CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Wednesday, December 20, 2017

Mr. Kevin Boshea
2955 Ridgelake Dr., Suite 207
Metairie, LA 70002

Re: **Isaiah Shannon VS.**
Department of Police
Docket Number: 8368

Dear Mr. Boshea:

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 - 12/20/2017 - 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,

Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Elizabeth S. Robins
Jim Mullaly
Isaiah Shannon

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

ISAIAH SHANNON vs. DEPARTMENT OF POLICE	DOCKET No.: 8368

I. INTRODUCTION

Appellant, Isaiah Shannon, 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. Similarly, Appellant did not allege that NOPD's investigation violated the procedural standards required by our Rules and La. R.S. § 40:2531. Therefore, the Commission's analysis will address only 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.

A referee appointed by the Commission presided over six days of hearing and prepared a report regarding factual findings and recommended disposition. 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

NOPD terminated Appellant for alleged violations of the following NOPD Rules:

- Rule 2: Moral Conduct; Paragraph 3, Truthfulness;
- Rule 2: Moral Conduct; Paragraph 6, Unauthorized Force;

(H.E. Exh. 1).

The rule regarding truthfulness 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.* NOPD views any violation of its rule requiring truthfulness as serious misconduct warranting termination. (NOPD Exh. 33).

NOPD's rule prohibiting unauthorized force simply states that an officer "shall not use or direct unjustifiable physical abuse, violence, force or intimidation against any person." (H.E. Exh. 1). NOPD's use of force policy and procedure manual, introduced and accepted into evidence collectively as "NOPD Exhibit 27," requires officers to use "only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose." (NOPD Exh. 27 at p. 93). And, any evaluation of whether or not the amount of force an officer used was reasonable "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 ...." *Id.* Among the factors used to determine the reasonableness of an officer's use of force are:

- Whether the subject poses a threat to himself, office[r]s, or others and the immediacy and severity of the threat.
- The conduct of the individual being confronted as reasonably perceived by the officer at the time.
- Proximity of weapons or dangerous improvised devices.
- Potential for injury to the subject, officers, suspects and others.
- Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.

Id. at 94. Officers may use deadly force to protect him/herself or others from what he/she reasonably believes would be **an imminent threat of death or serious bodily injury**. *Id.* at 94. The discharge of a firearm is a "level 4" use of force pursuant to NOPD's procedure manual and requires an in-depth investigation. Violations of NOPD's use of force policy range from a letter of reprimand to termination, depending upon the severity and context of the force. (NOPD Exh. 33).

Appellant's alleged rule violations stem from an incident that occurred on August 15, 2013 during which Appellant was involved in a vehicle pursuit that resulted in the pursued vehicle crashing into another vehicle. *Id.* Following the accident, NOPD alleges that Appellant improperly discharged his firearm at an unarmed suspect, constituting an unauthorized use of force. NOPD next alleges that Appellant then purposefully fabricated his account of where he was when he discharged his firearm. *Id.* Appellant claimed that he was in the suspect's vehicle and discharged his firearm in the vehicle when he noticed the suspect reaching for a black handgun. *Id.* NOPD asserts that Appellant actually discharged his firearm at the suspect after the suspect had exited the vehicle and was running from the accident scene. *Id.*

B. Appellant's Background

At the time of his alleged misconduct, Appellant had served in NOPD for six years. (Tr. v. 6 at 11:20-12:2). Initially, Appellant served as a patrolman in the First District but was soon selected to be a member of the First District Task Force. *Id.* at 12:3-14. First District Task Force members focus on crime abatement through "active" street-level patrols combined with firearm and narcotics investigations. *Id.* at 12:15-23. As a member of the First District Task Force, Appellant received numerous commendations from his supervisors, including being named "Officer of the Month" on two separate occasions. *Id.* at 12:24-13:7. Appellant also served as a member of a "multi-agency task force dubbed the Violent Crime Reduction Partnership" that "worked to effect 110 firearms-related arrests, 123 illicit narcotics arrests, 68 violent crime arrests and 96 arrests for other felony and misdemeanor charges" in a 120-day period. (App. Exh. 9). Along with these arrests, members of the multi-agency task force were active in a variety of other community policing efforts. *Id.* Members of the task force, including Appellant, received the "Superintendent's Coin." *Id.* According to NOPD Policy, the Superintendent's Coin is "awarded by the Superintendent of Police to an agency commissioned employee, non-commissioned employee or civilian who has distinguished themselves in a manner of professional or personal excellence." (NOPD Policy 1030.8).

