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Thursday, December 22, 2016

Mr. Donovan A. Livaccari
101 W. Robert E. Lee, Suite 402
New Orleans, LA 70124

Re: **Reginald Koeller VS.
Department of Police
Docket Number: 8526**

Dear Mr Livaccari:

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 - 12/22/2016 - 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
Brendan M. Greene
Reginald Koeller

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

REGINALD KOELLER vs. DEPARTMENT OF POLICE	DOCKET No.: 8526
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I. INTRODUCTION

Appellant, Reginald Koeller, 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, nor does Appellant alleged that NOPD’s investigation violated the provisions of La. R.S. § 40:2531. (Tr. at 8:2-20). Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause. The undersigned Commissioners have reviewed the transcript of the hearing that occurred on September 22, 2016, exhibits accepted into evidence by the hearing examiner, and the report filed by the hearing examiner. Based upon our review of these items, we now render the following findings and judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD suspended Appellant for three days in connection with an incident that occurred on July 5, 2015. (H.E. Exh. 1). During that incident, NOPD alleges that Officer Koeller violated

NOPD Rule 4: Performance of Duty; Paragraph 4: Neglect of Duty; Subparagraph C1 (hereinafter “Rule 4 Violation”). This section of NOPD’s rules reads as follows:

The following acts, or omissions to act, although not exhaustive, are considered neglect of duty...(1) failing to take appropriate and necessary police action.

(H.E. Exh. 1). NOPD alleges that Appellant’s actions during his response to a July 5, 2015 call for service were inadequate and constituted a failure take appropriate and necessary police action.

B. July 5, 2015 Call for Service

At approximately 3:09 a.m. on July 5, 2015, NOPD dispatch received calls related to a dispute between two family members. (NOPD Exh. 1). One of the citizens – hereinafter referred to as “L.S.” – informed an NOPD dispatcher that he was concerned about the erratic behavior of his son – hereinafter referred to as “P.S.” In requesting the presence of NOPD Officers, L.S. informed the dispatcher that his adult son was “acting crazy” and was requesting the return of a handgun. (NOPD Exh. 2). During his call to NOPD, L.S. indicated that P.S. was a deputy for the Orleans Parish Sheriff. *Id.* P.S. also called NOPD dispatch regarding this incident. P.S. indicated that he needed assistance retrieving his handgun from his father (L.S.). *Id.* The fact that one of the individuals involved in this incident was a law enforcement officer with a handgun played a prominent role in NOPD’s disposition of this matter.

Appellant stipulated to responding to the calls for service at approximately 3:30 a.m. on Saturday, July 5, 2015. Pursuant to NOPD policy, when Appellant arrived at the scene, he activated his Body Worn Camera (hereinafter “BWC”) which recorded a video of the response in evidence as “NOPD Exhibit 3.” (Tr. at 8:22-9:10).

The video shows that Appellant encountered L.S. upon exiting his vehicle. (NOPD Exh. 3). Appellant testified that L.S. had a “very calm” demeanor and did not appear to be injured. (Tr. at 82:22-83:8). However, Appellant did acknowledge that L.S. was “cautious,” and the video

confirms that L.S. expressed a clear concern that P.S. was acting “weird.” (NOPD Exh. 3). After listening to L.S. describe the source of his concern, Appellant accurately explained the process for involuntary commitment.¹ L.S. appeared to listen to and accept Appellant’s explanation. *Id.*

Appellant then asked where P.S. was and if L.S. would like to have Appellant try to talk with P.S. L.S. indicated that P.S. was “upstairs” and then invited Appellant into the residence. Upon entering, Appellant observed the home to be clean and neat with no outward signs of a struggle or any acts of violence. (Tr. at 86:1-8). L.S. then ascended stairs and asked an individual (presumably P.S.) if he wanted to talk with the police. Moments later, L.S. returned and informed Appellant that his son did not want to come downstairs. (NOPD Exh. 3). Appellant then asks L.S. if P.S. wanted Appellant to come upstairs and talk. (*Id.* at 3:20). L.S. responds, “no.” *Id.* Appellant testified that he could hear P.S. responding to questions from L.S. and such responses did not sound irate or out of control. (Tr. at 86:19-24).

Appellant stated that he chose not to go upstairs because P.S. was in a “private space,” had not been accused of committing a crime, and was not doing anything that alerted Appellant’s “suspicion to him having a mental health crisis.” (Tr. at 87:21-23). When asked why he did not confiscate P.S.’s firearm, Officer Koeller stated that he thought it would be a violation of P.S.’s second amendment rights since there was no apparent cause to take such an action. *Id.* at 88:15-89:6.

After exiting the residence with L.S., Appellant radioed his immediate supervisor, Sgt. Rudolph Thomas in order to provide a status report on the call for service. In the BWC video, Appellant can be heard informing Sgt. Thomas that the original classification of the call was a

¹ NOPD Sergeant Tokishiba Lane-Hart, who conducted the investigation into Appellant’s alleged misconduct, testified that Appellant’s explanation of the involuntary commitment process was accurate. (Tr. at 40:5-10).

