

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

JUAN VARA vs. DEPARTMENT OF POLICE	DOCKET NO.: 8106
KEVIN WHEELER vs. DEPARTMENT OF POLICE	DOCKET NO.: 8109

I. INTRODUCTION

The Department of Police (“Appointing Authority”) employed Kevin Wheeler and Juan Vara (“Appellants”) as police officers with permanent status. The Appointing Authority terminated each appellant on November 27, 2012 for violating NOPD’s rules relating to “Honesty and Truthfulness,” and, “False or Inaccurate Reports.” Each appellant was also suspended for additional alleged rule violations.¹

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. Hearings were held on June 26, July 11, and September 26, 2013. The testimony presented and the matters discussed at the hearings were transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

¹ Unauthorized Force = ten days; Failure to Report Misconduct = five days. Officer Wheeler received an additional three day suspension for violating instructions on the use of an Electronic Control Device (“ECD”).

II. FACTUAL BACKGROUND

On October 18, 2011, the Appellants responded to a domestic disturbance in which a female complainant alleged that a male suspect was armed with a machete and arguing with her. There are two videos of the incident thanks to the video recording devices attached to the Appellants' TASERS. Upon arriving at the scene, the Appellants developed a tactical plan with two other Officers, Anthony Polidore and Larry King. It was agreed that Officer Vara would enter the apartment with his TASER drawn and Officer Wheeler would provide "lethal cover" with his firearm. Upon entering the apartment, the Appellants repeatedly ask the female Complainant, "where is the guy with the knife?" The Complainant directed them to the rear of the apartment. Then, suddenly, the subject appeared.

As a preliminary matter, there is no dispute that the subject was armed with a two-foot-long machete when the Appellants first confronted him. Adding to the confusion and stress of the situation was the poor lighting of the apartment and the fact that the Appellants' tactical plan for responding to the disturbance was foiled when Officer Polidore physically intervened with the armed subject. (Tr. at 337:15-24) Officer Polidore's actions violated NOPD protocol regarding suspects with edged weapons. *Id.* Specifically, Officer Polidore maintained a very close proximity to the subject and physically grabbed the subject's arm. While Officer Polidore was successful in disarming the subject, his actions ran contrary to the plan developed by Appellants and put himself and his fellow Officers in unnecessary danger.

Appellants claim that, even after Officer Polidore's physical interaction with the subject, they believed the subject was still armed with the machete and was ignoring Appellants' instructions. The subject then slowly advanced towards the Appellants prompting both appellants to fire their TASERS into him. The deployment was almost simultaneous. Allegedly believing

that the subject was still armed and resisting, appellant Wheeler applied a second shock to the subject seconds later. Officer Vara then secured the suspect with handcuffs. (Tr. 382:4).

It was possible, though not necessarily practical, for the Appellants to review the TASER deployment videos prior to completing their reports. However, this issue is of little import given the unequivocal nature of the Appellants' report. Had the Appellants indicated that they were not sure of what occurred during the course of the incident, or whether or not the subject was in fact armed when the Appellants discharged their weapons, then, in all likelihood, the dispute would not involve termination.

Because of the TASER deployment, a Resisting Arrest report was required from a supervisor. Appellants gave Sergeant Philibert, a responding supervisor, their version of what occurred at the scene. Appellants reported that: 1) the subject was armed with the machete, 2) did not comply with verbal demands, 3) that Officer Polidore's attempt to disarm the subject was unsuccessful, and 4) the subject was armed and advanced towards them. All of which caused the Appellants to deploy their TASERs. The Appellants further stated that a second charge was necessary in order to disarm the subject. The information appellants gave Philibert is one basis of dismissal - Honesty and Truthfulness. The second basis for dismissal was related to the information in Appellants' official police report documenting the incident. The report was completed one hour post-incident by the Appellants.

III. LEGAL STANDARD

It is well-settled that, in an appeal before the Commission, 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. *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, we 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)).