Prior to joining NOPD, Appellant served in the United States Army as a member of a mechanized infantry unit. As part of that service, Appellant was deployed to Iraq. (Tr. v. 6 at 10:7-11:15). Following an honorable discharge, Appellant began working for NOPD.

B. August 15, 2013

During the early evening hours of August 15, 2013, Appellant and three other members of the First District Task Force (Officers Shelton Abram, Rodney Vicknair, and Bryan Bissell,) were

patrolling a high-crime "hot zone" within the First District. The Officers were in two marked NOPD vehicles. Appellant and Officer Abram rode together in NOPD car #102 (with Officer Abram driving), and were followed by Officers Vicknair and Bissell who rode in car #101. This practice is commonly referred to as "wolf packing." (Tr. v. 1 at 207:16-21).

During the course of their patrol, the Officers were traveling east on Derbigny Street when they observed a black Chevrolet Impala approaching them from the opposite direction. (NOPD Exh. 3 at p. 5). As the Impala got closer, all four Officers noticed that the driver and passenger were not wearing seatbelts. (Tr. at v. 1 at 16:15-17, 176:10-22, 206:8-15; Tr. v. 2 at 72:25-73:5). Collectively, the Officers decided to make a U-turn on Derbigny and follow the Impala. (NOPD Exh. 3 at pp. 5-6). Car #102 (Appellant and Officer Abram) was the first to make the turn. Almost immediately, the Impala began to increase its speed. *Id.* at p. 6. After the Impala proceeded through several intersections without obeying stop signs, Car 102 activated its lights and siren in an attempt to initiate a traffic stop. *Id.* at p. 6.

The driver of the Impala disregarded Car 102's lights and sirens and proceeded north on Canal Street before making a sharp turn. *Id.* at p. 6. At the intersection of Iberville and North Miro Streets, the Impala collided with a white pickup truck. (NOPD Exh. 6). The impact of the collision propelled the white pickup truck into an adjacent building from which the truck rebounded and came to a stop in the intersection. *Id.* The Impala also came to a stop a few feet from the truck.

Appellant and Officer Abram were closely following the Impala and observed the collision. Officer Abram exited Car 102 and proceeded to the driver's side of the Impala where he encountered the driver of the Impala (later identified as John Cowart). After a brief struggle – during which Mr. Cowart struck his head on the rear portion of the white pickup truck – Officer

Abram was able to force Mr. Cowart to the ground and apply handcuffs. (Tr. v. 2 at 74:18-24; NOPD Exh. 10).

While Officer Abram was occupied with Mr. Cowart, Appellant approached the passenger-side of the Impala where he observed the passenger moving in a way that suggested he was struggling to open the passenger-side door. (Tr. v. 1 at 22:2-25:3). Due to the furtive movements by the passenger, Appellant assumed the passenger-side door had been damaged in the accident and made the decision to proceed to the driver-side of the Impala. *Id.* at 24:18-25:11. When Appellant relocated to the driver-side door of the Impala and looked into the vehicle, he recognized the passenger as Terrell Chapman. *Id.* at 68:2-10. Chapman was a well-known figure among members of the First District Task Force, including Appellant and Officer Abram. (Tr. v. 1 at 70:4-25). Appellant knew Chapman to be a violent individual who served as the "muscle" for a group of drug dealers who operate in a specific area of the City. (Tr. v. 1 at 124:2-13).

As Appellant attempted to remove Chapman from the car, he observed Chapman's hands move down and towards the floor of the Impala. (Tr. v. 1 at 28:7-15). Appellant's eyes followed the motion of Chapman's hands to the floor of the car where he observed a black handgun well within reach of Chapman. *Id.* Appellant instructed Chapman not to move, but Chapman disregarded Appellant's instructions. What happened next is hotly disputed by the Parties.

1. Appellant's Version

Appellant testified that he believed Chapman was attempting to gain possession of a handgun, and if Chapman was able to gain possession of the gun, he would not hesitate to use it on both Appellant and Officer Abram. (Tr. v. 6 at 32:8-13). Appellant's familiarity with Chapman's violent criminal history heightened his sense of danger. (Tr. v. 6 at 31:23-32:13). In response to the threat he perceived from Chapman, Appellant drew his sidearm and fired a single

shot. (Tr. v. 1 at 45:15-22). Appellant did not take the time to aim his weapon and instead fired from his hip. *Id.* After Appellant fired, Chapman jumped into the rear of the Impala, opened the rear passenger-side door and fled. Id. at 45:23-46:8. Appellant chose not to pursue Chapman because his attention was drawn to the driver of the white pick-up truck who had collapsed in the street. (Tr. v. 1 at 86:3-12).

