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
STEPHEN CAPUTO

LISA M. HUDSON
DIRECTOR OF PERSONNEL

MITCHELL J. LANDRIEU
MAYOR

Tuesday, April 11, 2017

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

Re: **Tracy Fulton VS.**
Department of Police
Docket Number: 8230

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 - 4/11/2017 - 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,

Doddie K. Smith
Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Tracy Fulton

file

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
STEPHEN CAPUTO

LISA M. HUDSON
DIRECTOR OF PERSONNEL

MITCHELL J. LANDRIEU
MAYOR

Tuesday, April 11, 2017

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

Re: **Tracy Fulton VS.**
Department of Police
Docket Number: 8402

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 - 4/11/2017 - 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,

Doddie K. Smith

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Tracy Fulton

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

TRACY FULTON vs. DEPARTMENT OF POLICE	DOCKET Nos.: 8230 & 8402

I. INTRODUCTION

Appellant, Tracy Fulton, 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 did not raise a procedural challenge to his discipline based upon our Rules or 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.

A hearing examiner appointed by the Commission presided over the appeal hearing which spanned three days: Tuesday, August 25, 2015; Tuesday, May 10, 2016; and Tuesday, May 24, 2016. The undersigned Commissioners have reviewed the transcripts and exhibits from this hearing as well as the hearing examiner's report.[1] Based upon our review, we render the following judgment.

---

[1] The Commission points out that the hearing examiner who presided over the hearing, Victor Papi, did not prepare the report in this matter. Due to contractual restrictions, the Commission assigned the drafting of the report to another hearing examiner, Brendan Greene.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

On or about September 12, 2013, NOPD issued Appellant an "emergency suspension" based upon an allegation that Appellant had committed a second degree battery while off-duty. (H.E. Exh. 1). Specifically, NOPD alleged that Appellant, was involved in a "traffic crash" on September 4, 2013 and subsequently engaged in a physical confrontation with the operator of the other vehicle involved in the crash. *Id.* NOPD alleged that Appellant's actions on September 4th violated NOPD Rule 2: Moral Conduct; Paragraph 1, Adherence to Law, to wit: Revised Statute 14:34.1, Relative to Second Degree Battery; and Rule 3: Professional Conduct; Paragraph 1, Professionalism.[2]

NOPD Rule 2: Moral Conduct; Paragraph 1, Adherence to Law reads as follows:

> Employees shall act in accordance with the constitutions, statutes, ordinances, administrative regulations, and the official interpretations thereof, of the United States, the State of Louisiana, and the City of New Orleans, but when in another jurisdiction shall obey the applicable laws. Neither ignorance of the law, its interpretations, nor failure to be physically arrested and charged, shall be regarded as a valid defense against the requirements of this rule.

(H.E. Exh. 2).

State law defines "second degree battery" as "a battery when the offender intentionally inflicts serious bodily injury…." La. Rev. Stat. Ann. § 14:34.1. The statute goes on to define, "serious bodily injury" as any "bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death." *Id.*

NOPD Rule 3: Professional Conduct; Paragraph 1, Professionalism is reproduced below:

[2] Prior to the start of the hearing, the Parties stipulated that, on September 18, 2014, a jury rendered a verdict of "not guilty" with respect to a criminal charge of second degree battery against Appellant stemming from the September 4th incident. (Tr. v.1 at 7:25-8:8).

> Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or otherwise act in a manner which brings discredit to the employee or the Police Department.

(H.E. Exh. 2).

On or about April 17, 2015, NOPD terminated Appellant's employment following the completion of an investigation into the September 4, 2013 incident. (H.E. Exh. 2). NOPD cited the same two NOPD Rule violations in its termination letter to Appellant as it did in the notice of emergency suspension. (H.E. Exhs. 1, 2).

