



CITY OF NEW ORLEANS

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Friday, October 5, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

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

Re: **Rhett Charles VS.
Department of Police
Docket Number: 8736**

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 - 10/5/2018 - 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 cursive script that reads "Doddie K. Smith".

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Renee E. Goudeau
Jay Ginsberg
Rhett Charles

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

RHETT CHARLES, Appellant, vs. DEPARTMENT OF POLICE, Appointing Authority	DOCKET No.: 8736
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I. INTRODUCTION

Appellant, Rhett Charles, 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. Further, the Parties stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the standards required by our Rules and Louisiana Revised Statute § 40:2531. Therefore, the only question before the Commission is whether or not NOPD disciplined Appellant for sufficient cause. At all times relevant to the instant appeal, Appellant served as a Sergeant for NOPD and had permanent status as a classified employee.

On January 11, 2018, a hearing examiner appointed by the Commission presided over an appeal hearing. 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 hereby DENY the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD issued Appellant a two-day suspension for allegedly violating the following Rule

- Rule 4: Performance of Duty, Paragraph 4(B) Supervisory Responsibility

(H.E. Exh. 1).¹ NOPD's policy regarding personnel with supervisory authority states:

An employee with supervisory responsibility shall be in neglect of duty whenever he fails to properly supervise subordinates, or when his actions in matters relating to discipline fail to conform [to] the dictates of Departmental Rules, Policies and Procedures.

Id.

Appellant allegedly violated this rule when he failed to properly investigate a complaint of misconduct against another NOPD Officer, Officer Taralyn Webster. *Id.*

B. Appellant's Investigation

On August 6, 2015, Appellant began an investigation into misconduct allegedly perpetrated by Officer Webster. (NOPD Exh. 7). Specifically, Officer Webster allegedly failed to properly process a report regarding a traffic accident and prematurely terminated recording video footage on her body-worn camera ("BWC"). *Id.* The allegations against Officer Webster arose out of her investigation of a traffic accident that occurred on March 27, 2017 at the intersection of Napoleon Avenue and South Claiborne Avenue. (NOPD Exh. 3). The following facts are not in dispute regarding Officer Webster's actions while investigating the accident:

- After arriving at the scene of the accident, she activated her BWC and interviewed the drivers involved.
- She did not immediately make an assessment of who was at fault for the accident.

¹ NOPD took the position that each of Appellant's Rule 4 violations would have warranted demotion as stand-alone infractions.

- She deactivated her BWC prior to leaving the scene and while she was engaged with one of the drivers about an earlier, unrelated traffic accident at the same intersection.
- She subsequently met with a member of the City Attorney's Traffic Court division but did not supplement her report.

As part of his investigation, Appellant reviewed audio and video captured by Officer Webster's BWC and interviewed Officer Webster. Ultimately, he determined that Officer Webster's actions did not warrant discipline and made a recommendation that the allegations against her be "unfounded" with respect to the traffic enforcement action and "non-sustained" for the BWC violation. (NOPD Exh. 3). Appellant explained that part of his motivation for recommending conclusions of "non-sustained" and "unfounded" was Officer Webster's recent return from leave due to illness or injury. (Tr. at 121:3-11). He also believed that Officer Webster's errors could be addressed through counseling and additional training rather than discipline.

Deputy Superintendent Paul Noel was Commander of the Second District at all times relevant to this appeal and was responsible for reviewing the investigation conducted by Appellant. *Id.* at 9:23-10:3. After reviewing Appellant's investigation, Deputy Superintendent Noel was concerned that the recommendations in Appellant's report were inconsistent with the applicable NOPD policies. *Id.* at 10:21-12:10. Particularly when it came to the BWC policy.

NOPD's BWC policy requires an Officer to keep his/her BWC activated "until an investigative or enforcement contact or incident has concluded." (NOPD Exh. 5).² The BWC Policy goes on to define the "conclusion" of an incident as "when an officer has terminated contact

² The Commission observes that the BWC policy in evidence has an effective date of April 5, 2015 and purports to revise and replace an earlier version. (NOPD Exh. 5). Given that Appellant did not object to the introduction of the policy, the Commission finds that there were no substantive differences between the policy in place at the time of the vehicle accident Officer Webster investigated (March 27, 2015) and the April 5th version in evidence.

with an individual, cleared the scene of a reported incident or has completed transport of a civilian or arrestee.” *Id.* When Deputy Superintendent Noel reviewed footage captured by Officer Webster’s BWC, he observed that Officer Webster was still speaking with one of the drivers about an accident when she terminated the recording. *Id.* at 15:6-23. For Deputy Superintendent Noel, this was a clear violation of the BWC policy and should have resulted in a “sustained” recommendation.

Deputy Superintendent Noel also took issue with Appellant’s report and recommendation regarding the allegation pertaining to Officer Webster’s failure to issue a traffic citation. NOPD policy requires that, when an Officer is not able to determine fault with respect to a traffic accident, he/she must meet and consult with the City Attorney within five business days. (NOPD Exh. 1). Lieutenant Jenerio Sanders investigated the allegations against Appellant and determined that Officer Webster did in fact consult with the City Attorney regarding the March 27th accident, but Appellant did not include that vital detail in his report. (City Exh. 8; Tr. at 76:14-25). Appellant admitted to Lt. Sanders that his failure to include Officer Webster’s communication with the City Attorney constituted an “oversight.”

