



CITY OF NEW ORLEANS

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Tuesday, November 20, 2018

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

Re: **Richard Welch VS.
Department of Police
Docket Number: 8783**

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 - 11/20/2018 - 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
William R. H. Goforth
Brendan M. Greene
Richard Welch

file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

RICHARD WELCH vs. DEPARTMENT OF POLICE	DOCKET No.: 8783
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I. INTRODUCTION

Appellant, Richard Welch, 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 Sergeant for NOPD and had permanent status as a classified employee.

A referee, appointed by the Commission, presided over one day of hearing during which 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 GRANT the appeal and render the following judgment.

II. FACTUAL BACKGROUND

A. Alleged Misconduct

The allegations against Appellant stem from his response to an incident on August 31, 2016. (H.E. Exh. 1). Specifically, NOPD alleged that Appellant failed to take “appropriate and necessary police action” in response to a disturbance he encountered in the Third District Station parking lot. *Id.*

B. August 31, 2016

On August 31, 2016, Appellant was at his regular assignment in NOPD’s Third District Station. At around 1:00 p.m. on August 31st, Appellant realized he had forgotten some office supplies in his car and went to the Third District Station parking lot to retrieve them. When he got to the parking lot, he encountered a very unusual and distressing sight. He observed a car pulling partway into the Third District parking lot with a woman (hereinafter referred to as “Ms. T”) on the hood of the car holding onto the windshield wipers. (Tr. at 81:1-14). The car came to a stop and Appellant ordered Ms. T to get off the hood of the car and step away from the vehicle. *Id.* at 81:15-82:5. When Appellant asked Ms. T what the problem was, she told him that the driver of the vehicle (hereinafter referred to as “Mr. W”) was the father of her unborn child but Mr. W was refusing to acknowledge his status as the father. *Id.* at 82:21-83:6. At no point in time during her brief interaction with Appellant did Ms. T allege that Mr. W had struck or otherwise harmed her physically.

Appellant then attempted to further engage with Ms. T who was storming around the vehicle trying to confront Mr. W and becoming more and more irate. *Id.* at 83:7-24. Mr. W was relatively calm and remained inside the vehicle. Appellant believed that Ms. T was “transfixed” on Mr. W and would not calm down. *Id.* at 84:1-7. In an attempt to deescalate the situation and

separate the parties, Appellant ordered Mr. W to drive around the block. *Id.* at 84:8-23. Appellant believed that removing Mr. W from the immediate presence of Ms. T would allow him to get a better handle on the dispute. *Id.* at 102:19-103:6. After successfully separating Ms. T and Mr. W, Appellant asked Ms. T to accompany him into the Third District Station so that she could prepare a report. *Id.* at 84:24-85:4. Ms. T told Appellant to “fuck off,” or words to that effect, and then said she was going to leave with her sister. *Id.* at 105:14-106:5. About twenty seconds later, a car pulled up to the Third District Station and Ms. T got in and left the scene. *Id.* at 85:10-86:9. The entire incident transpired over the course of one or two minutes. Mr. W did not immediately return to the Third District station, but did come back around 9:00 p.m. at which time a desk officer told him to return in the morning as the station was closing its walk-in operations.

Exasperated by the interaction, Appellant returned to the Third District Station and learned that “a call came out with a woman on a car.” *Id.* at 89:8-11. A supervisor at the Third District, Lieutenant Tollefson, spoke to Appellant about the matter and Appellant indicated that he had “handled” an incident matching that description. *Id.* at 89:12-20. He then told Lieutenant Tollefson that he had marked the matter “G.O.A.” (gone on arrival) based on what happened in the parking lot. *Id.* at 89:20-24. Lt. Tollefson did not express any issue or concern with how Appellant handled the matter.

Both Mr. W and Ms. T subsequently provided statements to NOPD investigators on September 1, 2016. (NOPD Exh. 2). Lieutenant Kevin Imbraguglio, who was responsible for investigating the allegations against Appellant, summarized the claims made by Ms. T and Mr. W to NOPD personnel in his report. The Commission does not find these statements probative given that Appellant was unaware of them and based his reaction upon the tense and potentially explosive situation he encountered in the Third District Station parking lot.

