



CITY OF NEW ORLEANS

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Tuesday, March 20, 2018

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

Re: **Christopher Jennings VS.
Department of Police
Docket Number: 8523**

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 - 3/20/2018 - 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
Elizabeth S. Robins
Jim Mullaly
Christopher Jennings

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

CHRISTOPHER JENNINGS vs. DEPARTMENT OF POLICE	DOCKET No.: 8523
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I. INTRODUCTION

Appellant, Christopher Jennings, 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. Similarly, Appellant did not allege that NOPD’s investigation violated the procedural standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission’s analysis will address only 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.

A referee appointed by the Commission presided over four days of hearing and prepared a report regarding factual findings and recommended disposition. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the referee’s report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD alleged that Appellant violated the following rules promulgated by NOPD:

- Rule 4: Performance of Duty, Paragraph 2: Instructions from an Authoritative Source,¹ to wit, Policy 300: Use of Force, Paragraph 300.3: Duty to Intercede and Report; and
- Rule 2: Moral Conduct; Paragraph 3, Truthfulness;

(H.E. Exh. 1).

NOPD's Use of Force policy requires:

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use any use of force incident (*sic*) shall promptly report these observations to a supervisor, and officers observing a level 2, 3 or 4 use of force shall write a Force Statement before the end of shift, which shall be included in the Use of Force Report.

Id. Appellant allegedly violated this rule when he failed to report another officer's use of force on a handcuffed civilian on the night of September 30, 2015. *Id.*

The rule regarding truthfulness requires officers to be "honest and truthful at all times in their spoken, written, or electronic communication." (H.E. Exh. 1). An officer violates this rule when he "makes a materially false statement with the intent to deceive." *Id.* The policy further defines a "material" statement as one that could have an impact on the "course or outcome of an investigation...." *Id.* Appellant allegedly violated this rule when he witnessed a fellow officer strike a handcuffed prisoner twice in the head and reported instead that he observed the fellow officer restraining the prisoner. NOPD terminated Appellant's employment due to his alleged violation of this rule.

¹ The Commission accepts NOPD's practice of identifying its rules, policies and procedures as "authoritative sources." NOPD requires its employees to "professionally, promptly, and fully abide by or execute instructions issued from any authoritative source...."

B. September 30, 2015

On September 30, 2015, Appellant reported to his assignment at 8:00 a.m. and worked until his shift ended at 4:35 p.m. (Tr. v. 4 at 5:6-7). After a brief respite at home, Appellant began working a paid security detail in the French Quarter with fellow NOPD Officer Kelli Dunnaway. (Tr. v. 4 at 4:20-25). The detail assignment began at 7:30 p.m. and was scheduled to end at midnight. Around 9:00 p.m., an employee of a local bar flagged down the two officers and informed them that an exceedingly drunk individual was causing a disturbance, harassing patrons and refusing repeated requests to leave. *Id.* at 6:18-24. Officers Dunnaway and Jennings were able to locate the drunk individual – later identified as Vincent Knapp – and asked him to leave the bar. *Id.* at 6:25-7:6. Mr. Knapp initially complied with the request, but then immediately entered an adjacent bar and continued his obnoxious behavior. At that point, Appellant and Dunnaway placed Mr. Knapp under arrest for public intoxication, handcuffed him and brought him to the 8th District Police Station on Royal Street. *Id.* at 7:7-12.

Once Mr. Knapp was secured in the 8th District Station, Appellant and Officer Dunnaway requested that Mr. Knapp be transported to central lock-up. It took approximately thirty to forty minutes for the Officer responsible for transporting Mr. Knapp, Alfred Moran, to report to the 8th District Station due to a shift change. *Id.* at 7:19-8:5. During that time, Appellant and Officer Dunnaway chatted between themselves and with other Officers in the station.

When Officer Moran arrived at the station at approximately 11:30 p.m., Appellant provided him with relevant paperwork regarding Mr. Knapp's arrest and transportation. Appellant then continued his conversation with Officer Dunnaway. *Id.* at 8:18-22. Appellant denied that he witnessed anything "unusual" transpire between Officer Moran and Mr. Knapp on the night of the 30th. *Id.* at 9:10-12. Appellant acknowledged that he observed Officer Moran restraining Mr.

