



CITY OF NEW ORLEANS

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Wednesday, December 19, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Eric Hessler
PANO 2802 Tulane Avenue #102
New Orleans, LA 70119

Re: **Sean Carrigan VS.
Department of Police
Docket Number: 8742**

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 - 12/19/2018 - 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
Sean Carrigan

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CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS

SEAN CARRIGAN, Appellant, vs. DEPARTMENT OF POLICE, Appointing Authority.	DOCKET No.: 8742
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I. INTRODUCTION

Appellant, Sean Carrigan, brings the instant appeal pursuant to Article X, §8(A) of the Louisiana Constitution and this Commission’s Rule II, §4.1 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 Officer 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 alleged failure to activate his Body-Worn Camera (hereinafter “BWC”) during a call for service on August 6, 2015. (H.E. Exh. 1). NOPD asserts that Appellant’s failure to activate his BWC constituted a violation of NOPD Rule 4, Paragraph 2. This rule reads as follows:

An employee shall professionally, promptly, and fully abide by or execute instructions issued from any authoritative source, including any order relayed from a superior by an employee of the same or lesser rank. If the instructions are reasonably believed to be in conflict with the Rules, Policies and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon execution of the instructions which are reasonably believed to be in conflict with Department Rules, Policies, and Procedures, the employee receiving the instructions shall have the right to request and is entitled to receive, IMMEDIATELY, said instructions in writing, except in cases of emergency as determined by the supervisor. The issuing authority shall be held responsible should any conflict materialize; however, no instructions shall be issued or executed which are in violation of law.

(H.E. Exh. 1).

According to NOPD, the “authoritative source” at issue here is NOPD’s policy requiring an officer to activate his/her BWC during all calls for service. *Id.* Following an investigation, NOPD substantiated the allegations against Appellant and issued him a fifteen-day suspension.¹

B. August 6, 2015

On August 6, 2015, Appellant served as a platoon officer in NOPD’s Fourth District and worked the second shift from 2:25 p.m. to 11:00 p.m. (Tr. at 83:15-20). At approximately 4:30 p.m., Appellant responded to a residential burglar alarm in the Lakewood Neighborhood on the

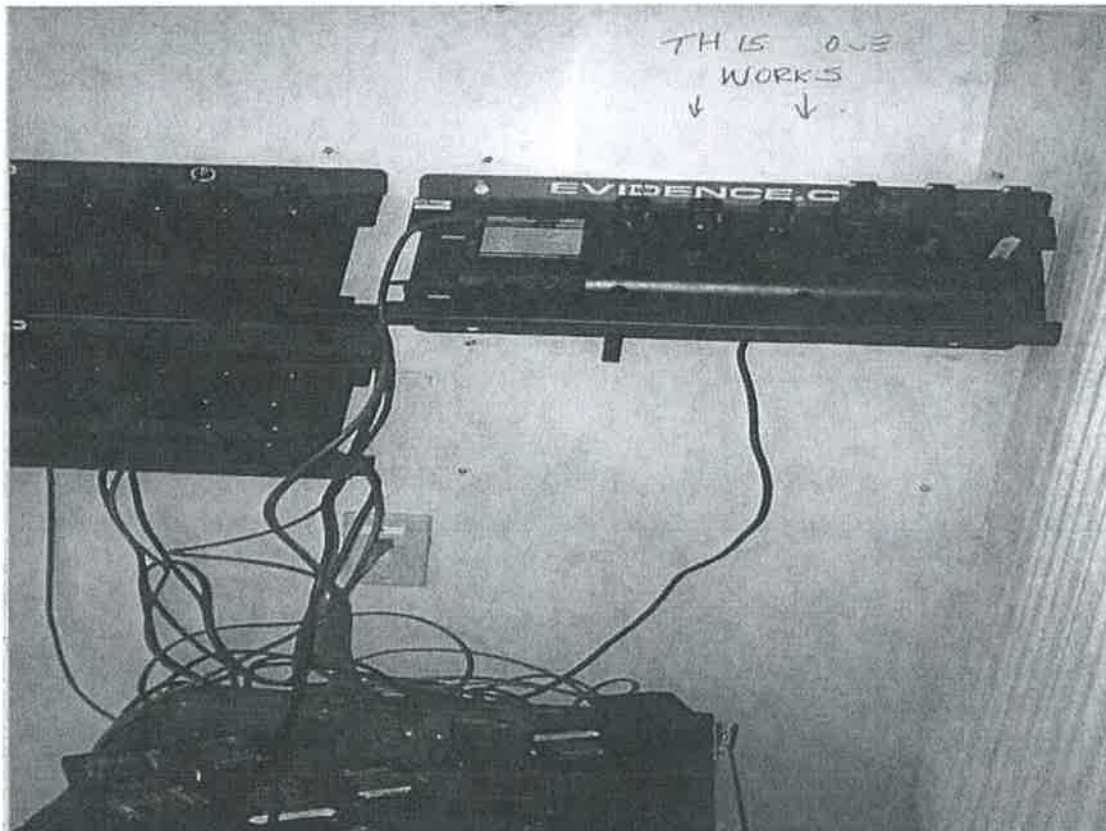
¹ The Parties stipulated that NOPD’s investigation into Appellant’s alleged misconduct adhered to the procedural requirements of Louisiana Revised Statute 40:2531. (Tr. at 2:32-4:14).

