



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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MAYOR

Monday, September 28, 2020

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Eric Hessler
PANO 2802 Tulane Avenue #102
New Orleans, LA 70119

Re: **Christopher McGaw VS.
Department of Police
Docket Number: 8838**

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 - 9/28/2020 - 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,

Doddie K. Smith
Chief, Management Services Division

cc: Shaun Ferguson
Michael J. Laughlin
Jay Ginsberg
Christopher McGaw

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CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

CHRISTOPHER MCGAW
Appellant,

vs.

DOCKET NO. 8838

DEPARTMENT OF POLICE
Appointing Authority

I. INTRODUCTION

Appellant, Christopher McGaw (hereinafter “Appellant”), brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission's Rule II, §4.1, and asks the Commission to find that the Department of Police (hereinafter “Appointing Authority”) did not have sufficient cause to discipline him. At all times relevant to the instant appeal, Appellant served as a Police Officer for the Appointing Authority and had permanent status as a classified employee.

A Hearing Examiner, appointed by the Commission, presided over a hearing during which both Parties had an opportunity to call witnesses and present evidence. The Hearing Examiner prepared a report and recommendation based upon the testimony and evidence in the record. 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 GRANT the appeal and render the following judgment.

II. FACTUAL BACKGROUND

The Appellant received a ten (10) day suspension for two violations of the Appointing Authority's internal policies. (Exhibit HE-1). The violations included Rule 4, Performance of Duty, Paragraph 2, Instructions from an Authoritative Source/Level C-1 Offense for the Appellant's failure to follow a supervisor's instruction to handcuff an arrested subject (5-day suspension) and Rule 4, Performance of Duty, Neglect of Duty, subparagraph C-6, Failing to Comply with Instructions, Oral or Written, from any Authoritative Source, for his failure to adhere to Chapter 41.3.10(a), Required Activation of the Body Worn Camera (BWC) (5-day suspension). (Exhibit HE-1). The factual bases for the violations are contained in the second paragraph of the January 1, 2018 disciplinary letter, which provides as follows:

An investigation was conducted by Sgt. Samuel Dupre, assigned to the Field Operations Bureau, Eighth District. Sgt. Dupre determined that you failed to do a transport when dispatched. Once on the scene, you failed to follow oral instructions given from a supervising officer and you failed to activate your Body Worn Camera during the call for service...

(Exhibit HE-1).

Certain material facts are not in dispute. On September 12, 2016, the Appellant was dispatched at approximately 10 pm to the 300 block of Bourbon Street for a prisoner transport. (Tr. at 7). The arrest was made by the Eighth District Mounted Division, requesting assistance from an officer on the ground to avoid having to dismount and compromise the control of their animal. (Tr. at 22-23). Sgt. David Laing of the Eighth District's mounted division testified that his division does not search and handcuff because

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they are on horseback, and that they routinely request officers on the ground to search, handcuff, and transport subjects to the station. (Tr. at 22-23).

The Appellant testified that, in response to the dispatch, he parked his police unit nearby and walked to the scene. (Tr. at 9). As a relatively new police officer, he testified that he was unfamiliar with how the mounted division operated. (Tr. at 13). According to the Appellant, he was accustomed to taking custody of the arrested subject after the subject was searched and handcuffed by the officer who made the arrest. (Tr. at 49). In this circumstance, he observed an unhandcuffed subject sitting on the curb between mounted police. (Tr. at 48). Officer McGaw testified that the officers seemed unconcerned, and that the subject was sitting between the officers “apparently minding his own business, not speaking, not moving, not doing anything. (Tr. at 49-50). The arresting officer was Officer Danika Cummings. (Tr. at 21). Officer Cummings did not testify. However, the Appellant acknowledged that Officer Cummings informed him that she had arrested the subject and that the Appellant needed to search, handcuff, and transport the arrested subject. (Tr. at 11).

The Appellant testified that he was reluctant to take any enforcement action until he was informed by Officer Cummings why the Appellant was in custody and subject to search and arrest. (Tr. at 12). According to the Appellant, he kept asking Officer Cummings what the Appellant had done and Officer Cummings would not tell him. (Tr. at 50-51). The Appellant testified that he refused Officer Cummings’ request because he did not want to search anyone until he was satisfied there was probable cause. (Tr. at 50-51).

