



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
BRITTNEY RICHARDSON, CHAIRPERSON
JOHN KORN, VICE-CHAIRPERSON
CLIFTON J. MOORE
MARK SURPRENANT
RUTH WHITE DAVIS

Monday, January 31, 2022

AMY TREPAGNIER
DIRECTOR OF PERSONNEL

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

Re: **Joshua McBurnie VS.
Department of Police
Docket Number: 9262**

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 - 1/31/2022 - 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: Shaun Ferguson
Kristen A. Lee
Jay Ginsberg
Joshua McBurnie
;
file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

**JOSHUA McBURNIE,
Appellant**

Docket No. 9262

v.

**DEPARTMENT OF POLICE,
Appointing Authority**

DECISION

Appellant, Joshua McBurnie, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from an April 7, 2021, 30-day suspension. (Ex. HE-1). At all relevant times, Appellant had permanent status as a Police Officer. A Hearing Examiner, appointed by the Commission, presided over a hearing on June 8, 2021. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated April 7, 2021, and controlling Louisiana law.

For the reasons set forth below, Officer McBurnie's appeal is DENIED.

I. FACTUAL BACKGROUND

The parties stipulated that Rule 2, Section 6 of NOPD policy, Unauthorized Force, was violated in this case. (Tr. at 6). The only dispute is the appropriate penalty. Officer McBurnie argues that the unauthorized use of force should have been a Level 2 instead of a Level 4 under the NOPD Disciplinary Matrix. (Tr. at 6-7). Whether the use of force is a Level 2 or Level 4 turns on the number of times McBurnie applied the taser to a suspect on October 19, 2019. (Tr. at 48). If there were a total of two applications of the taser, then the use of force is a Level 2, and the

presumptive penalty is a five-day suspension. (Tr. at 48). If there were a total of three applications of the taser, then the presumptive penalty is an 80-day suspension. (Tr. at 48). The first application of the taser and the last application of the taser are not disputed.

The use of force at issue in this case is a taser, also called a CEW (Conducted Energy Weapon). (Ex. NOPD-12). NOPD's Use of Force Policy, Chapter 1.3, defines a CEW Application as "[t]he contact and delivery of electrical impulse to a subject with a CEW." (Ex. NOPD-11). The Conducted Energy Weapon Policy, Chapter 1.7.1, defines application as "[t]he actual contact and delivery of electrical impulse to the subject via probe discharge or drive stun." (Ex. NOPD-12 at 2; Tr. at 15). The NOPD investigator, Sgt. Clinton Givens, determined that McBurnie had applied the CEW more than two times, resulting in a Level F violation of the Use of Force Policy. (Tr. at 18).

On October 19, 2019, Officer McBurnie was pursuing a female suspect who had threatened someone with a stick in a residential neighborhood. (Tr. at 10-11, 13). Eventually, a fence separated the suspect and Officer McBurnie. The suspect was inside the fenced-in back yard of a residence. (Tr. at 18). Officer McBurnie told the suspect to stop or he was going to tase her. (Tr. at 73). Then, Officer McBurnie tased the suspect over the fence. (Tr. at 18). Officer McBurnie believed other officers would be able to approach the suspect after he tased her the first time, but no other officer was nearby. (Tr. at 18). The suspect crawled away and pulled at the probe lines. (Tr. at 18, 74). Officer McBurnie testified that he thought he only pulled the trigger one time, but that the body-worn camera and the log of the taser showed that he pulled the trigger a second time. (Tr. at 74). The log reflects that the second discharge of electricity was only for two seconds. (Tr. at 18-19). Officer McBurnie testified that he put the taser in safe mode after two seconds. (Tr. at 81). According to McBurnie, "nothing happened" to the suspect, and "with just one lead, it was

useless.” (Tr. at 75). Sgt. Givens testified that the second application was “ineffective” because there was insufficient electrical delivery to lock up the muscles. (Tr. at 20-21). Officer McBurnie later used the taser in drive mode to gain compliance when the suspect refused to stop holding onto a fence with her hands. (Tr. at 16). Officer McBurnie admits that this last application of the taser was in violation of NOPD policy and does not contest the two-day suspension based on the last application. (Tr. at 17). According to McBurnie, he pulled the trigger of the taser three times, resulting in two applications of electricity. (Tr. at 83, 89).