B. September 4, 2013

i. Initial Contact

Appellant was a twenty-year veteran of NOPD and assigned to the Fourth District at all times relevant to the underlying appeal. (Tr. v. 3 at 91:1-9). At approximately 12:30 p.m. on September 4, 2013, Appellant had just finished working out at a local gym and was on his way to pick up his nephew and bring him to friend's house. *Id.* at 92:7-10. At the intersection of Earhart Boulevard and Monroe Street, Appellant came to a stop at a red light approximately four or five car lengths from the intersection. *Id.* at 92:18-19. Immediately to Appellant's left, a designated turning lane began for vehicles making a left onto Monroe St. from Earhart Blvd. After a few moments, Appellant heard what he described as a "big boom" and felt his car shake. *Id.* at 92:19-21.

Appellant immediately exited his vehicle – in the middle of Earhart Blvd. – in order to determine if his car had been struck by another vehicle. When he inspected his vehicle, Appellant observed gray paint scraped across the driver-side rear portion of his car. At this point, Appellant looked down Earhart Blvd. and saw a gray vehicle he believed was responsible for the damage to

his car. *Id.* at 92:22-93:2. The vehicle in question was a short distance away and stopped at a red light in the designated turning lane.

Appellant got back in his car, drove up behind the gray vehicle, and approached the driver-side of the other vehicle on foot via the neutral ground. *Id.* at 93:15-22. When he was within an arm's distance of the gray vehicle, he began telling the driver "hey man, you just struck my car." *Id.* at 94:17-23. The driver of the gray vehicle (referred to hereafter as "E.C.") did not respond to Appellant and instead "rolled up" his window. Undeterred, Appellant reached for the rear driver-side door and "hit" it, which caused the door to open. *Id.* at 94:17-23. When the door opened, Appellant observed that there were two "young ladies" in the back seat. Through the open door, Appellant continued to try and communicate with E.C. but was unable to get any response. Appellant then closed the door of E.C.'s vehicle, returned to his own car, and called NOPD's Second District via his cell phone. *Id.* at 94:22-24. Appellant testified that, based on his experience, he assumed that E.C. was not going to stop or otherwise acknowledge that he made contact with Appellant's car. *Id.* at 95:9-11.

Officer Robert Ponson was working as the "desk officer" for the Second District on September 4, 2013. *Id.* at 40:7-13. As desk officer, Officer Ponson was responsible for any complaints to NOPD's Second District whether via walk-in or phone call. *Id.* at 40:14-21. Officer Ponson fielded the call from Appellant during the afternoon of September 4, 2013 and recalled that Appellant requested assistance in connection with an alleged hit and run. *Id.* at 41:8-16. Unfortunately, there were no on-duty Second District personnel available to render assistance. When Officer Ponson informed Appellant that no one would be available to render immediate assistance, Appellant stated that he was going to contact NOPD's "command desk" and seek assistance through that avenue. *Id.* at 43:6-44:14.

ii. Second Interaction

When the left-hand-turn light turned green, E.C. proceeded left through the intersection of Earhart and Monroe, and Appellant followed him. After approximately three or four blocks, Appellant observed E.C. stop and exit his vehicle in front of (Tr. v. 3 at 98:11-13). Appellant parked his own vehicle about fifty feet away from E.C.'s vehicle. *Id.* at 100:22-24.

After parking, Appellant testified that he approached E.C. while saying "hey, man, you hit my car, let me get your driver's license." *Id.* at 98:19-22. Appellant claimed that E.C. did not respond and instead assumed "fighting stance." *Id.* at 98:22-23. Appellant then said, "I wish you fucking would" which Appellant claims was a warning to E.C. not to attack. *Id.* at 100:3-5. E.C. did not heed Appellant's "warning" and allegedly kicked at Appellant. In response, Appellant swung his right fist at E.C. and made contact with E.C.'s "facial area" causing E.C. to stumble three or four steps and fall to the ground. *Id.* at 100:9-12. NOPD introduced E.C.'s medical records which show that medical personnel examined E.C. shortly after his confrontation with Appellant and diagnosed E.C. with a fractured nose, headache and concussion syndrome. (NOPD Exh. 2).

iii. Calls Between Appellant and Command Desk

During the course of the hearing, Appellant introduced two recordings of calls between him and the command desk. These calls are part of the record as "Appellant Exhibit 2."

