

**KEVIN BALANCIER**

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**NO. 2001-CA-0036**

**VERSUS**

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**COURT OF APPEAL**

**NEW ORLEANS POLICE  
DEPARTMENT**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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**CONSOLIDATED WITH:**

**CONSOLIDATED WITH:**

**BYRON CORLEY**

**NO. 2001-CA-0127**

**VERSUS**

**NEW ORLEANS POLICE  
DEPARTMENT**

APPEAL FROM  
CITY CIVIL SERVICE COMMISSION ORLEANS  
NO. 5850 C/W 5855

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**Judge Terri F. Love**

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(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard  
Armstrong, Judge Terri F. Love)

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**REVERSED IN PART; AFFIRMED IN PART**

The New Orleans Police Department appeals the judgment of the Commission which reduced the suspension of Officer Kevin Balancier from twenty-five days to five days. Officer Byron Corley appeals the judgment of the Commission dismissing his appeal and upholding the three-day suspension imposed on him by the New Orleans Police Department. For purposes of this appeal, these two lawsuits have been consolidated. Based upon the foregoing evidence, the judgment of the trial court is affirmed in part and reversed in part.

**FACTS AND PROCEDURAL HISTORY**

The New Orleans Police Department, (“NOPD”), suspended Officer Kevin Balancier (“Officer Balancier”) for twenty-five days following a determination that on October 19, 1997, he violated department rules and/or procedures regarding professionalism, neglect of duty, and false or inaccurate reports in conjunction with a fight that occurred while he was off duty while acting under color of the law. During the fight, he was injured and inflicted injuries on another person. The NOPD suspended Officer Byron Corley (“Officer Corley”) for three days following a determination that he violated department rules and/or procedures regarding professionalism and neglect of duty in conjunction with his investigation of the fight involving Officer Balancier.

Both Officer Balancier and Officer Corley timely appealed to the Commission. A hearing was held before a Civil Service Commission hearing examiner on September 18, 1998. At that hearing, Officer Balancier testified as follows:

On Sunday, October 19, 1997, at just before 4:00 a.m., he went to the Black Magic Bar to purchase a take-out meal. As he was on vacation at the time, he was driving his personal car and was not in uniform. While inside, one of the bar owners told him that several patrons wanted to fight his bouncers. Upon returning to his car, he noticed that the patrons were now

outside cursing at the bouncers. He radioed the police dispatcher that a Code 103F (an altercation/fight) was about to start, and he requested assistance. While standing at the back of his car awaiting back-up, he was jumped by the four men he had been observing. They threw him to the ground and began punching and kicking him. He used his metal police flashlight in a defensive manner, but he was unsure if he had hit anyone. During the scuffle, he was hit in the ribs and in the face, receiving a cut above his right eye. After the fight, he returned to his car and cleaned his face. Because he had the flu at the time and was taking Tylenol and Nyquil, he failed to realize the full extent of his injuries.

When his back-up, Officers Corley and Lamar Davis (“Officer Davis”) arrived, Officer Balancier told them he was struck trying to break up a fight, but that he was okay. He also told them that he knew the subjects and would take care of the matter himself in the morning with his rank. He did not tell the officers about being jumped because he was embarrassed. He marked up the situation as N.A.T. (necessary action taken).

The next morning, he called the Second District and was told that no rank was on duty, but that he could reach Sergeant Andrew Washington (“Sgt. Washington”), at home in several hours. He spoke with Sgt. Washington at 2:00 p.m., telling him exactly what had happened the night

before. Sgt. Washington was on leave at the time and instructed him to immediately notify the on-duty platoon rank. He then called Sergeant Neil Charles (“Sgt. Charles”), who told him that his (Officer Balancier’s) division, Detective Investigative Unit, (“D.I.U.”), should handle the matter. He relayed this information to Sgt. Washington who told him that he would take care of it the next night when he returned to work for the 7:00 p.m. shift. Officer Balancier then changed the signal from a 103 (altercation) to a 34 (aggravated battery). At that point he knew that the use of force report and the report of injuries were needed.