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Sgt. David Laing testified that he was called to the scene where he observed Appellant walking away from Officer Cummings. (Tr. at 24). While Appellant was retrieving his police unit to transport the subject, Officer Cummings informed Sgt. Laing that Officer McGaw refused to handcuff the suspect (Tr. at 24-25). When Officer McGaw returned, Sgt. Laing intervened and was informed by the Appellant that he did not want to handcuff the subject because he did not want to violate his rights. (Tr. at 25). Sgt. Laing testified that he explained to the Appellant why the subject was arrested. (Tr. at 25). He told the Appellant that it was a “405”, which is the Municipal Code number for public intoxication. (Tr. at 25, 27). The Appellant was unfamiliar with the jargon and did not know what “405” meant. According to Sgt. Laing, he told the Appellant that a “405” was public intoxication. (Tr. at 39-40). Sgt. Laing testified that it was prudent for the Appellant to determine why the subject was arrested before handcuffing, searching, and transporting the subject. (Tr. at 37). At this point, Sgt. Laing stated that he was frustrated and told the Appellant that he no longer needed him. (Tr. at 28). The Appellant left the scene without having any contact with the arrested subject. (Tr. at 56).

The Appellant contends that the Officer Cummings ignored his request for basic information as to why the subject was being arrested. (Tr. at 62). He testified that Sergeant Laing informed him of the reason for the arrest, but cleared him from the scene before he could comply with his directive. (Tr. at 62). He stated that he would have searched, handcuffed, and transported the subject, after Laing told him the basis for the arrest, but was cleared before being given the opportunity to comply. (Tr. at 62-63).

Regarding the activation of a BWC, Chapter 41.3.1 requires activation for “all field contacts involving actual or potential criminal conduct within video or audio range.” Sgt.

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Samuel Dupre conducted the internal investigation and recommended a sustained violation of the BWC policy because the Appellant, by his own admission, never activated his BWC. (Tr. at 16-17). Sgt. Dupre observed no evidence that the Appellant interacted with the arrested subject, and from his review of Officer Cummings BWC, Appellant remained at least ten feet away from the subject during the entire interaction with other police personnel. (Tr. at 18). While Sgt. Dupre sustained the violation, he was never asked, and he never stated, how the Appellant violated the policy or why he should have activated his camera under the factual circumstances presented. (Tr. at 15-18).

The Appellant testified that he did not turn on his BWC because he was cleared from the scene before he began the assigned task of transporting the prisoner. (Tr. at 63). He never had any interaction with the subject, which would have triggered his obligation to activate the BWC. (Tr. at 56, 63).

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, the employee 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

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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

Occurrence of the Complained of Misconduct

1. Instructions from an Authoritative Source – Rule 4, Paragraph 2

Sgt. Laing testified that after Sgt. Laing informed Officer McGaw of the basis for the arrest, Sgt. Laing directed him to leave the scene. (Tr. at 43). Officer McGaw testified that the instruction to leave the scene was in the "next breath" after Sgt. Laing explained that "405" was public intoxication. (Tr. at 53-54). Therefore, Officer McGaw did not have an opportunity to obey Sgt. Laing's order before Sgt. Laing instructed Officer McGaw to leave the scene. Officer McGaw testified that he would have handcuffed the subject after Sgt. Laing told him the basis for the arrest was public intoxication. (Tr. at 55). Because Sgt. Laing testified it was appropriate for Officer McGaw to ask for the basis of the arrest, and Officer McGaw was willing to handcuff and search the subject when he obtained this information, Officer McGaw did not refuse to obey an order. (Tr. at 37-38). Sgt. Laing was frustrated and no longer wanted to wait on McGaw to handcuff and search the subject. Sgt.

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Laing testified he handcuffed the suspect himself and walked the suspect to the 8th District station. (Tr. at 28). Sgt. Laing did not initiate the complaint against Officer McGaw because Sgt. Laing was “done with it at that point.” (Tr. at 44).