West Bank. (NOPD Exh. 13). After briefly canvassing the residence with a fellow officer, Appellant determined that the alarm was falsely triggered by an individual who was working on the house with permission from the owner. (Tr. at 86:2-9). Appellant did not dispute that his response to the burglar alarm constituted a “call for service” under NOPD’s BWC policy and required activation of his BWC. In fact, Appellant testified that he did activate his BWC when he responded to the burglar alarm.

After concluding that there was no actual burglary or break-in, Appellant returned to his NOPD patrol unit and entered a summary of his action in his “trip sheet.”² In addition to listing the location and category of the call, Appellant checked off a box on the trip sheet indicating that he had activated his BWC. (NOPD Exh. 13). Appellant’s patrol unit was equipped with hardware and software that allowed Appellant to access video files created by the BWC’s activation and label the files. Appellant testified that he accessed the video file he had just created by activating his BWC and labeled the file in the same manner as he had on his trip sheet. *Id.* at 96:8-:97:3.

At approximately 10:30 p.m., Appellant returned to the Fourth District station and placed his BWC in a docking port. According to Appellant, there was only one functional docking station with six ports available. A picture of the docking station taken soon after Appellant’s alleged misconduct is in evidence as “Appellant Exhibit 1” and is reproduced below:

² NOPD requires officers to keep and maintain a “trip sheet” for each tour of duty. The trip sheet is a brief activity report in which an officer records his/her location along with identifying codes and times. At the end of each tour of duty, an officer submits his/her trip sheet to a supervisor.



The Fourth District’s administrators put up the sign pictured above that states “THIS ONE WORKS” to indicate that only the docking station immediately below the sign worked. (Tr. at 89:12-24). The other two docking stations, that appear to be wired for both power and internet access, were malfunctioning at the time leaving only six ports onto which Fourth District officers could place their BWCs. *Id.* at 89:25-90:17. Appellant testified that, since August 2015 NOPD has fixed the wiring and updated the technology so the process is greatly improved. *Id.* at 91:21-92:6. Commander Cesar Ruffin, one of the Fourth District supervisors responsible for reviewing the investigation into Appellant’s alleged misconduct, confirmed that the docking stations no

longer look like they did in August 2015 and that NOPD had upgraded the docking ports, in part, to address malfunctions. *Id.* at 29:24-30:4, 38:7-16.

At the end of each shift, officers coming off duty were required to place their BWC on the docking station so that video files created by a BWC could be downloaded onto Evidence.com a cloud-based server maintained by Axon an NOPD contractor. Downloading video files took between twenty minutes and two hours. *Id.* at 90:18-21. Officers did not play any active role in the downloading process other than placing a BWC in a port on the docking station. *See id.* at 78:25-79:6. There was no way an officer could confirm that a video had downloaded successfully in real-time. *Id.* at 93:7-11. Appellant testified that, once he placed his BWC on the docking station, he assumed that the hardware and software would download all of the video files he had created during his shift and left for the day.

C. Aftermath and Investigation

Following a random audit of BWC files, Fourth District personnel discovered that there was no video from Appellant's BWC that corresponded with Appellant's response to the August 6th false alarm. *Id.* at 56:7-17. Stated differently, NOPD found that Appellant had listed a call for service related to the false alarm on his trip sheet (NOPD Exh. 13) but there was no video file for that particular call for service on Evidence.com (NOPD Exh. 14). As a result, Cmdr. Shawn Ferguson initiated an investigation into Appellant's possible violation of NOPD's BWC policy.

