



# CITY OF NEW ORLEANS

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Wednesday, January 30, 2019

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

Re: **Jacob Nolan VS.**  
**Department of Police**  
**Docket Number: 8810**

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 - 1/30/2019 - 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: Shaun Ferguson  
Daniel T. Smith  
Alexandra Mora  
Jacob Nolan

file

**CIVIL SERVICE COMMISSION**

**CITY OF NEW ORLEANS**

JACOB NOLAN, Appellant,  vs.  DEPARTMENT OF POLICE, Appointing Authority	DOCKET No.: 8810
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**I. INTRODUCTION**

Appellant, Jacob Nolan, 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. The Commission finds that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and Louisiana Revised Statute § 40:2531. Therefore, the only question before the Commission is whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as an officer for NOPD and had permanent status as a classified employee.

On September 6, 2018, 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 hereby DENY-IN-PART and GRANT-IN-PART the appeal and render the following judgment.

## II. FACTUAL BACKGROUND

### A. Alleged Misconduct

NOPD suspended Appellant for a total of two days after substantiating two separate rule violations related to Appellant's transportation of an arrested subject. The two NOPD rules relevant to the Commission's review of this matter are reproduced below:

- Rule 4: Performance of Duty; Paragraph 4: Neglect of Duty, Subparagraph C.7 – The following acts or omissions to act, although not exhaustive, are considered neglect of duty.... [f]ailing to take necessary actions so as to ensure that a prisoner shall not escape as a result of carelessness or neglect. (**One-day Suspension**)
- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source, to wit Chapter 71.1, Prisoner Transportation, Subsection G.4. – Prisoners shall be transported in a manner that allows for constant visual observation. Seating of officers and prisoners should conform with the following ... All prisoners shall be secured in the vehicle by proper use of a seat belt unless a supervisor has given prior approval for the seat belt to not be used. Supervisors shall grant such approval only under extenuating circumstances. The reasons for not securing the individual in a seat belt shall be documented by the transporting officer and approved by the Supervisor. The approval shall be noted on both the officer's and supervisor's Daily Activity Sheet and in any related EPRs. (**One-day Suspension**).

(H.E. Exh. 1)

### B. November 4, 2017

The Parties agree on most of the material facts underlying the instant appeal. On the morning of November 4, 2017, Appellant responded to a call for service related to a "suspicious person" at the intersection of Magnolia Street and Martin Luther King Jr., Boulevard. (NOPD Exh. 2). Appellant understood that a detective had observed an individual for whom there were several outstanding warrants (hereinafter referred to as "subject"). (Tr. at 66:12-21). After arriving on scene, Appellant observed the detective approach the subject and who then attempted to flee on foot. *Id.* at 78:1-11. Appellant and the detective were eventually able to apprehend the subject and Appellant assisted the detective in placing the subject under arrest using Appellant's

handcuffs to secure the subject's hands. *Id.* 66:22-67:7. After placing the subject under arrest, Appellant and the detective recovered a firearm from the subject's person and placed the subject in the back of Appellant's patrol unit. *Id.* at 67:8-14. As the subject entered Appellant's patrol unit, Appellant heard the handcuffs "wrench down a couple of times" prompting Appellant to direct the subject to exit the vehicle so that Appellant could inspect and re-lock the handcuffs. *Id.* at 67:14-21. Later, in the Sixth District Stations' sally port, Appellant checked the handcuffs a second time after the subject complained that the handcuffs were too tight. *Id.* at 70:4-10. Appellant believes that he used his finger to assess the proper tightness of the handcuffs when he re-checked the handcuffs, but was not absolutely sure that he did. *Id.* at 70:10-14.