2. NOPD's Version

NOPD alleges that, once Appellant relocated to the driver-side of the Impala, Chapman opened either the front or rear passenger-side door and fled down North Miro Street toward Canal Street. When Chapman was about 10-15 feet from the Impala, NOPD asserts that Appellant fired a single shot in Chapman's direction.

The primary witness called by NOPD to support its version of events was Lieutenant Ken Burns. Lt. Burns testified that it was his belief that Appellant discharged his firearm at Chapman, while Chapman was running down North Miro Street. (Tr. v. 2 at 210:2-9). The evidence Lt. Burns pointed to as supporting his theory of events was; 1) a video captured by a security camera maintained by a private business, 2) lack of a "strike mark" in the Impala, and 3) witness statements collected in the course of NOPD's investigation. The Commission summarizes this evidence in the following paragraphs.

1. Security Footage

In the course of his investigation into Appellant's alleged misconduct, Lt. Burns learned that there was "surveillance video" that may have captured part of the incident. (Tr. v. 2 at 195:14-15). The video footage in question was captured by a security camera maintained by a private business located on Iberville Street. There was no testimony regarding how far the camera is from the intersection of Iberville and North Miro Street, but it appears to be in excess of 150 feet. The

camera is focused on the area immediately in front of the business, but the intersection of Iberville and North Miro is visible in the upper periphery of each frame. (NOPD Exh. 20). According to Lt. Burns, the security video shows Chapman exiting the Impala via a passenger-side door. Moments later, bystanders captured on the video physically "react." *Id.* at 212:16-23. While there was no audio with the video footage, Lt. Burns "reasonably conclude[d]" that the crowd was reacting to a gun shot.

Appellant's supervisor, Sergeant Gary Lewis, had a very different opinion regarding the video footage captured by the security camera. According to Sgt. Lewis, he learned "absolutely nothing" about the incident after watching the video. (Tr. v. 2 at 41:15-19). Captains Joseph Waguespack and Frederick Morton also had occasion to review the video pursuant to a request by Assistant Superintendent Albert. (NOPD Exh. 30). The Captains agreed with Lt. Burns that the video appears to show Chapman exiting the vehicle followed by the crowd reacting to a gunshot. The conclusion they reach regarding the import of the footage, however, far different. Among the variables the Captains take into account during their assessment of the video is the possibility that the reaction of the bystanders is delayed or in response to some other loud noise. They conclude by writing that, "the video is too far [from the scene] and too grainy to make a definite determination. Furthermore, there is no audio to pinpoint when the shot was fired." *Id.*

2. Witness Statements

Lt. Burns relied on witness statements collected during the course of NOPD's investigation into the shooting. One of the witnesses Lt. Burns believed provided a credible account of events was Chapman himself, whom Lt. Burns interviewed about two-and-a-half months after the incident. (App. Exh. 7).

i. Chapman's Statement

During the course of his interview with Lt. Burns, Chapman initially made numerous inaccurate statements. Among them were; 1) the driver of the Impala was attempting to find a safe place to pull over, and 2) the Impala had obeyed all posted stop signs. *Id.* at p. 1. When discussing the immediate aftermath of the accident, Chapman alleged that Appellant appeared in the driver-side door of the Impala with his gun drawn and aimed at Chapman's head. *Id.* at pp. 1-2. Once Chapman saw the gun, he fled out of the rear passenger-side door of the Impala and started running "as fast as [he] could." Even though Chapman was fleeing the Impala "as fast as he could," he claimed to have observed Appellant fire his gun from over the top of the Impala. *Id.* at p. 3. Lt. Burns – apparently recognizing the inconsistency – pressed Chapman on this point and asked where Chapman was facing as he fled. Chapman then claimed that he was running away from the Impala, "as fast as he could" with his back to Officer Shannon, but looked back **after** the shot was fired. *Id.* at p. 4.

One troubling statement that Lt. Burns did not follow up on was Chapman's claim that, when he was finally arrested, the arresting officers asked him about the shooting and indicated that they were "trying to get [Officer Shannon]" on a charge. *Id.* at 5. This cryptic remark warranted exploring.

