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DIRECTOR OF PERSONNEL

Tuesday, March 20, 2018

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

Re: **Corey Clark VS.**
Department of Police
Docket Number: 8601

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 - 3/20/2018 - 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
Stephanie Dovalina
Brendan M. Greene
Corey Clark

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

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| COREY CLARK vs. DEPARTMENT OF POLICE | DOCKET No.: 8601 |
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I. INTRODUCTION

Appellant, Corey Clark, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1 and asks the Commission to find that the Police Department for the City of New Orleans (hereinafter “NOPD”) did not have sufficient cause to discipline him. At all times relevant to the instant appeal, Appellant served as a Police Officer for NOPD and had permanent status as a classified employee. Appellant stipulated that NOPD’s investigation into his alleged misconduct adhered to the procedural requirements established by Louisiana Revised Statute § 40:2531.

A referee, appointed by the Commission, presided over a hearing on September 7, 2017. At the hearing, both Parties had an opportunity to call witnesses and present evidence. The referee prepared a report and recommendation based upon the testimony and evidence in the record. 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

The allegations against Appellant stem from actions he took – or failed to take – related to a call for service that occurred on July 6, 2013. (H.E. Exh. 1). Specifically, NOPD alleged that Appellant violated the following rules/policies:

- Rule 4: Performance of Duty; Paragraph 2: Instructions from an Authoritative Source, to wit, NOPD Policy 600.2 (b-2)¹ – “An officer responsible for an initial investigation shall complete no less than the following If information indicates a crime has occurred, the officer shall Determine if additional investigative resources (e.g., investigators or scene processing) assistance is necessary and request assistance as required.”
- Rule 6: Official Information; Paragraph 2: False or Inaccurate Reports – “An employee shall not knowingly make, or cause or allow to be made, a false or inaccurate oral or written report of an official nature, or intentionally withhold material matter from such report or statement.”

It was the last rule violation – False or Inaccurate Reports – for which NOPD terminated Appellant’s employment.

B. July 6, 2013

At about 5:00 in the afternoon on July 6, 2013, a call came into NOPD’s central command of a “possible 43” which is how NOPD codes “simple rape.” (NOPD Exh. 4). Appellant and Officer Brian Boyd were the first law enforcement personnel on scene. According to a narrative contained in an official report authored by Appellant, a woman (hereinafter referred to as “Ms. V”) at the scene alleged that an acquaintance (hereinafter Mr. P) had grabbed her by both arms and twisted her arms around her back. She also allegedly told Appellant that her acquaintance was “enraged,” picked her up by the neck, grabbed her by her hair, and slapped her in the face causing injury. (NOPD Exh. 10). Ms. V then conveyed to Appellant that Mr. P had slammed her into a

¹ NOPD takes the position that its policies and rules represent authoritative sources.

C. Clark
No. 8601

bed and pinned her down “until he elected to leave [Ms. V’s] residence.” *Id.* The details Appellant included in the initial report were consistent with those he wrote in the application for Mr. P’s arrest warrant. Based upon Appellant’s representations, an arrest warrant for Mr. P issued for the crime of “simple battery.” The only charge identified in the initial report was “simple battery.”

Several years later, an Assistant District Attorney called Ms. V and Appellant as witnesses during a criminal trial involving Mr. P. It was through this testimony that NOPD learned that Ms. V had informed Appellant that Mr. P had raped her on the afternoon of July 6, 2013 and that Appellant purposefully failed to include this allegation in his report and did not notify his supervisor or anyone in NOPD’s sex crimes unit.

C. NOPD’s Investigation

At the criminal trial, Appellant admitted that he initially responded to a call that was coded by NOPD as a “simple rape” and that he subsequently changed the coding to reflect a “simple battery.” (NOPD Exh. 15 at 3:29-4:9, 6:11-17). He also made it clear that the victim told him that she was raped and provided details as to how the rape transpired. *Id.* at 8:19-9:9. Appellant testified at trial that Ms. V was “hysterical” but adamant that she did not want to pursue charges against Mr. P nor did she want to submit to a medical examination. (NOPD Exh. 15 at 8:8-9:6, 10:26-32). Appellant admitted at trial that NOPD Policy requires Officers to report all incidents of sexually-based offenses to the Sex Crimes Unit and that there is no discretion on the part of an Officer in making such a report.

