



CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION
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DIRECTOR OF PERSONNEL

Tuesday, April 12, 2022

Mr. Eric Hessler
PANO 320 N. Carrollton Avenue #202
New Orleans, LA 70119

Re: **Jonathan Mykulak VS.
Department of Police
Docket Number: 9245**

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 - 4/12/2022 - 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 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 "Stacie Joseph".

Stacie Joseph
Management Services Division

cc: Shaun Ferguson
William R. H. Goforth
Alexandra Mora
Jonathan Mykulak

file

**CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS**

JONATHAN MYKULAK
Appellant

Docket No. 9245

v.

DEPARTMENT OF POLICE,
Appointing Authority

DECISION

Appellant, Officer Jonathan Mykulak, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his 80-day suspension beginning the week of January 31, 2021. (Exhibit HE-1). At all relevant times, Appellant had permanent status as a police officer. (Tr., Vol. I, at 110; Ex. HE-1). A Hearing Examiner, appointed by the Commission, presided over a hearing on August 18-19, 2021. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the parties' post-hearing memoranda, the Hearing Examiner's report dated March 22, 2022, and controlling Louisiana law.

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

I. FACTUAL BACKGROUND

Late at night on February 21, 2020, Officer Jonathan Mykulak, a member of the Seventh District Task Force, and his partner, Officer Sasha Winchester, stopped a vehicle for traffic violations. (Tr., Vol. II, at 324). The driver parked in a residential driveway and exited the vehicle. (Tr., Vol. II, at 127-28). Officer Mykulak saw narcotics in plain view in the vehicle. (Tr., Vol. II,

at 325). Officer Mykulak intended to handcuff the driver, but the driver ran back to the vehicle. (Tr., Vol. II, at 325). “[The suspect] sprinted back to his vehicle, opened the front door and dove under the front seat of his vehicle towards the floorboard.” (Tr., Vol. II, at 325). Officer Mykulak ran behind the suspect to the driver’s side of the vehicle, and Officer Winchester entered the vehicle from the passenger side. (Tr., Vol. II, at 131). The suspect was reaching under the seat on the driver’s side of the vehicle. (Tr., Vol. II, at 326). Both officers feared that the driver was reaching for a gun. (Tr., Vol. II, at 131, Vol. I, at 108). Officer Winchester testified, “I thought he was reaching for a gun to shoot myself or my partner.” (Tr., Vol. II, at 131). Officer Winchester pointed her weapon at the suspect when he failed to comply with requests to get out of the vehicle. (Tr., Vol. II, at 131-32, 327). Officer Mykulak hit the suspect in the head several times with his fists. (Tr., Vol. II, at 328). Officer Mykulak then tased the suspect, but because of the suspect’s coat, the prongs did not complete the circuit. (Tr., Vol. II, at 328). Officer Mykulak then used the taser to “drive stun” the suspect, placing the device directly on the suspect’s neck. (Tr., Vol. II, at 328). The taser was effective. (Tr., Vol. II, at 328-29). The officers placed the suspect on the ground, face-down, and handcuffed him. (Tr., Vol. II, at 329). Deputy Superintendent John Thomas testified that all force used by Officer Mykulak was appropriate until the suspect was on the ground and handcuffed. (Tr., Vol. I, at 108).

Officer Mykulak testified that he used no force after the suspect was handcuffed. (Tr., Vol. II, at 330). When Officer Mykulak was kneeling by the suspect, the suspect, said “I can’t breathe.” (Tr., Vol. II, at 335). Officer Mykulak testified that he then slipped twice causing him to hit the suspect with his knee two times. (Tr., Vol. II, at 332). According to Officer Mykulak, his foot slipped and he lost traction. (Tr., Vol. II, at 338-39). Officer Mykulak testified that when he tried to regain footing after first slipping and hitting the suspect’s back, his hands slid off the suspect’s

vehicle, causing his knee to strike the suspect again. (Tr., Vol. II, at 338-39). Officer Mykulak's knee was on the suspect's back the second time for about 10-14 seconds. (Tr., Vol. II, at 351). When the suspect said, "please get off me," Officer Mykulak removed his knee. (Tr., Vol. II, at 339). Officer Mykulak testified that the knee strike was not intentional. (Tr., Vol. I, at 143).

Officer Winchester's body-worn-camera recorded these events, and was entered into evidence as Exhibit NOPD-6, but Officer Mykulak's body-worn camera fell off. (Tr., Vol. I, at 51). The below Commissioners have reviewed that body camera video.