C. Aftermath and Investigation

In February 2017, Captain Simon Hargrove, who was investigating a different incident involving Ms. T, reviewed some of the details regarding the August 31, 2016 incident. Capt. Hargrove believed that the incident “may have been a domestic violence incident” and Appellant may have violated NOPD policy by not conducting a more thorough investigation. (NOPD Exh. 1). NOPD assigned the matter to Lt. Imbraguglio who learned that, prior to arriving at the Third District, Mr. W had called 911 to report that Ms. T was on the hood of his vehicle armed with pepper spray. Ms. T had also called 911 to report that she was one month pregnant and on the hood of Mr. W’s car. Though the timing of this call is not clear from the record. Appellant, however, was unaware of either of the 911 calls and only learned of the incident when it dramatically interrupted his trip to the parking lot.

Lt. Imbraguglio observed that Appellant was not responding to a call for service when he walked to his car on August 31st and did not have any information regarding the incident from NOPD dispatch workers. Ultimately, Lt. Imbraguglio did not believe Appellant violated any NOPD rule on August 31st and wrote that, “[d]ue to the exigent circumstances that were involved in the incident” Appellant acted in a “professional and competent manner.” (NOPD Exh. 2). On March 7, 2017, Lt. Imbraguglio contacted Appellant to notify him that the investigation was complete and that he had recommended that NOPD dismiss the allegations against Appellant.

Deputy Superintendent Paul Noel disagreed with Lt. Imbraguglio’s recommendation and authored what NOPD personnel refer to as a “cover letter” in which he explained the source of his disagreement. (NOPD Exh. 5). According to the cover letter, Appellant “did not ensure action was taken when he encountered two parties actively involved in a domestic dispute.” (NOPD Exh. 5). Deputy Superintendent Noel also wrote that Ms. T was holding onto Mr. W’s vehicle armed

with a can of pepper spray. *Id.* This assertion is apparently derived from Deputy Superintendent Noel's review of Mr. W's 911 call. At the time, however, Appellant did not observe Ms. T armed with anything. Deputy Superintendent Noel also noted that both Mr. W and Ms. T had called 911. While accurate, Appellant was not privy to this information until both parties had left the scene.

Finally, Deputy Superintendent Paul asserted that Appellant should have "initiated an on scene investigation and ensur[ed] both parties were interviewed." *Id.* As a result of Deputy Superintendent Paul Noel's cover letter, NOPD assigned the matter to Commander Jeffery Walls who conducted a pre-disciplinary hearing.

After hearing Appellant's account during the pre-disciplinary hearing Cmdr. Walls recommended that NOPD dismiss the allegations against Appellant because he believed that Appellant "did not have enough information to complete a domestic incident report because neither party remained on scene to talk with [Appellant]." (App. Exh. 1). Cmdr. Walls also observed that a detective confirmed Appellant's version of the story with Ms. T's sister who drove the car Ms. T used to leave the parking lot. Ms. T's sister stated that Ms. T was very upset and left without speaking with Appellant. *Id.*

Deputy Superintendent Noel also disagreed with Cmdr. Walls's recommendation and authored yet another cover letter. (NOPD Exh. 6). The second cover letter was very similar to the first except that Deputy Superintendent Noel added that Appellant should have "initiated an on scene investigation and ensured both parties were **detained** and interviewed." *Id.* (emphasis added). During his testimony, Deputy Superintendent Noel explained that Appellant's first duty was to render aid and make the scene as safe as possible. (Tr. at 29:11-21). Appellant then should have attempted to identify the aggressor, interview witnesses and prepare a police report. *Id.* at

30:1-16. Deputy Superintendent Noel viewed Appellant's instruction to Mr. W to drive around the block to be inappropriate given the need for Appellant to interview Mr. W about the dispute.