During the underlying appeal hearing, Appellant explained that his primary motivation for not putting the rape allegation in his report was guidance he had received from unnamed NOPD personnel that if there was “no victim” there was “no crime.” (Tr. at 190:11-18). He evidently viewed Ms. V’s reluctance to pursue charges and submit to a medical examination as an indication

C. Clark
No. 8601

that there was “no victim” to the alleged rape. Curiously, Officer Clark also testified that Ms. V did not want to report the battery either. *Id.* at 20:23-25. Yet, despite her protestations, Officer Clark did make a report regarding the battery.

Finally, Appellant argued that his concern for Ms. V’s privacy served as partial motivation for omitting her rape allegation from his report. This concern, however, is at best ill-informed given the obvious precautions available to NOPD through the redaction of sensitive information when responding to public records requests.

Deputy Superintendent Noel, a twenty-year veteran of NOPD with extensive experience as an officer, detective, supervisor and commander within NOPD’s sex crimes unit, presided over Appellant’s pre-disciplinary hearing. (Tr. at 112:6-22). At the pre-disciplinary hearing, Appellant claimed that he simply forgot to report the rape because he was “doing so many things at that one time.” (NOPD Exh. 8 at p. 4).

Even though he made the conscious decision to omit the rape from his report, Appellant admitted to Deputy Superintendent Noel that the alleged victim’s claim of rape was “material” to the investigation and should have been included in the initial police report. *Id.* at 151:9-14.

Deputy Superintendent Noel confirmed that NOPD policy mandates that Officers immediately report any alleged sexual assault to NOPD’s sex crimes unit. *Id.* at 120:18-121:4. One of the many reasons why NOPD mandates such reporting is to allow for the presence of specialized investigators who have experience and training working with victims of sexually-based offenses. *Id.* at 139:12-14:8. Because Appellant failed to notify the Sex Crimes Unit, it was not until a later incident when NOPD began investigating the allegation of rape.

III. LEGAL 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 Misconduct

1. *False or Inaccurate Reports*

Several statements by Appellant during the appeal hearing, criminal trial and disciplinary investigation call into question his credibility. For example, during his trial testimony, Appellant described Ms. V as being “hysterical,” but stated that she was able to provide a clear sequence of events that led to her rape. (NOPD Exh. 15 at 8:8-9:6). Yet, when he was facing the possibility of

serious discipline, Appellant claimed that Ms. V only made a “casual mention” of her rape. (NOPD Exh. 8 at p. 4). This inconsistency not only compromises Appellant’s credibility, but is insulting and disrespectful. Ms. V recounted a terrifying afternoon during which a male friend beat her, grabbed her by the throat, and slapped her in the face before pinning her to the bed and raping her. In no version of reality could a reasonable person portray such a description as “casual.”

Additionally, Officer Clark told Deputy Superintendent Noel that he did not include the rape allegation in his report because he “forgot” and was “doing so many things at that one time.” *Id.* Yet at trial, Officer Clark suggested to the court that he did not include the rape allegation because the victim did not want to pursue charges. (NOPD Exh. 15 at 10:26-32). There is no mention of Officer Clark “forgetting” to make the report because of all of his duties at the scene.

The Commission does not find Appellant to be a credible witness and his claim that his decision to omit Ms. V’s rape allegation because, “with no victim, there is no crime” is nonsensical. Regardless of Ms. V’s expressed desire to not “press charges” or submit to a medical examination, Appellant had an independent obligation to ensure that he notified a supervisor and arranged for appropriate investigative resources. That necessarily included the presence of trained professionals and counselors to provide assistance to Ms. V.

In order to establish that Appellant violated its rule prohibiting false and inaccurate reporting, NOPD must show two things; 1) Appellant withheld material information from his police report and warrant application, and 2) did so intentionally. As noted above, neither of these elements is in serious question. Appellant admitted that he consciously made the decision not to report Ms. V’s allegation of rape and further acknowledged that the allegation was material.

