



CITY OF NEW ORLEANS

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Wednesday, October 3, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Joseph Betcher VS.
Department of Police
Docket Number: 8739**

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 - 10/3/2018 - 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,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Gerald J. Hampton
Jay Ginsberg
Joseph Betcher

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

<p>JOSEPH BETCHER, Appellant,</p> <p>vs.</p> <p>DEPARTMENT OF POLICE, Appointing Authority.</p>	<p>DOCKET No.: 8739</p>
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I. INTRODUCTION

Appellant, Joseph Betcher, 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”) issued Appellant discipline in the form of a letter of reprimand. During the course of the hearing, Appellant challenged the sufficiency of NOPD’s investigation into Appellant’s alleged misconduct and asserted that NOPD did not adhere to the standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission’s analysis first addresses Appellant’s procedural claims. For the reasons stated below, we find that NOPD’s investigation did adhere to the procedural requirements of La. R.S. § 40:2531.

At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee. A referee appointed by the Commission presided over two days of 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 DENY the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD issued Appellant a letter of reprimand for an alleged violation of the following NOPD Rule:

- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source; to wit, NOPD Chapter 41.3.10(34) Body Worn Camera,¹ Cessation of Recording.

(H.E. Exh. 1).

NOPD Policy Chapter 41.3.10(34) provides that:

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.

NOPD alleged that Appellant violated the above-cited rule on April 12, 2016 at approximately 9:30 p.m. when he deactivated his BWC during an interaction between himself and a civilian with whom he was interacting. *Id.*

B. Appellant's Procedural challenge

Appellant claims that NOPD's investigation was procedurally deficient because investigators never provided him with adequate notice of the allegations against him in violation of Louisiana Revised Statute 40:2531. The relevant portion of the statute provides as follows:

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

¹ Hereinafter referred to as "BWC."

the commencement of any interrogation, such officer shall be informed as to the identity of all persons present during such interrogation. The police employee or law enforcement officer shall be allowed to make notes.

La. Rev. Stat. Ann. § 40:2531(1).

1. NOPD's Investigation

NOPD's initial investigation into Appellant's actions on April 12, 2016 was related to an allegation that Appellant had engaged in biased policing and failing to act impartially. (H.E. Exh. 1). The formal investigation into Appellant's alleged misconduct began on April 27, 2016 when Intake Specialist David Briant completed a DI-1 form. (NOPD Exh. 1). In the form itself, Specialist Briant identified three potential rule violations. None of them pertain to BWC use. *Id.* Sergeant Christopher Johnson was responsible for investigating Appellant's alleged misconduct and interviewed Appellant on May 16, 2016. At the time of the interview, Appellant was not yet under investigation for any allegations related to NOPD's BWC policy, and Sgt. Johnson did not ask Appellant any questions regarding Appellant's BWC. (Tr. v. 1 at 36:6-12, 39:13-40:6).

Ultimately, investigators did not believe that Appellant's actions on the 12th constituted biased policing. But, in the course of investigating the underlying complaint, Sgt. Johnson reviewed footage of Appellant's interaction with the original complainant captured by Appellant's BWC. (Tr. v. 1 at 11:23-12:22). After reviewing Appellant's BWC footage, Sgt. Johnson believed that Appellant had deactivated his BWC prior to completing his interaction with the original complainant. *Id.* at 14:20-15:6. Despite this belief, Sgt. Johnson did not seek to interview Appellant regarding this apparent policy violation.

On July 13, 2016, Sgt. Johnson issued Appellant written notice that NOPD's investigation into his alleged misconduct was complete. (NOPD Exh. 5). It was through the July 13th notice that Appellant first learned that he was under investigation for a violation of NOPD's BWC policy.

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(Tr. v. 1 at 78:17-79:6). Sgt. Johnson deemed the other three allegations of misconduct related to Appellant's conduct on April 12th "unfounded." (NOPD Exh. 5). The notice indicated that NOPD would conduct a pre-disciplinary hearing on August 12, 2016 in connection with the alleged BWC policy violation. *Id.* A later notice indicated that the hearing would occur on September 23, 2016 (NOPD Exh. 7). This second notice indicated that Appellant would have the opportunity to "present any mitigating circumstance, justification, or explanation" regarding the allegation against him. *Id.*

Commander Hans Ganthier presided over the pre-disciplinary hearing and addressed the allegation against Appellant. (Tr. v. 2 at 7:20-8:11). Cmdr. Ganthier claimed that he provided Appellant with an opportunity to provide mitigating circumstances or an explanation for his actions regarding his BWC on April 12, 2016, but Appellant declined this offer. *Id.* at 10:21-11:8. Appellant claimed that those presiding over his pre-disciplinary hearing already appeared to have decided the outcome and therefore chose not to explain his actions on the 12th. (Tr. v. 1 at 80:11-25).

2. Application of La. R.S. 40:2531

Appellant takes the position that Sgt. Johnson's failure to identify the alleged BWC Policy violation constitutes a violation of La. R.S. 40:2531. Specifically, Appellant asserts that Sgt. Johnson interrogated him without first describing the nature of the interrogation. The record reflects the fact that Sgt. Johnson never advised Appellant of the alleged BWC policy violation until after Sgt. Johnson had completed his investigation. But, the record also clearly establishes that Sgt. Johnson did not ask Appellant questions regarding Appellant's use of a BWC on April 12, 2016. According to Sgt. Johnson, Appellant's violation of the BWC policy was so clear, there was no need to ask Appellant questions about it. (Tr. v. 1 at 33:5-34:2).