In the matter now before the Commission, NOPD presented un rebutted testimony that, when Officers provide false information to the Department, such conduct impairs the efficiency of NOPD. (Tr. 168:10-169:3). The Commission accepts this testimony and finds that, when an Officer intends to deceive his/her supervisors in connection with an official report, makes a knowingly false statement on an official report, or intentionally withholds information from an official report, such conduct dramatically compromises the efficiency of a police department. *See Narcisse v. Dep't of Police*, 2012-1267 (La. App. 4 Cir. 3/6/13, 18); 110 So.3d 692, 702 (holding that an officer’s dishonesty in the course of his duties bore “a real and substantial relationship to the efficient operation of the appointing authority.”). Therefore, our analysis focuses on the first part of the two-part test.

IV. ANALYSIS

A. NOPD Has Established the Occurrence of the Complained of Activity

What is unique about this matter is that video evidence is available that depicts what actually happened on the night of October 18, 2011. (NOPD Exhs. 1, 2). These videos clearly show that the subject was not armed when the Appellants discharged their weapons. Therefore, whether or not NOPD meets its burden on appeal turns on whether or not NOPD proved, by a preponderance of the evidence, that Appellants: i) “made a materially false statement with the

intent to deceive” (NOPD Rule 2, Section 3), ii) knowingly made, or caused to be made, a false or inaccurate record or report of an official nature, or iii) intentionally withheld material matter from such report or statement. (NOPD Rule 6, Section 2). And, since Appellants were terminated for filing false or inaccurate reports, our analysis begins with the reports submitted by the Appellants.

1. Police Report

The accuracy and truthfulness of the first three paragraphs of Appellants’ report are not at issue. However, beginning in paragraph four of Appellants’ report, their account strays from what actually happened at the scene. The Appellants mention Officer Polidore’s interaction with the subject in their report, but unequivocally state that the subject “maintain[ed] a grip on the weapon.” (NOPD Exh. 3 and ¶¶4, 5.) In this same paragraph, Appellants state that the subject “appeared to be lacking the coordination to pull his pants up around his waist.” *Id.* at ¶4.

Then, Appellants reported that, not only was the subject armed, but that he “leveled” the machete at the Appellants. *Id.* at ¶5. This is an important detail given that this alleged “leveling” caused both Appellants to be concerned for their lives and the lives of others. In fact, the Appellants stated in their report that they discharged their TASERSs, “because the subject remained armed, leveled the machete, and [] he could [have] either hurt an officer or barricade[d] himself in the bedroom with the children. . . .” *Id.* at ¶5 (emphasis added). In fact, the video shows that the subject never leveled the machete at either Officer Vara or Officer Wheeler; Appellant Vega admitted as much during his testimony. (Tr. 289:2-5). Furthermore, Officer Vara equivocated during his testimony and claimed that he believed the subject was “going to level the machete.” *Id.* at 376:18-24. This is very different than reporting that the subject did actually level the machete. It also brings into serious question whether or not the Appellants truly believed that someone who appeared “lethargic,” “disorientated,” and who “lack[ed] the coordination to pull up

his pants” could level a weapon or barricade himself in a room with one of the minor children in the apartment.

In the Appellants’ report, they repeatedly allege that they instructed the subject to “drop his weapon.” (NOPD Exh. 3. at ¶4, 5). In reviewing the video and listening to the accompanying audio, the Commission notes that the Appellants do not issue such an instruction. In the letter of termination, Superintendent Serpas makes the point that, in the video, the Appellants are not directing the subject to “drop his weapon.” From the absence of such instruction, the Superintendent makes a reasonable inference that the Appellants did not believe the subject to be armed. (Hearing Officer Exh. 1 at p. 2).

Appellants then write that the subject, upon being “tased,” “***released the machete***, and fell to the floor on his back.” (NOPD Exh. 3 at ¶6) However, as noted above, the machete was not on, or even very close to the subject when he was turned over. Members of NOPD testified that it should have been apparent to the Appellants that they had just tased an unarmed subject. (Tr. at 179:1-9, 224:6-14).