Appellant's version of events has very little in common with Chapman's except for one detail. There was a gun in the Impala. During the course of his statement Chapman admitted to having a gun in the Impala, but denied that it was "anywhere" near his person when Appellant was pointing his own gun at Chapman. *Id.* at p. 2.[1] This is simply not credible. Officer Bissell, who

[1] Lt. Burns first testified that he specifically recalled asking Chapman whether or not there was a gun in the Impala and that Chapman flatly denied having a gun in the Impala. (Tr. v. 2 at 2-4). On cross-examination, Lt. Burns had to walk back this testimony when confronted with the statement he collected from Chapman in which Chapman specifically **admits** to having a gun in the impala. (Tr. v. 3 at 43:8-24).

arrived on the scene shortly after Appellant discharged his weapon, observed a black handgun on the "floorboard" of the Impala. (Tr. v. 1 at 180:6-181:3).[2] Given that Chapman was in the Impala and the gun was on the floorboard, it is more likely than not that the gun was in close proximity to Chapman during his brief encounter with Appellant.

Finally, the Commission notes that Chapman knew both Appellant and Officer Abram by name and description as members of the Task Force. *Id.* at p. 2.

ii. Other Witness Accounts.

Emergency medical personnel transported the driver of the Impala (referred to hereinafter as "Cowart") to University Medical Center due to injuries he sustained during the crash and his subsequent arrest. Lt. Burns interviewed Cowart at approximately 9:15 p.m. on the night of August 15, 2013. (NOPD Exh. 16 at 12 of 29). Cowart told Lt. Burns that he exited the Impala after the accident with his hands in the air, but that one of the officers who responded to the scene struck him in the mouth, causing him to lose one of his teeth. *Id.* Next, he claimed that one of the officers slammed his head into the rear portion of the white truck involved in the accident. According to Cowart, his injuries were the result of the officer's brutality rather than the very serious accident he had just experienced. He even went so far as to deny ever coming into contact with the Impala's airbags. Given the fact that the air bags instantly deployed upon contact with the white truck and

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[2] During the presentation of its case, NOPD focused a great deal of time and effort on Appellant's relocation of the black Sig Saur from the Impala to the trunk of Appellant's NOPD vehicle. The Commission notes that NOPD did not allege that Appellant acted inappropriately when he removed the Sig Saur from the Impala. And, several NOPD witnesses testified that Appellant's action in relocating the firearm was consistent with controlling a crime scene that was difficult to secure. (Tr. v. 1 at 219:12-220:2; Tr. v. 2 at 45:4-15, 90:5-20). Finally, any claim that Appellant "planted" the Sig Saur fails in light of the testimony of several witnesses and Chapman's own acknowledgement that he had a gun in the car. If NOPD was truly concerned about Appellant's actions, the Commission assumes NOPD would have formally alleged specific misconduct instead of relying on inference and innuendo. NOPD's thinly veiled attempt to portray Appellant as a dirty cop who hatched a plan to cover his unlawful use of force with a plant weapon reflected poorly on its case.

Cowart's tooth was found in the vehicle, the Commission finds Cowart's statements entirely self-serving and unreliable.[3]

Lt. Burns interviewed several other individuals who claimed to have been eyewitnesses to the crash and the subsequent interaction between Appellant and Chapman. (NOPD Exh. 16 at p. 6 of 29). Most of the witnesses had either personally interacted with Appellant and/or Officer Abram on previous occasions or had friends and/or relative who had. None of the prior interactions appeared to have been positive ones. And, most knew Cowart and/or Chapman, often referring to them by their nicknames. *Id.* at pp. 7-8.

Many of the witness told Lt. Burns that one of the officers slammed Cowart's head into the side of a vehicle and alleged that Appellant fired his weapon while out in the open. One witness, "Mr. D," stated that Appellant's vehicle struck the Impala, causing it to crash into the white truck. *Id.* at p. 16. Even though the quality of the security footage is poor, it is clear that the marked NOPD vehicle Officer Abram was driving never made contact with the Impala. Because Mr. D was not called by NOPD, Appellant did not have the opportunity to explore this clear inconsistency.

Another witness, "Ms. B," stated that she observed an officer discharge his weapon at the passenger. However, the individual she identified as the shooter was Officer Abram. When Lt. Burns pointed out this "misidentification," Ms. B indicated that she "needed her glasses." *Id.* at 16. Unfortunately, there is nothing in the record that addresses the degree to which Ms. B's impaired eyesight may have affected her ability to clearly observe what happened on August 13th.