On Monday evening, Officer Balancier called Sgt. Washington at the Second District to discuss the report, but the Sergeant was busy and the matter kept getting shifted to other people. At 11:00 p.m. that night, Officers Stanley Morlier and Wilfred Carter came to Officer Balancier’s home to take a report and photograph his injuries. He asked them why rank was not handling it. They told him that rank had said that because he was on leave and not acting in his official capacity, anyone could handle it. Officer Balancier testified that the report was taken within the twenty-four hours for notification on the use of force and the report of injuries. They wrote it up as a 34 R.T.F. (aggravated battery – report to follow) with arrest warrants for the four men that Officer Balancier said had attacked him. On cross-

examination, Officer Balancier acknowledged that if he was injured in the line of duty, he was required to make a report within twenty-four hours. He claimed, however, that he notified rank within twenty-four hours of the incident, but that they dropped the ball by shifting it back between his detective unit and platoon. He also admitted that when he spoke to the on-duty rank, Lieutenant Richard Scott (“Lt. Scott”), just minutes after the incident, he did not tell him that he had been involved in the fight or that he needed assistance.

Officer Corley testified that after hearing the 103 signal, he and Officer Davis reported to the scene. Prior to locating Officer Balancier, they questioned the bar owner and others standing around, but everyone was reluctant to talk about what had happened. They then located Officer Balancier who was seated in his car. He told them he had been struck while trying to break up a fight, but that he was all right. Officer Corley testified that Officer Balancier had an abrasion under his right eye and a trickle of blood on his shirt, but he otherwise looked normal and did not seem to need any immediate medical attention. However, he denied that Officer Balancier looked like he did in the photographs introduced at the hearing

After leaving the scene, Officer Corley met with Lt. Scott at the Second District station and apprised him of the situation. He also mentioned

Officer Balancier's slight injury and the bloodstain on his shirt. Officer Corley told Lt. Scott that based on his job experience and his observations, his gut feeling was that something was not right and that he (Lt. Scott) should speak to Officer Balancier. He also informed Lt. Scott that Officer Balancier had said he would contact his rank in the morning relative to the incident. Lt. Scott advised him that that should suffice. Officer Corley marked up the scene as 103 N.A.T. (necessary action taken) based on the information he had at the time. He did not file any reports. He stated that he felt his duty to take the matter any further was relieved once he had spoken with Lt. Scott, his supervisor.

Officer Lamar Davis was called to testify at the hearing. He stated that Officer Balancier told him and Officer Corley that there had been a fight, but that the perpetrators and victim had left the scene. Officer Balancier did not inform them that he had been involved in the fight, nor did he appear to Davis as having been injured. He stated that he and Officer Corley had done everything in their power to investigate what happened, but no information was relayed so they marked it up as N.A.T. (necessary action taken). He confirmed that Officer Corley had radioed Lt. Scott to advise him of the abrasion on Officer Balancier's eye and the blood stain on his shirt, and of his hunch that there may have been more to the situation than

Officer Balancier had admitted. He further stated that Lt. Scott then spoke with Officer Balancier and determined that everything was okay.

Sergeant Andrew Washington also testified at the hearing. He confirmed that Officer Balancier called him at 1:30 p.m. on Sunday, October 19, 1997, to advise him that he had been attacked during an incident at 4:00 a.m. that morning. Sgt. Washington was on vacation and told Officer Balancier to immediately notify the on-duty supervisor of the incident. He testified that when an officer is injured in an altercation while on duty, he should immediately notify the on-duty supervisor so that a first report of injury and use of force report can be completed by that supervisor. He stated that he was not responsible for seeing that any reports were filed in this matter.

The NOPD offered the testimony of Lieutenant Richard Scott. He testified that he was the Second District night supervisor on the night in question. He heard Officer Balancier make the 103 call requesting back-up. He became concerned when Officer Corley and Davis were having trouble finding Officer Balancier and radioed for him to give his 1020 (his location). Officer Balancier radioed back and told him that everything was okay and that he did not need to come out to the scene. He gave no indication that he (Officer Balancier) had been involved in the fight. Officer Corley met with



him later that evening and stated that something was amiss, but he refused to give any specifics. Officer Corley did not mention that Officer Balancier had been injured in any way. He stated that both Officer Corley and Officer Balancier were senior officers and he respected their opinions when they marked the scene up as necessary action taken. Two days later he learned that Officer Balancier had filed a police report in which he changed the code from a 103 (disturbance) to a 34 (aggravated battery) and named a suspect who was later arrested. It was only then that he learned that Officer Balancier had been injured in the fight. Lt. Scott testified that if an officer is involved in an altercation where there is use of force, he should report it immediately to an on-duty supervisor so that a use of force report can be written.

