



MITCHELL J. LANDRIEU
MAYOR

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

MICHELLE D. CRAIG, CHAIRPERSON
RONALD P. MCCLAIN, VICE-
CHAIRPERSON
JOSEPH S. CLARK
TANIA TETLOW

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Thursday, January 19, 2017

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

Re: **Sean Carrigan VS.
Department of Police
Docket Number: 8129**

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 - 1/19/2017 - 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
Shawn Lindsay
Victor Papai
Sean Carrigan
:
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

SEAN CARRIGAN

vs.

DEPARTMENT OF POLICE

DOCKET NO.: 8129

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. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause. According to a letter issued to Appellant by the NOPD, Appellant received a ten-day suspension for violating NOPD Rule 4, ¶ 2 – Instructions from an Authoritative Source. An aggravating factor identified by NOPD justifying the length of Appellant’s suspension was that he had violated the same Rule twice before. After a review of the transcript, evidence and hearing examiner’s report, the undersigned Commissioners render the following findings of fact and decision.

II. FACTUAL BACKGROUND

The essential facts surrounding the Appellant’s discipline are not in dispute. On October 12, 2011 at approximately 2:30 p.m., Appellant responded to an alleged “theft by fraud” at Armstrong Family Services (hereinafter “Armstrong”) located at 2658 Ursulines Street in New Orleans. (NOPD Exh. 1 at p. 1). When he arrived at the scene, Appellant interviewed an Armstrong employee. This employee presented Appellant with copies of two checks drawn from

Armstrong's account in the amount of \$1,380 and \$1,800. *Id.* at pp. 14-15. The employee alleged that the two checks were stolen from Armstrong by a client of the business who then used the checks to steal \$3,180 from Armstrong's checking account. *Id.* at p. 3. Appellant included the name of the possible suspect in his initial report. *Id.* at p. 3.

During his testimony, Appellant stated that the Armstrong employee whom he interviewed stated that she did not see the possible suspect take the checks. (Tr. at 15:12-13). The Commission also finds that, at the time of Appellant's initial investigation, NOPD had not yet obtained any video footage from the bank at which the checks were cashed; in fact, Appellant did not yet know at which bank the possible suspect cashed the checks. *Id.* at 33:4-34:5.

After collecting the Armstrong employee's statement along with other documentation, Appellant submitted a report on the matter. NOPD's process for the review and approval of police reports requires that the Officer submit a draft report to his/her supervisor. That supervisor would review the report and either approve it or disapprove it. In the matter now before the Commission, Appellant's supervisor, Sergeant Marquez disapproved the report and directed Appellant to do three things:

1. List the individual identified by the Armstrong employee as a possible suspect in the "wanted" section of the report,
2. Send a "wanted bulletin," and
3. Obtain an arrest warrant for the suspect.

Appellant was disciplined for not complying with the second and third directions issued by Sgt. Marquez. During the course of the hearing, Sgt. Marquez acknowledged that he did not know if Appellant complied with item 1 listed above and further that Appellant was not disciplined in connection with that first item. (Tr. at 120:11-122:24).

Appellant does not deny that he refused to follow Sgt. Marquez's instructions to send a wanted bulletin and obtain an arrest warrant for the possible suspect identified by the Armstrong employee. However, Appellant defended his actions and claimed that he viewed Sgt. Marquez's instructions to be unlawful orders and that he is not obligated to follow such orders. In support of his position, Appellant argued that, since there were no eye witnesses to the theft of the checks, and no video evidence of the individual who had cashed the checks, there was insufficient probable cause to support an arrest warrant. *Id.* at 40:11-17. Appellant claimed that the order to obtain an arrest warrant was unlawful.¹

Eventually, an arrest warrant was issued for the individual identified as a possible suspect by the Armstrong employee. (App. Exh. 2). This warrant was based upon an application for arrest warrant that contained an affidavit by Sgt. Marquez. The narrative supplied by Sgt. Marquez is substantially similar to the narrative contained in Appellant's original report with the exception of some additional details such as the total amount of the checks, the fact that the Armstrong employee confirmed that the signature on the stolen checks were not hers and that the individual who signed the checks signed them in the name of the possible suspect. *Id.*

¹ The Commission must address an area of apparent contradiction between Appellant's testimony and the statements he provided to Captain Grimillion during NOPD's administrative investigation. (NOPD Exh. 3). In his statement, Appellant claims that he talked with Judge Hansen who agreed with Appellant that there was not sufficient evidence to justify a finding of probable cause and the issuance of an arrest warrant. However, during his testimony before the Commission's hearing examiner, Appellant claims that he did not talk to a judge regarding an arrest warrant for the Armstrong matter. (Tr. at 61:11-15). The Commission raises this issue only to point out that, during his testimony, Appellant did not claim to base his reservations on anything other than his experience. However, it seems clear that part of his reservation was based upon his alleged conversation with a judge. NOPD points out that the judge with whom Appellant allegedly spoke did not have the advantage of the documentation gathered during the course of Appellant's investigation.