Knapp but did not intervene until Officer Moran began “changing out” the handcuffs securing Mr. Knapp. *Id.* at 11:8-25.

According to Appellant, it was only until he was contacted by investigators with NOPD’s Public Integrity Bureau (“PIB”) that he learned Officer Moran had struck Mr. Knapp. *Id.* at 9:16-21. Sergeant John Helou, an investigator with PIB, directed Appellant to prepare a use of force statement as part of NOPD’s investigation into the use of force perpetrated by Officer Moran. In his use of force statement, Appellant wrote the following:

On Wednesday, September 30, 2015 at or about 9:30 p.m. I had the occasion of arresting, along with Kelli Dunnaway, Vincent Knapp for public intoxication. After relocating him to the 8th district station we requested a prisoner transport. At or about 11:15 p.m. Officer Alfred Moran arrived to transport Mr. Knapp. As this was occurring I was engaged in conversation with Officer Dunnaway as she was seated at an 8th District station computer and I was facing [the] island in the middle of the station. While speaking with Officer Dunnaway I heard a commotion and turned to view Officer Moran restraining Mr. Knapp. I rendered assistance to Officer Moran in swapping out the handcuffs belonging to Officer Dunnaway, and then helped him along with Officer Dunnaway escort Mr. Knapp to Officer Moran’s unit for transport.

(NOPD Exh. 5).

In addition to his use of force statement, Appellant also provided NOPD investigators with two statements regarding his observations on the night of September 30th. (NOPD Exhs. 7, 13). During his interview, Appellant stated that he was engaged in a conversation with Officer Dunnaway when he heard a commotion emanating from the prisoner bench. *Id.* Upon hearing the commotion – which Appellant described as a “thump” or “thumping sound” – Appellant looked towards the prisoner bench and observed Officer Moran restraining Mr. Knapp. The restraint itself involved Officer Moran “holding [Mr. Knapp] down on the bench” by the head. (NOPD Exh. 13). Despite repeated questioning from NOPD investigators and the Deputy City Attorney, Appellant

maintained that he was not looking at Officer Moran and Mr. Knapp at the moment Officer Moran struck Mr. Knapp. (NOPD Exhs. 7, 13; Tr. v. 4 at 23:16-19).

Appellant emphatically denied witnessing Officer Moran strike Mr. Knapp and explained that, at the time of the incident, he had been working for approximately twelve hours and was more focused on his conversation with Officer Dunnaway – and the welcomed end to his shift – than with Officer Moran and Mr. Knapp. *Id.* at 10:5-13. Appellant denied hearing Mr. Knapp make an allegation that Officer Moran had hit him. While he described Officer Moran’s restraint as “reasonable,” Appellant acknowledged that he should have notified a supervisor pursuant to NOPD Policy. (NOPD Exh. 13 at p. 16). Especially since Officer Moran perpetrated the use of force on a handcuffed subject.

B. Video Evidence

Officer Lewis Simmons was working in the 8th District on the night of September 30, 2015 and had arrested an individual who had refused to sign a criminal summons related to a charge of obstructing a public walkway. (NOPD Exh. 11). Officer Simmons had activated his Body-Worn Camera (“BWC”) during the course of the arrest and escorted the arrested subject to the 8th District Station where he secured the subject to the same bench as Mr. Knapp. Then, Officer Simmons detached his BWC and placed it on the island directly across from the bench and about six to eight feet away from Mr. Knapp.² The BWC captured both audio and video data related to Officer Moran’s initial interaction with Mr. Knapp. The video clearly shows Officer Moran strike Mr. Knapp twice in the head with the second strike resulting in an audible “thump” that the Commission reasonably concludes was Mr. Knapp’s head striking the bench. *Id.* at min. 20:37-38. Appellant testified that the “thump” that resulted from Officer Moran’s second blow to Mr.

² The Parties acknowledged that the BWC angle to the prisoner bench was approximately perpendicular to the angle Appellant had. (Tr. v. 1 at 127:5-128:3).

Knapp prompted him to focus on Mr. Knapp and Officer Moran. (Tr. v. 4 at 23:16-19). After the “thump,” there are no additional strikes from Officer Moran.