The NOPD also offered the testimony of Sergeant Lawrence Miller (Sgt. Miller) of the Public Integrity Division (P.I.D.). He was assigned to investigate allegations of misconduct against Officer Corley and Officer Balancier. He interviewed civilian witnesses, took statements from the officers involved, listened to police radio audiotape transmissions concerning the incident, and reviewed the photographs of both Officer Balancier's injuries and those of a Mr. Cloudie, one of the suspects involved in the altercation. He concluded that Officer Balancier had been injured in a

violent altercation and that he had inflicted a head injury on Mr. Cloudie with his black metal flashlight during that altercation. He testified that NOPD procedures require that when an officer, whether on or off duty, is injured or injures another in a physical confrontation, that officer must notify a supervisor within a reasonable time so that a Section 661 “use of force” form can be filled out. In addition, an officer hurt while acting under the color of law should make a “first report of injury.” Sgt. Miller testified that the purpose of the first report of injury is to officially notify the Administration and the officer’s chain of command that he has been injured in the line of duty so that he can get adequate treatment and compensation and return to full duty. Sgt. Miller stated that when an officer is given an assignment, he is required to perform certain duties such as completing a report, searching the area for suspects, and making sure that first aid is rendered to anyone who is injured.

Sgt. Miller further stated that once Officer Balancier had radioed for assistance and Officer Corley had arrived on the scene, Officer Balancier was relieved of all investigatory responsibility, save for his need to notify a supervisor for the 661 use of force form to be done. Sgt. Miller found that Officer Corley had neglected his duty by not writing a report, and by not transporting Officer Balancier, who in his (Sgt. Miller’s) opinion was clearly

injured, to the hospital. He stated that Officer Corley should have documented Officer Balancier's refusal to receive medical treatment to prevent him (Officer Corley) from being liable for any such refusal. He found that Officer Balancier had neglected his duty by failing to notify a supervisor that a use of force form needed to be done. He noted that Officer Balancier's radio transmissions to the supervisor that he was all right and that everything was okay were false and inaccurate because he in fact had sustained tremendous trauma to his eye, along with lacerations to his face and neck. Sgt. Miller testified that those statements were official communications via his police radio and that they pertained to official police business. He also sustained professionalism charges against Officer Balancier because his false and inaccurate official communications demeaned the dignity of and brought discredit to the NOPD. On cross-examination Sgt. Miller admitted that Officer Balancier did bring to light all of the information relating to the fight, but not until twenty-four to forty hours later and after anonymous allegations of misconduct had been made concerning the matter. He could not say for sure whether Officer Balancier was aware of those complaints when he disclosed the true circumstances of the incident.

Officer Stanley Morlier testified on behalf of the NOPD. He was

assigned to investigate the battery that occurred upon Officer Balancier. When he arrived at Officer Balancier's house at 11:30 p.m. on Monday, Officer Balancier had already spoken to his rank and upgraded his original signal from a 103 (disturbance) to a 34 (aggravated battery). Officer Morlier testified that he took the photographs marked as City No. 2 some forty hours after the incident and that they show Officer Balancier with extensive bruises to his face and eye. He stated that based on the information that he gathered from Officer Balancier, arrest warrants were secured for the perpetrators who had beaten him, and those individuals eventually pled guilty to the charges against them.

Deputy Superintendent Ronald Serpas also testified on behalf of the NOPD. He held a pre-disciplinary hearing on Officer Corley and Officer Balancier. At that hearing, he reviewed the Public Integrity Division Report submitted in this matter. Neither Officer Corley nor Officer Balancier offered any other circumstances, witnesses, or facts at that hearing that he believed would tend to mitigate their behavior. He thus recommended that Officer Corley be suspended for three days and Officer Balancier be suspended for twenty-five days. He found that both officers' actions or inactions affected the mission of the NOPD. Specifically he noted that the officers in this case failed to perform their duty by failing to notify their

supervisors or other officers of a criminal investigation and, as a result, ministerial forms such as the use of force report were either not created, or they were false or inaccurate.

Based on the foregoing testimony, the Commission found, with respect to Officer Balancier:

The Appointing Authority has established that Officer Balancier failed to properly advise Lt. Scott that he was the victim of a battery and that he knew the perpetrators. While Officer Balancier may have wanted to take care of the matter himself, that was not his call. Consequently, he neglected his duty by failing to apprise his supervisor immediately of the situation. However, Officer Balancier did report everything to his immediate supervisor the next day and necessary action was taken. Thus, all other charges including a false and inaccurate report should not be sustained.... Officer Balancier's subsequent actions eliminated any charges of failing to file proper reports and certainly mitigated his neglect in not properly reporting the incident to Lt. Scott. Thus, the suspension is reduced to five days.

With respect to Officer Corley, the Commission found:

The Appointing Authority has established that Officer Corley should have taken additional steps in his investigation. He knew that Officer Balancier had been attacked and failed to conduct any further investigation. According to the testimony of Officer Balancier, He [sic] told Officer Corley that he wanted to take care of the matter himself. By leaving the matter to Officer Balancier, Officer Corley neglected his duty.