Deputy Superintendent Noel concluded that Appellant’s recommendations established that Appellant was either not familiar with NOPD policies or failed to conduct a thorough evaluation. Either way, he believed Appellant’s actions to be “obviously negligent.” (Tr. at 18:24-19:7). Appellant himself admitted that he did not read the policy “in its entirety” before concluding his investigation into Officer Webster’s alleged misconduct. *Id.* at 121:14-24. Appellant went on to testify that his recommendations were made “off the top of [his] head.” *Id.* at 121:25-122:5. Based upon Appellant’s circumspect perusal of NOPD policy, he believed that Officer Webster was authorized to terminate recording with her BWC. He based this misunderstanding on the fact that

Officer Webster had begun speaking with one of the drivers in the March 27th accident about a different accident that Officer Webster was investigating when she deactivated her BWC. *Id.* at 131:18-25. Lt. Sanders testified that, even though the subject had shifted to a different crash, Officer Webster was still engaged in investigatory activities and should have either left the BWC on or reactivated it. *Id.* at 136:25-137:17.

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

NOPD asserts that Appellant's decision to find the allegations against Officer Webster either "unfounded" or "exonerated" was so erroneous that it constituted supervisory negligence. Appellant did not help his case when he acknowledged that he did not refer to an NOPD policy in the course of his investigation. (*See tr. at 121:14-122:6*). At a bare minimum, the Commission expects that any supervisor investigating alleged policy violations perpetrated by a subordinate would familiarize himself/herself with the applicable policy. Here, Appellant went "off the top of his head" when he was making recommendations regarding the disposition of the investigation into Officer Webster's misconduct.

Had Appellant reviewed NOPD policy he would have discovered that Officer Webster's decision to deactivate her BWC was a clear violation of NOPD Policy. Similarly, Appellant's failure to include Officer Webster's consult with the City Attorney represents a serious lapse in his understanding of the enforcement policy. Appellant's actions with respect to his investigation were apparently motivated in part by his sympathy for Officer Webster, who was just returning from a prolonged absence. We agree with the hearing examiner that the appropriate stage at which to consider mitigating factors – like a recent serious illness – is the penalty stage. In the matter now before us, it is clear that Appellant sought to apply mitigating factors into his assessment as to whether or not Officer Webster had violated NOPD policy. Such an action represents a failure on Appellant's part to faithfully execute his duties as a supervisor overseeing an investigation.

B. Impact on NOPD's Efficient Operations

NOPD relies upon its supervisors to conduct investigations into alleged misconduct perpetrated by NOPD personnel. The entity within NOPD charged with overseeing internal

investigations is the “Public Integrity Bureau.” The operative word being “integrity.” PIB assignments are very demanding and stressful. But the public depends upon investigators to faithfully follow and apply NOPD policies developed in concert with City leaders, Federal Consent Decree Monitors and members of the Community. By not applying NOPD policy to the investigation Appellant failed in his primary duty as an investigator. He also exposed NOPD personnel to inconsistent application of policies.

Based upon the above findings, we find that Appellant’s actions did have an adverse impact on NOPD’s efficient operations.

C. Was the Discipline Commensurate with Appellant’s Offense

In conducting its analysis, the Commission must determine if Appellant’s discipline 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).

Deputy Superintendent Noel testified that Appellant’s approach to the investigation into Officer Webster’s misconduct was “obviously negligent” and unacceptable. He also acknowledged that this was the first case in which he had recommended that NOPD pursue discipline against an investigator because of the manner in which the investigator conducted an investigation. The Commission agrees that Appellant’s recommendations represent a dramatic departure from the applicable NOPD policies. Based upon Appellant’s testimony, it is clear that he was attempting to give Officer Webster a “break” and did not want to burden her with serious discipline. But, as stated above, Appellant did not have the discretion to ignore clear policy violations. He could have advocated for leniency when he arrived at the penalty stage of analysis.

Additionally, Appellant omitted a key element of the “enforcement action” allegation – Officer Webster’s consultation with the City Attorney – and admitted that it was an “oversight.” This, combined with his obvious misunderstanding of the BWC policy contributed to an incorrect and incomplete investigation.

In the vast majority of cases, investigators assigned to NOPD’s Public Integrity Bureau do excellent, detailed work. They are a credit to the department and to their fellow officers. But, NOPD has an obligation to deter investigators from cutting corners or failing to apply established policies. NOPD argued that Appellant’s actions represented such a dramatic deviation from acceptable investigatory standards, that discipline was warranted. We agree. Furthermore, we accept NOPD’s assertion that the severity of Appellant’s failures warranted a two day suspension.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES Appellant’s appeal.

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

Judgment rendered this 5th day of October, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



RON McCLAIN, VICE-CHAIRPERSON

9/13/18

DATE

CONCUR



STEPHEN CAPUTO, COMMISSIONER

10-1-18

DATE



MICHELLE D. CRAIG, CHAIRPERSON

10-1-18

DATE