty second lag, the BWC records both visual and audio inputs. Cmdr. Ferguson testified that this thirty-second lag is present at both the beginning and end of any BWC recording. In this respect, the BWCs are unlike the cameras many have built into their smartphones that begin and end recording as soon as an operator presses a button. (Tr. at 100:6-16).

Upon review of the video evidence, the Commission observed that the thirty-second lag is present at the beginning of the video in evidence as “NOPD Exhibit 6.” In the video, the footage begins exactly thirty seconds before Officer Carrigan’s hand moves in front of the BWC signaling his activation of the record function. After thirty seconds elapse, the audio portion of the recording begins. This is consistent with Cmdr. Ferguson’s explanation of how the BWC operate.

However, the same thirty-second lag is not present at the end of the video. According to Cmdr. Ferguson’s testimony, what the Commission should have seen had Appellant actually taken action to cease recording with his BWC was a thirty-second lag between his hand motion and the end of the video footage. (Tr. at 100:6-22). Thirty seconds prior to the end of the video footage, Officer Carrigan can be observed getting back into his vehicle and it is not until the 21:56 minute mark of the video that Appellant’s hand passes in front of the BWC. The video itself ends at 22:01. This lines up with Appellant’s testimony that he noticed the green light on his BWC flashing before or soon after getting back into his vehicle and attempted to restart the recording.

Because there is only a five to six-second lag between Appellant’s hand motion and end of the video footage instead of a thirty-second lag, the Commission finds that Appellant’s hand motion upon which NOPD relies in issuing the fifteen-day suspension was not the cause of the

cessation in recording. As a result, we find that NOPD has failed to establish that Appellant violated NOPD Policy 41.3.10, paragraph 30.²

B. Impact on NOPD's Efficient Operations

1. Professionalism

NOPD argued that Appellant's use of profanity in the presence of a civilian, in referring to other civilians, was unprofessional because it reflected poorly on Appellant and NOPD. (Tr. at 58:5-11). The Commission agrees with the hearing examiner that Mr. M's profanity-laced agreement with Appellant's comment does not lessen the degree of Appellant's misconduct. NOPD rightly expects its Officers to display composure and professional behavior at all times. This is especially true in difficult and tense situations. We find that any display of unprofessionalism in the presence of civilians by an NOPD Officer reflects poorly on both the Officer and NOPD. Therefore, we find that Appellant's comments did have a negative impact on the efficient operations of NOPD.

2. Collection of Evidence

The Commission finds that a video recording of an alleged crime represents evidence that a NOPD Officer should endeavor to collect. While Appellant believed that the matter was straightforward and may not have ultimately led to a criminal conviction, he could have made a minimal effort to collect the video. It is always possible that witnesses, perpetrators and victims change their stories between the initial investigation and the court date. This especially true if the witnesses, perpetrators and victims are drunk during the initial investigation.

² The Commission recognizes that Appellant did not report his suspicion that his BWC malfunctioned to his supervisor. However, NOPD did not base any discipline upon an allegation that Appellant failed to promptly report an equipment malfunctions.

However, NOPD did not introduce any evidence that the lack of a video of the incident in question interfered with the prosecution of Mr. M for simple battery. Bearing this in mind, Appellant's failure to make arrangements to collect the video evidence had a minor impact on NOPD's efficient operations.

3. Transportation of Civilians

For the safety of its Officers, NOPD requires detailed communication regarding the transportation of any civilian in an NOPD vehicle. An Officer must supply NOPD dispatch with the nature of the transportation, the odometer reading, the destination, number of passengers and the ending odometer reading. Upon completing the transport, the Officer must enter it into his or her daily activity log. This is sound policy the violation of which represents an adverse impact on NOPD's efficient operations. Appellant failed to make any of the required notifications and did not record the transportation in his trip sheet. As with the prior allegation, Appellant's compliance with NOPD Policy 600.2 required minimal effort. Nevertheless, Appellant chose not to comply. The violation of duly noticed and promulgated policies necessarily impairs the efficient operations of NOPD by creating inconsistent practices across the department. Therefore, we find that NOPD has met its burden in establishing that Appellant undocumented transport of Mr. M adversely impacted NOPD's efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if 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).

The letters of reprimand NOPD issued to Appellant represent the lowest level of discipline available within the civil service system. There can be no real dispute that NOPD has an interest and responsibility to ensure Officers act in a professional manner, collect available evidence at a crime scene and exercise caution when transporting civilians. While Appellant failed to meet NOPD's expectations with respect to these policies, the impact on NOPD's operations was minor. Therefore, a letter of reprimand represents an appropriate level of discipline. Should Appellant engage in similar misconduct in the future, NOPD will be justified in issuing far more severe discipline.

Given that the Commission did not find that NOPD met its burden with respect to its allegation that Appellant violated the BWC Policy, the Commission will not determine if a fifteen-day suspension was commensurate with the alleged misconduct.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the Appellant's appeal IN PART. NOPD is hereby ordered to remit to Appellant all back pay and emoluments related to the fifteen-day suspension referenced in Hearing Examiner Exhibit 1. Furthermore, NOPD shall expunge any record of the fifteen-day suspension from Appellant's records. However, the letters of reprimand referenced in Hearing Examiner Exhibit 1 shall remain in place.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 3rd day of July, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



TANIA TETLOW, COMMISSIONER

6/28/17

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

6/26/17

DATE



MICHELLE D. CRAIG, COMMISSIONER

6-27-2017

DATE