Lieutenant Gervais Allison was responsible for the investigation and received the assignment on August 28, 2015. (NOPD Exh. 1). Lt. Allison immediately requested and received an extension to the sixty-day deadline for investigations into alleged misconduct by law enforcement personnel established by Louisiana Revised Statute 40:2531. (NOPD Exhs. 4-5). As

a result of the extension, the deadline to complete the investigation into Appellant's alleged misconduct moved from October 24, 2015 to December 24, 2015. (*See* NOPD Exh. 3).

As part of his investigation, Lt. Allison interviewed Appellant. The account Appellant provided Lt. Allison was essentially the same one he provided to the Commission during the instant appeal hearing. (NOPD Exh. 3 at p. 3-8). Following his interview with Appellant, Lt. Allison reached out to Sergeant Robert Blanchard – who served in NOPD's "Information Systems Section/Body Worn Camera Unit" – in order to determine if NOPD was aware of any other officers who had complained that labeled BWC files were not successfully downloading onto Evidence.com. *Id.*³ According to Sgt. Blanchard, NOPD had received complaints from officers that labeled BWC videos were not properly uploading. *Id.* Sgt. Blanchard confirmed his statement to Lt. Allison in an email to Lt. Allison, Comdr. Ferguson and Sgt. Shawn Summers. (NOPD Exh. 15). Sgt. Blanchard went on to state that the only entity that could confirm whether or not Appellant's BWC had malfunctioned was Axon (formerly referred to as "Taser"). *Id.*

On November 6, 2015, Lt. Allison reached out to an Axon/Taser regional support manager and inquired if Axon/Taser could determine if a technical problem had caused the missing video. (NOPD Exh. 3 at p. 4). But, before Axon/Taser responded, Lt. Allison concluded his investigation "due to time constraints" imposed by state law. Neither Lt. Allison nor his supervisors contacted Appellant to see if he would be willing to voluntarily agree to extend the deadline. (Tr. at 80:3-

³ The Commission notes that many of the statements in Lt. Allison's investigatory report are hearsay. And, we agree with the hearing examiner that the report also contains several instances of "totem hearsay." Nevertheless, neither party objected to the introduction of Lt. Allison's report as a full exhibit, nor was there any limitation with respect to its introduction. Furthermore, both Cmdr. Ruffin and Cmdr. Ferguson reviewed Lt. Allison's report as part of their role in the investigation. Neither had an issue with the manner in which Lt. Allison conducted his investigation, but did disagree with the conclusions Lt. Allison made. (Tr. 20:14-21:16). Therefore, the Commission will accept Lt. Allison's report as a full exhibit and will assign to it appropriate probative value. *Miller v. Leonard*, 588 So.2d 79, 82 (La.1991)("uncontradicted hearsay testimony of a single witness, admitted without objection, may properly be considered and given probative value."); *see also, Coleman v. Victor*, 326 So.2d 344, 349 (La.1976); *Guedon & Associates, Inc. v. Haik*, 533 So.2d 1256, 1260 (La. Ct. App.1988).

18). And NOPD witnesses were not aware if Axon/Taser ever responded to Lt. Allison's request. *Id.* at 82:2-11.

Lt. Allison concluded that Appellant "did document his activities in Evidence.com, but as a result of some technical difficulty, the video was not uploaded and saved on Evidence.com." In support of his conclusion, Lt. Allison observed that Appellant had received discipline in connection with BWC violations in the past, but had been "proficient" in July and August of 2015 in documenting and labeling his BWC videos with the instant allegation constituting the only instance where a video was missing. Lt. Allison also found Appellant's actions lent credibility to his denial of any misconduct. Specifically, Lt. Allison believed that Appellant had labeled the video in Appellant's patrol unit and finished his tour of duty and assumed it had been successfully downloaded until he received notice on August 11, 2015 that there was a missing video. Finally, Lt. Allison found that the other complaints regarding the operation of the BWCs by other officers tended to support Appellant's version of events.

Cmdrs. Ferguson and Ruffin did not agree with Lt. Allison's conclusion and believed that Appellant was simply trying to make excuses for failing to activate his BWC. Appellant's disciplinary history and prior BWC rule infractions contributed to the Commanders' skepticism about Appellant's excuse.⁴ Ultimately, Cmdrs. Ruffin and Ferguson recommended that NOPD sustain the allegation against Appellant and issue a fifteen-day suspension. Appellant's prior BWC violations served as aggravating factors when considering the severity of the discipline and NOPD asserted that the instant BWC violation was Appellant's third in a three-year span. (Tr. at 17:16-18:5).