2. Body Worn Camera (BWC) Required Activation – Rule 4, Paragraph 4, Chapter 41.3.10

The Appointing Authority has failed to establish that the Appellant should have activated his BWC. The undisputed facts confirm that the Appellant was cleared from the prisoner transport assignment before it ever began. (Tr. at 28). The Appellant had no contact with the arrested subject. (Tr. at 56). Had the Appellant activated his BWC, it would have recorded his interactions with other police personnel, which is not “actual or potential criminal conduct” as defined by Chapter 41.3.10. The internal policy requires reasonable interpretation where the circumstances are not specifically spelled out. In this case, the Appointing Authority’s application of policy is without a rational basis and is therefore arbitrary.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS the Appellant’s appeal. The Appointing Authority is ordered to remove the 10-day suspension from the Appellant’s record, and to return 10 days of back pay with all emoluments of employment.

Judgment rendered this 28th day of September, 2020.

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CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER:


CJMOOREJR (Sep 26, 2020 07:33 CDT)

CLIFTON J. MOORE, JR., VICE-CHAIRPERSON

09/26/20

DATE

CONCUR:

I write separately to emphasize that Officer McGaw testified the recruits spent a “majority of [their] time” at the academy learning about constitutional policing. (Tr. at 51). Officer McGaw testified that his superiors’ instructions in this instance “caused [him] enough concern that [he] was not about to put his hands, handcuffs, or search someone without probable cause.” (Tr. at 51). From the record before the Commission, it appears that Officer McGaw acted in accordance with his training on constitutional policing, and it concerns this Commissioner that Officer McGaw suffered discipline. I am concerned about the chilling effect of this discipline on the willingness of other officers to raise questions about constitutional policing.


Brittney Richardson (Sep 28, 2020 11:16 CDT)

BRITTNEY RICHARDSON, COMMISSIONER

09/28/20

DATE

DISSENT IN PART:

After reviewing the entire record in this matter, I agree with the conclusions reached by the Hearing Examiner as set forth in his March 4, 2019 Report. More specifically, the Appointing Authority: 1) established by a preponderance of the evidence that the Appellant improperly failed to comply with Sgt. Liang’s directive to handcuff the arrested suspect and 2) failed to establish by a preponderance of the evidence, given the totality of the

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circumstances, that the Appellant should have activated his BWC.

Thus, I dissent from the majority and agree with the Hearing Examiner relative to the five day suspension for the Appellant's improper failure to comply with the directive to handcuff the arrested suspect. A copy of the Hearing Examiner's report is attached.

Mark C. Surprenant

Mark C. Surprenant (Sep 28, 2020 12:17 EDT)

MARK SURPRENANT, COMMISSIONER

09/28/20

DATE

CHRISTOPHER McGAW

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 8838

REPORT OF THE HEARING EXAMINER

Christopher McGraw ("Appellant") is employed by the Department of Police ("Appointing Authority") as a Police Officer with permanent status. The Appellant received a ten (10) day suspension for two violations of the Appointing Authority's internal policies. The violations included Instructions from an Authoritative Source for the Appellant's failure to follow a supervisor's instruction to handcuff an arrested subject (5-day suspension) and Neglect of Duty, for his failure to adhere to Chapter 41.3.10(a), Required Activation of the Body Worn Camera (BWC) (5-day suspension). The factual basis for the violations is contained in the second paragraph of the January 1, 2018 disciplinary letter, which provides as follows:

An investigation was conducted by Sgt. Samuel Dupre, assigned to the Field Operations Bureau, Eighth District. Sgt. Dupre determined that you failed to do a transport when dispatched. Once on the scene, you failed to follow oral instructions given from a supervising officer and you failed to activate your Body Worn Camera during the call for service...

Certain material facts are not in dispute. On September 12, 2016, the Appellant was dispatched to the 300 block of Bourbon Street at approximately 10 pm for a prisoner transport. The arrest was made by the Eighth District Mounted Division, who requested assistance from an officer on the ground to avoid having to dismount and compromise the control of their animal. Sgt. David Laing of the Eighth District's mounted division testified that his division does not search and handcuff because they are on horseback, and that they routinely request officers on the ground to search, handcuff, and transport the subjects to the station.

