



CITY OF NEW ORLEANS

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Tuesday, September 27, 2016

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Sean Carrigan VS.
Department of Police
Docket Number: 8447**

Dear Mr. Hessler:

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 - 9/27/2016 - 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
Jim Mullaly
Sean Carrigan
file

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

SEAN CARRIGAN vs. DEPARTMENT OF POLICE	DOCKET No.: 8447
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I. INTRODUCTION

Appellant, Sean Carrigan, 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. Therefore, the Commission’s analysis will be limited to whether or not the Appellant was disciplined for sufficient cause.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

NOPD suspended Appellant for eight days effective September 27, 2015 and notified Appellant of the suspension via letter dated September 21, 2015. (H.E. Exh.1). According to the letter issued to Appellant by NOPD, Appellant’s suspension was the result of the following rule violations:

- Seven-day suspension: Violation of NOPD Rule 4: Performance of Duty (paragraph 2 – Instructions from an Authoritative Source)
- One-day suspension: Violation of NOPD Rule 4: Performance of Duty (paragraph 2 – Instructions from an Authoritative Source, to wit NOPD Policy 447)

Id.

Specifically, NOPD alleged that Appellant failed to label and properly process video files from his Body Worn Camera (“BWC”) between December 21, 2014 and December 24, 2014. *Id.* Appellant’s actions allegedly violated NOPD policy 447.4 regarding BWCs. Furthermore, NOPD alleges that Appellant’s misconduct was exacerbated by the fact that Appellant received written counseling regarding policy 447.4 and the proper process for labeling and organizing BWC videos on October 15, 2014 and December 22, 2014. *Id.*

The notice informing Appellant of his termination contains what purports to be NOPD policy 447.4 in its entirety. (H.E. Exh. 1). That policy reads as follows:

Department members are to select a system defined category for each digital recording (i.e. – field interview, case file, citation, traffic stop, traffic accident, miscellaneous, training or other appropriate category listed for the event, provided, however, that miscellaneous shall be used only where the activity does not reasonably fall within another category). Specific instructions on system use are provided in training.

One of Appellant’s immediate supervisors during the relevant period of time was Sergeant Dowal Barrett who testified that NOPD policy requires Officers to turn on BWCs during every “call for service.” Basically, NOPD policy mandates that, as soon as an Officer arrives on the scene of a call, he or she must turn on the BWC. (Tr. at 10:21-11:5). Upon leaving the scene, Officers turn off the BWC and must label any video taken. (Tr. at 9:3-7, 11:6-8). An Officer “labels” a BWC video by plugging the BWC into a computer located at the police station (Tr. at 27:10-17); the Officer then assigns an item number to the video file and includes the address of the call for service and category of the incident/call. *Id.* at 11:10-14. Sgt. Barrett described the process as being very similar to the manner in which any computer use would name a digital file.

On cross-examination, Sgt. Barrett acknowledged that the use of BWCs by NOPD was a relatively recent phenomenon and NOPD’s policy regarding BWCs occasionally changed. *Id.* at

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17:13-17. Sgt. Barrett also acknowledged that the policy itself did not contain instructions as to when an Officer of “department member” must label a video file. *Id.* at 21:14-19.

Sgt. Barrett also testified that, when an Officer commits a “minor” or “administrative type” of policy violation, he or she typically receives a form known as a “105.” *Id.* at 18:15-23. If an Officer receives three 105s for the same policy violation, his or her next violation will result in the initiation of a formal disciplinary procedure. *Id.* at 18:15-23. Appellant only received one 105 form, but Sgt. Barrett stated that Appellant’s supervisors had spoken with Appellant on several occasions regarding the need to properly label and organize his BWC video files. *Id.* at 18:24-19:18.

One of the supervisors that repeatedly spoke with Appellant regarding use of BWC and how to properly process BWC video files was Sergeant Berwick Nero. *Id.* at 40:21-23. On October 15, 2014, Sgt. Nero issued Appellant a written counseling form directing Appellant to turn on his BWC for every service call. (NOPD Exh. 7). Sgt. Nero also issued Appellant a 105 form regarding Appellant’s failure to properly label his BWC video files on December 11, 18 and 21, 2014. *Id.* However, Sgt. Nero stated on cross-examination that neither the 105 form nor the policy at issue in the instant appeal contains a requirement that the labeling of video files occur on the same day the file was generated. (Tr. at 44:11-47:6). After Appellant received the counseling form from Sgt. Nero, he subsequently reviewed his BWC files and labeled them as directed. *Id.* at 48:13-16.

Sgt. Nero then provided testimony with respect to when NOPD expects Officers to label BWC files:

Q. Did you instruct Officer Carrigan about how to use the body worn camera before initiating your complaint?

A. I gave him several instructions on this.

Q. How specific were the instructions to Officer Carrigan?

A. Well, they were specific to Officer Carrigan in regards to his deficiencies when he didn't do this. But in general, since it was something that was new to everybody, it was something that we went over frequently in roll call. "**That this is what needs to be done after each call, label the videos and make sure that you don't have any videos unlabeled.**"

(Tr. at 49:8-24)(emphasis added).

Q. Was Officer Carrigan - Is it your understanding that all officers were to fill out the body worn camera daily? Not outside the scope of the DI-1, is that your understanding?