NOPD also introduced video footage captured by surveillance cameras positioned throughout the 8th District Station. One of those cameras (#5) was trained on the prisoner bench upon which Mr. Knapp was seated/passed out. (NOPD Exh. 12).³ Appellant is visible in the lower, left-hand portion of the footage and is wearing a baseball cap. *Id.* On cross-examination, Appellant viewed the footage from camera #5 and acknowledged that it appeared that he was facing in the general direction of the prisoner bench and the adjacent “island” during the initial interaction between Officer Moran and Mr. Knapp. (Tr. v. 4 at 27:10-22). The undersigned Commissioners viewed the video footage from camera #5 as well and confirmed that, from the direction of the brim of Appellant’s baseball cap, it appeared as if he was facing the prisoner bench during the time Officer Moran twice struck Mr. Knapp. (NOPD Exh. 12 at min. 11:42:00-25). The quality of the video, however, is poor and not dispositive as to where Appellant’s attention and/or eyes were focused during this time.

The surveillance footage shows that Appellant did not have an apparent reaction to any of the conduct occurring on the prisoner bench. Sergeant Samuel Dupree, who was the ranking officer on duty in the 8th District Station, confirmed that he did not observe any other Officers reacting in a way that suggested they were surprised by any recent occurrence. This, in and of itself, is unusual given that, in the span of a few seconds, a highly intoxicated prisoner had clearly kicked a fellow officer and the officer in turn struck the subject twice in the head. (NOPD Exhs.

³ The angle of surveillance camera #5 to the prisoner bench was very different than Appellant’s. As a preliminary matter, camera #5 was positioned far above the main floor of the 8th District Station and was pointed down towards the bench. Additionally, the angle of the camera is more directly trained on the bench when compared with the Angle Appellant had. Sgt. Helou agreed that the cameras’ perspective was “entirely different” than Appellant’s. (Tr. v. 4 at 41:24-42:11).

11, 12). The Commission, and several witnesses, expected an Officer witnessing such an exchange would have a noticeable reaction to such an event. Yet, it took Appellant twenty-seven (27) seconds to react to anything that was occurring on the prisoner bench. (Tr. v. 1 at 124:25-125:6).

Sergeant John Helou, a member of NOPD's FIT, investigated the allegations of misconduct against Appellant. And as part of his investigation, he viewed the video evidence and compared it to Appellant's statement. Sgt. Helou believed that the video footage contradicted several elements of Appellant's statements and believed that Appellant had been purposefully deceptive. First and foremost, Sgt. Helou believed that the video evidence showed Appellant facing the island and prisoner bench during the time Officer Moran struck Mr. Knapp. This led Sgt. Helou to speculate that Appellant was focused on Mr. Knapp and Officer Moran and witnessed Officer Moran strike Mr. Knapp. Sgt. Helou also believed that the video evidence did not show Officer Moran holding Mr. Knapp down or otherwise restraining him. (Tr. v. 1 at 102:17-22).

As noted above, the video evidence is not conclusive. Immediately after the "thump" which supposedly caused Appellant to focus on Mr. Knapp and Officer Moran, it is not clear what Officer Moran is doing with his hands. (NOPD Exh. 11 at min. 20:39-42; NOPD Exh. 12 at min. 11:42:00-04). Furthermore, Officer Simmons walks between the bench and both cameras, obscuring part of the interaction between Officer Moran and Mr. Knapp. If the Commission cannot determine exactly what Officer Moran was doing with his hands after multiple viewings of the videos it is possible that Appellant had similar difficulty during a few seconds of partially obstructed observation. Based upon the evidence, the Commission does not agree with Sgt. Helou that the video evidence contradicts Appellant's claim that he observed Officer Moran restrain Mr. Knapp against the prisoner bench by his head.

Finally, the Commission points to a telling exchange that occurred during Sgt. Helou's cross-examination:

-Question: Is there anything in [NOPD Exh. 12] that directly contradicts Officer Jennings' statement that he was looking at the island?

-Answer: Well, I mean I can't tell if he is looking at the island or not.

(Tr. v. 1 at 124:15-20). The Commission recognizes Sgt. Helou as a dedicated and principled NOPD Officer. He had testified at several appeal hearings and has been a credible source of information in each one. Here, he acknowledged that it is difficult to determine where Appellant's attention was focused during the course of the video. The Commission appreciates Sgt. Helou's candor and agrees with his observations.

