



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
BRITTNEY RICHARDSON, CHAIRPERSON
CLIFTON J. MOORE, VICE-CHAIRPERSON
JOHN KORN
MARK SURPRENANT
RUTH WHITE DAVIS

Monday, May 24, 2021

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

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

Re: **Jonathan Fowlkes VS.
Department of Police
Docket Number: 9169**

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 - 5/24/2021 - 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 shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,


Stacie Joseph
Management Services Division

cc: Shaun Ferguson
Elizabeth S. Robins
Alexandra Mora
Jonathan Fowlkes

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**JONATHAN FOWLKES,
Appellant**

Docket No. 9169

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

DECISION

Appellant, Officer Jonathan Fowlkes, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his 60-day suspension beginning June 1, 2020. (See Exhibit HE-1). At all relevant times, Appellant was employed as a Police Officer and had permanent status (Tr. at 112). A Hearing Examiner, appointed by the Commission, presided over a hearing on August 6, 2020. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated March 10, 2021, and controlling Louisiana law.

For the reasons set forth below, Fowlkes' appeal is DENIED.

I. ANALYSIS

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the 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 (quoting *Cure v.*

Dep't of Police, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending and terminating the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984).

The issues for our determination are whether the NOPD carried its legally imposed burden of proving that 1) Appellant's (Jonathan Fowlkes) use of force on December 31, 2018 against the uncooperative, verbally abusive, passively resistant, intoxicated, handcuffed individual (Jason Stuart) was unauthorized and excessive Level 4 force; 2) Appellant's alleged improper conduct on December 31, 2018 impaired the efficient operation of the NOPD; and 3) Appellant's alleged improper conduct on December 31, 2018 warranted a 60 day suspension.

The NOPD investigation concluded that the Appellant had improperly used Level 4 force (defined in NOPD-5) when he "threw" (the Appellant said on the video recorded at the scene that he "pushed" Stuart) the handcuffed Stuart headfirst into the back of the police unit, causing him to strike the steel partition in the back of the unit, resulting in a laceration above his left eye. (See Tr. at 13, 46-47). Stuart was taken to University Medical Center (UMC) where he was told he needed stitches to close the laceration. Stuart was belligerent to the UMC staff and refused medical treatment. (See Ex. HE-1 and Ex. NOPD-2; Tr. at 72).

NOPD's investigation of this matter was headed by Lieutenant Kevin Burns, Jr., a member of NOPD's Force Investigation Team, which concluded that there had been an unauthorized and excessive use of Level 4 force against Stuart, warranting a 60 day suspension. (Tr. at 42-43). This decision was supported and approved by Shaun Ferguson, the Superintendent of Police, in his June 9, 2020 communication to the Appellant. (See Ex. HE-1 and Ex. NOPD-2).

Before the 60 day suspension was issued by Superintendent Ferguson, the Appellant had an opportunity to be heard and present any evidence which he wished on December 11, 2019, at the Bureau Chief's Panel Hearing. (HE-1; Tr. at 16).

Lt. Burns testified at the August 6, 2020 hearing before the Commission's appointed Hearing Examiner that Sgt. Daggs, the supervising officer, improperly opined that the use of force by Appellant was Level 2, not 4, given all the video footage available of the incident in question. (Tr. at 56). Both Lt. Burns and Captain Christopher Goodly testified at the August 6, 2020 hearing that it was their opinion, based on the totality of the evidence, that the Appellant had committed a Level 4 Use of Force violation, warranting the 60 day suspension. (See Ex. HE-1, Ex. NOPD-2, Ex. NOPD-12, and Tr. at 12-13, 23-25, 44-47 and 54-55).

In order to determine whether Level 4 force was used, we need to review whether the force used by the Appellant met any of the requirements for Level 4 as defined in NOPD-5. Subsection (c) of the definition of Level 4 force states: "All uses of force by a NOPD officer resulting *in serious injury or requiring hospitalization.*" Although Stuart was taken to the UMC emergency room and stitches to close the laceration were recommended, it is unclear from NOPD-5 whether a trip to an emergency room constitutes "hospitalization" as that term is used in connection with the Appointing Authority's definition of "Serious Physical Injury" or whether hospitalization refers to in-patient treatment. There was no evidence presented at the hearing as to what "hospitalization" meant in the context of the "Serious Physical Injury" definition in NOPD-5. Given all the evidence presented or not presented at the August 6, 2020 hearing, the Appointing Authority failed to carry its legally imposed burden to prove that "Serious Physical Injury," as defined in NOPD-5, occurred.

However, the above does not conclude our analysis in that it must also be determined whether subsection (h) of Level 4 force was met. That provision refers to a strike or kick being used against the individual or "*similar use of force against a handcuffed subject.*" The evidence presented in the record

supports the conclusion reached by the NOPD that Level 4 excessive force was used by the Appellant to get the arrested individual into the back of the police unit in that the force used (throwing handcuffed Stuart headfirst into the back of the unit) was “similar” to someone being struck or kicked. (Tr. at 23-24, 44- 47, 68-72, and 78).

The NOPD performed a thorough investigation of this matter and, as indicated above, conducted a hearing at which the Appellant had a full opportunity to present whatever evidence he wished. Subsequent thereto, the NOPD concluded that a Level 4 Use of Force violation had occurred, warranting a 60 day suspension, which was at the lowest possible end of the discipline matrix providing for a potential suspension of up to 80 days for the Appellant’s excessive use of Level 4 force. The 60 day suspension was issued, instead of 80 days, because the Appellant admitted that he had used excessive force and thus took ownership of his actions according to Superintendent Ferguson. (HE-1; Tr. at 13).

This Commission is legally bound to follow controlling precedent as set by the Louisiana Supreme Court and the Louisiana Fourth Circuit Court of Appeal. That precedent is very clear and was articulated concisely by the Fourth Circuit Court of Appeal in *Byrd v. Dept. of Police*, 109 So. 3d 973, 980 (La. App. 4th Cir. 2013). Importantly, this Commission should not “second-guess” an Appointing Authority’s decision unless the decision made is arbitrary and capricious or constitutes an abuse of discretion. The undersigned Commissioners respectfully disagree with the recommendation made by the Hearing Examiner, who improperly substitutes her own judgment in place of the NOPD, to the effect that the use of force used by the Appellant was Level 2, not 4. Based on the totality of the evidence presented and controlling Louisiana law, it would be improper for this Commission to substitute its own judgment for the sound, highly supportable judgment properly exercised by the NOPD in determining that a Level 4 Use of Force violation occurred, warranting a 60 day suspension.

The undersigned Commissioners conclude that the Appointing Authority has carried its legally imposed burden of proving that there was a Level 4 Use of Force violation by the Appellant; that violation

impaired the efficient operation of the NOPD; and the 60 day suspension was commensurate with Appellant's wrongful conduct.

The appeal is DENIED.

This the 24th day of May, 2021

WRITER:

ms

Mark Surprenant (May 14, 2021 09:45 PDT)

MARK SURPRENANT, COMMISSIONER

CONCUR:

J H Korn

J H Korn (May 22, 2021 10:27 EDT)

JOHN KORN, COMMISSIONER

Ruth White Davis

Ruth Davis (May 18, 2021 21:59 CDT)

RUTH WHITE DAVIS, COMMISSIONER