⁴ The Commission points out that one of the instances of prior discipline related to Appellant's BWC usage upon which Cmdrs. Ruffin and Ferguson relied was a fifteen-day suspension under PIB #2015-0299-C. (NOPD Exh. 9). Via judgment rendered in Civil Service Case #8563, the Commission reversed this fifteen-day suspension. In reversing the suspension, the Commission found that record suggested that Appellant's BWC had malfunctioned.

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 So. 2d 1093, 1094 (La. Ct. App. 2007)). If the Commission finds that an appointing authority has met its initial burden and had sufficient cause to issue discipline, it must then determine if that discipline “was commensurate with the infraction.” *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15, 7); 165 So.3d 191, 197 (citing *Walters v. Dep't of Police of City of New Orleans*, 454 So.2d 106, 113 (La. 1984)). Thus, the analysis has three distinct steps with the appointing authority bearing the burden of proof at each step.

IV. ANALYSIS

A. Occurrence of the Complained of Misconduct

NOPD argues that the absence of any video on the Evidence.com server is the most compelling evidence of Appellant's misconduct. (See NOPD Exh. 14).⁵ Yet, balanced against such evidence is:

- Appellant's contemporaneous record that he did activate his BWC during the applicable call for service. (NOPD Exh. 13).
- Appellant's testimony that he accessed the BWC file in his patrol unit and appropriately labeled the file in accordance with NOPD Policy. (Tr. at 96:1-18).
- Sgt. Blanchard's confirmation that other NOPD officers had complained about the same issue Appellant alleged occurred with the BWC video file in question. (NOPD Exh. 1)
- The apparently makeshift condition of the BWC docking area in the Fourth District station in August 2015. (App. Exh. 1).
- Obvious technical problems with at least two other docking stations as indicated in a sign over the only working docking station in the Fourth District. (App. Exh. 1).
- NOPD's upgrade of hardware and software to address concerns that some equipment was malfunctioning. (Tr. at 38:7-16).

Given the above-listed factors, it was reasonable for Lt. Allison to seek verification from Axon/Taser as to the possibility that a technical glitch resulted in the missing video. Unfortunately for both Appellant and NOPD, Axon/Taser was unable to respond to Lt. Allison within two weeks and Lt. Allison, citing "time constraints" decided to conclude his investigation without the benefit

⁵ NOPD also asserted that the successful upload of other videos before and after the false burglar alarm tend to show that Appellant's BWC was operating properly. Lt. Allison came to a different conclusion and found the other videos to be evidence that Appellant was "proficient" at activating his BWC and subsequently labeling the video files. The Commission recognizes that both conclusions are reasonable and finds that the other videos are not compelling evidence supporting one side or the other.

of Axon/Taser's response. Even Cmdr. Ruffin acknowledged that Axon/Taser's analysis would have been the best evidence to either support or undermine Appellant's defense. (Tr. at 28:10-15).

NOPD did not explain why Lt. Allison had to complete his investigation on November 25, 2015 as opposed to December 24, 2015 – which was the deadline date afforded to NOPD as a result of the extension reference earlier. Additionally, NOPD did not seek an agreement with Appellant to delay the conclusion of the investigation until Axon/Taser had an opportunity to respond. Finally, it is not clear from the record why Lt. Allison, who received the investigation on August 28, 2015 did not seek a review from Axon/Taser until November 6, 2015.

The Commission acknowledges that the absence of a BWC video related to Appellant's response to the false burglar is strong evidence that Appellant failed to activate his BWC. But on the other side of the ledger, Appellant has introduced compelling exculpatory evidence. All Parties appear to agree that an analysis by Axon/Taser would have constituted the most compelling evidence in this matter, but such an analysis was never performed.

Bearing the above in mind, the Commission finds that NOPD has failed to establish that it was more likely than not that Appellant failed to activate his BWC during a call for service on August 6, 2015.

V. CONCLUSION

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

S. Carrigan
No. 8742

Judgment rendered this 19th day of December, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER



MICHELLE D. CRAIG, CHAIRPERSON

12/17/2018

DATE


CONCUR



CLIFTON J. MOORE, Jr., COMMISSIONER

12/17/18

DATE



STEPHEN CAPUTO, COMMISSIONER

12-17-18

DATE