Sgt. Helou, who viewed both the BWC footage and surveillance footage more than a dozen times initially testified that Mr. Knapp accused Officer Moran of hitting him by "screaming," "you hit me." (Tr. v. 3 at 39:3-7). But, when the video was played again, Sgt. Helou acknowledged that Mr. Knapp instead said, "just fucking hit me" which would not alert anyone in the vicinity that Mr. Knapp accused anyone of hitting him. *Id.* at 41:18-42:4. The Commission points out this testimony, not to call into question Sgt. Helou's truthfulness – he has shown himself to be a professional and credible witness in numerous appeal hearings – but to emphasize issues with memory and perception. Sgt. Helou repeated this mistake in his report where he wrote that Appellant "denied hearing Mr. Knapp stating Officer Moran hit him, despite the fact the video footage [NOPD Exhs. 11, 13] showed [Appellant] stood next to Mr. Knapp as [Mr. Knapp] made this statement." (NOPD Exh. 9 at p. 48). This is no small matter. It appears to the Commission that at least a portion of NOPD's findings are based upon a statement Appellant provided that was both accurate and truthful. The Commission also observes that Appellant did not have the advantage of combing through video and audio files prior to submitting his statement.

Sgt. Helou testified that he interpreted the laughter exchanged between Appellant and Officer Dunnaway to be evidence that they had witnessed Officer Moran's use of force. There was never any explanation of how Sgt. Helou reached this conclusion and the Commission finds that the fact that Officer Dunnaway and Appellant are laughing is apropos of nothing. In fact, there was direct evidence – in the form of Officer Dunnaway's testimony during which she explicitly denied laughing about witnessing Mr. Knapp being struck – that contradicted Sgt. Helou's speculation. (Tr. v. 3 at 135:18-137:1). NOPD did not introduce any evidence that impeached Officer Dunnaway's testimony on this point.

Deputy Superintendent Paul Noel conducted the pre-disciplinary hearing regarding the allegations against Appellant. In preparation for the hearing, Deputy Superintendent Noel watched all available video evidence. And based on the videos, Deputy Superintendent Noel believed that Appellant's body language changed once Officer Moran began to interact with Mr. Knapp, which suggested to him that Appellant was focused on the interaction. (Tr. v. 2 at 49:9-50:18). Put simply, the Deputy Superintendent believed that Appellant was acting one way before Officer Moran engaged with Mr. Knapp, and a very different way once the interaction began. Deputy Superintendent Noel interpreted the fact that Appellant's head did not move during Officer Moran's strikes to Mr. Knapp as an indication that Appellant was watching the strikes occur. Further, Deputy Superintendent Noel stated that Appellant's hands are in a "ready" position and that he flinched at one point. This suggested to Deputy Superintendent Noel that Appellant was reacting to the strikes. In all, the change in body language was "dramatic" according to Deputy Superintendent Noel. *Id.* at 58:3-4.

On cross-examination, Deputy Superintendent Noel acknowledged that the video footage does not show Appellant's eyes. Moreover, the angle of the video footage prevents the viewer

from determining if Appellant's eyes were even open at the time Officer Moran struck Mr. Knapp. (Tr. v. 2 at 83:19-84:1). The Deputy Superintendent also agreed that, it was only after watching all of the video footage numerous times that he was able to "fully grasp what had happened" and "link everything together" from various perspectives. *Id.* at 76:16-77:6.

C. Character Evidence

Appellant called two witnesses who provided what the Commission characterizes as "character evidence." In a typical appeal hearing, such evidence has little, if any, probative value. In the instant appeal, however, the Commission attaches more weight to character evidence because the underlying misconduct depends, in part, on the Appellant's state of mind. Appellant had to have the intent to deceive NOPD investigators regarding what he saw on September 30th. Therefore, Appellant is free to call witnesses to testify as to their experiences with Appellant's credibility and general trustworthiness. If NOPD had been able to find any evidence to suggested that Appellant had been untruthful in the past, the Commission would have attached similar weight to such evidence.

Additionally, NOPD's case is based almost entirely on circumstantial evidence, which requires the Commission make reasonable inferences. Past conduct aids the Commission in making such inferences.

