



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

MICHELLE D. CRAIG, CHAIRPERSON
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CLIFTON J. MOORE, JR.

LATOYA CANTRELL
MAYOR

Friday, August 24, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Kenneth M. Plaisance
5626 Elysian Fields Avenue
New Orleans, LA 70122

Re: **Terrance Saulny VS.
Department of Police
Docket Number: 8351**

Dear Mr. Plaisance:

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 - 8/24/2018 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, 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
Jim Mullaly
Terrance Saulny

file



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Re: **Terrance Saulny VS.
Department of Police
Docket Number: 8423**

Dear Mr. Plaisance:

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 - 8/24/2018 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

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CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

TERRANCE SAULNY vs. DEPARTMENT OF POLICE	DOCKET Nos.: 8423, 8351
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I. INTRODUCTION

Appellant, Terrance Saulny, 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. Appellant asserted that NOPD did not adhere to the standards required by our Rules and Louisiana Revised Statute § 40:2531 in conducting its investigation. Therefore, the Commission’s analysis will first address Appellant’s procedural claims. If the Commission determines that NOPD’s investigation was procedurally sound, we will then consider 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.

On November 2, 2017 and December 8, 2017, a hearing examiner appointed by the Commission presided over an appeal hearing and prepared a report. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner’s report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

On September 25, 2014, NOPD placed Appellant on an unpaid suspension in connection with allegations that Appellant violated the following NOPD Rule:

- Rule 2: Moral Conduct; Paragraph 6, Unauthorized Force;

(H.E. Exh. 1).

After serving thirty-eight days of unpaid suspension, Appellant returned to work in the “communications” division of NOPD as a non-commissioned officer. (Tr. at 141:4-10). NOPD did not return Appellant’s service weapon to him and did not assign him law enforcement work.

NOPD terminated Appellant’s employment effective June 11, 2015. The reasons NOPD provided to Appellant in the notice of termination were the following sustained violations of NOPD Policy:

- Rule 2: Moral Conduct; Paragraph 6, Unauthorized Force; and
- Rule 2: Moral Conduct; Paragraph 4: Truthfulness.

(NOPD Exh. 2).

The notice contained specifics regarding how Appellant allegedly violated the above-cited rule. With respect to the “Unauthorized Force” allegation, NOPD asserted that Appellant pushed a juvenile detainee (referred to hereinafter as “Ms. B”) into the corner of a detention cell, placed his forearm across the neck, and twice struck Ms. B with metal restraints. *Id.* NOPD alleged that Appellant violated its policy regarding truthfulness when he denied using “vulgarity” towards Ms. B. *Id.* Pursuant to the termination notice, NOPD viewed each rule violation as grounds for termination.

B. Appellant's Procedural Challenge to NOPD's Investigation

1. Appellant's Emergency Suspension

Louisiana Revised Statute 40:2531, known colloquially as “the Police Officers’ Bill of Rights,” guarantees certain due process protections for any law enforcement officer who is the subject of an investigation into alleged misconduct. The law establishes specific timelines for initiating investigations as well as completing them:

When a formal, written complaint is made against any police employee or law enforcement officer, the superintendent of state police or the chief of police or his authorized representative shall initiate an investigation within fourteen days of the date the complaint is made. Except as otherwise provided in this Paragraph, each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days.... The investigation shall be considered complete upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint. Nothing in this Paragraph shall limit any investigation of alleged criminal activity.

La. Rev. Stat. § 40:2531(7).

