



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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DIRECTOR OF PERSONNEL

Thursday, April 6, 2023

Mr. Eric Hessler
PANO 320 N. Carrollton Avenue #202
New Orleans, LA 70119

Re: **Neil Carter VS.
Department of Police
Docket Number: 9435**

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 - 4/6/2023 - 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: Michelle M. Woodfork, Interim
James M. Roquemore
Jay Ginsberg
Neil Carter

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**NEIL CARTER,
Appellant**

Docket No. 9435

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

DECISION

Appellant, Officer Neil Carter, 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 December 15, 2022, five-day suspension by the New Orleans Police Department. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a Senior Police Officer. (HE-1; Tr at. 6). A Hearing Examiner, appointed by the Commission, presided over a hearing on February 14, 2023. 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 22, 2023, and controlling Louisiana law.

For the reasons set forth below, Officer Carter's appeal is GRANTED.

I. FACTUAL BACKGROUND

On December 15, 2022, the New Orleans Police Department imposed a five-day suspension on Officer Carter for unauthorized use of force. (Ex. HE-1). This discipline was based on Officer Carter's use of a Conducted Electrical Weapon (CEW), also known as a taser, on August 10, 2020, to subdue a fleeing suspect. (Ex. HE-1).

On August 10, 2020, at 5:37 P.M., Officer Carter responded to a call at Palmer Park, 2300 South Carrollton Avenue, from a complainant who informed Officer Carter that the suspect, who was currently in Palmer Park, had destroyed the video cameras outside her home on Dublin Street earlier in the day with a wooden 2x4. (Ex. NOPD-2, Tr. at 6-9). The suspect had also threatened to harm the complainant. (Ex. NOPD-3). Officer Carter's report reads that "[the suspect] had made threats stating 'you gonna die' to her a few days prior and she feared that he was out to injure or kill her." (Ex. NOPD-3 at 2). The complainant also informed Officer Carter that she knew the suspect, as he is her spouse's cousin, and that he has mental issues. (Ex. NOPD-2, Tr. at 9). In particular, he had a history of violence and was known to carry guns and knives. (Ex. NOPD-2). The complainant also relayed to Officer Carter that the suspect had threatened people with an AK-47. (Tr. at 10). Based on this information, Officer Carter called for backup. (Tr. at 10). Officer Carter instructed the complainant to stay at her current location in her vehicle on Dublin Street, and he drove to Carrollton Avenue, in order to pursue the suspect. (Ex. NOPD 4-5).

When Officer Carter approached the suspect on foot, entering the park from Carrollton Avenue, the suspect ran toward Dublin Street. (Ex. NOPD 4-5). Eventually, Officer Carter caught up with the suspect, who was then moving at a slower pace. (Ex. NOPD 4-5). Officer Carter repeatedly asked the suspect to stop. (Ex. NOPD 4-5). The suspect removed an object from his backpack, dropping the backpack behind a vehicle. (Ex. NOPD 4-5). The suspect held the object, later identified as a Bible, in his left hand. (Ex. NOPD 4-5). Officer Carter then deployed his taser. (Tr. at 5, 11).

Officer Carter testified that he believed the object in the suspect's hand was a gun or knife. (Tr. at 12). The weather was rainy, and Officer Carter testified that "I had trouble seeing because it was blurry." (Tr. at 12). Officer Carter also testified that he was unable to discern if the suspect

took a weapon out of his bag, as he could only identify a dark object in his left hand. (Tr. at 16). In addition, the complainant was in a truck in the corner of the park about 50-100 feet away from the suspect, and the suspect was moving in the direction of the complainant. (Tr. at 20, 75-76).

The NOPD Operations Manual provided as follows at the time of this incident:

CEWs are authorized for use when:

- (a) A subject who may be lawfully detained or apprehended poses an imminent risk of harm to the officer(s), the subject, or others;
- (b) Attempts to subdue the subject with less intrusive means have been or will likely be ineffective; AND
- (c) There is an objectively reasonable expectation that it would be unsafe for officers to approach the suspect within contact range.

OR

- (d) Situations in which a suspect for whom an officer has probable cause to arrest is actively fleeing from arrest for a serious offense; AND
- (e) Attempts to subdue the subject with less intrusive means have been or will likely be ineffective or increase the likelihood of greater harm to the officer, the subject or another party.

(Ex. NOPD-12 at ¶ 4).

Because damage to property is a misdemeanor without bodily harm, the suspect's actions were not a "serious offense." (NOPD-12 at 3). Therefore, subsections (d) and (e) are inapplicable. Several months after this incident, NOPD revised the policy, changing the requirement of a "serious offense" to threatened infliction of bodily harm. (Tr. at 109-10, 150).