“domestic disturbance” but Appellant tells Sgt. Thomas that “no disturbance occurred.” (NOPD Exh. 3). This appears to be accurate based upon L.S.’s demeanor and statements along with Appellant’s own observations. What Appellant omitted from his briefing to Sgt. Thomas was that P.S. was a sheriff’s deputy, and that L.S. felt the need to confiscate P.S.’s handgun. *Id.* While Sgt. Thomas would have had access to the dispatcher’s report regarding L.S.’s initial call, supervisors typically depend upon responding officers to provide important details with respect to a particular call rather than what a dispatcher writes in a report.

The NOPD Sergeant responsible for investigating Appellant’s alleged misconduct, Tokishiba Lane-Hart, reviewed the BWC video and testified that Appellant’s actions were inappropriate. Sgt. Lane-Hart expressed a serious concern over Appellant’s failure to personally observe P.S.’s physical and mental state. (Tr. at 33:4-20, 35:22-36:1). According to Sgt. Lane-Hart, NOPD has a policy that requires officers to observe subjects under the circumstances that confronted Appellant on July 5, 2015. *Id.* at 33:12-15. However, NOPD did not charge Appellant with a violation of this policy – NOPD Policy 600 – and never introduced this policy. *See id.* at 38:22-25.

Based upon her own review of the video, Sgt. Hart admitted that she did not observe any of the necessary prerequisites for involuntary commitment of P.S. *Id.* at 40:12-16. However, Sgt. Lane-Hart focused on the fact that Appellant did not personally observe P.S.’s physical or mental state and was therefore missing a key piece of information. *See id.* at 40:16-19.

When challenged as to any possible justification for her contention that Appellant should have conducted a further investigation after initially being denied access to P.S., Sgt. Lane-Hart stated that:

The justification he would have had was due to the nature of the call where you have a parent calling to say that their adult child, who is residing with them in their

residence, is saying that hey, he is acting out, he is taking, he is taking medication and acting weird. Although it's not a criminal matter at that point it becomes a welfare issue for the Police Department. So when [L.S.] made that comment about [P.S.] and [L.S.] called us out, it is upon us to do our due diligence to make sure that everybody involved is in good standing, or I should I say not good standing, but safe and healthy [Appellant] should have called the supervisor out on the scene or insist, I should have said insisted that, "Hey, I need to see your son." ... Because the possibility is if he would have interviewed him, maybe would have seen something, maybe not. But the only reason I sustained it is because [Appellant] failed to make physical contact and interview [P.S.].

(Tr. at 45:24-47:6). Notwithstanding Sgt. Lane-Hart's explanation, the record is silent as to the training NOPD personnel undergo regarding the assessment of citizens or suspects who may be suffering from mental health problems.

Commander Lawrence Dupree was responsible for conducting the pre-disciplinary hearing regarding the allegations against Appellant. In doing so, he reviewed the investigative report as well as all of the materials submitted by Sgt. Lane-Hart, including the BWC footage. (Tr. at 49:8-20). Cmdr. Dupree sustained the allegations against Officer Koeller due to the fact that Officer Koeller "neglected to interview [P.S.]" and "failed to tell his supervisor that one party was a deputy sheriff, had his handgun confiscated, was taking unknown medication, and was acting irate and weird." (Tr. at 52:15-23, 55:9-56:9; NOPD Exh. 4).² Cmdr. Dupree testified that P.S.'s job as a deputy sheriff was an extremely important detail because of the position of trust and power occupied by law enforcement personnel. (Tr. at 71:1-15).

III. LEGAL STANDARD

Appointing authorities may only discipline permanent employees 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.*

² Appellant did inform Sgt. Thomas that L.S. had indicated that P.S. was taking medication that was causing P.S. to act "a little strange." (NOPD Exh. 3 at 5:11).

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. Occurrence of the Complained of Activities

NOPD based its decision to suspend Appellant on, 1) Appellant’s failure to personally observe P.S.’s physical and mental state, and 2) Appellant’s failure to inform Sgt. Thomas that P.S. was a sheriff’s deputy whose father had confiscated his firearm.

1. Failing to Personally Observe P.S.

Appellant provided compelling testimony justifying his actions once in the residence. Such justification included; 1) Appellant’s observation that L.S. was calm (albeit clearly worried), 2) there were no outward signs of struggle, 3) it was 3:30 in the morning, 4) P.S. did not sound erratic or irate when responding to L.S.’s questions, 4) P.S. did not want to talk with Appellant, and 5) Appellant did not want to enter P.S.’s personal space without an invitation to do so.

Sgt. Lane-Hart testified that Appellant violated NOPD policy by failing to personally observe P.S.'s behavior. However, NOPD never introduced this policy and did not cite it in the disciplinary notice to Appellant. The BWC video shows that Appellant was not passive or apathetic in his interactions with L.S. In fact, Appellant spoke with L.S. at length regarding the requirements of involuntary commitment, offered to try and speak with P.S. and entered the residence with the hope of speaking with P.S. The Commission does not find that Appellant's actions in interacting with P.S. or L.S. constituted a Rule 4 Violation.