Commander Jeffery Walls testified as part of Appellant's case-in-chief and worked with Appellant in various capacities during the latter part of his career with NOPD. Cmdr. Walls testified that, based upon his six-years-worth of experience working with Appellant, he found Appellant to be an "honest, trustworthy and loyal" member of NOPD. (Tr. v. 3 at 151:3-9).

Robert Sims, is a co-founder of the French Quarter Task Force, the organization that arranged for the paid detail Appellant worked on September 30, 2015. Mr. Sims testified that he

had worked with Appellant numerous times and found him to be an active and conscientious member of the task force. When Mr. Sims became aware of the allegations against Appellant, he decided to testify on Appellant's behalf because the alleged misconduct was inconsistent with his experience with Appellant. *Id.* at 162:16-22.

Finally, the Commission notes that, over the course of his seven-year career with NOPD, Appellant did not have any discipline in his record and NOPD had never substantiated an allegation of misconduct against him.

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

1. Failure to Report Use of Force

With each statement Appellant submitted to NOPD investigators regarding the interaction between Officer Moran and Mr. Knapp, he admitted to witnessing a reportable use of force. In fact, Appellant admitted that the use of force he observed was a “category 4” use of force because it was perpetrated against a handcuffed subject. Bearing this in mind, there is no dispute that Appellant failed to properly report Officer Moran’s use of force and violated NOPD Policy 300.

2. Truthfulness

In order to violate this rule, an officer must “knowingly” provide a false statement “with the intent to deceive.” NOPD’s case against Appellant rests upon its assertion that Appellant observed Officer Moran strike Mr. Knapp and purposefully omitted this observation from the statements he provided to NOPD investigators. Instead, Appellant indicated that he witnessed Officer Moran restrain Mr. Knapp, by the head, against the prisoner bench in the 8th District Station.

Sgt. Helou testified that Appellant was not allowed to view any video evidence prior to providing his use of force statement, criminal statement or administrative statement. (Tr. v. 3 at 14:16-25). This is part of NOPD policy and is evidently intended to encourage Officers to be candid in recounting incidents. When viewed through this prism, Appellant’s statement that his attention was drawn to the bench by an audible “thump” carries more credibility. In the video, there is a “thump” when Officer Moran strikes Mr. Knapp a second time. Immediately after the thump, Officer Moran is hovering over Mr. Knapp with his hands on Mr. Knapp’s person. According to Appellant, he viewed Officer Moran’s actions as restraining Mr. Knapp by Mr. Knapp’s head. Even after repeated viewings of the video, the Commission is unable to determine

what Officer Moran is doing with his hands after striking Mr. Knapp a second time and does not believe that the evidence is sufficient to establish that Appellant, who had a split second to observe Officer Moran's action, was purposefully deceptive in his description of events. Sgt. Helou and Deputy Superintendent Nolan, both dedicated members of NOPD, reached specific conclusions regarding what the videos showed, but only reached such conclusions after viewing the videos "dozens" of times. Appellant did not have the luxury of viewing the video at all prior to making his statements.

Deputy Superintendent Noel focused on Appellant's body language as depicted in video footage from the 8th District Station surveillance cameras. He believed that Appellant's lack of movement suggested that he was focused upon the interaction between Officer Moran and Mr. Knapp. The Commission does not doubt Deputy Superintendent Noel's conviction on this point, but finds that his conclusions are speculative. An opposite conclusion, that Appellant's apparent lack of any observable reaction is evidence that he was not focused on the interaction, is an equally, if not more, plausible assumption. In fact, more than one witness testified that, if an Officer observed an arrested subject kick a fellow Officer, they would expect the observing Officer to immediately react. (Dupre at Tr. v. 3 at 114:5-12).

Additionally, we do not agree with Deputy Superintendent Noel that Appellant's body language changes "dramatically" during the course of the incident between Officer Moran and Mr. Knapp. As evidence of the different inferences possible after viewing the video evidence, the Commission notes the testimony of Lieutenant Ken Burns, who conducted the criminal investigation into Officer Moran's actions. On cross-examination, Lt. Burns stated that he did **not** observe a reaction from Appellant when Officer Moran struck Mr. Knapp. (Tr. v. 2 at 136:12-22). Lt. Burns's theory was that Appellant did not react because he was already looking at and

observing Officer Moran strike Mr. Knapp. Cmdr. Walls testified that he viewed the video and did not observe Appellant “react to anything.” Based upon Cmdr. Walls’s history with Appellant, he believed that the lack of a reaction on Appellant’s part was due to Appellant not observing Officer Moran strike Mr. Knapp. Each account is different and each makes a different, reasonable inference.

