



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
SUITE 900 – 1340 POYDRAS ST.
NEW ORLEANS LA 70112
(504) 658-3500 FAX NO. (504) 658-3598

CITY CIVIL SERVICE COMMISSION

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MAYOR

Monday, March 27, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Decynda Barnes VS.
Department of Police
Docket Number: 8472**

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,

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

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Decynda Barnes

title

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DECYND A BARNES vs. DEPARTMENT OF POLICE	DOCKET No.: 8472
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I. INTRODUCTION

Appellant, Decynda Barnes, 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 Tuesday, February 16, 2016, 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.¹ Based upon our review, we render the following judgment.

¹ The Commission points out that the hearing examiner who presided over the hearing, Victor Papi, did not prepare the report in this matter. Due to contractual restrictions, the Commission assigned the drafting of the report to another hearing examiner, Brendan Greene.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD issued Appellant a one-day suspension for violating NOPD Rule 4, paragraph 2: Instructions for an Authoritative Source. 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 pertaining to the activation of an Officer’s Body-Worn Camera (“BWC”). *Id.* Policy 447.3 requires an Officer to activate his/her BWC during all “calls for service.” According to NOPD, Appellant allegedly violated Policy 447.3 when she failed to activate her BWC during a call for service during the early morning hours of February 22, 2015. *Id.*

B. Appellant’s Background and Training

Appellant is a twenty-three-year veteran of NOPD. (Tr. at 57:16-19). On or about January 29, 2015, NOPD reassigned Appellant from the homicide division – where she had been working for the past fifteen years – to the Seventh District. *Id.* at 57:24-58:3. While Appellant worked in the homicide division, she did not have occasion to use a BWC and did not receive any training

on the use of a BWC. *Id.* at 59:1-3. In fact, the only BWC training Appellant received prior to February 22, 2015 occurred shortly after she reported for duty at the Seventh District. *Id.* at 58:7-17. Sergeant Sheila Celious administered Appellant's BWC training and acknowledged that she had "laid a lot on" Appellant during the course of one or two hours of training. *Id.* at 39:2-5. And, the training Sgt. Celious provided to Appellant differed from the training received by other NOPD Platoon Officers who typically covered the BWC policy during in-service training. *Id.* at 42:10-10. Sgt. Celious confirmed that, prior to the incident in question, NOPD's Compliance Bureau had released guidance regarding the operation of BWCs. And, according to the Compliance Bureau's guidance, any officer responding to a call for service had the responsibility to exit his/her vehicle and activate his/her BWC, even if it appeared that there was no "scene." *Id.* at 46:6-20. Confusion on the part of some NOPD personnel apparently prompted the Compliance Bureau to issue such guidance. *Id.* at 48:13-24.

C. February 22, 2015

At approximately 12:30 a.m. on February 22, 2015, Appellant was dispatched to the intersection of Forum Blvd. and Beekman Rd. in New Orleans East in response to a call that a child had been shot. *Id.* at 59:4-7. There is no dispute that this constituted a call for service. When Appellant arrived at the intersection, she could not locate a crime scene and drove around the block in an attempt to find one. At no point in time did she get out of her car or activate her BWC. *Id.* at 10:15-11:4.

At some point, NOPD dispatch advised Appellant that the shooting victim was at the hospital. (*Id.* at 59:9-13). Appellant then drove to the hospital and interviewed the victim.² Later,

² NOPD does not allege that Appellant's failure to activate her BWC at the hospital violated Policy 447.3. Both Sgt. Ray Jones and Cmdr. Dupree testified that it was appropriate for Appellant to refrain from recording interactions with victims/witnesses when in a hospital setting. (Tr. at 22:24-23:11, 28:18-20, 32:22-23, 33:7-12).

when NOPD detectives attempted to conduct a follow-up investigation by reviewing footage from Appellant's BWC, they discovered that she had failed to record any. The detectives assumed that Appellant would have recorded some BWC footage because she was the platoon officer who responded to the call for service. *Id.* at 11:4-6.

Sergeant Ray Jones conducted the initial investigation into Appellant's alleged misconduct and was able to determine that Appellant did respond to a call on the 22nd in the vicinity of Forum Blvd. but did not record any BWC footage. (Tr. at 15:11-17; NOPD Exh. 2). In response to a question from the hearing examiner, Sgt. Jones testified that NOPD Policy 447.3 required an Officer to activate his/her BWC, even when the victim was no longer at the scene. *Id.* at 22:14-19. Ultimately, Sgt. Jones found that Appellant violated Policy 447.3 by failing to activate her BWC when she arrived at the scene of an alleged crime in response to a call for service. *Id.* at 25:4-7.

Commander Lawrence Dupree presided over the "commander's hearing" at which Appellant had an opportunity to formally respond to the allegations against her. *Id.* at 29:25-30:3. Cmdr. Dupree agreed with Sgt. Jones that NOPD Policy 447.3 required Appellant to activate her BWC when she arrived on the scene of an alleged crime. During his testimony, Cmdr. Dupree's stated that a video recording of the scene would have provided information regarding the alleged crime, whether there was evidence present or not. Therefore, Cmdr. Dupree expected Appellant to, at the very least, have exited her vehicle and recorded the lack of evidence. *Id.* at 32:19-33:2.