2. Failing to Notify Supervisor of P.S.'s Profession and Presence of Handgun

Law enforcement personnel occupy a position of trust and power in any community. Any credible evidence that an individual who wields such power is unstable or may be suffering from a mental illness/breakdown must be treated seriously. Appellant need only have notified his supervisor of P.S.'s status as a law enforcement officer with a handgun and NOPD would likely not have moved forward with discipline. Appellant stated that he did not feel that P.S.'s occupation as a sheriff's deputy was relevant or important enough to share with his supervisor. The undersigned Commissioners disagree.

Based upon the foregoing, the Commission finds that Appellant did fail to take appropriate action when he failed to notify his supervisor that P.S. was a sheriff's deputy.

B. Impairment of Efficient Operation of Appointing Authority

1. LC's Future Criminal Conduct

NOPD initiated the investigation into Appellant's actions following reports that P.S. engaged in criminal activity soon after Appellant responded to the July 5th call for service. (Tr. at 25:2-11; H.E. Exh. 1). After completing his investigation, Cmdr. Dupree determined that

Appellant's failure to adequately investigate the July 5th call for service contributed to a later incident that occupied substantial resources of the NOPD. (Tr. 59:10-21).

In her report, Sgt. Hart hypothesized that, "if it was noticeable that [P.S.] would act irate and display behaviors that would indicate that he was a danger to himself or other, members of the [NOPD] could have effect[ed] a civil commitment." (NOPD Exh. 1)(emphasis added). This is conjecture. At the time Appellant reported to the scene, P.S. presented as an individual who was tired and did not want to talk with the police. Neither P.S. nor L.S. raised their voices or appeared agitated or irate. Hindsight is 20/20, and Appellant's actions must be viewed in the context of what was before him during the early morning hours of July 5, 2015. NOPD did not establish that, had Appellant personally observed P.S. or informed his supervisor that P.S. was a law enforcement officer, NOPD could have averted P.S.'s future criminal conduct.

2. Failure to Inform Sgt. Thomas of P.S.'s Status as Law Enforcement Officer

NOPD Officers in the field are under an enormous amount of pressure and often have to make split second decisions without the advantage of a calm moment to collect their thoughts. In such circumstances, it is understandable if a detail is omitted. Yet, in the matter now before the Commission, Appellant did have a calm moment. In fact, the entire call proceeded in an orderly manner without apparent conflict or confrontation. Thus, Appellant had time to collect his thoughts and provide Sgt. Thomas with a detailed report as to the essential facts surrounding the call for service. Nevertheless, he failed to identify two vital facts; 1) the individual on medication and acting "a little strange" was a sheriff's deputy, and 2) the father of the sheriff's deputy was so concerned that he took the deputy's firearm.

Whenever a police officer fails to inform his supervisor of all relevant information regarding a call for service, the efficient operations of NOPD suffer. Appellant's failure to notify

Sgt. Thomas of P.S.'s status as a law enforcement officer is an omission that deprived Sgt. Thomas of essential information and compromised Sgt. Thomas's ability to properly allocate NOPD resources. While Appellant may have thought P.S.'s job was "irrelevant," the Commission credits Cmdr. Dupree's testimony to the contrary.

Based upon our findings, NOPD has established that, through the omission of material facts regarding the call for service, Appellant compromised the efficient operations of the NOPD.

C. Discipline Commensurate with Offense

In conducting its analysis, the Commission must determine if the Appellant's suspension 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). The Commission makes such a determination independently based upon the facts presented during the hearing. *Morris v. City of Minden*, 50,406 (La.App. 2 Cir. 3/2/16)(citing *Walters v. Dept. of Police of New Orleans*, 454 So.2d 106 (La.1984); *City of Bossier City v. Vernon*, 12-0078 (La.10/16/12), 100 So.3d 301)(emphasis added).

Cmdr. Dupree testified that Appellant's misconduct constituted a "category one" violation according to NOPD's penalty matrix and that a three-day suspension was within the range of discipline provided for under the matrix. (Tr. at 58:11-25). The matrix provides a useful reference to the Commission regarding the reasonableness of discipline. And, even though the Commission is not bound by any appointing authority's matrix, such matrices do provide guidance to employees as to the degree of discipline that accompanies certain violations. Such guidance is an element to the reasonableness of discipline.

NOPD has a clear interest in having its officers provide supervisors with relevant information regarding calls for service. With complete and accurate information, supervisors are in a much better position to issue orders and assign resources. Appellant's omissions do not appear willful, but nevertheless constitute misconduct that NOPD seeks to deter. Based upon the foregoing, the undersigned commissioners find that the three-day suspension issued to Appellant was commensurate with his misconduct.

V. CONCLUSION

Based upon the foregoing, the Commission hereby DENIES Appellant's appeal.

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Signatures appear on the following page.

R. Koeller
No. 8526 BMG

Judgment rendered this 22nd day of December, 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

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

12-19-16
DATE

Joseph S. Clark
JOSEPH S. CLARK, COMMISSIONER

12-19-16
DATE

Tania Tetlow
TANIA TETLOW, COMMISSIONER

12-20-16
DATE