Prior to Appellant's pre-disciplinary hearing, NOPD sent Appellant notice of the hearing that contained, for the first time, the allegation that Appellant had violated NOPD's BWC policy. At the pre-disciplinary hearing, Appellant had the opportunity to provide information regarding his decision to deactivate his BWC, but chose not to avail himself of this opportunity because he viewed the proceeding as a *fait accompli*.

In *Regis v. Dep't of Police*, 2016-0821 (La.App. 4 Cir. 5/24/17, 16), 221 So.3d 165, 174–75, NOPD added a charge of misconduct following a pre-disciplinary hearing. This added charge had never been part of the underlying investigation against the accused officer and the accused officer had no notice of it. As a result, the Fourth Circuit determined that, because the accused officer was not given “advanced notice” of the additional charge or provided with “an adequate opportunity to present a defense to that charge” the officer's termination was fatally flawed. *Id.* at 176.

The case now before the Commission differs from *Regis* in an important respect. Here, Appellant had notice of the additional BWC charge *prior* to his pre-disciplinary hearing and before anyone presented questions regarding the BWC allegation to him. Furthermore, Appellant had an opportunity to address the BWC allegation before NOPD issued discipline. The fact that Appellant viewed any explanation as a futile gesture does not change the fact that he had an opportunity to present an explanation.

Based upon the foregoing findings of fact and law, the Commission finds that NOPD's investigation complied with the requirements of the law.

C. April 12, 2016

The Parties do not dispute the material facts related to Appellant's use of his BWC on April 12, 2016. On the evening of the 12th, Appellant responded to a call for service involving an alleged

hit and run. (NOPD Exh. 1). The individual who had initiated the call for service (referred to hereinafter as the “Complainant”) later claimed that Appellant was unprofessional and engaged in biased policing. *Id.* NOPD investigators did not find any evidence to support the Complainant’s allegations, but did discover that Appellant had intentionally turned off the recording function of his BWC before clearing the scene. Appellant stipulated that he deactivated his BWC prior to “completing his contact” with the Complainant. (Tr. v. 1 at 8:9-9:3).

Sgt. Johnson testified that Appellant prematurely deactivated his BWC in violation of NOPD Policy because Appellant had yet to clear the scene of the call for service. According to Sgt. Johnson, Appellant should have waited until the end of Appellant’s interaction with the Complainant to turn off his BWC. *Id.* at 31:2-19. Appellant stated that the unrecorded portion of his interaction with Complainant lasted only a few seconds and involved him providing the Complainant with an item number. *Id.* at 75:14-21.

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

NOPD’s BWC Policy requires an officer to activate his/her BWC during all calls for service and leave the BWC activated “until an investigative or enforcement contact or incident has concluded.” The Policy defines the “conclusion” of an incident as “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 the matter now before the Commission, Appellant acknowledged that he deactivated his BWC prior to ending his interaction with the Complainant. While the uncaptured portion of Appellant’s interaction with the Complainant spanned only a few seconds, Appellant’s deactivation of his BWC violated the strict terms of the Policy.

B. Impact on NOPD’s Efficient Operations

Sgt. Johnson testified that NOPD implemented its BWC Policy to ensure the creation of both a video and audio record of interactions between officers and the public. It is therefore important that such recordings constitute a complete record of such interactions. When an officer only captures a portion of his/her interaction with a subject or civilian, he/she exposes himself/herself to charges of misconduct for which there is little evidence other than the officer’s word against the subjects. Such premature termination of recording also compromises NOPD’s ability to audit interactions between officers and the public in order to identify areas of training.

The Commission accepts Appellant's testimony that the unrecorded portion of his interaction with the Complainant lasted only a few more seconds. This suggests that the adverse impact was minimal. Yet, serious misconduct could occur over the span of a few short moments, which is why NOPD's policy clearly establishes when an officer may deactivate his/her BWC.

As a result of the foregoing, we find that Appellant's conduct had an adverse impact on the efficient operations of NOPD.

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).

A letter of reprimand represents the lowest level of discipline available to appointing authorities to address misconduct perpetrated by employees. In the matter now before the Commission, Appellant's violation of the BWC policy had a minor impact on the efficient operation of the Department. Nevertheless, the Commission finds that NOPD's BWC policy is reasonably related to its obligation to monitor interactions between officers and the public. And NOPD has an interest in deterring violations of the Policy through discipline.

Therefore, the Commission finds that a letter of reprimand was commensurate with Appellant's misconduct.

V. CONCLUSION

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

J. Betcher
No. 8739

Judgment rendered this 3rd day of October 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



MICHELLE D. CRAIG, CHAIRPERSON

10/2/2018

DATE

CONCUR



RONALD M. McCLAIN, VICE-CHAIRPERSON

10/1/18

DATE



CLIFTON MOORE, Jr., COMMISSIONER

10/1/18

DATE