## **APPLICABLE LAW**

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action by his employer

except for cause expressed in writing. The employee may appeal from such disciplinary action to the City Civil Service Commission. The burden of proof on appeal, as to the facts, shall be on the appointing authority. La. Const. art. X, § 8 (1974); Walters v. Department of Police of New Orleans, 454 So.2d 106, 112-113 (La. 1984). The Commission's decision is subject to review on any question of law or fact upon appeal to the appropriate court of appeal. La. Const. art. X § 12(B).

The Commission has a duty to independently decide, from the facts presented, whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction. Walters, 454 So.2d at 113. Legal cause for disciplinary action exists whenever an employee's conduct impairs the efficiency of the public service in which that employee is engaged. Cittadino v. Department of Police, 558 So.2d 1311 (La. App. 4 Cir. 1990). The appointing authority has the burden of proving, by a preponderance of the evidence, that the complained of activity occurred, and that such activity bore a real and substantial relationship to the efficient operation of the public service. Id., at 1315.

In reviewing the Commission's exercise of its discretion in determining whether the disciplinary action is based on legal cause and the

punishment is commensurate with the infraction, this Court should not modify the Commission's order unless it is arbitrary, capricious or characterized by an abuse of discretion. Walters, 454 So.2d at 114. "Arbitrary or capricious" means that there is no rational basis for the action taken by the Commission. Bannister v. Department of Streets, 95-0404, p.8 (La. 1/16/96), 666 So.2d 641, 647.

The Commission has the authority to "hear and decide" disciplinary cases, which includes the authority to modify (reduce) as well as to reverse or affirm a penalty. La. Const. art.X, § 12; Branighan v. Department of Police, 362 So.2d 1221, 1223 (La. App. 4 Cir. 1978). The legal basis for any change in a disciplinary action can only be that sufficient *cause* for the action was not shown by the appointing authority. The protection of civil service employees is only against firing (or other discipline) without cause. Id. at p. 1222. (emphasis in original)

The superintendent of police is charged with the operation of his department and it is within his discretion to discipline an officer for sufficient cause. Id. at p. 1223.

## **DISCUSSION**

The NOPD lists three assignments of error in its appeal of the Commission's judgment reducing Officer Balancier's suspension from

twenty-five to five days. First, it claims that the Commission acted arbitrarily and capriciously and committed clear legal error in granting, in part, Officer Balancier's appeal. Second, it claims that the Commission committed clear error and acted arbitrarily and capriciously when it dismissed the testimony of the rank and others, finding that the incident in question was properly reported. Finally, the NOPD claims that the Commission committed clear error and acted arbitrarily and capriciously when it reduced Officer Balancier's suspension from twenty-five days to five days on the basis that he properly reported the incident when the testimony presented clearly revealed that he did not.

In his sole assignment of error, Officer Corley contends that the Commission arbitrarily and capriciously found that he neglected his duty and accordingly upheld the three-day suspension.

In Palmer v. Department of Police, 97-1593 (La. App. 4 Cir. 1/28/98), 706 So.2d 658, we reversed the Commission's reversal of the NOPD's imposition of a two-day suspension where a prisoner in an officer's custody had escaped because the officer had not followed police procedure. In its decision, the Commission noted that it had found mitigating circumstances which needed to be taken into account in determining whether Officer Palmer's actions had impaired the efficient operation of the public service.



We stated that Officer Palmer's actions either did, or did not impair the efficient operation of the public service, *despite mitigating circumstances*. Finding that Officer Palmer's actions clearly impaired the efficiency of the public service, we held that the Commission's opinion that the two-day suspension was inappropriate was simply a substitution of its judgment for that of the appointing authority.

Similarly, in Chapman v. Department of Police, 97-1384 (La. App. 4 Cir. 1/28/98), 706 So.2d 656, we rejected the Commission's reduction of a suspension from thirty to ten days, holding that the Commission is not charged with the operation of the NOPD or disciplining its employees. Importantly, we noted that the Commission had concluded that Officer Chapman violated departmental regulations, but it believed that the thirty-day suspension was "too harsh" under the circumstances. We concluded that the Commission's action was simply a substitution of its judgment for the Superintendent's judgment. We found that the Superintendent had sufficient cause to impose the penalty and that the NOPD carried its burden of proof. The Commission's action was an arbitrary and capricious interference with the authority of the Superintendent to manage his department.

In Smith v. New Orleans Police Department, 00-1486 (La. App. 4 Cir.