The first call between Appellant and the command desk appears to begin as Appellant is following E.C.'s vehicle through the intersection of Earhart and Monroe. (App. Exh. 2). Initially, Appellant informed the command desk that "he need[ed] assistance" and was following a vehicle that had just struck his and refused to stop. (App. Exh. 2 at 0:06-0:19). Appellant then updated

the command desk as to his position – between Leonidas Street and Joliet Street. At this point in the call, Appellant began to provide a more specific address to the operator but abruptly stopped speaking with the operator in order to engage E.C. in a conversation. Appellant can be heard making the following statements to E.C., "Hey, where your driver's license at man?" "You hit my vehicle man." and "I wish the fuck you would." (App. Exh. 2 at 0:30-0:43). Appellant's voice is the only one audible during this interaction.

At the 0:49 mark, the call between Appellant and the Command Desk cut off. This is consistent with Appellant's testimony that, during the physical contact between himself and E.C., he dropped his phone. The command desk operator called Appellant back, and the second call between the command desk and Appellant begins at the 1:02 minute mark of "Appellant Exhibit 2." Upon reestablishing contact with the command desk, Appellant gave the operator his exact location and indicated that "he need[ed] some assistance." (App. Exh. 2 at 1:02-1:07).

At the 4:00 mark of "Appellant Exhibit 2," Appellant provided the command desk operator with his version of events. Specifically, Appellant stated:

> He [meaning E.C.] hit my vehicle on Earhart and Monroe. I go to try to stop and stop him. He refused to stop. I followed him to , where he stopped. I guess he lives here. When he get[s] out of the car and I try to talk to him, he tried to attack me. Then he goes and gets a machete out of his trunk.

(App. Exh. 2 at 4:00-4:20).

During the course of the recorded calls, Officer Fulton sounded calm and conveyed his version of events in a measured fashion. (App. Exh. 2). Ambient noise is audible, as is the sound of passing cars, and the command desk operator can be heard posing several questions to Appellant that Appellant promptly answered. This suggests that Officer Fulton did not activate a "mute" function on his phone during the course of his conversation with the command desk. (See App.

Exh. 2). At the end of the call, Officer Fulton notified the command desk officers that other NOPD personnel have arrived at the scene. (App. Exh. 2).

III. LEGAL STANDARD

A. General Standard in Administrative Proceedings Before the Commission

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.

B. Standard When Appellant is Accused of Violating a Law

An additional consideration that the Commission must address is whether or not the allegation that Appellant violated a criminal statute – and thus violated NOPD rules – changes NOPD's standard of proof. Put simply, the Commission must answer the question, do NOPD's

allegations that Appellant violated La. R.S. 14:34.1 change the standard from "preponderance" to "beyond a reasonable doubt"? We find that it does not.

In *Bailey v. Dep't of Pub. Safety & Corr.*, 2005-2474 (La.App. 1 Cir. 12/6/06, 10); 951 So.2d 234, 240, Mr. Bailey, a sergeant in the Louisiana State Police, was arrested for violation of La. R.S. 14:98 (operating a vehicle while intoxicated) and 32:58 (careless operation of a vehicle). Mr. Bailey was eventually acquitted of the criminal charges but the appointing authority terminated him for, among other things, violating Louisiana State Police rules and regulations that prohibit employees from breaking the law. *Id.* at 239. Mr. Bailey appealed his termination to the Louisiana State Police Commission.[3] In his appeal, Mr. Bailey argued that, because his termination was based upon an allegation that he committed a criminal act, and he was subsequently acquitted of that criminal act, his termination is invalid. *Id.* The State Police Commission rejected this argument and found that:

> [U]nlike a criminal proceeding in which the state must prove beyond a reasonable doubt all the elements of the charged crime, the appointing authority in an administrative proceeding need only prove by a preponderance of the evidence that the complained of action occurred and that it impaired the efficient operation of the public service.