The Louisiana Court of Appeals for the Fourth Circuit has consistently held that NOPD “initiates its investigation under La. R.S. 40:2531(B)(7) on the date it initiates the DI-1 form.” *Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16, 8), 198 So.3d 250, 255, *writ denied*, 2016-1691 (La. 11/29/16), 210 So.3d 804 (citing *Abbott v. Dep't of Police*, 2014-0993, p. 17 (La. App. 4 Cir. 2/11/2015), 165 So.3d 191, 202-03). And, an investigation “shall be considered complete” upon notice to the accused officer “of a pre-disciplinary hearing or an unfounded or unsustained complaint.” *Id.* Any discipline issued to an accused officer in contravention of the due process guarantees of the Police Officers’ Bill of Rights is an “absolute nullity.” La. Rev. Stat. § 40:2531(C); *see also*, *Mulvey v. Dep't of Police*, 2012-1041 (La.App. 4 Cir. 1/30/13, 9); 108 So.3d 891, 896 *writ denied*, 2013-0484 (La. 4/5/13); 110 So.3d 591 (“non-compliance with the minimum standards set forth in La.Rev.Stat. 40:2531 results in the discipline imposed being

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declared an absolute nullity.”); *Young v. Dep't of Police*, 2013-1596 (La.App. 4 Cir. 6/25/14); 152 So.3d 193, 195, *reh'g denied* (Dec. 30, 2014), *writ denied*, 2015-0201 (La. 4/17/15); 168 So.3d 400; *Liang v. Dep't of Police*, 2013-1364 (La.App. 4 Cir. 8/20/14, 18); 147 So.3d 1221, 1230 (“NOPD's failure to comply with the minimum standards of the Police Officer's Bill of Rights renders the discipline imposed an absolute nullity.”).

Here, NOPD initiated its investigation into Appellant’s alleged violation of the use of force policy on September 24, 2014. (NOPD Exh. 1). After securing an extension of the original sixty-day deadline, NOPD completed its investigation on January 21, 2015. (NOPD Exh. 3). Yet, one day after initiating its investigation, and well before it had completed its investigation, NOPD placed Appellant on an unpaid “emergency suspension.” (H.E. Exh. 1). In total, Appellant served thirty-eight days of unpaid suspension prior to returning to perform administrative duties.

There is no question that the thirty-eight-day unpaid suspension constituted discipline. Similarly, there is no dispute that NOPD issued such discipline without providing Appellant with the opportunity to, retain counsel, attend a pre-disciplinary hearing or introduce evidence and/or testimony on his behalf. Further, the record establishes that NOPD issued discipline before substantiating or even investigating the allegations against Appellant.

Bearing the above findings of facts and law, the Commission finds that the “emergency suspension” issued to Appellant violated the due process requirements of the Police Officers’ Bill of Rights and is therefore an absolute nullity. *See Hampton v. Dep't of Fire*, 2016-1127 (La. App. 4 Cir. 5/3/17, 9), 220 So.3d 111, 117 (period of emergency suspension for firefighter deemed an absolute nullity because it preceded opportunity to call witnesses or obtain counsel). In making this finding, the Commission notes that our rules do not contain the same procedural protections for classified employees. Employees not covered by the Firefighters’ Bill of Rights or Police

Officers' Bill of Rights are entitled to a pre-disciplinary hearing only when the discipline in question is termination.

2. NOPD's Honesty and Truthfulness Investigation

Among the due process protections guaranteed by the Police Officers' Bill of Rights is the right of the accused officer to be informed, at the commencement of interrogation, of the nature of the investigation. La. Rev. Stat. § 40:2531(B)(1). In the matter now before the Commission, NOPD's initial investigation into Appellant's alleged misconduct focused entirely upon Appellant's use of force against Ms. B. NOPD specifically cited to Appellant's use of force in the emergency suspension notice and DI-1 intake form. (H.E. Exh. 1; NOPD Exh. 1).

Sergeant Andre LeBlanc conducted an interrogation of Appellant on October 24, 2014. (Tr. at 162:18-20). The stated purpose of the interrogation was to address Appellant's alleged violation of NOPD's rule regarding use of force. *Id.* at 57:4-16, 140:20-25. During the course of the investigation, Sgt. LeBlanc asked Appellant about Appellant's use of profanity and/or vulgarity during his interaction with Ms. B. *Id.* at 143:1-14. Based upon Appellant's responses, Sgt. LeBlanc believed that Appellant was not being truthful. At some point in time after the October 24th interrogation, NOPD added an allegation to its investigation of Appellant's actions. Namely, an allegation that Appellant had violated NOPD's rule requiring officers be honest and truthful. (NOPD Exh. 3).