The expert who testified on behalf of the Appellants provided compelling testimony with respect to the mental and physical stresses on officers when responding to calls like the one at issue here. However, this case boils down to whether or not the Appellants were honest and truthful in reporting their actions to NOPD following the discharge of their weapons. Appellants’ expert rendered an opinion based in part on his finding that the Appellants “were not looking at [the subject’s] right hand.” (Appellant Exh. 4). Appellants themselves contradict such a finding by reporting:

- The subject “emerged from the hallway armed with a machete ***in his right hand***.”
- The subject was “holding the machete by the handle ***in his right hand***” and “***using his left hand*** to pull his pants up”

- Officer Polidore attempted to disarm [the subject] by grabbing his right hand, which was holding the machete by its handle.”
- Officer Polidore continued to maintain a grip on the subject’s hand and the weapon.”
- The subject then leveled the machete which officer Polidore had his and on the subject’s right hand (gripping the weapon).”

According to the Appellants’ report, they were paying very close attention to the subject’s hands and made several unequivocal statements as to what the subject was doing with his hands leading up to the Appellants’ tasing the subject.

2. Resisting Arrest Report

Pursuant to NOPD policy, the Appellants’ supervisor, Sergeant Russell Philibert, had to complete a “resisting arrest report” due to the fact that Appellants discharged their weapons. (Tr. at 183:2-9). This report was based upon information provided to Sgt. Philibert by the Appellants. *Id.* at 184:4-7. Based upon the information provided to him from the Appellants, Sgt. Philibert wrote that “the ECD activation caused [the suspect] to fall to the floor and disarm (sic) him.” (NOPD Exh. 4). Then, “a second [TASER] activation cycle was required to handcuff [the subject] and to remove the machete next to him.” *Id.* Both of these assertions are demonstrably false. Before the subject was tased, Officer Polidore had disarmed the suspect, and “placed [the machete] in the corner away from [the subject].” (Tr. 102:19-22). As Officer Polidore and Sgt. Smith testified, when the suspect was handcuffed and rolled over, the machete was nowhere on his person or near enough for the subject to reach. (Tr. 272:21-273:8).

The Appellants also told Sgt. Philibert that they “shouted” at the subject to “release the weapon.” (NOPD Exh. 4). As noted above, this is not true.

3. *Video Evidence*

Upon a review of the video, the interaction between the suspect and Officer Polidore appears non-confrontational. There is little, if any, resistance offered by the subject. When Officer Polidore withdraws from the subject, the subject is unarmed and attempting to pull his pants up with both hands. (NOPD Exh. 1). When viewing the video during their testimony, both Appellants testified that they thought the subject's belt was the machete. (Tr. 306:11-16, 349:20-350:8, 350:19-22, 377:5-11). Given that this testimony came well after the Appellants submitted inaccurate reports, the Commission views it as largely self-serving and inconsistent with the definitive claims the Appellants made in their reports.

During his testimony at the appeal hearing, Appellant Wheeler said he was approximately eight (8) feet away from the subject. (Tr. at 337-338.) From a review of the video, it appears that the subject was much closer than that when the Appellants made the decision to discharge their TASERS. It is difficult to believe that, even in low light, that they could not see that the subject was not holding a two-foot-long knife. Further, Officer Vara testified that, at the time the subject was advancing on him and Officer Wheeler, Vara believed that the machete was "behind [the subject's] leg or on his side." *Id.* at 374:16-19. This is inconsistent with the account Appellants provided to NOPD in their report when they allege that the subject leveled the machete at them. Officer Vara also claims that he did not realize that the subject's belt was not the machete until he viewed the video (Tr. 377:8-11), but he was the one who handcuffed the subject and should have immediately been able to confirm that the subject's belt was not a two-foot-long knife. *See id.* at 378:4. Finally, Appellants' expert confirms that there were 11-12 seconds between the subject being disarmed and Appellants discharging their Tasers. (Tr. p. 445) During this time, the subject

was slowly moving closer to Appellants, while trying to pull his pants up, and only passively resisting the Appellants' instructions. *Id.* at 180:17-181:2.