Id. (citing *Walters v. Department of Police of New Orleans,* 454 So.2d 106, 113 (La.1984)). The State Police Commission went on to find that the appointing authority had sufficient cause to terminate Mr. Bailey's employment. *Id.* The First Circuit affirmed the State Police Commission's decision and noted with approval that the State Police Commission recognized that it was "not their role to determine whether Mr. Bailey was guilty or innocent as to the ***crime*** of driving while intoxicated and that [Mr. Bailey's] acquittal, for whatever reason, by the Court in Calcasieu Parish

---

[3] While the Louisiana State Police Commission is organized under a different Part of the Louisiana Constitution (Art. X, § 43) the burden of proof on appeals is the same as appeals before this Commission.

of DWI, is interesting but certainly not dispositive of his disciplinary action before this tribunal." *Id.* at 240-41 (emphasis in original).

The facts of the matter now before the Commission are substantially similar in procedural posture to that of Bailey. *See Bailey, supra* at 240. Therefore, NOPD's burden in establishing that Appellant engaged in misconduct remains a preponderance of the evidence. *Bailey, supra* at 240; *see also Dep't of Pub. Safety & Corr., Louisiana State Penitentiary v. Hooker*, 558 So.2d 676, 679 (La. Ct. App. 1st Cir. 1990)("[I]t must follow that if an *acquittal* on a criminal charge does not preclude a civil service disciplinary action on the same facts, a *nolle prosequi* on a criminal charge does not preclude such an action either.").

IV. ANALYSIS

A. Occurrence of the Complained of Activities

NOPD terminated Appellant for committing a second degree battery upon E.C. Therefore, the Commission's analysis will focus upon whether or not NOPD has established, by a preponderance of the evidence, that Appellant committed a second degree battery. Put differently, NOPD must show that it was more likely than not that Appellant intentionally inflicted serious bodily injury on E.C.

There is no dispute that Appellant struck E.C. in the face with a blow hard enough to send E.C. to the ground. Therefore, the undersigned Commissioners find that it is more likely than not that the broken nose and concussion sustained by E.C. was a direct result of being struck by Appellant. Further, the Commission finds that a broken nose and concussion constitute a serious bodily injury as defined by Louisiana Revised Statute § 14:34.1. *See State v. Landry*, 2003-1671 (La.App. 4 Cir. 3/31/04, 7), 871 So.2d 1235, 1239 (the term "extreme physical pain" as used in the context of second degree battery refers to "a condition which most people of common

intelligence can understand; it is considered subjective in nature and susceptible to interpretation."). Based upon the above findings, all of the elements of second degree battery are present in the matter now before us.

During his criminal trial, Appellant argued that he struck E.C. in self-defense, which, if proven, is a viable defense to an allegation of criminal battery. At his appeal hearing, Appellant presented the same defense to Commission in challenging NOPD's discipline. NOPD takes the position that Officer Fulton cannot claim self-defense because he aggressively approached E.C. at the intersection of Earhart and Monroe and then continued the confrontation by following E.C. to E.C.'s residence.

Because the alleged misconduct involves an allegation of criminal second degree battery, the Commission looks to Louisiana Revised Statute § 14:21 which provides that:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

La. Rev. Stat. Ann. § 14:21. Thus, if Appellant was the aggressor in the interaction between himself and E.C., he cannot claim self-defense.