The Appellant testified that, in response to the dispatch, he parked his police unit nearby and walked to the scene. As a relatively new police officer, he testified that he was unfamiliar with how the

mounted division operated. According to the Appellant, he was accustomed to taking custody of the arrested subject after the subject was searched and handcuffed by the officer who made the arrest. In this circumstance, he observed an unhandcuffed subject sitting on the curb between mounted police. The arresting officer was Officer Danika Cummings. Officer Cummings did not testify. However, the Appellant acknowledged that Officer Cummings informed him that she had arrested the subject and that the Appellant needed to search, handcuff, and transport the arrested subject.

The Appellant testified that he was reluctant to take any enforcement action until he was informed by Officer Cummings why the Appellant was in custody and subject to search and arrest. According to the Appellant, he kept asking Officer Cummings what the Appellant had done and Officer Cummings would not tell him. The Appellant testified that he refused Officer Cummings' request because he did not want to search anyone until he was satisfied there was probable cause.

Sgt. David Laing testified that he was called to the scene and observed a discussion between the Appellant and Officer Cummings. Sgt. Laing intervened and was informed by the Appellant that he did not want to handcuff the subject because he did not want to violate his rights. Sgt. Laing testified that he explained to the Appellant why the subject was arrested. He told the Appellant that it was a "405", which is the Municipal Code number for public intoxication. The Appellant was unfamiliar with the jargon and did not know what that meant. According to Sgt. Laing, he told the Appellant that a "405" was public intoxication. Sgt. Laing testified that it was prudent for the Appellant to ask and find out why the Appellant was arrested before transporting him, but, after he told him, the Appellant still did not comply with his instruction. At this point, Sgt. Laing stated that he was frustrated and told the Appellant that he no longer needed him. The Appellant left the scene without ever having any contact with the arrested subject.

The Appellant contends that the Officer Cummings ignored his request for basic information as to why the subject was being arrested. He testified that Sergeant Laing informed him of the reason for the arrest, but cleared him from the scene before he could comply with his directive. He stated that he would have searched, handcuffed, and transported the subject, but was cleared before he had the opportunity to comply.

Regarding the activation of the BWC, Chapter 41.3.1 requires activation of the BWC for "all field contacts involving actual or potential criminal conduct within video or audio range." Sgt. Samuel Dupre conducted the internal investigation and recommended a sustained violation of the BWC policy because the Appellant, by his own admission, never activated his BWC. Sgt. Dupre observed no evidence that the Appellant interacted with the arrested subject and remained at least ten feet away from him during the entire interaction with other police personnel. While Sgt. Dupre sustained the violation, he was never asked, and he never stated, how the Appellant violated the policy or why he should have activated his camera under the factual circumstances presented.

The Appellant testified that he did not turn on his BWC because he was cleared from the scene before he began the assigned task of transporting the prisoner. He never had any interaction with the subject, which would have triggered his obligation to activate the BWC.

CONCLUSION

The Appointing Authority has established by a preponderance of evidence that the Appellant failed to comply with Sgt. Laing's directive to handcuff the arrested subject. The Appellant's testimony that he would have complied if given more time does not excuse his noncompliance. From Sgt. Laing's reasonable perspective, he answered the Appellant's questions regarding the arrest, but the Appellant still failed to take timely action after receiving the answers that he desired.

However, the Appointing Authority has failed to establish that the Appellant should have activated the BWC. The undisputed facts confirm that the Appellant was cleared from the prisoner transport assignment before it ever began. The Appellant had no contact with the arrested subject. Had the Appellant activated his BWC, it would have recorded his interactions with other police personnel, which is not "actual or potential criminal conduct". Internal policy requires reasonable interpretation where the circumstances are not specifically spelled out. In this case, a mechanical application of policy without any rationale is arbitrary. There was no reason for the Appellant to turn on his BWC to record him walking from his vehicle to Bourbon Street. There was no reason for the Appellant to turn on his BWC to record his conversations with other police personnel.

Considering the foregoing, the Appellant's appeal should be **GRANTED** in part and **DENIED** in part. The Appointing Authority should be ordered to return five days of back pay to the Appellant.

March 4, 2019

DATE

Jay Ginsberg

HEARING EXAMINER