



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

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Thursday, January 19, 2017

Mr. Raymond C. Burkart, III
19407 Front Street
Covington, LA 70433

Re: **Joseph Davis VS.
Department of Police
Docket Number: 8302**

Dear Mr. Burkart, III:

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 - 1/19/2017 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, 12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Victor Papai
Joseph Davis
:
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

JOSEPH DAVIS vs. DEPARTMENT OF POLICE	DOCKET No.: 8302
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I. INTRODUCTION

Appellant, Joseph Davis, 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. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause.

II. FACTUAL BACKGROUND

NOPD suspended Appellant for two days, without pay, for allegedly violating NOPD rules regarding professionalism and courtesy. (H.E. Exh. 1). NOPD notified Appellant of the two-day suspension via letter dated March 24, 2014. *Id.* In this letter, NOPD alleges that Appellant violated NOPD “Rule 2: “Moral Conduct; Paragraph 2: Courtesy.” *Id.* Rule 2, Paragraph 2 of NOPD’s rules reads as follows:

Employees shall be courteous, civil and respectful in their conduct towards all persons. The use of profane, vulgar or discourteous gestures or language to or in the presence of any citizen is prohibited. The use of profane, vulgar or discourteous gestures or language either verbal or written by one employee to another is prohibited.

Id. At the outset of the hearing, Appellant stipulated to the charges contained in the March 24th correspondence.

The allegations against Appellant stem from an incident that occurred on or about March 6, 2011. The details of the March 6th incident are not in dispute. On that date, Appellant was serving as a member of a special task force assigned to the French Quarter during Mardi Gras. At a certain point in the evening, the task force encountered a group of citizens parading in the vicinity of Franklin Avenue and Charters Street. The Officers did not have advance notice of an authorized parade and attempted to determine whether or not the participants of the parade had acquired the requisite permits.

During the course of this check, Officers observed several parade participants climbing on vehicles, trespassing into neighboring properties and generally causing a disturbance. As he and his fellow task force members were attempting gain some semblance of control over an ever-worsening situation, Appellant heard what he described as a loud rushing of air. He then turned to see a tall white male rise from a crouching position next to an NOPD vehicle. Appellant suspected that the subject had used a knife or other edged tool to slash the vehicle's tires. It was at that time that Appellant tried to effect an arrest of the subject and began loudly ordering the suspect to stop. It is undisputed that Appellant used vulgarity in making the arrest and repeatedly told the subject to "get on your fucking knees" and "let me see your fucking hands" or words to that effect.

A citizen posted a video, taken by cell phone, of a portion of the incident on the video-streaming site YouTube. (NOPD Exh. 4). It was this video that prompted an investigation into Officer conduct on March 6th as the video clearly shows another NOPD officer, Ananie Mitchell, knocking the cell phone out of the hands of the citizen recording the event.

During the appeal hearing, the Parties stipulated to the following additional facts:

- (A) The independent police monitor received a complaint regarding NOPD Officer conduct related to the March 6, 2011 incident.
- (B) Subsequent to receiving this complaint, the monitor transmitted it to the Police Integrity Bureau (hereinafter “PIB”).
- (C) The PIB completed a “DI-1” form, which triggers an internal investigation into police employee misconduct.
- (D) The PIB assigned the investigation to Sergeant Andre’ LeBlanc, Jr.

(Tr. at 9:25-10:25). The case number for the DI-1 form was 2011-0223-C and the alleged misconduct Sgt. LeBlanc initially investigated was unauthorized use of force by Officer Ananie Mitchell. *Id.* at 15:17-23. As part of his investigation, Sgt. LeBlanc reviewed the YouTube video. And, it was not until Sgt. LeBlanc saw the video and recognized Appellant – and could hear Appellant using “vulgarity” – that Sgt. LeBlanc suspected that Appellant may have violated NOPD rules as well. *Id.* at 19:14-18.

III. LEGAL STANDARD

A. Police Officer’s Bill of Rights

The provisions of Louisiana Revised Statute § 40:2531, known colloquially as the “Police Officers’ Bill of Rights” governs the investigative due process that must be afforded to “police employees” as defined by the statute. It is undisputed that NOPD Officers, like Appellant, are “police employees” pursuant to § 40:2531. Any investigation that does not conform to the due process requirements enumerated in § 40:2531 renders the related discipline “an absolute nullity.” For reasons of efficiency, the Commission reviews only the due process requirements that appear to be relevant to the instant appeal.

The first due process protection required by § 40:2531 is that:

The police employee or law enforcement officer being investigated shall be informed, at the commencement of interrogation, of the nature of the investigation and the identity and authority of the person conducting such investigation, and at the commencement of any interrogation, such officer shall be informed as to the identity of all persons present during such interrogation. The police employee or law enforcement officer shall be allowed to make notes.