The first time NOPD personnel questioned Appellant about his alleged dishonesty was during the pre-disciplinary hearing presided over by Deputy Superintendent Rannie Mushatt. Deputy Superintendent Mushatt noted that Appellant changed his statement regarding his use of profanity. (Tr. at 91:16-92:1). According to Deputy Superintendent Mushatt, Appellant had

initially denied using profanity when interrogated by Sgt. LeBlanc, but changed his statement after having an opportunity to review body-worn camera footage of the incident. *Id.*

Appellant did not have notice of any alleged rule violation regarding honesty and truthfulness in advance of Sgt. LeBlanc's interrogation because the facts related to the alleged violation had not yet occurred. It was Appellant's responses to Sgt. LeBlanc's questions that triggered the second allegation of misconduct. And, Appellant did have ample notice of both the alleged unauthorized use of force and honesty/truthfulness violations in advance of his pre-disciplinary hearing with Deputy Superintendent Mushatt. Putting the merits of the Parties' cases aside, the Commission finds that NOPD provided the requisite notice to Appellant regarding the honesty/truthfulness violation in advance of asking him questions about it. In making this finding, the Commission observes that the alleged violation did not even exist until Appellant began answering Sgt. LeBlanc's questions. Appellant makes the suggestion that Sgt. LeBlanc should not have been asking Appellant about his use of profanity or vulgarity during an interrogation focused on an unauthorized use of force. We disagree. While Sgt. LeBlanc's questions about Appellant's use of profanity were not relevant to Appellant's use of force, it was appropriate for Sgt. LeBlanc to establish some context regarding Appellant's interaction with Ms. B.

Having addressed Appellant's procedural arguments, the Commission turns to the merits of the case.

C. NOPD Policies

The two relevant NOPD policies for the purpose of the instant appeal are:

- Rule 2: Moral Conduct; Paragraph 6, Unauthorized Force; and
- Rule 2: Moral Conduct; Paragraph 4: Truthfulness.

(NOPD Exh. 2).

1. NOPD Use of Force Policy

NOPD's Use of Force Policy provides guidelines to officers on the reasonable use of force. (NOPD Exh. 7). The Policy acknowledges that, "there is no way to specify the exact amount or type of reasonable force to be applied in any situation" but NOPD expects officers to make use of force decisions in a "professional, impartial and reasonable manner." *Id.* Ultimately:

Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that is necessary in a particular situation, with limited information and in the circumstances that are tense, uncertain and rapidly evolving.

Id.

The policy also provides some useful definitions in order to determine the appropriate level of force for a given situation. One such definition is for "active resistance." Per NOPD policy, a subject engages in "active resistance" when he/she; attacks or attempts to attack an officer, exhibits aggressive behavior, or exhibits defensive resistance (e.g., attempts to flee). *Id.* A subject engages in "passive resistance" when he/she; is unresponsive to police verbal communication or direction, verbally indicates that he/she does not intend to comply with directions, or braces, tenses, links arms or otherwise indicates that he/she intends to avoid being taken into custody. *Id.* Additionally, the Use of Force Policy defines "reasonable force" as the amount of force that is "objectively reasonable under the circumstances and the minimum amount of force necessary to effect an arrest or protect the officer or other person." *Id.*

Among the many factors upon which NOPD relies in determining whether or not an Officer's use of force was reasonable are:

- (a) Whether the subject poses a threat to himself, officers or others and the immediacy and severity of the threat.
- (b) The conduct of the individual being confronted as reasonably perceived by the officer at the time.

- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers versus subjects).
- (d) The effects of drugs or alcohol.
- (e) Subject's mental state or capacity.
- (f) Proximity of weapons or dangerous improvised devices.
- (g) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (h) The availability of other options and their possible effectiveness.
- (i) Seriousness of the suspected offense or reason for contact with the individual.
- (j) Training and experience of the officer.
- (k) Potential for injury to citizens, officers, suspects and others.
- (l) Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the officer.
- (m) The risk of escape.
- (n) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (o) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (p) Any other exigent circumstances.