According to Dept. Super. Bardy, NOPD considered Appellant to be the "aggressor" because Appellant had "other options" available to him. One obvious option was to wait for NOPD officers to render assistance. NOPD also argued that, at the time E.C. left the scene of the alleged hit and run, Appellant was not in danger and had an opportunity to continue his communications with either the Second District or the command desk rather than confronting E.C. (NOPD Exh. 1 at 23 of 31). Appellant responded to NOPD's assertions about "other options" by pointing out that the Second District desk officer had informed him that there were no units available to render

assistance. Therefore, Appellant argues that he had to continue to try and make contact with E.C. in order to advise E.C. that he had struck Appellant's vehicle.

Based upon the allegations against Appellant and his defense against those allegations, the critical question before the Commission is whether or not the events that led to Appellant striking E.C. in the face preclude Appellant from claiming self-defense.

a) Louisiana Case Law on Self-Defense

There is a conflict of jurisprudence within Louisiana appellant courts, including the Fourth Circuit, regarding which party bears the burden of proof as to a claim of self-defense in a non-homicide situation. *State In Interest of M.J.*, 2014-0622 (La.App. 4 Cir. 2/4/15, 12–13), 160 So.3d 1040, 1048, *writ denied sub nom. State in Interest of M.J.*, 2015-0487 (La. 1/15/16), 184 So.3d 704; *State v. Cooks*, 2011-0342 (La.App. 4 Cir. 12/14/11, 11), 81 So.3d 932, 939, *writ denied,* 2012-0112 (La. 5/18/12), 89 So.3d 1189; *State v. Wischer*, 2004-0325 (La.App. 4 Cir. 9/22/04, 9), 885 So.2d 602, 607; *State v. Fluker,* 618 So.2d 459 (La.App. 4th Cir.1993).

In cases that place the burden with the State, courts most often use the following justification:

> The State bears the burden of proving guilt beyond a reasonable doubt. Except where expressly stated by the legislature, the State should bear the burden of proving every aspect of the defendant's guilt. Where an issue of exculpatory circumstances exists, it should be the State's burden to disprove such a claim of innocence.

Fluker, *supra* at 463 (internal citations omitted).

Yet, because the question of whether or not Appellant acted in self-defense arises in the context of an administrative hearing, the standard of proof, whether borne by NOPD or Appellant, is a preponderance of the evidence. As explained below, the facts of the case indicate, by a preponderance of the evidence, that Appellant was the aggressor in the instant matter and cannot

claim self-defense. Therefore, the Commission need not resolve the matter of which party bears the burden of proof as to Appellant's claim of self-defense.

The following actions are examples of conduct Louisiana courts have found contribute to a defendant's role as an "aggressor" for the purposes of La. R.S. 14:21:

- Initiating an argument;[4]
- Refusing to leave when asked to do so;[5]
- Failing to withdrawal from the conflict;[6] and
- Following the victim.[7]

Even when viewed in a light most favorable to Appellant, the following facts show that he was the aggressor:

- Appellant approached E.C.'s vehicle following the accident and attempted to engage E.C. in a conversation. (Tr. v. 3 at 94:15-19).
- When Appellant approached the car, he observed E.C. raise the driver-side window. *Id.* at 94:18-19.
- Appellant then reached for and "hit" the rear driver-side door of E.C.'s vehicle, causing it to open. *Id.* at 94:19-22.
- Appellant had ample time to record E.C.'s license plate number and provide it to either the Second District or command desk, but chose to follow E.C. instead. (App. Exh. 2).
- Appellant confronted E.C. a second time outside of E.C.'s home.
- Appellant did not withdraw from the conflict until after he struck E.C. in the face.