[3] A forensic analyst recovered a tooth from the Impala during his investigation. (NOPD Exh. 13). This undermines Cowart's testimony that Officer Abram and Appellant dislodged his tooth in the process of placing him under arrest.

Two witnesses who did not appear to have a bone to pick with Appellant or Officer Abram were the driver of the white truck (Mr. R) and the operator of a motorcycle that was almost struck by the Impala (Mr. M). Only Mr. M appeared to have a clear recollection of seeing someone fleeing the scene followed by a gun shot. (NOPD Exh. 28 at pp. 32-33). However, Mr. R could not determine if the man who was running had exited the Impala.

Sgt. Andre LeBlanc, another NOPD investigator who made the scene, also conducted interviews. *Id.* at pp. 9-10. One of the witnesses Sgt. Leblanc interviewed, "Mr. H," claimed that he observed an officer discharge his weapon at the passenger of the Impala who was both "running" from the car and had "his hands in the air." *Id.* at p. 9. Two months later, Lt. Burns interviewed Mr. H. During this second interview, Mr. H clarified that the passenger exited the vehicle and initially complied with Appellant's instruction to "freeze" and put his hands in the air. At that time, Appellant allegedly shot at the passenger, causing the passenger to flee. *Id.* at 25. Mr. H also expressed his opinion that Appellant was a bad officer and should be fired.

Another witness, "Mr. Y" told Sgt. LeBlanc that the passenger of the Impala exited the car with his hands in the air and Appellant shot at the passenger. *Id.* at p. 13. But in the same statement, Mr. Y claimed that the passenger was fleeing the scene when Appellant shot at him. *Id.* at p. 13.

Unfortunately, NOPD failed to call any of the witnesses Lt. Burns interviewed as part of its case. Therefore, neither the hearing examiner nor Appellant had the opportunity to address the inconsistencies/inaccuracies present in each statement.

3. NOPD's Forensic Investigation

Following the on-scene investigation, NOPD impounded the Impala and members of NOPD's crime lab conducted a forensic examination of the vehicle. Officer Theodore Koelling

was assigned to NOPD's Advanced Crime Lab at the time and "processed" the Impala at the request of Lt. Burns. (Tr. v. 2 at 158:12-21). When Officer Koelling "processes" a vehicle, he conducts an examination of the vehicle in an attempt to locate any evidence. In the case of the Impala, Officer Koelling was looking for "ballistic evidence." *Id.* at 158:23-24.

During his investigation, Officer Koelling located and collected a .40 caliber shell casing under the front passenger seat. (NOPD Exh. 13). A ballistics expert with NOPD subsequently examined the shell casing and compared it with those test fired from both Appellant's sidearm and the Sig Sauer recovered on the scene. (App. Exh. 1). As a result of the tests, NOPD determined that the spent shell casing recovered from the Impala was fired from Appellant's weapon. *Id.*

Lt. Burns testified that he believed that the spent casing from Appellant's weapon was planted. (Tr. v. 3 at 36:8-18). The Commission notes that this is an extremely serious accusation that does not appear to be supported by anything other than speculation. In fact, this line of reasoning resembles NOPD's attempt to establish that Appellant planted the Sig Sauer in the Impala in order to support his claim of justifiable force. And as with that claim, there is no support on the record. NOPD's pursuit of allegations during the appeal hearing that it did not deem significant enough to formally bring against Appellant compromised its presentation.

Officer Koelling also conducted a visual search of the Impala in an attempt to locate any indication that a bullet had struck a part of the interior. Witnesses referred to such indications as "strike marks." Officer Koelling was unable to find any strike marks even after he conducted a second, more thorough search at the request of Deputy Superintendent Robert Bardy. (Tr. v. 2 at 176:14-19).

Officer Koelling has extensive experience in conducting examinations for strike marks, although it is not clear what type of training he underwent prior to or during such experience. He

testified that, in the 500+ cases in which he has examined a vehicle for strike marks, about 200 involved instances where a gun had been discharged in the vehicle. *Id.* at 166:4-16. In some, but not all, of these examinations, Officer Koelling has found evidence of a strike mark. *Id.* at 167:22-168:6. According to Officer Koelling, all of the Impala's windows were intact at the time of his examination. Officer Koelling was not qualified as a ballistics expert and could only testify in general terms regarding whether a strike mark was found.