Id.

Along with the above factors, NOPD's Use of Force Policy establishes specific principles for Officers regarding when it is appropriate to use force. Several of these principles (reproduced immediately below) are applicable to the instant appeal:

- Force shall be de-escalated immediately as resistance decreases.
- Officers shall not use neck holds, except where lethal force is authorized.
- Officers shall not use force above un-resisted handcuffing to overcome passive resistance, except that physical removal is permitted as necessary and objectively reasonable.

Id.

Finally, the Commission notes that, according to the Use of Force Policy, a "Level 3" use of force includes "any strike to the head," and "use of impact weapons where contact is made."

Id.

2. NOPD's Honesty and Truthfulness Policy

NOPD's rule regarding honesty and truthfulness is very straight forward. The rule requires Officers to be "honest and truthful at all times in their spoken, written, or electronic communication." (H.E. Exh. 1). An officer violates this rule when he "makes a materially false

statement with the intent to deceive.” *Id.* The policy further defines a “material” statement as one that could have an impact on the “course or outcome of an investigation....” *Id.*

D. September 24, 2014

At the time of the underlying incident, Appellant had served as an officer in NOPD for twenty-five years. (Tr. at 131:10-12). On the evening of the 24th, Appellant was working at the Juvenile Detention Center (hereinafter the “Center”). At approximately 9:00 p.m. another officer (identified in the record as Officer Kelsey Lewis), brought an arrested juvenile subject (Ms. B) to the front desk of the Center for intake. Officer Lewis informed Appellant that Ms. B had been arrested for robbery and resisting arrest. *Id.* at 131:13-23. Officer Lewis also told Appellant that Ms. B had been banging her head on the back of the patrol unit. *Id.* at 132:20-25.

After processing Ms. B through intake, Appellant placed Ms. B in a holding cell that was near an exit from the Center. *Id.* at 133:6-14. Appellant testified that the locking mechanism on Ms. B’s holding cell was malfunctioning and other juvenile detainees, in the recent past, kicked open the door. *Id.* at 133:23-134:2. Soon after being placed in the cell, Ms. B began kicking the door and yelling “let me out.” *Id.* at 134:3-8. Appellant directed Ms. B to stop, but Ms. B refused. Concerned that Ms. B would either kick open the door and escape or injure herself, Appellant retrieved four-point restraints¹ and entered Ms. B’s cell. *Id.* at 134:9-15. Upon entering Ms. B’s cell, Appellant testified that he directed Ms. B to calm down. When Ms. B refused to calm down, Appellant claimed that he directed Ms. B to kneel on the bench in the cell so that he could place her in the four-point restraints. *Id.* at 136:16-137:2. The Parties acknowledged that an officer’s

¹ Four-point restraints are made out of steel and resemble handcuffs. There are two sets of “cuffs” one set attaches to a subject’s wrists and another set to a subject’s ankles. There is a long chain that connects the two sets.

use of the four-point restraints within the Center – when used as restraints – is consistent with practice and policy. *Id.* at 77:3-13.

Video footage captured by a security camera in Ms. B’s holding cell on the night of the 24th is in evidence as “NOPD Exhibit 5.”² The video footage confirms that Ms. B repeatedly kicked the holding cell door, which flexes alarmingly with each strike. Appellant entered the holding cell and appears to be calm. (NOPD Exh. 5 at min. 3:00). For her part, Ms. B initially appears to comply with Appellant’s directives regarding turning around and moving towards the bench. Ms. B does not make any sudden or furtive movements, but Appellant appears to become agitated with what he described during his testimony as “one thing leading to another.” (Tr. at 135:22-2). Ms. B then folded her arms and can be observed saying something. (NOPD Exh. 5. at min. 3:20). This prompted Appellant to push Ms. B towards the bench with enough force to cause Ms. B to grab the cell wall to maintain balance. Appellant then continued to push Ms. B around the cell. As he did so, he struck Ms. B with the four-point restraints at least twice and forced his forearm under Ms. B’s chin for a brief period. At this point, another officer entered the cell and assisted Appellant in bringing Ms. B to the ground. Once on the ground, Appellant placed his weight on Ms. B’s back, struck Ms. B in her hip area with the restraints, and then secured the restraints on Ms. B’s feet and hands. The interaction between Appellant and Ms. B occurred within