Deputy Superintendent Noel also took issue with what he perceived as Appellant's failure to request support, effectively separate the parties, and prepare a police report. *Id.* at 30:17-31:20. Instead, Appellant marked the incident "GOA" or "gone on arrival." Deputy Superintendent Noel did not feel that this was an accurate reflection of the incident and stated that Appellant should have been more active in securing statements from the parties. Deputy Superintendent Noel asserted that Appellant did not render assistance to the individuals involved in the dispute. *Id.* at 48:1-6.

In his second cover letter, Deputy Superintendent Noel recommended that NOPD issue Appellant a one-day suspension for failing to take appropriate police action. NOPD Superintendent Michael Harrison accepted this recommendation and issued the suspension on April 9, 2018.

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

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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. Procedural Challenge

Appellant asserts that NOPD failed to complete its investigation into his alleged misconduct with the time delays established in Louisiana Revised Statute Section 40:2531 (known colloquially as the Police Officer’s Bill of Rights). Appellant’s argument rests upon his assertion that NOPD did not notify him of a hearing date until April 30, 2017.

Appellant testified that Lt. Imbraguglio called on or about March 9, 2017 to discuss the investigation into the underlying allegations of misconduct. During the call, Lt. Imbraguglio stated that the allegations were going to be classified as “unfounded” and allegedly did not indicate that there would be any need to appear at a pre-disciplinary hearing. Lt. Imbraguglio had a very different recollection of his conversation with Appellant. Lt. Imbraguglio was confident that he notified Appellant that the pre-disciplinary conference was tentatively scheduled for April 10, 2017 with NOPD Commander Jeffrey Walls. Lt. Imbraguglio noted that he had to check with Cmdr. Walls ahead of time to ensure that he was available on April 10th. (Tr. at 65:11-66:1).

NOPD initiated the investigation against Sgt. Welch on February 14, 2017. *See Wilcox v. Dep't of Police*, 2015-1156 (La.App. 4 Cir. 8/10/16, 10), 198 So.3d 250, 256, *writ denied*, 2016-1691 (La. 11/29/16), 210 So.3d 804 (NOPD began its administrative investigation on July 23, 2012

when Officer Wilcox's superior officer completed the DI-1 form); *Kendrick v. Dep't of Police*, 2016-0037 (La.App. 4 Cir. 6/1/16, 13), 193 So.3d 1277, 1285, *writ denied*, 2016-1435 (La. 11/15/16), 209 So.3d 779 (parties to appeal stipulated that NOPD initiated the investigation when the Form DI-1 was issued). NOPD had sixty days (April 15, 2017) to complete its investigation. La. Rev. Stat. Ann. § 40:2531(B)(7). By statute, an investigation into alleged misconduct perpetrated by a law enforcement officer is complete “upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint.” *Id.*

NOPD asserts that Lt. Imbraguglio notified Appellant of the need for a pre-disciplinary hearing via phone on March 7, 2017 – within the sixty-day time delay. Appellant claimed that Lt. Imbraguglio only stated that the allegations were unfounded. Based upon the record, the Commission finds that Lt. Imbraguglio’s version of events is likely the more accurate one since he was operating off of what was essentially a script during his call with Appellant on March 7, 2017. (*See* NOPD Exhibit #3). This document makes it clear that there was a set date and time for the pre-disciplinary hearing and that the recommendation of Lt. Imbraguglio was just that, a recommendation, and the Superintendent had final authority over disciplinary matters. The Commission also accepts Lt. Imbraguglio’s testimony that he had to check with Cmdr. Walls schedule before setting the pre-disciplinary hearing date and time in the notice. (*See* Tr. at 65:11-66:1).

B. Occurrence of the Complained of Misconduct

In its disciplinary letter, NOPD alleged that Appellant failed to take appropriate and necessary police action on August 31, 2016 when he did not “initiate[] an on scene investigation

and ensure[] both parties were detained and interviewed.”¹ This is at odds with Deputy Superintendent Noel’s claim that Appellant’s first duty was to render aid and make sure that the scene was as safe as possible.

On the afternoon of August 31st, Appellant encountered an irate woman hanging onto the windshield wipers of a moving car. When the car came to a stop, Appellant immediately intervened by directing Ms. T to get off of the car. When it became clear to Appellant that Ms. T was fixated on Mr. W and getting more and more upset, he decided to remove Mr. W from the scene in an attempt to deescalate the rising tension. After Mr. W left, Appellant tried, unsuccessfully, to engage with Ms. T who was both uncooperative and vulgar in response.