Lt. Burns believed that the absence of a "strike mark" or bullet-hole in the Impala was compelling evidence against Appellant. *Id.* at 212:24-213:3. If Appellant's story was true, argued Lt. Burns, then investigators would have found a strike mark in the car. Especially since only the driver-side door was open and all of the Impala's windows were up at the time the shot was fired. From Lt. Burns's perspective, the only other explanation consistent with Appellant's story was that Chapman had been hit by the round Appellant fired. Lt. Burns dismissed this possibility since NOPD personnel were posted at all area hospitals and no gunshot-wound victims matching Chapman's description were found. Additionally, Chapman himself was apprehended months later and did not have any signs of a gunshot-wound.

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. Hearsay Evidence

As the hearing examiner correctly and repeatedly observed, hearsay evidence is admissible in appeal hearings. However, the mere fact that such evidence is admissible does not mean that it is "competent." It is for the Commission to determine if such evidence is "competent" or "of the type a reasonable person would rely upon." *Taylor v. New Orleans Police Dep't*, 2000-1992 (La.App. 4 Cir. 12/12/01, 5); 804 So.2d 769, 773, *writ not considered,* 2002-0139 (La. 3/22/02); 811 So.2d 935. In *Taylor*, the hearsay at issue was in the form of sworn statements by NOPD Officers. The Commission treads this ground carefully since it is fully aware that the careers and livelihoods of classified employees are often at stake. And because of this, the Commission encourages appointing authorities to present witnesses for live testimony whenever possible.

In the matter now before us, the hearsay at issue constitutes witness statements collected by police officers investigating possible criminal misconduct. Each statement contains some inconsistencies and Appellant alleged that several of the witnesses were biased against both Officer

Abram and Appellant. Such bias possibly stemmed from Appellant's and Officer Abram's arrest of family members and friends during their time on the First District Task Force. Unfortunately, neither the hearing examiner nor the Commission was in a position to explore any potential biases. The record would have greatly benefitted from the cross-examination of such witnesses.

Captains Morton and Waguespack, who had the opportunity to listen to the recorded statements of the civilian witnesses (unlike the Commission or Hearing Examiner). The Captains identified numerous conflicting statements and corroborated Appellant's claim that several of the witnesses bore him specific ill will due to his role as a Task Force member. The Commission is acutely aware that the assessments of Captains Morton and Waguespack are hearsay. This fact, however, underscores the predicament the Commission finds itself when weighing hearsay against hearsay. The statement provided by Cowart is an example of a witness statement that contains details that are demonstrably false. First, Cowart claimed that he was attempting to pull over when he crashed into another vehicle. (NOPD Exh. 28 at p. 2 of 59). Dash-cam video evidence clearly shows the Black Impala speeding away from a marked NOPD vehicle. (NOPD Exh. 21). Similarly, the security camera video in evidence as "NOPD Exhibit 21" shows the Black Impala speeding through a stop sign before plowing into a white truck. Thus, Cowart's statement already lacks credibility. Then, Cowart stated that Officer Abram slammed his face against the truck causing his tooth to come loose. The tooth was subsequently found in the front, driver's-side seat of the Impala, casting serious doubt upon Cowart's version of events. Finally, and perhaps most importantly, Cowart stated that he was "constantly being harassed" by Appellant and Officer Abram when he visited his grandmother who lives in the area. This establishes that Cowart knew Appellant and may have had reason to fabricate his account. Yet, neither the Commission nor

Appellant had the opportunity to explore these inconsistencies and potential bias during the hearing.

NOPD's own approach to the investigation of the August 15th incident suggests that investigators harbored serious doubts as to the credibility of several witnesses. At least three alleged eye-witnesses (and Cowart himself) claim that Cowart was attempting to surrender when Officer Abram and Appellant struck him, slammed him into the white truck and beat him while on the ground. Yet, NOPD did not introduce any evidence that Officer Abram or Appellant was disciplined as a result of any use of force perpetrated upon Cowart's person. From a review of the record, it appears that NOPD credited a portion of the witnesses' statements but dismissed others.

The Louisiana Court of Appeals for the Fourth Circuit has previously held similar hearsay evidence to be admissible in appeal hearings. *Broaden v. Dep't of Police*, 2003-1427 (La.App. 4 Cir. 1/14/04, 7); 866 So.2d 318, 322 (out of court statement of witness to domestic abuse introduced through officer who interviewed witness as part of an administrative investigation into employee misconduct); s*ee also, Johnson v. Dep't of Police*, 2008-0467 (La.App. 4 Cir. 12/10/08, 13); 2 So.3d 501, 510 (out of court victim statement supported by cell phone records, other eye witness accounts and NOPD Officer statements); *Gant v. Dep't of Police*, 1999-1351 (La.App. 4 Cir. 1/5/00, 9); 750 So.2d 382, 387, *writ denied,* 2000-0688 (La. 4/20/00); 760 So.2d 1161 (deceased victim testimony introduced through NOPD Officer who interviewed the victim). Upon consideration of the case law and the totality of circumstances regarding the hearsay evidence now at issue, the Commission does not view the caliber of witness statements collected by NOPD investigators on August 15, 2013 as comparable to the statements at issue in the above-cited cases.