² Appellant objected to the introduction of the video claiming that it was incomplete because it did not capture the entirety of Ms. B’s stay in the holding cell. The Hearing Examiner overruled the objection and allowed the video into evidence. Upon reviewing the video in the context of the underlying appeal, the Commission finds that the Hearing Examiner’s ruling to be appropriate. The video captures the moments before Appellant entered Ms. B’s cell, Appellant’s use of force and also several minutes of Ms. B after Appellant leaves the cell.

Appellant failed to articulate any convincing argument as to how any allegedly omitted footage would be relevant to the Commission’s analysis of whether or not Appellant’s use of force was reasonable. Appellant claimed that the video was incomplete because it did not show him placing Ms. B in the cell and did not show Ms. B attempt to “unhook” herself using the bench. (Tr. at 151:16-19). The Commission does not find that the absence of such footage prejudiced the Appellant in the assessment of whether his actual use of force was reasonable. For the purposes of the instant appeal, we find that the video footage is complete with respect to Appellant’s use of force.

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a span of less than thirty seconds. (*Id.* at min. 3:00-3:25). At no point during the time that Appellant was in the cell did Ms. B appear to be a flight risk or make any attempt to get past Appellant and through the cell door.

Following his interaction with Ms. B, Appellant contacted the City's Emergency Medical Services (hereinafter "EMS"). EMS members relocated to the Center and examined Ms. B. According to Appellant, the EMS personnel determined that Ms. B had not sustained any injuries and did not need to go to the hospital. (Tr. at 140:12-16). Appellant then contacted his supervising Sergeant to notify him of the incident and completed a "use of force statement."

Two days after the incident, NOPD placed Appellant on emergency suspension as it reviewed Appellant's use of force. While Appellant was on emergency suspension, Sergeant Andre LeBlanc contacted him and informed him that he was under investigation for his use of force on Ms. B. When Sgt. LeBlanc questioned Appellant regarding his use of vulgarity, Appellant claimed that he told Sgt. LeBlanc that he did not use "vulgarity." *Id.* at 143:1-4. Appellant asserted that Sgt. LeBlanc's question about the use of vulgarity was specifically focused on Ms. B's intake process. And, when Sgt. LeBlanc asked Appellant whether he cursed at Ms. B, Appellant claimed that his answer was, "I don't recall." *Id.* at 143:5-9. On cross-examination, Appellant acknowledged that, when asked by Sgt. LeBlanc whether or not he told Ms. B that "she would have to get her head right in the mother fucker" Appellant had replied, "I don't recall." *Id.* at 166:7-10.

During Appellant's pre-disciplinary hearing, Deputy Superintendent Mushatt asked Appellant whether or not he used profanity. This time, Appellant admitted using profanity. Appellant addressed this inconsistency during his testimony and explained that, between his interview with Sgt. LeBlanc and his disciplinary hearing (a period of seven months) he had had an

opportunity to review body-worn camera footage of the incident. The footage contained audio that captured Appellant using profanity during his interaction with Ms. B. *Id.* at 146:4-12. Prior to his interrogation by Sgt. LeBlanc, Appellant had not had an opportunity to review any video footage of the incident. Deputy Superintendent viewed Appellant's change of story as proof that he intended to mislead Sgt. LeBlanc and substantiated both the use of force allegation and the honesty/truthfulness allegation.

III. LEGAL STANDARD

A. General Standard

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.