NOPD alleges that the situation was a “domestic dispute” that warranted a more robust intervention by Appellant. The Commission finds that NOPD’s position has the benefit of hindsight while the reality of what Appellant knew at the time he intervened was extremely limited. For starters, Appellant understood that the dispute was about the paternity of Ms. T’s unborn child. Neither Ms. T nor Mr. W made an allegation **to Appellant** that the other had perpetrated any manner of assault and/or battery.²

Both the DI-1 form and Lt. Imbraguglio’s report contain a great deal of information and context regarding how the dispute between Mr. W and Ms. T developed and how they both came to be at the Third District Station. But all that Appellant knew was that a very irate woman was holding onto the hood of a car driven by a man she claimed was the father of her unborn child.

¹ The disciplinary letter also includes an allegation that Ms. T was armed with pepper spray during the incident. Such an allegation likely stems from Deputy Superintendent Noel’s review of Lt. Imbraguglio’s report. Yet it fails to acknowledge or otherwise account for the fact that Appellant had no knowledge of the pepper spray.

² It was only after an NOPD detective interviewed Ms. T the following day that NOPD learned that Ms. T alleged that Mr. W struck her with his car as she was trying to prevent him from leaving his residence. For his part, Mr. W told NOPD investigators that Ms. T jumped on his car as he was trying to leave.

There was no evidence that either party had committed a crime or harmed the other. Further, neither party threatened the other.

According to Appellant's description of the incident, Ms. T appeared to be the aggressor, but it was unclear at the time whether or not Ms. T had committed a crime. The fact that Appellant had to order Ms. T to get off of the car, suggests that Ms. T had no intention of letting Mr. W drive away without addressing her paternity claim. In separating the parties, Appellant was rendering aid and earnestly believed he had made the scene as safe as possible. He then attempted to interview Ms. T who responded with profanity and left almost immediately.

Given Ms. T's desire to leave, and means to do so, Appellant likely would have had to detain her against her will in order to conduct any further interview. And, any attempt to detain Ms. T could have escalated an already tense situation. As noted above, NOPD does not allege that Appellant should have arrested Ms. T, only "detain" her. Given Ms. T's aggravated state and strong desire to leave, arresting her may have been the only way to detain her and there was no testimony regarding whether or not Appellant had probable cause to effect an arrest.

Similarly, Appellant's instruction to Mr. W to drive around the block was a split-second decision motivated by Appellant's desire to defuse the conflict. Mr. W's presence obviously had an effect on Ms. T and she was "fixated" on him. Given that all of this transpired over the course of one or two minutes, Appellant has presented sufficient mitigating factors for any alleged violation of NOPD policy.

As a result of the foregoing, the Commission agrees with Lt. Imbraguglio and Cmdr. Walls that, due to the exigent circumstances, Appellant acted appropriately. NOPD has failed to establish that Appellant failed to take appropriate and necessary police action on August 31, 2016. In making this finding, the Commission takes pains to emphasize that Deputy Superintendent Noel is a

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dedicated law enforcement officer with more than twenty years of service to NOPD and the residents of New Orleans. His review of this matter, however, was colored by the entire investigative report rather than focused on the limited information Appellant had when he encountered Ms. T and Mr. W.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby GRANTS Appellant's appeal. NOPD shall rescind the one-day suspension referenced in "Hearing Examiner Exhibit 1," remit to Appellant any applicable back pay and emoluments, and expunge any record of the one-day suspension from Appellant's records, **including records known as the "long form" and "short form."**

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SIGNATURES APPEAR ON THE FOLLOWING PAGE.

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Judgment rendered this 20th day of November, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER


STEPHEN CAPUTO, COMMISSIONER

11-12-18
DATE

CONCUR


BRITTNEY RICHARDSON, COMMISSIONER

11-19-18
DATE


RONALD P. McCLAIN, VICE-CHAIRMAN

11-19-18
DATE