III. POSITION OF PARTIES

A. Appointing Authority

NOPD asserts that Appellant's failure to obtain an arrest warrant for the individual identified as a possible suspect by the Armstrong employee and his failure to issue a wanted bulletin constitute clear violations of NOPD policies requiring adherence to orders issued from an authoritative source. Furthermore, NOPD alleges that the ten-day suspension issued to Appellant was justified by two prior instances where Appellant failed to follow orders issued by an authoritative source.

B. Appellant

Appellant contends that his extensive experience in criminal investigations made it clear to him that there was not sufficient evidence to justify the issuance of an arrest warrant in the Armstrong fraud matter. Therefore, Sgt. Marquez's instructions to issue a wanted bulletin and obtain an arrest warrant constituted illegal orders that Appellant was not obligated to follow.

IV. STANDARD

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A), 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. *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, we 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 Commission's analysis is a three-pronged one with the appointing authority bearing the burden of proof for each prong.

V. ANALYSIS

A. The Complained of Activity

1. *Failure to Obtain an Arrest Warrant*

Appellant acknowledges that he did not even attempt to obtain an arrest warrant for the suspect identified in the initial police report. The directive to Appellant probably should have been, "Submit an application for an arrest warrant to the presiding judge." This is an issue of wordsmithing rather than of substance.

It is a basic tenant of criminal law that

The process of determining probable cause for the issuance of search and arrest warrants does not involve certainties or proof beyond a reasonable doubt, or even a prima facie showing, but rather involves probabilities of human behavior, as understood by persons trained in law enforcement and as based on the totality of circumstances. The process simply requires that enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system.

State v. Rodrigue, 437 So.2d 830, 832-33 (La.1983)(internal citations omitted)(emphasis added).

What the Parties overlooked during the course of the instant appeal hearing was the fact that it is not up to an Officer to determine if there is sufficient probable cause to issue an arrest warrant. That determination is squarely within the purview of the reviewing judge or magistrate.

Appellant's counsel posed the following question to Captain Darryl J. Albert during the appeal hearing:

Q: And who do you believe is in the best position to determine when their investigation has revealed probable cause, the investigator or someone else?

The correct answer to this question is “someone else.” Namely, the magistrate or judge who has the constitutional mandate to make such a determination.

The fact that Appellant had serious misgivings regarding whether or not the evidence he collected during the course of his initial investigation was sufficient to establish probable cause that would support the issuance of an arrest warrant is of little import. It was – and is – the duty of the magistrate or judge to determine if there is sufficient cause to issue an arrest warrant.

There was no testimony or evidence showing or even suggesting that Sergeant Marquez directed Appellant to lie about the evidence or information available to NOPD following the initial investigation or submit an affidavit with knowingly false statements.² In response to a leading question, Appellant suggested that Sgt. Marquez’s order required him to “legally swear in front of a judge that [he] believed that [the possible suspect] committed this crime.” Tr. at 40:11-17. There is no evidence that Sgt. Marquez directed Appellant to make such a representation to a judge.

Sergeant Marquez’s instruction was clear; “Obtain an arrest warrant.” Appellant did not take any steps towards completing this task other than an informal conversation with a judge outside of the context of a formal application. The fact that Appellant failed to actually complete an affidavit that summarized his initial investigation is dispositive to the Commission’s analysis under this prong.

Had Appellant submitted such an affidavit and a magistrate/judge subsequently determined that there was insufficient evidence contained in the affidavit to justify probable cause for the

² The Commission notes that Sgt. Marquez did complete and submit an application for an arrest warrant in connection with the alleged theft by fraud initially investigated by Appellant. There was no testimony that he directed Appellant to sign and/or submit this affidavit or attempt to dictate to Appellant what to include and what not to include in such an affidavit. However, the Commission expresses some concern regarding the definitive statements contained in this affidavit. For example, Sgt. Marquez states that the reporting person reported that a client stole two checks from the Armstrong Family Services check book. The affidavit further alleges that the reporting person stated that the checks were stolen by the client during a visit by the client to the business. (App. Exh. 2). These statements appear in the report generated by Appellant but without clarifying that the Armstrong employee did not actually witness the theft of the checks and merely suspected that the client had stolen the checks.

issuance of an arrest warrant, Appellant would not be subject to discipline. Instead, Appellant took it upon himself to act as the judge and determine, for himself, the DA of Orleans Parish, and the Criminal Court, that there was insufficient probable cause to issue an arrest warrant. The Commission finds that NOPD has satisfied its burden in establishing that Appellant failed to follow Sgt. Marquez's order to obtain an arrest warrant for the possible suspect identified by the Armstrong employee in Appellant's police report.