IV. ANALYSIS

A. Occurrence of the Complained of Activities

1. *Unauthorized Use of Force*

During the presentation of his case, Appellant seems to conflate the motivation he had for entering Ms. B's cell with the motivation for his use of force against Ms. B. The Commission agrees with Appellant that it was appropriate for him to enter Ms. B's cell and attempt to get her to stop kicking the door. Once Appellant entered the cell, however, Ms. B did not appear to be a flight risk. Sgt. LeBlanc and Deputy Superintendent Mushatt testified that Ms. B was exhibiting "passive resistance" during the moments before Appellant shoved her repeatedly against the wall. (Tr. at 35:12-24, 98:7-11). Based upon the definition of "passive resistance" in NOPD's Use of Force Policy, we agree. In fact, Ms. B appears to have engaged in "text book" passive resistance by folding her arms and failing to comply with Appellant's directions. At no point in time during the thirty-second exchange does Ms. B actively resist Appellant. Nevertheless, Appellant uses all of his strength to push Ms. B against the wall and shoved his forearm under her chin. To make matters worse, Appellant used the four-point restraints as a weapon and repeatedly struck Ms. B with them (including around her head and shoulders).

There were no exigent circumstances that prevented Appellant from carefully considering the appropriate application of force. In other words, there was no need to make a "split-second" decision regarding whether or not to use force. Appellant's justification for his use of force was that he went into the cell "to put the shackles on [Ms. B] and she resisted." *Id.* at 159:6-8. When asked why he struck Ms. B with the restraints while Ms. B was laying prone on the ground, Appellant claimed that he "wasn't trying to strike her to injure her. I was trying to put the restraints on her." *Id.* at 159:12-19. While it may be true that Appellant was not trying to "injure" Ms. B

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when he struck her with the restraints, it is readily apparent that he was not trying to place the restraints on Ms. B during these strikes. For Appellant to suggest otherwise is disingenuous to the point of being insulting.

Appellant objected to questions regarding the size disparity between himself and Ms. B arguing that such differences are irrelevant. The Commission strongly disagrees. NOPD's Use of Force Policy clearly identifies the relative size of the officer and subject as a factor in determining whether or not the officer's use of force was reasonable. (NOPD Exh. 7). Specifically, the policy notes that the "age, size, relative strength, skill level" of the subject relative to the officer are all relevant factors when considering the appropriateness of the use of force. In the matter before us, Appellant was clearly older, much bigger, and much stronger than the juvenile with whom he was interacting. Despite this significant disparity, Appellant did not hesitate to use his height and weight advantage to force Ms. B about the cell.

The degree of force Appellant used far exceeded what was reasonable given the situation, and established Appellant's blatant disregard for the guidelines within NOPD's use of force policy. One such guideline states that, "[o]fficers shall not use force above un-resisted handcuffing to overcome passive resistance." Since Ms. B offered only passive resistance, Appellant's shocking and dramatic physical intervention clearly violated the policy.

As a result of the foregoing, the undersigned Commissioners find that NOPD has established that Appellant violated the Use of Force Policy as described in the termination notice in evidence as Hearing Examiner Exhibit 2.

2. Honesty and Truthfulness

In order to violate NOPD's rule regarding honesty and truthfulness, an officer must "knowingly" provide a false statement "with the intent to deceive." NOPD's case against

Appellant with respect to this rule rests upon its assertion that Appellant lied to Sgt. LeBlanc when Appellant; 1) denied using “vulgarity” during Ms. B’s intake process, and 2) when Appellant said he could not recall whether or not he told Ms. B “she would have to get her head right in the mother fucker.” *Id.* at 166:7-10. NOPD relied upon Appellant’s later admission to Deputy Superintendent Mushatt that he had in fact used profanity when interacting with Ms. B to substantiate Appellant’s honesty and truthfulness violation.