Following the commander's hearing, Cmdr. Dupree recommended that NOPD issue Appellant a letter of reprimand. He based his recommendation on "all the other mitigating and extenuating factors with [Appellant]." *Id.* at 70:5-9. However, Deputy Superintendent Robert Bardy disagreed with Cmdr. Dupree's suggested level of discipline and instead recommended a

one-day suspension. Superintendent Michael Harrison agreed with Dept. Super. Bardy and issued a letter of reprimand.

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 Policy 447.3 requires Officers to activate their BWC when responding to all calls for service. And, on the night of February 22, 2015, Appellant responded to a call for service but did not activate her BWC.

Sgt. Celious confirmed that Appellant's failure to exit her vehicle and activate her BWC was a violation of NOPD Policy. However, Sgt. Celious noted that Appellant was new to platoon work and may have been confused as to when to activate her BWC. Appellant testified in her own defense and claimed that she was unable to locate any crime scene and proceeded to circle the block in her vehicle until dispatch informed her that the victim has been relocated to the hospital. Nevertheless, Sgt. Jones, Cmdr. Dupree, and Sgt. Celious all testified that Appellant's actions violated NOPD Policy 447.3. Based upon the record before us, we find that Appellant engaged in the misconduct alleged by NOPD.

B. Impact on NOPD's Efficient Operations

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 has committed to the use of BWCs 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.

Furthermore, the Commission accepts the testimony provided by Cmdr. Dupree that the lack of evidence at a particular scene may provide investigators with valuable insight when trying to corroborate claims by subjects, witnesses and victims. By failing to exit her vehicle at the scene of a call for service, Appellant deprived NOPD investigators of potentially important information. Yet, from a practical perspective, the actual impact of Appellant's failure was minimal given that the shooting in question occurred inside a residence and not at the intersection of Forum Blvd. and

Beekman Rd. (Tr. at 59:22-60:2). Cmdr. Dupree acknowledged this and stated that Appellant's misconduct was best classified as a breach of protocol. *Id.* at 69:21-25.

Based upon the foregoing, we find that Appellant's failure to adhere to the BWC Policy had an adverse effect on NOPD's efficient operations, albeit a minor one.

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 Commission's authority to "hear and decide" disciplinary cases "includes the authority to modify (reduce) as well as to reverse or affirm a penalty." *Whitaker v. New Orleans Police Dept.*, 863 So.2d 572, 576 (La.App. 4 Cir. 9/17/03)(citing La. Const. art. X, § 12; *Branighan v. Department of Police*, 362 So.2d 1221, 1223 (La.App. 4 Cir.1978)). However, the authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. *Id.* at 1222. The Commission does not exercise this authority lightly. Yet, in the matter now before us, it appears that NOPD failed to take into account several mitigating factors related to Appellant's violation of Policy 447.3.

In the disciplinary notice NOPD sent to Appellant, Superintendent Harrison wrote that Appellant "offered nothing which would tend to mitigate, justify or explain" her misconduct. (H.E. Exh. 1). This stands in stark contrast to Cmdr. Dupree's testimony during which he identified several mitigating factors. In fact, Cmdr. Dupree testified that he recommended NOPD

issue Appellant a letter of reprimand because he “did take into account all the other mitigating and extenuating factors.” *Id.* at 70:2-9 (emphasis added).

First and foremost among these mitigating factors was that Appellant had only been using the BWC for one month prior to the incident that led to her suspension. And, during that time, she had only received a limited one- or two-hour training session as opposed to the typical in-service training provided to other platoon officers. Another mitigating factor was Appellant’s apparent confusion regarding her need to exit her vehicle and record BWC footage even if she could not readily identify a crime scene. Appellant had also spent the previous fifteen years of her career serving in division that did not issue BWCs or train its personnel in their use. Finally, both Cmdr. Dupree and Sgt. Celious testified that NOPD had extended an unofficial “grace period” to NOPD personnel regarding enforcement of the BWC policy. This suggests that NOPD recognized it would take some time before the use of BWCs became a regular practice for its platoon officers.

Despite these mitigating factors, Deputy Superintendent Bardy disagreed with Cmdr. Dupree and authored a “cover letter” in which he recommended a one-day suspension. The cover letter did not contain an explanation for Bardy’s recommendation, and NOPD did not introduce any evidence that supported the harsher penalty.

Based upon the record before us, we find that the one-day suspension is not commensurate with Appellant’s misconduct.

V. CONCLUSION

D. Barnes
No. 8472

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 one-day suspension referenced in Hearing Examiner Exhibit 1. Furthermore, NOPD shall expunge any record of the one-day suspension from Appellant's records. NOPD shall then issue a letter of reprimand to Appellant for the violation of NOPD Policy 447.3.

Judgment rendered this 17th day of March, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



TANIA TETLOW, COMMISSIONER

3/24/17

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

3-27-17

DATE



MICHELLE D. CRAIG, COMMISSIONER

3-22-17

DATE