The disputed facts are whether Officer Carter had an objectively reasonable expectation that it would be unsafe for officers to approach the suspect within contact range and whether the suspect posed an imminent risk of harm to the officer or the complainant. NOPD's witnesses testified that Officer Carter had probable cause to arrest the suspect, as the victim pointed out the person who committed the crime. (Tr. at 70, 134). Captain Eric Gillard agreed that the suspect was

capable of violence. (Tr. at 112). Captain Bruce Haney, the Commander with the Police Academy, testified that the suspect was possibly armed and known to be violent. (Tr. at 124). Captain Haney testified that the presence of the victim in the truck and the suspect's action of walking in the direction of the victim changed his assessment. (Tr. at 143-46). Captain Haney concluded, "this could turn into something bad." (Tr. at 148). Ultimately, Captain Haney agreed that a reasonable police officer could have believed that the suspect posed an imminent threat to himself or others. (Tr. at 152). Captain Haney also recognized that Officer Carter had a duty to protect the complainant. (Tr. at 159).

Captain Eric Gillard, who served on the three-person captains' panel to recommend discipline, testified that he was "on the border" about whether Officer Carter's use of the taser impaired the efficient operations of NOPD. (Tr. at 93, 98).

Officer Carter called an expert in use of force, who testified that Officer Carter complied with NOPD policy, based on the totality of the circumstances. (Tr. at 175). The expert testified that it was reasonable for Officer Carter to believe the suspect was armed and that it would have been unsafe to approach the suspect hands-on because this action required the officer to put his gun within the reach of the suspect. (Tr. at 185, 187). The expert considered the size of the suspect, 6'9", and the reasonableness of Officer Carter's belief that he would be unable to restrain the suspect physically. (Tr. at 184-85). The expert testified that Officer Carter did not "believe that he could physically control the perpetrator with personal weapons." (Tr. at 184).

II. ANALYSIS

Although Appellant offered testimony about the timeliness of the investigation under the Police Officer Bill of Rights, La. R.S. 40:2431, at the conclusion of the hearing, counsel for

Appellant stated that he was waiving this argument. (Tr. at 221-22). Therefore, the Commission will not address this issue.

“Employees with the permanent status in the classified service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A).” *Whitaker v. New Orleans Police Dep’t*, 2003-0512 (La. App. 4 Cir. 9/17/03), 863 So. 2d 572 (quoting *Stevens v. Dep’t of Police*, 2000-1682 (La. App. 4 Cir. 5/9/01)). “Legal cause exists whenever an employee’s conduct impairs the efficiency of the public service in which the employee is engaged.” *Id.* “The Appointing Authority has the burden of proving the impairment.” *Id.* (citing La. Const., art. X, § 8(A)). “The appointing authority must prove its case by a preponderance of the evidence.” *Id.* “Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service.” *Id.* “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).

NOPD has failed to meet its burden of showing either prong of cause for discipline. First, NOPD has failed to show the occurrence of the complained-of conduct. NOPD has failed to show that Officer Carter violated the CEW policy. NOPD’s own witnesses testified that it was reasonable for Officer Carter to believe the suspect posed an imminent risk of harm to Officer Carter and the complainant. The undersigned Commissioners credit the expert witness’ testimony

addressing why it was unsafe for Officer Carter to approach the suspect within contact range. Therefore, Officer Carter's actions met paragraphs (a)-(c) of the CEW policy.

Second, NOPD has failed to show that Officer Carter's use of the taser impaired the efficient operation of NOPD. Capt. Eric Gillard, one of the members of the disciplinary panel testified he was "on the border" about whether Officer Carter's conduct impaired the efficient operation of NOPD. NOPD offered no evidence that Officer Carter's belief that the suspect may have had a weapon was not credible. Capt. Gillard agreed with Officer Carter's attorney that the subject was capable of violence and capable of pulling it off. (Tr. at 112). Capt. Haney testified that the presence of the victim in the suspect's intended path changed his assessment about the reasonableness of Officer Carter's use of the taser.

NOPD has also changed its policy to recognize that an officer may use a taser when harm is imminent, even if the alleged crime is a misdemeanor. (Tr. at 109). Failure to follow policy usually impairs the efficient operation of the police department. In this case, the officer's actions appear to have led to a change in the policy which presumably would not have been made had it not *bettered* the efficiency of the operation of the police department. This change benefits officer safety by recognizing prospective threats. If Officer Carter's conduct on August 10, 2020, had occurred under the new version of the policy, Officer Carter's actions would meet not only paragraphs (a)-(c) of the CEW policy but also paragraphs (d)-(e).

III. CONCLUSION

Officer Carter's appeal is GRANTED. NOPD shall reimburse Officer Carter all wages and emoluments of employment from the five-day suspension and remove the discipline from Officer Carter's record.

This the 6th day of April, 2023

WRITER:



Brittney Richardson (Apr 6, 2023 12:36 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:



J H Korn (Mar 31, 2023 10:25 CDT)

JOHN KORN, VICE-CHAIRPERSON



Mark C. Surprenant (Mar 31, 2023 09:37 CDT)

MARK SURPRENANT, COMMISSIONER