§ 40:2531 (B)(1).

Due to the nature of the allegations, Appellant also had the right to be represented by counsel:

The police employee or law enforcement officer being questioned, whether as a target or as a witness in an administrative investigation, shall have the right to be represented by counsel, other representative, or both, of the police employee or law enforcement officer's choice.

The police employee or law enforcement officer shall be granted up to thirty days to secure such representation, during which time all questioning shall be suspended.

The police employee or law enforcement officer's representative or counsel shall be allowed to offer advice to the employee or officer and make statements on the record regarding any question asked of the employee or officer at any interrogation, interview, or hearing in the course of the investigation.

La. Rev. Stat. Ann. §§ 40:2531 (B)(4a-c).

B. Sufficient Cause for Discipline

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued 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. Conformity with Louisiana Revised Statute § 40:2531

The Fourth Circuit has established that, for the purposes of La. R.S. § 40:2531, an investigation begins when NOPD initiates a DI-1 form. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La.App. 4 Cir. 2/11/15, 17); 165 So.3d 191, 202-03; see *Young v. Department of Police*, 13–1596, p. 1, n. 2 (La.App. 4 Cir. 6/25/14), 152 So.3d 193, 194, n. 2. The DI-1 form that triggered an investigation in the matter now before the Commission was initiated on March 10, 2011. (NOPD Exh. 1). Appellant is not named in the DI-1 form and the incident described within the form focuses on an unnamed Officer striking a citizen and knocking a cell phone from that citizen’s hands. *Id.* The PIB assigned a case number to the incident, 2011-0223-C, and assigned the matter to Sgt. LeBlanc.

On March 17, 2011, NOPD, through Sgt. LeBlanc, timely requested a sixty-day extension in connection with the investigation into PIB Case No. 2011-0223-C. (City Exh. 2). The Officer identified in the extension request as the subject of the investigation was Ananie Mitchell. *Id.* The Commission’s hearing officer granted the request and set June 27, 2011 as the new date for the conclusion of the investigation. (City Exh. 3). Pursuant to both § 40:2531 and Rule IX, § 1.4,

the Personnel Director must notify the accused employee/Officer of the date of the hearing and of his/her right to attend that hearing. There was no evidence introduced in the record that shows Appellant was notified of a request to extend an investigation into his alleged misconduct.

On or about June 14, 2011, Sgt. LeBlanc directed Appellant to appear and render a statement in connection with an internal disciplinary investigation. (NOPD Exh. 5). The notice indicates that “an allegation of misconduct was made against Ananie Mitchell” and identifies the type of misconduct alleged as an unauthorized use of force. *Id.*¹ Appellant complied with Sgt. LeBlanc’s directive and submitted to a series of questions.

As with the notice of the investigation, the transcript of Sgt. LeBlanc’s interview with Appellant indicates that the focus of the investigation was an allegation that Officer Mitchell engaged in an unauthorized use of force. (City Exh. 6). In fact, Sgt. LeBlanc explicitly stated at the beginning of his interview with Appellant that “the nature of this investigation is a complaint of [an] alleged violation of alleged (sic) rule 2 Moral Conduct paragraph 6 unauthorized use of force by Ananie Mitchell.” *Id.* Sgt. LeBlanc also made it clear to Appellant that, at the time of the interview, Appellant “was not being accused of any misconduct.” *Id.* Sgt. LeBlanc made these representations despite having reviewed the YouTube video – with audio – and observing/hearing Appellant engaged in the use of vulgarity when arresting an individual suspected of slashing a police vehicle’s tires. (Tr. 56:3-57:6).

Over the course of the interview, Sgt. LeBlanc asks Appellant pointed questions regarding Appellant’s use of “vulgarity” during an arrest on the night in question. *Id.* at 6. Sgt. LeBlanc

¹ Sgt. LeBlanc alleges that he made Appellant aware of the rights afforded to officers facing allegations of misconduct pursuant to the Police Officers’ Bill of Rights. However, the notice does not contain any information about the allegations against Appellant. The Commission appreciates Sgt. LeBlanc’s honesty and candor during the course of his testimony. And, during that testimony, Sgt. LeBlanc states “to be honest with you ... there was no specific investigation related to [Appellant].” (Tr. at 50:18-20).