A. Yes. And really after each call, and definitely we had -- Like I said, the report came out every Monday, so we knew the task was we didn't want to see anybody on the report Monday with videos that weren't labeled. So that's something we reiterated over and over again. "That every Monday this report is going to come out, make sure all the videos are labeled. **If you're off on the weekend, before Monday make sure all the videos are labeled before you leave.**"

(Tr. at 52:3-19)(emphasis added). Based upon Sgt. Nero's testimony, the Commission finds that NOPD expected Officers to label BWC files soon after the call/incident that triggered the creation of the video, but not necessarily on the same day.

Commander Shaun Ferguson testified that it was his understanding of the BWC video labeling policy that Officers must label videos "as soon as possible." (Tr. 57:25-58:6). Cmdr. Ferguson also testified that it was his understanding that Sgt. Nero had instructed Appellant to label BWC videos after every call. (Tr. at 59:8-13). For his part, Appellant testified that no supervisor ever told him that he had to label his BWC video files every day. (Tr. at 74:25-75:2). Nevertheless, Appellant admitted that it was his understanding that he needed to label BWC files, "as soon as possible." *Id.* at 81:4-8, 81:18-19. Appellant also testified that BWC files could be labeled in an Officer's patrol car if the on-board computer is working properly; in the event that

the computer is not working properly, an Officer had to return to the station and label the files on a desktop computer. (Tr. 75:7-19).

With respect to Appellant's BWC video files and the allegations that he failed to properly label them, Sgt. Barrett testified that NOPD supervisors have the capability of printing reports on any Officer's BWC video files. And, a report generated by NOPD shows that Appellant failed to properly label his BWC videos on five separate occasions the week of December 15, 2014. (NOPD Exh. 6).

III. LEGAL STANDARD

Employees in the classified service may only be disciplined for sufficient cause. La. Con. Art. X, § 8(A). If an employee believes that his/her discipline was issued 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. *Labelling BWC Files*

NOPD established that, as of December 22, 2014, the Appellant had failed to label BWC videos recorded on December 11, 2014, December 18, 2014, and December 21, 2014. (NOPD Exh. 1). Even assuming that, as a general rule, policy 447 requires Officers to label BWC videos as soon as possible, it is clear from the evidence and testimony that Appellant was not meeting this standard. It is not reasonable to interpret “as soon as possible” to be approximately one week. Further, according to the testimony, Appellant only labeled the outstanding BWC videos after being ordered to by his Supervisors. Again, it is not reasonable to equate “as soon as possible” with “wait until your supervisor directs you to take action.” The Commission does not find it credible that Appellant believed that “as soon as possible” meant several days up to a week.

2. *Instructions From an Authoritative Source*

We find that Appellant’s failure to timely label his BWC files also ran afoul of directives issued to him by his supervisors during roll call and one-on-one interactions regarding Appellant’s repeated appearance on NOPD’s audit reports for unlabeled BWC files. The Commission credits Sgt. Nero’s testimony that Officers were generally informed that BWC files should be labeled promptly and that NOPD’s policy required BWC video labeling as soon as possible. Appellant disregarded instructions from his supervisor when he waited up to a week before labeling his BWC files.

B. Impairment of Efficient Operation of Appointing Authority

1. Labelling BWC Files

One need only take a cursory review of the world in which law enforcement personnel operate to understand the importance of body-worn cameras. More often than not, footage from body-worn cameras provide exonerating evidence to Officers accused of misconduct. These cameras also provide a degree of transparency and accountability that New Orleans citizens demand and deserve. It is essential that each video is labeled accurately so that, if a category of video is requested from NOPD, responsive videos can be produced and relied upon. As the event that triggered the creation of the video recedes from the present, so too will an Officer's recollection of that event and his or her ability to accurately categorize and label the video file. Therefore, the Commission finds that NOPD has satisfied its burden that Appellant's failure to timely label BWC files impaired NOPD's efficient operation.

2. Instructions From an Authoritative Source

It is axiomatic that a paramilitary operation, like the New Orleans Police Department, depends upon strict adherence to orders issued by individuals throughout the chain of command. When an officer fails to follow legal instructions, such a failure compromises the designated chain of command and reduces accountability. Thus, NOPD has met its burden in establishing that Appellant's failure to follow lawful directions from his supervisor compromised the efficient operation of 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).

NOPD suspended Appellant one day for his violation of the BWC policy and seven days for his failure to follow orders from an authoritative source. (H.E. Exh. 1). Given Appellant's repeated failure to promptly label his BWC files, even after regular reminders and directive from his supervisors, the Commission finds that a one-day suspension is commensurate with Appellant's violation of the BWC labeling policy.

With respect to the seven-day suspension NOPD issued to Appellant due to Appellant's failure to follow instructions from an authoritative source, NOPD alleges that Appellant's prior misconduct served as an aggravating factor and warranted more severe discipline. Specifically, NOPD relied upon a letter of reprimand issued to Appellant on December 18, 2014 and a one-day suspension issued on January 22, 2015. (Tr. at 61:12-62:19). Both the reprimand and suspension were related to Appellant's failure to adhere to instructions from an authoritative source. (NOPD Exh. 8). Given that Appellant has previously received discipline regarding his failure to follow instructions from an authoritative source, and that such discipline occurred shortly before the misconduct that is the subject of the instant appeal hearing, the Commission finds that a seven-day suspension is progressive and commensurate with Appellant's misconduct.

V. CONCLUSION

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

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Judgment rendered this 27th day of Sept., 2016.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

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

9/19/16
DATE

Joseph S. Clark
JOSEPH S. CLARK, COMMISSIONER

9/26/16
DATE

Tania Tetlow
TANIA TETLOW, COMMISSIONER

9/1/16
DATE