B. Appellants' Discipline was Commensurate with their Infraction

Since NOPD has established that Appellants knowingly provided false information in connection with an official report and that such actions compromised the efficient operation of the Department, the Commission now turns to whether or not termination is the appropriate level of discipline for such misconduct. In conducting its analysis, the Commission must determine if the Appellants' termination was "commensurate with the dereliction;" otherwise, the discipline would be "arbitrary and capricious." *Waguespack v. Dep't of Police*, 2012-1691 (La. App. 4 Cir. 6/26/13, 5); 119 So.3d 976, 978 (citing *Staehele v. Dept. of Police*, 98-0216 (La. App. 4 Cir. 11/18/98), 723 So.2d 1031, 1033).

NOPD has established a "penalty schedule" in connection with certain rule violations. PR 1021.3. For the most part, this schedule operates under a theory of progressive discipline and provides for increasing levels of discipline for subsequent rule infractions. However, there are several rule violations for which the only penalty is dismissal. For example, the only discipline listed for a violation of Rule 2, Section 2 is dismissal. PR 1021.4.3.² Likewise, a violation of Rule 6, Section 2 also carries with it the penalty of dismissal for a first offense. PR 1021.8.2.³ While there was little testimony as to the genesis of these rules and why a violation of them warrants discipline, the Commission takes a common sense approach to its analysis.

² Rule 2, Section 3 requires that all employees "be truthful at all times, in their spoken, written, or electronic communications, whether under oath or not, in all matters and official investigations relating to the scope of their employment and operations of the Department."

³ Rule 6, Section 2 states that, "[a]n employee shall not knowingly make, or cause or allow to be made, a false or inaccurate oral or written record or report of an official nature, or intentionally withhold material matter from such report or statement."

Official reports generated by Officers in connection with arrests, uses of force or other interactions with citizens often provide the only insight into such incidents. These records are public documents, and members of the public frequently request them. In the interest of accountability, transparency and public trust, it is essential that these records accurately reflect what happened, regardless of whether or not the Officers involved are shown in a positive light. If Officers alter, omit or misrepresent material in these reports, the essential role these reports play is drastically compromised. Therefore, the Commission finds that NOPD has a vested interest in ensuring that Officers commit to the highest level of truthfulness in making official reports and severely disciplining those Officer who fail to do so.

V. CONCLUSION

This is not a conclusion that the Commission comes to lightly. We recognize that the Appellants were good officers faced with a very difficult position. Further, the Commission appreciates both the internal and external pressures on NOPD Officers. Nevertheless, there were numerous instances where the Appellants submitted or reported demonstrably false information to NOPD, and their belief that their reports were accurate is called into serious question by their testimony, the video evidence and their initial account of the incident. If there is any lesson to be learned from this episode, it is that Officers and supervisors must adhere to the highest standards of truthfulness and transparency when preparing reports regarding incidents when force is required. If there is any doubt about a particular situation following the heat of the moment, Officers should note that in their reports. The public must have faith that, when NOPD officers respond to a potentially dangerous situation, that they will conduct themselves in a professional, forthright manner with the health and safety of all citizens foremost in their minds.

Based upon the evidence and testimony presented by the Parties during the appeal hearing, the Commission finds that NOPD has sustained its burden in showing that Appellants violated NOPD Rule 2, Section 3 and Rule 6, Section 2. The Commission further finds that violations of these rules impairs the efficiency of NOPD. Finally, the Commission finds that the nature of the Appellants' violations warrant the highest degree of discipline, termination. Therefore, Appellants' appeal is DENIED and their terminations shall stand. Given that the Commission finds that there was sufficient cause justifying Appellants' dismissal, it need not determine if there was sufficient cause to suspend Appellants for lesser violations.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 30 DAY OF NOVEMBER, 2015.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION




MICHELLE D. CRAIG, CHAIRMAN

CONCUR:



RONALD P. McCLAIN, VICE-CHAIRMAN



TANIA TETLOW, COMMISSIONER