Officer Mykulak admitted that he received training about the danger of positional asphyxia from placing pressure on an arrestee in a prone position when the arrestee is handcuffed with his hands behind his back. (Tr., Vol. I, at 111-12). The Public Integrity Bureau investigator testified that "when a person is placed on their stomach and you add - - you factor in placing their arms behind their back, it creates pressure to the rib cage that make breathing difficult. And if you add any extra factors like weight from someone else, that increases the risk of that person suffocating." (Tr. Vol. I, at 202). "Also, being on drugs or heightened pulse also contributes to that greatly." (Tr., Vol. I, at 202). The investigator also testified that an officer should move a handcuffed arrestee from his stomach to another position as soon as possible to reduce the risk of positional asphyxiation. (Tr., Vol. I, at 198).

II. ANALYSIS

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the appointing authority has the burden of proving by a preponderance of the evidence: 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (quoting *Cure v.*

Dep't of Police, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984).

The Appointing Authority has carried its burden of showing that the complained-of conduct occurred, namely, the Appellant's application of his knee to the suspect when the suspect was handcuffed and in a prone position. Even if the undersigned Commissioners credit the Appellant's testimony that the knee strikes to the suspect's back were accidental (Tr., Vol. I, at 143), the evidence shows that the Appellant applied pressure for a period of time to the suspect's back when he was in a prone position and handcuffed, endangering the suspect with positional asphyxia. (Tr., Vol. I, at 111-12, 202). The evidence is clear that the Appellant's first contact with the handcuffed individual was because of the Appellant's slip. (Ex. NOPD-6). On that occasion, the Appellant immediately removed his knee from the individual's back. (Ex. NOPD-6).

As to the second time that the Appellant's knee made contact with the arrestee's back, in contrast to the first contact when the Appellant immediately removed his knee from the individual's back, the Appellant kept his knee on the individual's back during the second contact for approximately 10-14 seconds based on the body camera video introduced into evidence. (Tr., Vol. II, at 351; Ex. NOPD-6). The Appellant testified that such a delay in removing his knee was because he was exhausted from fighting with the individual. (Tr., Vol. II, at 340, 346). However,

he was able to immediately remove his knee the first time despite his apparent exhaustion at that time. Thus, the delay in doing so the second time is very disturbing.

The Appellant's own testimony is most significant as to why he did not immediately remove his knee from the arrestee's back the second time. More specifically, although he referred to his exhaustion as a reason for the prolonged contact with the arrestee's back, the Appellant importantly testified that he continued to apply his knee to the arrestee's back for those approximate 10-14 seconds so that he could maintain contact with the arrestee and prevent him from potentially running away. (Tr., Vol. II, at 340-341, 346-347). Further, the arrestee should not have been allowed to remain handcuffed on his stomach on the ground for such a long period of time, thus creating the potential for this further contact with the individual's back, even if it initially resulted from the Appellant's slip or loss of balance, which contact was then improperly and unreasonably prolonged due to the Appellant's stated intent to make sure the arrestee did not run away while he, the Appellant, was trying to recover from the just concluded struggle with the arrestee. (*See* Tr., Vol. I, at 198).

Unauthorized use of force impairs the efficient operation of NOPD, which entered into a consent decree with the Department of Justice because NOPD was consistently using excessive force. (Tr., Vol. I, at 64-65). NOPD's Use of Force Policy provides that "[t]he policy of the New Orleans Police Department is to value and preserve human life when using lawful authority to use force. Therefore, officers of the New Orleans Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others." (Ex. NOPD-9).

NOPD imposed the presumed penalty for a level four use of force under NOPD's disciplinary matrix. The penalty imposed, an 80 day suspension, is commensurate with the violation committed by the Appellant. (Tr., Vol. I, at 49, 58, 60; Ex. NOPD-4).

Officer Mykulak's appeal is DENIED.

This the 12th day of April, 2022

WRITER:

Mark C. Surprenant

Mark C. Surprenant (Apr 8, 2022 12:14 CDT)

MARK SURPRENANT, COMMISSIONER

CONCUR:

Bn

Brittney Richardson (Apr 8, 2022 12:23 CDT)

BRITTNEY RICHARDSON, CHAIRPERSON

J H Korn

J H Korn (Apr 9, 2022 15:40 CDT)

JOHN KORN, VICE-CHAIRPERSON