Appellant then transported the subject to the Orleans Parish Prison's Central Lockup. When Appellant arrived at Central Lockup with the subject, the subject immediately began to limp. Appellant believed that the subject was feigning an injury to avoid jail, but the on-duty medical professional at Central Lockup refused to accept the subject without a medical assessment. (NOPD Exh. 2).<sup>1</sup>

Appellant followed the established protocol for subjects requiring a medical assessment. But on the way to UMC, Appellant observed the subject making furtive and unusual movements in the back seat of the patrol unit. (Tr. at 68:15-20). This prompted Appellant to be suspicious that the subject was trying to discard/hide contraband. *Id.* at 68:21-69:1. When Appellant arrived at UMC, he parked his patrol unit and instructed the subject to exit the vehicle and stand next to Appellant while Appellant quickly searched the backseat. *Id.* at 69:5-13. Appellant claimed that his primary motive in searching the back seat was to look for weapons, but he also noted that it is

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<sup>1</sup> When Central Lockup medical personnel refuse to accept into custody an arrested subject who appears to have injuries, NOPD personnel must transport the subject to University Medical Center (hereinafter "UMC") for an assessment.

part of standard operating procedures for officers to conduct a search of a vehicle to ensure that a subject had not left anything behind (including contraband or personal property). *Id.* at 69:22-23, 72:17-20.

While Appellant turned to close the door of his vehicle, the subject bolted. *Id.* at 69:23-25. It was at this point that Appellant noticed that the subject had freed one of his hands from the handcuffs. *Id.* at 69:25-70:1. Appellant turned to pursue the subject who runs towards and over a cement ledge adjacent to a parking structure ramp and falls approximately thirty-five feet. (NOPD Exh. 2). UMC security and medical personnel immediately arrived on scene to transport the subject into the facility for evaluation. Not surprisingly, the subject sustained serious injuries as a result of his ill-advised escape, including a fractured pelvis and internal bleeding. *Id.* Fifteen seconds elapsed between Appellant opening the rear door of his vehicle to the subject falling and injuring himself.<sup>2</sup> Appellant's BWC captured video footage of the incident. The subject remains in the BWC's frame for all but a brief moment.

Appellant claimed that he never turned his back on the subject and did not let the subject out of his sight. (Tr. at 75:15-22). On cross-examination, Appellant acknowledged that he had already observed the subject attempt to flee from law enforcement personnel. *Id.* at 78:1-11. Appellant also acknowledged that he has modified his approach to prisoner interactions when exiting his patrol unit since the incident. Specifically, Appellant now makes sure that he faces both the prisoner and vehicle when exiting and has the prisoners exit on a different side. *Id.* at 80:21-81:3.

### III. LEGAL STANDARD

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<sup>2</sup> The Hearing Examiner reviewed a portion of the video footage captured by Appellant's BWC during the hearing. While the video was not formally introduced into the record, neither party voiced an objection to paying the video and the Commission finds that it is an important piece of evidence. Bearing that in mind, the Commission has reviewed the relevant portion of the video and incorporates it into evidence by reference.

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 identified two separate instances of misconduct in its disciplinary letter. The Commission shall address each of them in turn.

##### 1. ***Rule 4: Performance of Duty, Paragraph 4: Neglect of Duty, subparagraph C.7.***

In order to meet its burden with respect to this allegation, NOPD must establish that Appellant’s “carelessness” or “negligence” led to the subject’s escape. For the purposes of this decision, the Commission does not find a meaningful distinction between the “careless” or

“negligent.” Thus, we will use “negligence” as it comes with helpful benchmarks from the world of Tort Law. The Louisiana Supreme Court has held that “law enforcement officers are held to choose a course of action that is reasonable under the circumstances” and must act “as a reasonably prudent [person] under the circumstances.” *Goins v. Wal-Mart Stores, Inc.*, 2001-1136 (La. 11/28/01, 7), 800 So.2d 783, 788–89 (citing *Hardy v. Bowie*, 98-2821 (La. 9/8/99, 12), 744 So.2d 606, 614).

Bearing in mind the above-cited case law, the question before the Commission is whether or not Appellant acted in a reasonably prudent manner given the circumstances on November 4, 2017. NOPD provided additional focus to the Commission’s inquiry by alleging that Appellant’s carelessness and/or negligence was his “failure to secure [the] arrested subject prior to checking the rear seating area of the vehicle.” What Appellant knew and did during the leading up to the subject’s escape is relevant to the Commission’s analysis and we briefly summarize our findings below.

Prior to arriving on the scene of his initial interaction with the arrested subject, Appellant understood that he was responding to a situation involving a subject with several outstanding warrants. When Appellant arrived on scene, he observed the subject attempting to flee from a detective. While this does not establish a proclivity for flight, it does put Appellant on notice that the subject could possibly attempt to flee given the opportunity.

