



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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MAYOR

Tuesday, June 27, 2017

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Daniel Plustache VS.
Department of Police
Docket Number: 8534**

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 - 6/27/2017 - 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
Jim Mullaly
Daniel Plustache

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

DANIEL PLUSTACHE vs. DEPARTMENT OF POLICE	DOCKET No.: 8534
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I. INTRODUCTION

Appellant, Daniel Plustache, 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 August 18, 2016, a hearing examiner appointed by the Commission presided over an appeal hearing for the above-captioned matter. 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 a letter of reprimand 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 Chapter 41.3.10, Paragraph 9 pertaining to the activation of an Officer’s Body-Worn Camera (“BWC”). *Id.* NOPD’s BWC Policy requires an Officer to activate his/her BWC during all “calls for service” and all “arrests and transfers.” *Id.* According to NOPD, Appellant allegedly violated the BWC Policy when he failed to activate his BWC during a prisoner transport on August 20, 2015. *Id.*

B. Appellant’s Background and Training

At the time of the alleged misconduct, Appellant was a sixteen-year veteran of NOPD assigned to the Fourth District’s second watch. (Tr. at 36:16-22). Appellant had only been assigned a BWC for about three or four months prior to August 20, 2015. *Id.* at 37:4-10. Despite being relatively new to the operation of a BWC, Appellant testified that he was generally familiar

with NOPD's policies regarding when an officer needed to activate his/her BWC. *See id.* at 38:16:-39:12. Appellant acknowledged that one of the circumstances under which the policy required an officer to activate his/her BWC was when that officer transports prisoners. *Id.* at 39:22-25.

C. August 20, 2015

On August 20, 2015, Appellant began his shift on or about 2:30 p.m. (NOPD Exh. 2). Between 2:30 p.m. and 5:00 p.m. Appellant responded to several calls for service, and during these calls, he properly activated his BWC and captured footage. (NOPD Exh. 2; tr. at 12:9-16). At 5:15 p.m. Appellant transported two prisoners from one location to another. (NOPD Exh. 2). Appellant did not activate his BWC on jail property because he understood NOPD Policy prohibited such recordings. However, once Appellant was in his vehicle, he believed that he had activated his BWC by pressing a button on the device. (Tr. at 40:1-12). Appellant also activated his vehicle's internal video system known as the "MVU." *Id.* at 22:1-3, 30:4-9.

Each officer prepares a daily log known as a "trip sheet" in order to create a record of that officer's activities on any given day. (40:16-23). And, these trip sheets contain a column in which an officer must indicate whether or not he/she activated a BWC during the activity/incident. For the prisoner transport on August 20, 2015, Appellant indicated that he had activated his BWC. (NOPD Exh. 2). He made the same notation for five other incidents. *Id.*

During a review of Appellant's BWC footage for August 20, 2015, his supervisor, Sergeant Sean Summers, noted that there was no footage for the prisoner transport. (Tr. at 9:7-22). As a result of this finding, NOPD initiated a disciplinary investigation and eventually found that Appellant had violated NOPD's BWC Policy when he failed to activate his BWC during the August 20th prisoner transport. Neither the NOPD Sergeant investigating the allegations against

Appellant, nor Commander Gary Marchese, who presided over the disciplinary hearing, received any training regarding the investigation into possible BWC malfunctions. *Id.* at 16:24-17:13.

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 requires an officer to activate his/her BWC during prisoner transports. And, there is no dispute that Appellant was engaged in a prisoner transport on August 20, 2015. Appellant claims that he did attempt to activate his BWC, but that it malfunctioned and failed to

record any footage of the transport. NOPD did not find Appellant's excuse plausible and issued a letter of reprimand for violating the BWC Policy. NOPD did not find Appellant's reason for a lack of footage convincing because Appellant had successfully recorded of five other calls for service on August 20, 2015. This, argued NOPD, was proof that Appellant's BWC was working properly.

The Commission does not find this evidence necessarily establishes that Appellant failed to activate his BWC. In fact, the successful recording of other incidents shows that Appellant was conscious of his responsibilities under the BWC policy. Furthermore, Appellant took affirmative steps to activate his vehicle's video recording system during the prisoner transport. This lends credibility to Appellant's version of events.

Based upon the testimony of Sgt. Glaudi and Cmdr. Marchese, NOPD's investigation into Appellant's misconduct consisted of: 1) a brief attempt to review the non-existent BWC footage of the August 20th prisoner transport; 2) and a review of Appellant's trip sheet. When Appellant raised the possibility of a device malfunction, NOPD chalked it up as a flimsy excuse and proceeded to substantiate the allegations. Given Appellant's successful recording of earlier events, activation of the MVU, and representations on the trip sheet, NOPD's investigation may have benefited from some additional follow-up analysis.

As a result of the foregoing, the Commission finds that NOPD has failed to meet its burden in establishing that Appellant engaged in the alleged misconduct.

B. Impact on NOPD's Efficient Operations

A finding that an appointing authority failed to meet its initial burden typically ends the Commission's analysis. However, the undersigned Commissioners briefly address the second part of the sufficient cause analysis in recognition that NOPD's BWC Policy is an important initiative.

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. The Commission finds that Appellant attempted to comply with NOPD's BWC Policy, but was unable to do so as a result of a device malfunction.

While Appellant ultimately failed to record any BWC footage of the prisoner transport, he did personally take additional steps to record the prisoner transport. Therefore, there was little, if any, actual impact on the efficient operations of NOPD.

Based upon the foregoing, the Commission finds that Appellant's failure to successfully record BWC footage of the August 20th prisoner transport did not have an impact on NOPD's efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense

Given that the undersigned Commissioners have found that NOPD has failed to meet its burden of proof with respect to the first two parts of our analysis, we will not address the final part.

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V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the Appellant's appeal. NOPD is hereby ordered to rescind the letter of reprimand issued to Appellant at issue in the underlying appeal.

Judgment rendered this 26th day of June, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



JOSEPH S. CLARK, COMMISSIONER

6/26/17

DATE



RONALD P. McCLAIN, VICE-CHAIRMAN

5/26/17

DATE



MICHELLE D. CRAIG, COMMISSIONER

5/25/2017

DATE