Given that E.C. had exited his vehicle and did not appear to be fleeing the scene, Appellant had the option of taking note of the license plate number, make, model and color of E.C.'s vehicle and communicating that information to the command desk operator. Instead, Appellant chose to

[4] *State v. Simmons*, 414 So.2d 705, 708 (La.1982)
[5] *Id.*
[6] *Id.*
[7] *State v. Havies*, 16-635 (La.App. 5 Cir. 3/15/17, 8); *State v. Rasheed*, 2002-2100 (La.App. 4 Cir. 2/26/03, 6), 841 So.2d 85, 89–90

exit his own vehicle and continue the confrontation. Such conduct contributed to Appellant's role as the aggressor. *See State v. Rasheed*, 2002-2100 (La.App. 4 Cir. 2/26/03, 6), 841 So.2d 85, 89–90 (a defendant's choice to pursue the victim as opposed to obtaining the victim's license plate number and calling the police factored into the defendants role as an aggressor).

Because the Commission finds that Appellant's actions at the intersection of Earhart and Monroe, as well as his subsequent choice to confront E.C. at were acts of aggression, we must turn to whether or not E.C.'s response to these aggressive acts was reasonable. *See State v. Gonday*, 442 So.2d 703, 706 (La. Ct. App.1983)(when a defendant chases and stops a victim following an automobile accident, the defendant may be an aggressor for some manner of the victim's response). Even if the Commission were to accept Appellant's version of events, E.C.'s assumption of a "fighting stance" and initial kick at Appellant were reasonable in light of Appellant's earlier aggressive acts.

Based upon the foregoing, the undersigned Commissioners find that Appellant was an aggressor and therefore cannot rely upon a claim of self-defense.

B. Impact on NOPD's Efficient Operations

Even when off-duty, NOPD officers have an obligation to carry themselves in a professional and respectful manner. The Commission need not look long or hard for instances where an off-duty officer's conduct caused residents to question both the competency and the legitimacy of NOPD's operations.

Appellant's decision to aggressively confront E.C. by approaching him at the intersection of Earhart and Monroe and opening the door of E.C.'s car was inappropriate and needlessly escalated an already difficult situation. Even after the initial interaction, Appellant had an opportunity to withdraw himself from any confrontation. The Commission observes that Appellant

could readily observe that E.C. was not speeding away from the scene of an accident. In fact, E.C. was stopped at a light, giving Appellant ample time to take down a full description of the vehicle as well as write down the vehicle's license plate number. Instead, Appellant chose a far more aggressive approach and both Appellant and NOPD now suffer the consequences of this choice.

Based upon the record before us, we find that Appellant's actions adversely impacted NOPD's efficient operations.

C. Was the Discipline Commensurate with Appellant's Offense

In conducting its analysis, the Commission must determine if Appellant's termination 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 has a duty and responsibility to deter aggressive interactions between Officers and residents whether on or off-duty. Furthermore, NOPD must ensure that all personnel represent themselves and NOPD in a professional and lawful manner, even when off-duty. At the hearing, NOPD introduced its penalty matrix regarding violations of its "Adherence to Law" policy. This matrix puts NOPD personnel on notice that any violation of state law carries with it severe discipline. In previous decisions, the Commission has held that it is not bound by NOPD's penalty matrix when considering whether or not discipline is commensurate with a certain offense. However, any discipline issued by an appointing authority that is consistent with prior notice regarding possible consequences of misconduct suggests that such discipline is not arbitrary and capricious.

The crime of second degree battery is a felony. La. Rev. Stat. Ann. §§ 14:34.1, 14:2.

NOPD's penalty matrix has one penalty for such an offense, dismissal. Thus, NOPD's penalty matrix provides clear notice to NOPD personnel that any misconduct related to the commission of a felony carries with it the most severe discipline. Importantly, the matrix does not make a distinction between felonies committed on or off duty. Given the severity of Appellant's misconduct, the Commission finds that dismissal is appropriate.

V. CONCLUSION

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

Judgment rendered this 11th day of April, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

STEPHEN CAPUTO, COMMISSIONER — DATE 4-10-17

RONALD P. McCLAIN, VICE-CHAIRMAN — DATE 4/10/17

MICHELLE D. CRAIG, CHAIRPERSON — DATE 4/10/2017