Statements collected by law enforcement officers during the course of a criminal investigation are hearsay, but may be competent. However, here there are several factors weighing

against competency in the matter now before us. First, the statements contain inconsistencies. Such inconsistencies may be innocent and a product of poor word choice, failure to wear one's glasses, or an overlooked fact, but the Commission does not have the ability to address the sources of the inconsistencies. For example, Chapman claimed that he was running away from the Impala as fast as he could because Appellant was pointing a gun at him. As Chapman fled, his back was to the Impala when Appellant fired at him. Yet, Chapman claimed that he observed Appellant fire his weapon from over the top of the Impala. And, more than one of the witnesses told Lt. Burns that Appellant fired at Chapman while Chapman was stopped in the intersection with his hands in the air. Such a conflict would normally be ripe ground for cross-examination and would have provided the Commission with valuable insight into what actually happened on August 15th.

The Commission is also cognizant of claims made by Appellant – as well as Captains Waguespack and Morton – that several witnesses were biased against him and Officer Abram. Such a claim is speculative but plausible given Appellant's status as a First District Task Force member. The Commission notes that many of the witnesses appeared to know members of the District 1 Task Force by name and had a negative view of their work. Again, such alleged biases could have been explored on cross-examination had the witnesses been called to testify. They were not.

B. Occurrence of the Complained of Activities

A suspect who is fleeing on foot does not represent an "imminent threat of death or serious bodily injury" to bystanders or fellow officers. Therefore, if Appellant discharged his weapon at a fleeing suspect, he would have perpetrated a dramatic violation of NOPD's use of force policy.

1. Discharge of Firearm at Fleeing Suspect

Appellant was the only eye witness to the shooting who provided testimony at the appeal hearing. As noted above, the Commission does not regard the hearsay evidence collected by investigators during the course of their investigation to be competent given the statements' inconsistencies, incompleteness, and potential bias.

Similarly, the video evidence is not as compelling or as conclusive as NOPD believes it to be. Each Commissioner has viewed the video several times. As a preliminary matter, the video itself was captured by a security camera installed by a local business. Understandably, the camera is focused upon the area immediately in front of the business. The viewer can see the intersection of Iberville and North Miro Streets in the periphery of the video, but the quality of the image is very poor. And, because there is no audio, the Commissioners do not know whether the bystanders' "flinched" in response to a gunshot or some other stimulus, such as an officer yelling "freeze" or "get down." Further, the bystanders do not appear to be overly concerned. One individual can be observed ushering three young children toward a home on Iberville Street, but after the children ascend the stoop, she runs back toward the intersection. This could be a sad product of a community desensitized to violence, or it could be an indication that they were not reacting to a potential life-threatening situation. This vital question went unanswered as no bystanders were called to provide testimony before the hearing examiner.

For the Commission, the most compelling evidence supporting NOPD's position was the lack of a strike mark in the Impala. This evidence is balanced by the fact that a casing from Appellant's gun was found in the Impala. And Officer Koelling testified that in the hundreds of vehicles he has "processed", there were some where he was unable to find a strike mark, even in instances where there was a high level of confidence that a firearm had been discharged in the vehicle.

As a result of the foregoing, the Commission makes the follow findings of fact:

i. Appellant and Officer Abram were riding together during an active task force patrol in an area known for elevated levels of crime.

ii. Appellant and Officer Abram observed a black Impala drive towards them and noted that neither the driver, nor the passenger we wearing seatbelts.

iii. Appellant and Officer Abram attempted to effect a traffic stop and the Impala fled at a high rate of speed through a residential neighborhood.

iv. After speeding through several intersections and stop signs, the Impala disregarded a stop sign and plowed into a white pick-up truck causing severe damage to the truck and Impala.

v. Appellant exited the marked NOPD vehicle, approached the passenger-side of the Impala and then went around the front of the Impala to the driver-side.

vi. Appellant looked into the Impala and recognized Chapman as a violent past offender.

vii. Appellant observed Chapman reach towards a gun that was located on the floor of the Impala.[4]

There was no dispute that Appellant was generally aware of Chapman's reputation for violence. The presence of a handgun understandably heightened Appellant's sense of danger and he credibly testified that he believed that, had Chapman gained possession of the weapon, he would have used it on Appellant and Officer Abram. Given the totality of circumstances, the Commission finds that Appellant reasonably believed that Chapman posed an imminent threat of death or serious bodily injury if he were to obtain possession of the handgun. Therefore, Appellant's use of deadly force in discharging his weapon was reasonable.