2. Failure to Send a Wanted Bulletin

There was very little testimony regarding the process through which an Officer in NOPD "sends" a wanted bulletin. Appellant testified that "a wanted bulletin can't be sent until you talk to a judge, make sure you have probable cause, and get an arrest warrant signed." (Tr. at 18:16-18). Since Appellant did not take even the first steps in obtaining an arrest warrant, he was unable to secure a wanted bulletin for the same matter. The Commission finds that Appellant's failure to secure a wanted bulletin is inexorably linked to his failure to submit an application for an arrest warrant. Therefore, we find that NOPD has satisfied its burden in establishing that Appellant failed to follow an order from an authoritative source regarding the bulletin.

B. Appellant's Misconduct Impaired the Efficiency of NOPD

It is axiomatic that a paramilitary operation like the New Orleans Police Department depends upon strict adherence to orders issued by individuals throughout the chain of command. The Commission credits Capt. Albert's testimony that, when an officer fails to follow legal instructions, such a failure "impacts and allows the department to run sort of a freelancing without accountability. Following those [legal] instructions by the designated chain of command [NOPD has] maintains the level of accountability." (Tr. at 126:17-22). Capt. Albert was careful to emphasize "legal" instructions must be followed, and the Commission recognizes that NOPD has

a mechanism in place that allows Officers to challenge orders that are illegal or may infringe upon the civil rights of a citizen.

If an officer receives an order that the officer believes is illegal or unjustified, the officer has the responsibility to request that the individual issuing the order put that order in writing. Sgt. Marquez did put his orders in writing to Appellant when he disapproved of the report initially filed by Appellant. (NOPD Exh. 1 at p. 6). Appellant testified that he was concerned that he would be liable for criminal and civil penalties for false arrest/imprisonment should a warrant issue in this matter for the arrest of the person identified by the Armstrong employee as the possible suspect. Given that Appellant was only required to submit an affidavit regarding the facts for which he has personal knowledge and his supervising officer issued a written order, Appellant's fears of liability are unfounded.

C. Appellant's Discipline was Commensurate with the Offense

In conducting its analysis, the Commission must determine if the Appellant's ten-day 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). Capt. Alpert testified that the length of Appellant's suspension fit within the penalty matrix developed by NOPD for Rules violations. Specifically, Capt. Alpert noted that Appellant had two prior instances of discipline for failure to follow orders from an authoritative source within thirty-six months of the instant infraction. (Tr. at 130:1-6). This testimony went unrebutted by Appellant. The Commission finds that it is essential that NOPD personnel respect the chain of command and follow lawful orders issued by those within the chain of command. Failure to strictly adhere to orders/instructions could seriously impact the operations of NOPD, and discipline

in the form of a suspension is an appropriate deterrent to such conduct. Especially when, as is the case here, an employee has documented failures to follow orders in the recent past. Therefore, the Commission finds that the 10-day suspension issued in this matter was commensurate with Appellant's offense.

V. CONCLUSION

There is no dispute that Appellant is a seasoned officer with a wealth of experience. In fact, he probably knows the elements of criminal law better than most attorneys. While this aids him in his day-to-day duties, it also likely lead him to wrongly believe that he was responsible for determining if there was probable cause to issue an arrest warrant in the matter he was investigating. Contrary to Appellant's arguments, in order to obtain an arrest warrant, an officer is not required to swear before a judge that he believes a particular individual committed a crime. What he is obligated to do is to swear as to the veracity of the facts that he collected as part of his investigation. In the matter now before the Commission, those facts were:

1. An employee of Armstrong reported that two checks were stolen,
2. The Armstrong employee discovered the checks had been stolen when she received copies of the cashed checks from Armstrong's bank,
3. The individual who signed the checks used the name of a client of Armstrong,
4. The client whose name appears on the stolen checks visited Armstrong shortly before the checks were stolen and subsequently cashed,
5. No one witnessed the client steal the checks
6. No one witnessed the client physically cash the checks.

S. CARRIGAN
No. 8129

Appellant did not submit an affidavit with these facts as part of an application for an arrest warrant. In fact, the only action Appellant allegedly took in furtherance of these instructions was to have an informal conversation with a magistrate.

Based upon the above findings, the undersigned Commissioners hereby DENY appellant's appeal. His 10-day suspension shall remain in place.

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Signatures appear on the following page.

Judgment rendered this 18th day of January, 2017

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



JOSEPH S. CLARK, COMMISSIONER

1-18-2017

DATE

CONCUR



RONALD P. McCLAIN, VICE-CHAIRPERSON

1/19/17

DATE



MICHELLE D. CRAIG, CHAIRPERSON

1/18/2017

DATE