When Appellant assisted the subject into the NOPD patrol unit, he heard the handcuffs securing the subject “click” suggesting to him that the handcuffs had not been double locked. He readjusted the handcuffs and continued to the Sixth District Station. NOPD acknowledged that Appellant’s actions to this point were appropriate and reflect an officer who is paying close attention. So far so good.

When the staff at Central Lockup refused to accept the arrested subject due to an apparent injury, Appellant returned the subject to the vehicle and began to drive to UMC. The Commission accepts Appellant's representation that he observed the arrested subject make furtive movements and that such movements caused Appellant to believe that the subject was attempting to access/dispose of a weapon or contraband. This also established that Appellant was carefully monitoring the subject. Then, during a brief moment when Appellant looked into the rear seat of the vehicle, the arrested subject bolted. NOPD asserts that Appellant should have either; a) waited to check the vehicle, b) held onto the subject while Appellant looked in the vehicle, or c) attempted to secure additional assistance from law enforcement personnel who were likely at the hospital.

Appellant stated that he decided to immediately check the backseat of the vehicle because the subject's odd behavior caused Appellant to believe that the subject had discarded a weapon or contraband. His check consisted of a brief look into the rear seat of the vehicle. Appellant did not enter the back seat or place any part of his body in the rear of the vehicle. And, during the time that Appellant glanced into the vehicle, the arrested subject was no more than one or two feet from Appellant. Given the specific circumstances, the Commission finds that Appellant acted in a reasonably prudent manner when he momentarily looked in the back seat of the vehicle to search for weapons or contraband. The Commission also finds that the timing and method of Appellant's brief look into the back seat of the vehicle, while perhaps not ideal, was reasonable. While Appellant certainly could have conducted a more in-depth search of the vehicle later, the Commission accepts Appellant's representation that UMC staff would not have permitted Appellant to leave the arrested subject's side. Thus, Appellant likely would have had to wait for backup or the arrested subject's discharge to search the vehicle. While Appellant certainly could



have waited to search the back seat, the Commission does not find that Appellant's brief look into the back seat was unreasonable.

NOPD also argued that Appellant's failure to maintain a physical hold on the arrested subject was unreasonable. The Commission would be more inclined to accept this argument if there were standard operating procedures ("SOPs") establishing such physical contact as required. No such SOPs are in evidence. Instead, the Commission must to assess whether Appellant's decision to have the arrested subject stand -- at most -- one to two feet away while Appellant momentarily looked in the back of the vehicle versus holding on to the arrested subject was unreasonable. Given the mere seconds during which the event transpired, the Commission does not find that NOPD has established, by a preponderance of the evidence, that Appellant acted unreasonably or carelessly when he looked into the rear of the vehicle. In making this finding, the Commission acknowledges that Appellant had other options available to him, but the course of conduct he chose was not unreasonable given the circumstances.

## ***2. Chapter 71.1, Prisoner Transportation.***

Appellant acknowledged that he forgot to secure the arrested subject with a seatbelt while transporting the subject. (Tr. at 82:16-83:2). This is a clear violation of NOPD policy.

### **B. Impact on NOPD's Efficient Operations**

The impact on NOPD's efficient operations as a result of Appellant's failure to secure the subject with a seatbelt were minimal. Nevertheless, the Commission acknowledges that the potential impact on NOPD and the City's coffers is substantial. One need not look far to see the dire consequences of prisoners being seriously injured during the course of transportation. Here, while the subject was not injured during the course of his transportation between Central Lockup and UMC, the potential for liability was great. Appellant's failure to adhere to NOPD policies

designed to keep arrested subjects safe and limit the liability of the City also compromised NOPD's efficient operations. All City Departments develop policies and procedures to promote the safe and efficient execution of important services. When an employee – especially one like Appellant who is responsible for the safety of arrested subjects – violates policies and procedures, they negatively impact the efficient operations of the City and appointing authority.

Appellant noted that his failure to place a seatbelt on the arrested subject did not result in the subject sustaining an injury. While this is true, NOPD's seatbelt policy is a preventative measure intended to mitigate the risk of prisoner transportation. Appellant exposed the subject to potential serious injury and the City to potential liability. Based upon the above findings, we find that Appellant's actions did have an adverse impact on NOPD's efficient operations.