Captain Jeffrey Walls testified that Officer McBurnie was trained under an earlier policy. (Tr. at 59). Captain Walls described McBurnie as a “good officer” and a “role model.” (Tr. at 61-62). He described McBurnie as dependable and a hard worker. (Tr. at 66-67). Captain Walls also testified that the circuit must be completed in order to deliver electricity. (Tr. at 65). According to Captain Walls, with only one probe, the device does not work at all. (Tr. at 68).

Deputy Superintendent Thomas was involved in the drafting of the use of force policy. (Tr. at 43). The reason for the severe penalty for more than two applications of a taser was because of the risk of serious injury or death. (Tr. at 57). Chief Thomas determined that McBurnie tased the suspect more than two times. (Tr. at 57). Deputy Superintendent Thomas testified that all three officers on the disciplinary panel agreed that McBurnie applied the taser when the suspect was crawling away. (Tr. at 47). Deputy Superintendent Thomas conceded that, under the policy, an application requires actual contact, but that the suspect could feel the effects of electricity with one probe. (Tr. at 55).

Although the panel categorized the use of force as a Level F, the panel mitigated the penalty from 80 days to 30 days. Deputy Superintendent John Thomas testified that McBurnie was “honest,” a “young officer,” and that he was trained under a prior policy. (Tr. at 50).

II. ANALYSIS

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the appointing authority has the burden of proving by a preponderance of the evidence: 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for disciplining the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984).

The Department of Police has carried its burden of showing that the complained-of conduct occurred. McBurnie admits he violated the NOPD Use of Force Policy. Use of unauthorized force by police officers impairs the efficient operation of the Department.

In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee's work record and previous disciplinary record. *See Matusoff v. Dep't of Fire*, 2019-0932 (La. App. 4 Cir. 5/20/20), *writ denied*, 2020-00955 (La. 10/20/20), 303 So. 3d 313. The undersigned

Commissioners find that Officer McBurnie applied his taser at least three times to the suspect. Under the matrix, Officer McBurnie's unauthorized use of force was Level F. As to the penalty, NOPD mitigated the presumptive penalty for a Level F use of force based on Officer McBurnie's earlier training under a different policy and his job performance. Because NOPD considered all the mitigating factors and reduced the penalty from 80 days to 30 days (in addition to the two-day suspension for the last use of the taser), the Commission will not disturb NOPD's penalty. *Durning v. New Orleans Police Dep't*, 2019-0987 (La. App. 4 Cir. 3/25/20), 294 So. 3d 536, 540, *writ denied*, 2020-00697 (La. 9/29/20), 301 So. 3d 1195

Officer McBurnie's appeal is DENIED.

This the 31st day of January, 2022

WRITER:


Brittney Richardson (Jan 29, 2022 17:27 CST)

BRITTNEY RICHARDSON, CHAIRPERSON

CONCUR:


CJ MOORE (Jan 26, 2022 10:20 CST)

CLIFTON J. MOORE, JR., COMMISSIONER

DISSENT BY VICE-CHAIRPERSON KORN

I agree that NOPD has carried its burden of showing the complained-of conduct occurred and that the conduct impaired the efficient operation of the Department. However, NOPD has failed to show that Officer McBurnie applied the taser on three occasions to the suspect on October 19, 2019, under the definition of "application" in NOPD's Conducted Energy Weapon Policy, Chapter 1.7.11. Officer McBurnie and Captain Walls testified that no electric shock was delivered after the suspect removed one of the probes, in contradiction to the testimony by Deputy

Superintendent Thomas and Sgt. Givens. Thus, Officer McBurnie only applied the taser on two occasions. In addition, Officer McBurnie testified that he did not intentionally pull the trigger on the second occasion, which is believable given the circumstances. For these reasons, I would find that the offense was a Level C under the disciplinary matrix, with a presumptive penalty of five days. Therefore, I would reduce the 30-day suspension (based on a Level F use of force) to a five-day suspension.

When applying discipline, the department must consider both the deterrent effect of the discipline and the consequences on morale for both the officer involved and all other officers in the force. In general, the penalty for infractions should be the minimum necessary to prevent similar behavior in the future consistent with maintaining good order and discipline. This is especially important given the difficulty in attracting and retaining good officers. This officer has no prior infractions, is described as a “good officer” and a “role model” and was forthright in questioning. Additionally, McBurnie was trained under a prior CEW policy. I believe that the financial implications of a 30 day suspension would have a negative effect on this officer’s morale, who was presumably acting in good faith and that a 5 day suspension is sufficient to prevent any similar infractions in the future..

J. H. Korn

J. H. Korn (Jan 31, 2022 12:22 CST)

JOHN KORN, VICE-CHAIRPERSON