Therefore, the Commission finds that NOPD has met its burden and proven, by a preponderance of the evidence, that Appellant violated NOPD Rule 6, Paragraph 2.²

B. Impact on NOPD's Efficient Operations

This Commission has repeatedly observed that official reports generated by Officers in connection with arrests, uses of force or other interactions with citizens often provide the only insight into such incidents. In the interest of accountability, transparency and public trust, it is essential that these records accurately reflect what happened. When Officers purposefully omit material facts in these reports, the essential role these reports play is drastically compromised. Therefore, the Commission finds that NOPD has a vested interest in ensuring that Officers commit to the highest level of transparency and truthfulness in making official reports.

By failing to promptly report Ms. V's allegation of rape, Appellant deprived Ms. V of the opportunity to work with professionals trained to investigate allegations of sexually-based crime. Even if the Commission were to credit Appellant's testimony regarding Ms. V's expressed desire to avoid bringing charges against Mr. P or submitting to a medical examination, she made these decisions without the advantage of counseling from a victim-advocate. Clearly, Appellant was ill-equipped to walk Ms. V through the basic mechanics of an investigation and was unable – or unwilling – to dispel some of Ms. V's obvious misconceptions about such investigations.

Finally, while it pales in comparison to the other negative impacts, local media coverage cast both NOPD and Appellant in a negative light due to Appellant's omissions. This in turn diminished NOPD's reputation in the community. NOPD must maintain the trust of the

² Because NOPD did not issue discipline to Appellant as a result of his alleged violation of Rule 4, Paragraph 2, the Commission will not address such misconduct other than to point out that Appellant admitted that NOPD mandates Officers report all allegations of sexual assault and that he failed to do so.

community it serves in order to effectively police. Appellant's misconduct made it harder to maintain such trust.

For the above-stated reasons, the Commission finds that Appellant's misconduct had 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 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).

As noted above, the Commission has found that Appellant knowingly withheld material information from his initial investigative report in violation of NOPD Rule 6, Paragraph 2. NOPD views violations of this rule as deception-based misconduct that renders an Officer "unemployable." In support of this assertion, NOPD relies upon *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the U.S. Supreme Court found that a prosecutor suppressed evidence favorable to a criminal defendant's defense. Further, such evidence was "material either to guilt or to punishment." 373 U.S. at 87. As a result, the Court found that the State had violated the criminal defendant's due process rights in violation of the Fourteenth Amendment. *Id.* Following *Brady*, the Court held in *Giglio* that, "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting [the witness's] credibility falls within [the rule established by Brady]." 405 U.S. at 154 (internal citations omitted).

NOPD's well-founded concern is that courts would view any substantiated allegations of misconduct against an Officer involving deception as directly affecting an Officer's credibility. Thus, Supreme Court precedent would compel prosecutors to disclose such misconduct to criminal defendants in any matter in which the Officer in question was involved. Upon such a disclosure, any competent defense counsel would likely use such information to undermine the credibility of the Officer and call into question the integrity of the criminal investigation itself. The critical upshot of such misconduct then is that NOPD could not reasonably rely upon Appellant to prepare police reports, swear to affidavits or testify in criminal matters.

In fact, Appellant's failure to report the victim's allegation of rape had an obvious impact on his testimony during the criminal prosecution of the alleged perpetrator. Appellant admitted to violating NOPD's requirement to report the sexual assault and the alleged perpetrator's defense attorney used his failure to call into question his credibility as an investigator. Thus, the Commission had a real-world example of the adverse inferences present when an Officer purposefully withholds essential details of an alleged crime.

Based upon the record before us, the undersigned Commissioners find that termination was an appropriate level of discipline given the nature of Appellant's misconduct.

V. CONCLUSION

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

C. Clark
No. 8601

Judgment rendered this 20th day of March, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



MICHELLE D. CRAIG, CHAIRPERSON

2 / 27 / 2018
DATE

CONCUR



STEPHEN CAPUTO, COMMISSIONER

3-1-18
DATE



CLIFTON MOORE, JR., COMMISSIONER

3-19-18
DATE