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asks Appellant why Appellant chose to use vulgarity and whether or not using vulgarity was something Appellant did on a regular basis. *Id.* Following Sgt. LeBlanc's interrogation of Appellant, NOPD issued a notice to Appellant informing him that there would be a pre-disciplinary hearing on August 17, 2011 regarding allegations that Appellant had violated NOPD Rule 2, Paragraph 2. (NOPD Exh. 7).² This "notice" constitutes the first time anyone within NOPD informed Appellant he was the subject of an investigation rather than simply a possible witness. Sgt. LeBlanc confirmed that he never informed Appellant that Appellant was the target of an internal investigation. (Tr. at 51:25-52:10). Eventually, NOPD sustained the allegations against Appellant and suspended him for two days. (H.E. Exh. 1).

The following exchange took place during the course of Sgt. LeBlanc's redirect examination:

Q. When you are investigating officers, are you under an obligation to let them know you are investigating them?

A. No, sir.

(Tr. at 79:19-22). Put simply, Sgt. LeBlanc is wrong.

As we pointed out above, the very first due process protection required by § 40:2531 is that:

The police employee or law enforcement officer being investigated **shall be informed, at the commencement of interrogation, of the nature of the investigation** and the identity and authority of the person conducting such investigation, and at the commencement of any interrogation, such officer shall be informed as to the identity of all persons present during such interrogation. The police employee or law enforcement officer shall be allowed to make notes.

² This notice alleges that NOPD verbally made Appellant aware of the disposition of the initial investigation on June 27, 2011.

§ 40:2531 (B)(1)(emphasis added). Sgt. LeBlanc repeatedly informed Appellant that the nature of the investigation pertained to Officer Mitchell's alleged excessive use of force. And, Sgt. LeBlanc told Appellant that Appellant was not the subject of the investigation. However, Sgt. LeBlanc's questions to Appellant during the interview were prompted by Sgt. LeBlanc's review of the YouTube video. Certainly, Sgt. LeBlanc was aware that Appellant's actions could constitute a violation of NOPD police. Nevertheless, Sgt. LeBlanc prefaced his interview with the following question to Appellant:

Q: This is to advise you that you are being interview[ed] only as a possible witness in this case and as of this time *you are not being accused of any misconduct*, do you understand this?

A: Yes.

(NOPD Exh. 6).

Even though Appellant was not "being accused of any misconduct," Sgt. LeBlanc proceeded to ask Appellant questions about Appellant's use of "vulgarity" during an arrest on March 6, 2011. Sgt. LeBlanc first asked a series of questions about Appellant's observations and state of mind, then asked:

Q: And, during that apprehension [of the tire slashing suspect], during that video you can hear yourself use some vulgarity?

Id.

Appellant answers "yeah" to Sgt. LeBlanc's question, and then Sgt. LeBlanc followed up with the compound question found below:

Q: What do you believe that your reason for using that vulgarity was? Is that something you normally do, or is it a situation that was out of the ordinary, and you believe that you thought that you can get a little bit more compliance to get the crowd back? What was the issue with that?

Id.

Given the above exchange, there is no doubt that the nature and focus of Sgt. LeBlanc's investigation had shifted away from Officer Mitchell's use of force and to Appellant's language. Even according to NOPD's own witness, Deputy Chief Albert, once Sgt. LeBlanc learned of Appellant's possible misconduct, Sgt. LeBlanc should have notified Appellant that Appellant would be the subject of an investigation. (Tr. at 109:4-10). Thus, NOPD failed to inform Appellant as to the nature of the investigation prior to an interrogation that eventually led to Appellant's discipline. The Commission further notes that, had Appellant been informed that he was the target of Sgt. LeBlanc's investigation rather than simply a witness, it is possible that Appellant would have exercised his right to have counsel present during any interrogation. Appellant never had that opportunity.

Based upon the foregoing, the Commission finds that the two-day suspension at issue was the product of a procedurally flawed investigation and is thus an absolute nullity. *See* La. R.S. § 40:2531

B. Sufficient Cause Analysis

Since the two-day suspension issued to Appellant is an absolute nullity pursuant to La. R.S. § 40:2531, the Commission need not conduct an analysis as to whether NOPD had sufficient cause to issue discipline to Appellant.

V. CONCLUSION

Based upon the foregoing, the Commission hereby GRANTS the appeal. NOPD shall remit to Appellant all back pay and emoluments related to the two-day suspension and shall rescind and/or expunge from Appellant's record any reference to the two-day suspension.

Judgment rendered this 18th day of January, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

M.D.C.
MICHELLE D. CRAIG, CHAIRPERSON

1/18/2017
DATE

Ronald P. McClain
RONALD P. McCLAIN, VICE-CHAIRMAN

1/18/17
DATE

Joseph S. Clark
JOSEPH S. CLARK, COMMISSIONER

1-18-2017
DATE