Appellant’s interview with Sgt. LeBlanc occurred on October 24, 2014, one month after the underlying incident itself. According to Appellant, Sgt. LeBlanc’s initial questions regarding the use of “vulgarity” pertained to Ms. B’s intake process. He denied using vulgarity during the intake process but asserted that he could not recall whether he used profanity against Ms. B some point later in the evening. Seven months after his interview with Sgt. LeBlanc, Appellant appeared before Deputy Superintendent Rannie Mushatt for a pre-disciplinary hearing. During that hearing, Appellant admitted that he used profanity during his interaction with Ms. B. Appellant attributed his changed statement to the fact that, during the intervening seven months, he had an opportunity to review body-worn camera footage of the incident and heard himself using profanity.

While NOPD established that Appellant used profanity when interacting with Ms. B, it has left too many other questions unanswered. First, it is not clear from the record whether or not Appellant retracted his denial of using profanity during Ms. B’s intake, his statement that he did not recall whether or not he used profanity, or both. It is also not clear from the record whether or not Appellant used profanity once or throughout his interactions with Ms. B. These deficiencies are significant. It is not difficult to believe that Appellant could forget a single inappropriate curse word. Forgetting a stream of obscenities is far less likely.

The Commission also questions NOPD's assertion – through the termination notice – that Appellant intentionally misled Sgt. LeBlanc. Based on Appellant's actions on the 24th, it does not appear that he sought to hide the fact that he used force. Appellant immediately reported his use of force and composed a use of force statement in conformity with NOPD policy. And, NOPD did not suggest that Appellant lied in his use of force statement or otherwise attempted to mislead the Force Investigation Team. While the Commission strongly disagrees with Appellant's claim that his use of force was reasonable, there is nothing in the record to suggest that Appellant attempted to hide his actions.

Bearing the above in mind, the Commission finds that NOPD has failed to meet its burden with respect to Appellant's intent to mislead Sgt. LeBlanc.

Additionally, in order to violate NOPD's rule requiring honesty and truthfulness, an Officer not only must lie, but the lie must pertain to a "material" fact. NOPD defines a "material" fact as a fact that could have an impact on the "course or outcome of an investigation..." (H.E. Exh. 2). When Sgt. LeBlanc interrogated Appellant, the only outstanding allegation against Appellant was his use of force against Ms. B. NOPD did not explain how Appellant's use of profanity while interacting with Ms. B could have impacted the outcome of the use of force investigation. Such an impact is not obvious to the Commission and we will not make a leap of faith based upon speculation unsupported by the record. Had NOPD initiated a concurrent investigation regarding Appellant's lack of professionalism, his use of profanity would certainly have been material. But, it was only after his interrogation by Sgt. LeBlanc that Appellant's use of profanity became part of NOPD's investigation.

In prior cases in which the Commission upheld the termination of NOPD personnel for violating the honesty/truthfulness rule, NOPD introduced exhaustive evidence that the appellants

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attempted to mislead investigators regarding some material fact that went to the heart of the underlying allegations. For example, in *Moran v. Department of Police*, C.S. No. 8524 (Feb. 28, 2017), the Commission found that an officer intentionally misled investigators regarding both the nature of the force he used on a handcuffed subject and why he used such force. Here, Appellant's alleged dishonesty related to a tangential matter – use of profanity – that had no apparent bearing on his use of force. When the focus of NOPD's investigation expanded to include Appellant's alleged dishonesty, Appellant answered Deputy Superintendent's questions honestly.

As a result of the foregoing, the Commission finds that, even assuming that Appellant intentionally misled Sgt. LeBlanc regarding Appellant's use of profanity, such misconduct was not a material fact related to Appellant's use of force.

B. Impact on NOPD's Efficient Operations

NOPD's Use of Force Policy succinctly summarizes the importance of establishing clear guidelines for officers:

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

(NOPD Exh. 7).

When an officer fails to follow the guidelines established by the policy, he or she compromises NOPD's ability to balance the authority vested in officers with the rights of residents. The policy is replete with warnings to officers to carefully consider the circumstances prior to using force. Residents depend upon officers to follow use of force guidance and any failure to do

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so compromises the trust the public has in NOPD. Through his actions, Appellant demonstrated that he did not respect the limitations of his power and authority. This had dire consequences for Ms. B who suffered unjustified violence at the hands of Appellant. Appellant's unjustified and excessive use of force on a juvenile inmate also reflected poorly on NOPD as a law enforcement entity.