### **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 *Staehele v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

In NOPD's disciplinary matrix, the "presumptive" penalty for a "Level B" offense is a one-day suspension while the presumptive penalty for a "Level A" offense is a letter of reprimand. Deputy Superintendent Noel explained that Appellant's failure to secure the subject in the vehicle with a seatbelt "involved a person in [NOPD's] custody" and was therefore a more serious rule infraction than – for example – reporting to work late.

Deputy Superintendent Noel justified the one-day suspension by arguing that Appellant's actions impacted the safety of the arrested subject. The Commission also takes judicial notice of

Louisiana Revised Statute 32:295.1(B) which requires that a passenger in a motor vehicle wear a safety belt while the vehicle is in forward motion.<sup>3</sup> Here, there is no dispute that it was Appellant's responsibility to ensure that the arrested subject was safely secured with a seatbelt. Failure to do so was a nominal violation of state law and created a needlessly dangerous situation. Further, it exposed NOPD and the City to liability for any injuries sustained by the arrested subject during his transportation.

The Commission finds that NOPD's rules regarding the safe transportation of arrested subjects is vital to limit the inherent risk involved in transporting members of the public (whether they are wanted felons or not). In order to enforce its well-founded rules, NOPD has an interest and responsibility to deter violations with substantial discipline. This is especially true when the potential consequences of non-compliance are serious injury or death.<sup>4</sup>

NOPD may have had other options available regarding the discipline, but given the risk involved, the Commission does not find that a one-day suspension is arbitrary or capricious for Appellant's failure to secure a seat belt on the arrested subject. As a result of the foregoing, the undersigned Commissioners find that a one-day suspension was commensurate with Appellant's violation of the prisoner transportation rule.

## V. CONCLUSION

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

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<sup>3</sup> The Commission understands that NOPD did not charge Appellant with a violation of the cited state law. Nevertheless, the Commission cites to the statute to underscore the concern for safety and the potential liability to NOPD and the City of New Orleans.

<sup>4</sup> The Commission cautions NOPD on the equitable and consistent application and enforcement of the seatbelt rule. There seemed to be some disagreement within NOPD as to whether the violation was a "Level A" or "Level B" offense. This case should end that inquiry and rightly sets a high bar. It may be worth retraining officers and supervisors that even a first-time violation of the rule shall result in a one-day suspension.

NOPD failed to establish that Appellant violated Rule 4: Performance of Duty, Paragraph 4: Neglect of Duty, Subparagraph C.7: escape of prisoner. Therefore, the Commission orders that the one-day suspension associated with this alleged rule violation be rescinded and any reference to the reprimand removed from Appellant's short and long form. NOPD shall also remit to Appellant any and all appropriate back pay and emoluments associated with the one-day suspension.

NOPD did establish Appellant's violation of Rule 4: Performance of Duty, Paragraph 4: Neglect of Duty, Subparagraph C.6 Instructions from an Authoritative Source, to wit: Chapter 71.1, Prisoner Transportation. The one-day suspension associated with this violation shall remain in effect and may be reflected in Appellant's short and long form.

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J. Nolan  
No. 8810

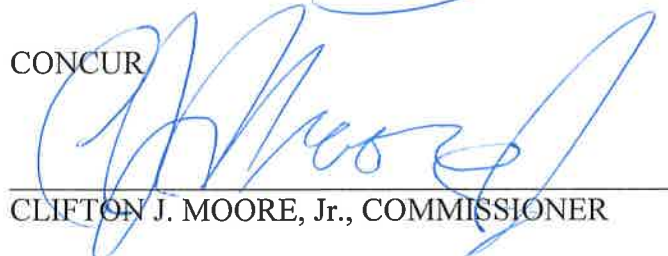
Judgment rendered this 30<sup>th</sup> day of January, 2019.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

  
MICHELLE D. CRAIG, CHAIRPERSON

1/14/2019  
DATE

CONCUR  
  
CLIFTON J. MOORE, Jr., COMMISSIONER

1-18-19  
DATE

  
BRITTNEY RICHARDSON, COMMISSIONER

1-14-2019  
DATE