The barely perceptible flinch Appellant makes during the course of the interaction between Officer Moran and Mr. Knapp is not conducive to the reaction of a seasoned Officer who just witnessed a fellow officer being kicked by a drunk, belligerent subject. The Commission recognizes that this is circumstantial evidence, but NOPD’s case against Appellant is based entirely upon circumstantial evidence.⁴ Thus, all reasonable inferences deserve equal consideration. Sergeant Sam Dupre, who testified during Appellant’s case-in-chief, stated that, based upon his nineteen years of experience in NOPD, he would have expected Officers to have a visceral reaction to another Officer striking a handcuffed subject in the face. (Tr. v. 3 at 114:5-12). This too is speculation, but a reasonable one based upon the experience of the witness.

The Commission also struggled to determine Appellant’s motive to lie about witnessing Officer Moran strike Mr. Knapp in the head. Appellant’s admission that he observed and failed to report Officer Moran restraining Mr. Knapp, “by the head,” already constituted a serious violation of NOPD’s Use of Force Policy. (See NOPD Exh. 4). In fact, per the Use of Force Policy,

⁴ The Louisiana Supreme Court has defined, “circumstantial evidence” as “evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred.” *Rando v. Anco Insulations Inc.*, 2008-1163 (La. 5/22/09, 33), 16 So.3d 1065, 1090. Here, Appellant denied witnessing Officer Moran strike Mr. Knapp but NOPD’s investigators inferred that he was lying based upon video evidence. While not binding precedent in Civil Service appeals, the court in *Rando* went on to state that, “[i]f circumstantial evidence is relied upon, that evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty.” *Id.* Finally, the Commission cites to the *Rando* decision because the standard of proof in that matter was a “preponderance of the evidence” just as it is here.

Appellant had arguably admitted to witnessing a Level 4 “Serious Use of Force.”⁵ Appellant himself told investigators that Officer Moran’s restraint of Mr. Knapp constituted a “reportable use of force” and acknowledged that he should have reported it. (Tr. v. 1 at 89:16-90:17). He further acknowledged that any use of force against a handcuffed prisoner is prohibited by NOPD Policy.

Clearly then, Appellant was not trying to deceive investigators to avoid discipline. The penalty matrix published by NOPD indicates that, even for a first offense, failure to abide by written policy the discipline range includes termination. Yet, Deputy Superintendent Noel confirmed that, since Appellant did not have a true opportunity to intercede and prevent Officer Moran’s use of force, the violation was a category 2 violation as opposed to a category 3 violation. Lt. Burns was also confused as to why Appellant would lie about witnessing the strikes since “it wouldn’t have been that big of a deal for him.” (Tr. v. 2 at 141:10-13). Given Appellant’s previously unblemished record, the Commission finds it unlikely that Appellant made a conscious decision to describe Officer Moran’s use of force as a “head hold” of a handcuffed prisoner rather than two strikes to a handcuffed prisoner’s head in an attempt to lessen the consequences of his failure.

Based upon the record before us, we do not find that NOPD has established that Appellant purposefully mislead investigators.⁶

⁵ Appellant testified that he believed Officer Moran’s actions constituted a “Level 4” use of force. (Tr. v. 1 at 95:23-96:4). All neck holds are included in NOPD’s definition of a “serious use of force.” The Commission does not believe that, when an NOPD Officer Restrains someone by the head, there is a functional difference between that and a neck hold. Further, the fact that Appellant readily admitted that Mr. Knapp was handcuffed at the time of the alleged “head hold,” supports the contention that he had witnessed a serious use of force.