As a result of the foregoing, we find that Appellant's conduct had a substantial adverse impact on the efficient operations of NOPD.

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 an interest and obligation in establishing clear guidance regarding the circumstances under which officers may use force. As noted above, when officers disregard such guidance, the consequences for the subject and NOPD as a law enforcement entity are serious. Therefore, it is reasonable for NOPD to deter violations of its Use of Force Policy with discipline up to and including termination.

NOPD has developed a penalty matrix in order to provide personnel with advance notice of the disciplinary sanctions possible for certain categories of misconduct. (NOPD Exh. 10). While the Commission is not bound by NOPD's penalty matrix, the existence of the matrix militates against a claim that discipline imposed pursuant to the matrix is arbitrary. Built into the matrix are aggravating factors that increase the severity of available sanctions. One such factor is

whether or not the rule violation at issue is a first offense. Prior to his interaction with Ms. B, Appellant did not have any sustained complaints against him regarding his use of force.

Yet, even a first offense for an unauthorized use of force exposes an officer to discipline up to termination if it is a “Category 3” offense. As defined by the matrix, a “Category 3” violation is misconduct that; a) may affect the rights or liberties of another, b) may affect job performance, and/or c) involves a serious administrative or criminal violation. NOPD asserts that Appellant’s use of force against Ms. B was a “Category 3” offense.

Video footage of Appellant’s use of force establishes that he overpowered Ms. B (a much smaller juvenile subject) who was passively resisting instructions by pushing her around the cell. He then proceeded to place his forearm under Ms. B’s chin while violently bringing the steel restraints down around her shoulder. When a fellow officer rendered assistance, Appellant struck Ms. B in the side with the restraints before finally applying the restraints to Ms. B’s legs. The Commission also notes that the disparity between Appellant’s size and strength as compared to Ms. B is a significant aggravating factor. Appellant failed to put into practice any of the guidelines contained within NOPD’s use of force policy when he flung Ms. B around the cell, pushed his forearm into her neck and used the steel restraints as weapons. His cavalier disregard for NOPD’s use of force policy calls into question Appellant’s ability to perform his duties as a police officer and protect the rights of residents and detained subjects.

Based upon a review of the record before us, the Commission agrees that Appellant’s use of force was a major disciplinary infraction and represented a dramatic violation of the use of force guidelines established by NOPD. While NOPD had other options available, the Commission does not believe that termination is so severe as to constitute arbitrary or capricious discipline.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant's appeal with respect to his termination. However, the Commission GRANTS Appellant's appeal with respect to the thirty-eight day unpaid emergency suspension Appellant served at the beginning of NOPD's investigation. NOPD shall remit to Appellant all back pay and emoluments related to any time Appellant served on an unpaid suspension prior to the conclusion of NOPD's investigation into his misconduct.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

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Judgment rendered this 24th day of August, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

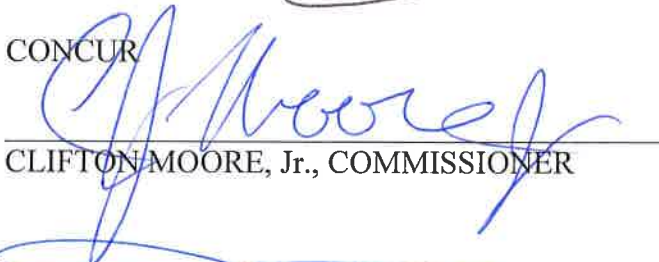
WRITER



MICHELLE D. CRAIG, CHAIRPERSON

8-21-18

DATE

CONCUR


CLIFTON MOORE, Jr., COMMISSIONER

8-21-18

DATE



STEPHEN CAPUTO, VICE-CHAIRPERSON

8-21-18

DATE