[4] This last finding is something that NOPD attempted to discredit by suggesting that Appellant had planted the gun. Given that several witnesses observed the gun on the floor of the Impala and Chapman himself admitted to having a gun in the car, there can be no genuine dispute as to the presence of the gun. That Appellant perceived Chapman reaching for the gun is unrebutted save for Chapman's unreliable, hearsay denial that the gun was not anywhere near him.

2. Truthfulness

In order to establish that Appellant knowingly provided NOPD investigators with false information, it must first establish that Appellant discharged his firearm at an unarmed suspect who was fleeing the scene of an accident. As explained above, the Commission finds that NOPD failed to establish, by a preponderance of the evidence, that Appellant discharged his weapon at a fleeing suspect.

Even if the weight of the evidence against Appellant was more substantial, it is still questionable as to whether or not NOPD could have met its burden in showing that Appellant knowingly provided the Force Investigation Team and PIB investigators with materially false information with the intent to deceive investigators.

There are a variety of factors that could have interfered with Appellant's recollection of the shooting. First, he was initially involved in a high-speed chase through a residential neighborhood that resulted in a serious accident. When he approached the Impala, he observed the driver struggling with Officer Abram. Officer Abram was loudly telling Appellant that there was another person in the vehicle. When Appellant looked into the car, he recognized Chapman as an individual with a violent past. He next noticed Chapman reaching for a gun. Appellant was confident that, if Chapman gained possession of the gun, he would use it. What happened next is disputed, but Appellant claimed that he drew his weapon and fired a single shot while positioned with one leg in the Impala and one leg out (in a partial kneeling position). NOPD contends that Appellant fired the shot over the top of the Impala. Either way, the entire incident occurred over the course of less than six seconds.

NOPD rightfully approaches any violation of its rule requiring truthfulness as an offense that warrants termination. The public and fellow officers must be in a position to trust that those

charged with enforcing the law strive to maintain the highest levels of integrity. NOPD has also established a very high bar in establishing a violation of its truthfulness rule. Given the stakes, the Commission views this as a reasonable approach.

In order to violate the rule, an officer must "knowingly" provide a false statement "with the intent to deceive." Proving an officer's intent to deceive is difficult and requires a fact specific inquiry. Appellant has no history of discipline or providing false statements. And he was demonstrably truthful with respect to several aspects of the events of August 15, 2013. In a prior Commission case, *Vara/Wheeler v. NOPD*, Nos. 8106 & 8109 (December 9, 2015), *aff'd Vara & Wheeler v. Department of Police*, 2016-CA-0036 (La. 4th Cir., June 29, 2016), the Commission found that two Officers had intentionally mislead supervisors and investigators regarding their use of force. Unlike the matter now before the Commission, the Officers in Vara/Wheeler provided a very detailed account of an interaction with a subject they claimed was armed with a machete. The Officer's reports contained several demonstrably false statements and suggested that the Officers were particularly focused on the subject's hands. Finally, the video evidence in the Vara/Wheeler matter was captured by the Officer's TASER, which had audio and was approximately eight feet away from the subject. Here, the only video evidence is grainy footage captured by a security camera at least 100 feet from the incident.

V. CONCLUSION

This was not an easy case and the Commission acknowledges that there was evidence introduced into the record that supported both sides of the dispute. Ultimately, the Commission finds that the evidence introduced by NOPD was not sufficient to meet its burden of proof. As a result of the above findings of fact and law, the Commission hereby GRANTS Appellant's appeal. NOPD shall reinstate Appellant with all back pay and emoluments of employment.

Judgment rendered this 10th day of December, 2017.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

CLIFTON MOORE, JR. COMMISSIONER — DATE 12/10/17

CONCUR

MICHELLE D. CRAIG, CHAIRPERSON — DATE 12/11/17

RON McCLAIN, VICE-CHAIRPERSON — DATE 12/11/17