4/11/01), \_\_\_ So.2d \_\_\_, we reversed the Commission's reduction of a suspension from five days to two days for an officer's failure to complete an investigation of a shoplifting incident by writing a police report and confiscating surveillance tapes that showed the alleged perpetrator fleeing the scene. At the Civil Service hearing, the NOPD called the officer who investigated the charges against Officer Smith, as well as the Captain who had conducted a Commander's hearing on those charges. Both testified that Officer Smith should have prepared a police report. In addition, Officer Smith testified to having two sustained, and one pending, suspensions for neglect of duty. Thus, we found ample evidence to show that the Superintendent acted reasonably and with sufficient legal cause in imposing a five-day suspension under the circumstances of the case.

Recently, in Stevens v. Department of Police, 2000-1682 (La. App. 4 Cir. 5/9/01), \_\_\_ So.2d \_\_\_, we reversed the Commission's reduction of a suspension from fifteen days to ten days for an officer's running of a stop sign and causing an accident with another vehicle. The Commission concluded that the appointing authority had suspended Officer Stevens for just cause; nevertheless, it found that the fifteen day suspension was not commensurate with the dereliction and reduced it to ten days in view of Officer Stevens' exemplary record and the appointing authority's previously

imposed disciplinary action in similar cases. We held that the Commission's reduction of the suspension was an arbitrary and capricious interference with the Superintendent's authority to manage the police department.

We find that the decision of the Commission with respect to Officer Balancier was an arbitrary and capricious substitution of its judgment for that of the NOPD. There was ample testimony that Officer Balancier's actions had a negative impact on the efficient operation of the NOPD. His failure to immediately notify either Officers Corley and Davis, or the on-duty supervisor Lt. Scott, that he had been injured and had possibly injured someone else in the altercation outside the Black Magic Bar impaired the ability of the NOPD to timely investigate the matter. As it turned out, the NOPD was charged with police misconduct surrounding the incident, without the benefit of knowing in advance its own officer's version of that incident. As we stated in Palmer, an officer's conduct either does, or does not, impair the efficiency of the public service, despite any mitigating circumstances. Because Officer Balancier's conduct clearly impaired the efficiency of the NOPD, the Commission's decision that the suspension imposed against him should be shortened because he reported everything to his immediate supervisor the next day, thereby mitigating his earlier

improper behavior, was an improper substitution of its judgment for that of the Appointing Authority. The NOPD is charged with the operation of its department. A dangerous precedent would be set if the NOPD were to allow an officer to escape virtually unpunished when he deliberately and intentionally misled his supervisor and other investigating officers about the true nature of an incident in which he was involved. The NOPD met its burden of proving that it had sufficient cause to discipline Officer Balancier and that the twenty-five day suspension it levied against him was commensurate with his dereliction.

With regard to Officer Corley, we find that the Commission properly upheld the three-day suspension imposed upon him by the NOPD. As testified to by Sgt. Miller, once Officer Corley responded to Officer Balancier's call for assistance, he was responsible for writing a report, searching the area for suspects, and making sure that first aid was rendered to anyone who was injured. His agreeing to allow Officer Balancier to take care of the matter himself with his rank in the morning ran afoul of proper police procedure. He should have pressed Officer Balancier for more details about the altercation and who was involved in it. At the very least, he should have documented Officer Balancier's refusal to seek any medical treatment.

Officer Corley testified that he told his supervisor, Lt. Scott, that Officer Balancier appeared to be slightly injured and that he had a hunch that something was not right and that Lt. Scott should speak to Officer Balancier himself. He further testified that after informing Lt. Scott that Officer Balancier had told him that he would contact his rank in the morning relative to the incident, he was told by Lt. Scott that that should suffice. Officer Corley therefore argued that any duty that he may have had to take the matter further was relieved once he had spoken with Lt. Scott. Lt. Scott, on the other hand, testified that Officer Corley refused to give him any specifics about his hunch that something was amiss, and that he did not mention that Officer Balancier appeared to be injured in any way. The Commission determined that Lt. Scott's version of the facts was more credible than the version espoused by Officer Corley.

Based on the facts presented, the Commission's decision to uphold the three-day suspension of Officer Corley was not manifestly erroneous.

## **CONCLUSION**

For the foregoing reasons, the decision of the Civil Service Commission reducing by twenty days the twenty-five day suspension imposed upon Officer Balancier by the NOPD is reversed and the discipline originally imposed is reinstated.

The decision of the Civil Service Commission dismissing Officer Corley's appeal of the three-day suspension imposed upon him by the NOPD is affirmed.

**REVERSED IN PART; AFFIRMED IN  
PART**