⁶ Because the Commission finds that NOPD failed to establish that Appellant witnessed Officer Moran strike Mr. Knapp, the issue of whether or not Appellant’s omission was “material” is moot. However, the Commission will note that, while the initial investigation pertained to Officer Moran’s misconduct, the question of Appellant’s violation of the Use of Force Policy soon became part of the underlying investigation. Therefore, what he actually witnessed on the night of September 30, 2015 was certainly material to NOPD’s ancillary investigation into Appellant’s misconduct.

B. Adverse Impact on NOPD's Efficient Operations

NOPD has adopted a common sense use of force policy that places the obligation to report on both the Officer using force and any Officer who witnesses a use of force. Through extensive training, NOPD seeks to equip Officers with the tools necessary to make split-second decisions regarding the circumstances under which a use of force is appropriate. The hope is that all Officers will make the decision in a "professional, impartial and reasonable manner." The Use of Policy's reporting requirement provides a tool not only to monitor how Officers put into practice the training they receive, but allows NOPD to identify areas of possible deficiency. With such information, NOPD can specifically tailor training using real-world examples. As the policy itself notes, "[v]esting officers with the authority to use reasonable force and to protect the public welfare requires, monitoring, evaluation and a careful balancing of all interests."

There is also a strong element of accountability on the part of individual officers. By requiring those who witness a use of force to report it, NOPD seeks to remove any inclination an officer may have to cover for a fellow officer. By mandating a report regarding any use of force, NOPD's policy removes discretion and relieves an Officer witnessing a use of force from trying to determine if the use of force was reasonable. The process is simple, if you see any use of force, report it to a supervisor.

When Appellant failed to report Officer Moran's use of force against Mr. Knapp, he violated the use of force policy and deprived NOPD of an opportunity to immediately intervene. He also invited NOPD to draw negative inferences from his delay that eventually led to a prolonged disciplinary process and termination.

It also was tangentially relevant to the investigation into Officer Moran's misconduct since part of Officer Moran's defense depended upon specific conduct by Mr. Knapp that no other witness observed.

As a result of the foregoing, the Commission finds that NOPD has established that Appellant's misconduct had a negative impact on its efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense?

In conducting its analysis, the Commission must determine if Appellant's five-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).

NOPD's use of force policy requires an Officer to intervene and report any unreasonable use of force by a fellow officer. Deputy Superintendent Noel acknowledged that Appellant would not have had an opportunity to intervene in Officer Moran's use of force due to how quickly it occurred. As a result, he described Appellant's violation of the use of force policy as a "category two" violation. Such violations warrant a three to ten-day suspension pursuant to NOPD's penalty matrix. The Commission is not bound by the penalty matrix and must conduct its own fact-based inquiry. The matrix, however, does provide notice to NOPD Officers regarding the level of discipline they face for specific violations. Provided that NOPD administers discipline in a manner consistent with the matrix, the Commission views it as strong evidence that the discipline is not arbitrary or capricious.

In the matter now before us, Appellant did not introduce any evidence that suggested the five-day suspension related to his failure to report the force he witnessed Officer Moran use against Mr. Knapp was excessive or otherwise inconsistent with NOPD's disciplinary practices.

Therefore, we find that a five-day suspension was reasonable and commensurate with Appellant's misconduct.

V. CONCLUSION

This was a difficult case. The Parties introduced evidence that supported both sides of the dispute. Ultimately, the Commission finds that the circumstantial evidence introduced by NOPD was not sufficient to meet its burden of proof with respect to the allegation that Appellant lied about witnessing Officer Moran strike Mr. Knapp. As a result of the above findings of fact and law, the Commission hereby GRANTS-IN-PART Appellant's appeal. NOPD shall reinstate Appellant with all back pay and emoluments of employment. However, the Commission finds that NOPD did establish that Appellant failed to report the use of force he did witness Officer Moran use against Mr. Knapp. Appellant's failure constituted a violation of NOPD Policy 300 (Use of Force). Therefore, Appellant's personnel record shall reflect a five-day suspension without pay. NOPD may deduct the five days from any back pay award.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

C. Jennings
No. 8523

Judgment rendered this 20th day of March, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



STEPHEN CAPUTO, COMMISSIONER

3-19-18

DATE

CONCUR



CLIFTON J. MOORE, JR., COMMISSIONER

3-19-18

DATE



MICHELLE D. CRAIG, CHAIRPERSON

3-19-2018

DATE