

NEVILLE PAYNE

*

NO. 2004-CA-2072

VERSUS

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COURT OF APPEAL

**NEW ORLEANS POLICE
DEPARTMENT**

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 6509

* * * * *

Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge David S. Gorbaty, and
Judge Roland L. Belsome)

Neville Payne
2720 Valentine Court
New Orleans, LA 70131

IN PROPER PERSON, PLAINTIFF/APPELLEE

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AFFIRMED IN

PART;

REVERSED IN

PART

The New Orleans Police Department (hereinafter, “NOPD”) appeals the judgment of the New Orleans Civil Service Commission (hereinafter, “the Commission”), reducing the length of the suspension from fifteen days to one-day imposed on Officer Nelson Payne (hereinafter, “Officer Payne”) for neglecting to properly investigate an incident that resulted in the death of an injured party. We affirm in part and reverse in part.

Facts

The facts are not in dispute. Officer Payne is a Police Officer IV with permanent status in the Civil Service System, having been hired by the appointing authority on February 20, 1983, and promoted to his current class on August 12, 1990. On January 4, 2001, Officer Payne was dispatched to investigate an incident that occurred at 5335 St. Claude Avenue. Upon arriving on the scene, an injured party was being loaded into an ambulance. Officer Payne was advised by a firefighter, who was on the scene in his capacity as a first responder, that the injured party had been intoxicated and had fallen from the balcony of his apartment.

An administrative inquiry revealed that Officer Payne changed the call from a Signal-24 (Medical) to a Signal-19 (Drunk), and marked the matter NAT (Necessary Action Taken). Two days later, the victim died from his injuries. As a result of the administrative inquiry, it was determined that

Officer Payne failed to investigate further and failed to complete an incident report when one should have been completed.

Following the investigation, Officer Payne was notified by letter dated June 19, 2002 that he was being suspended for fifteen days for violating an NOPD neglect of duty regulation for failing to go to the hospital to learn of the victim's condition, for failing to write an incident report upon learning of the serious nature of the victim's injuries, and for violating Rule IX of the Rules of Civil Service Commission for the City of New Orleans relative to maintaining standards of service.

Officer Payne appealed his suspension to the Commission and a hearing was held on September 5, 2002 in which Officer Payne represented himself.

At the September 5, 2002 hearing before the Commission, Chief Riley testified that he was the Commander of the Fifth District at the time of Officer Payne's alleged offense, and he conducted the disciplinary hearing in this matter. He stated that he considered Officer Payne's statements regarding the incident and reviewed the documentation provided by the investigator of the incident, and thus concluded that Officer Payne was in neglect of duty based upon his failure to fully investigate the scene. Chief Riley opined that a full investigation would have revealed that the subject

had sustained a severe injury, one that resulted in his dying two days later. Although he thought that Officer Payne had done nothing wrong in speaking to a fireman who had arrived on the accident scene prior to Officer Payne as a first responder, Chief Riley stated that Officer Payne should have observed the victim himself, either at the scene or later at the hospital, or obtained more definite information from someone other than the first responder.

Chief Riley further testified that Officer Payne had the responsibility of determining whether the blind victim had fallen as a result of an accident or whether he had been pushed off of the balcony, as well as determining whether the balcony was defective. He further testified that as a result of the lack of investigation and the absence of an incident report, the NOPD was unable to provide information to the victim's family when they filed a complaint with the Housing Authority of New Orleans and with a police captain several months after the victim's death. Accordingly, Chief Riley recommended that Officer Payne receive a fifteen-day suspension, based upon Officer Payne's failure to take appropriate action and based upon Officer Payne's previous record that included one other neglect of duty violation that he believed had occurred during the past five years.

Chief Riley confirmed that in determining whether a violation should be counted as a first, second or third offense under the NOPD's penalty

schedule, only the past three years of the officer's record was relevant.

Consequently, a fifteen-day suspension is within the parameters of a first offense for neglect of duty.

Sgt. Terrence St. Germain of the Second District, who was Officer Payne's direct supervisor at the time of the incident and who investigated the incident, also testified at the hearing. His investigation revealed that an individual had fallen from a balcony and was being taken away by EMS⁴ when Officer Payne arrived on the scene. Officer Payne had spoken with a fireman who, in turn, had spoken with the EMS personnel who stated that a drunk had fallen. Officer Payne then made the signal a 19 (Drunk) and left it at that. It later turned out that the victim died, a fact which Officer Payne was unaware.

Like Chief Riley, Sgt. St. Germain believed that Officer Payne should have personally observed the victim, either on the scene or later at the hospital.

Officer Payne testified at the hearing that when he arrived on the scene, he observed a gentleman in an ambulance being attended to by EMS personnel. He stated that he walked up to the window of the ambulance and could see that the man was moving and seemed alert. According to Officer Payne, there was an NOPD rule that prohibited officers from entering an

EMS unit with a weapon once the technicians had begun working on someone.

Officer Payne stated that a fireman at the scene informed him that a drunk had fallen approximately ten feet from a second story balcony, and that the victim was going to be all right. He testified that if the circumstances had indicated that there might have been foul play involved, such as a claim that the victim had been pushed off of the balcony, he would have relocated to the hospital to investigate further.

Officer Payne explained that on the night in question there were only three people working in the Fifth District, and as a result he did not have the luxury of taking forty-five minutes to spend on the incident. He further stated the supervisor on duty should have been listening to the call go out on the police radio and could have directed him to investigate further.

In a decision rendered on October 11, 2004, the Commission made the following findings of fact:

The Appointing Authority has established by a preponderance of evidence that the Appellant violated the internal rules concerning neglect of duty. However, this is the Appellant's first charge of neglect of duty within the past three years making this a first violation for purposes of the Appointing Authority's penalty schedule. Asst. Supt. Riley characterized the violation as serious. However, based upon the Appointing Authority's

penalty schedule⁵ and the record evidence, this was a minor offense. The record reflects that the violation was purely administrative and did not affect anyone's rights or liberties. Clearly, diverting to the hospital and writing a report would not have changed anything. It was an accidental death. The man fell from a balcony and killed himself.

Accordingly, the Commission denied in part and granted in part Officer Payne's appeal, stating:

The Appointing Authority's penalty schedule recommends a reprimand to a five-day suspension for this type of offense. Considering the Appellant's work record and the nature of the charge, the penalty is reduced to a one-day suspension. The Appointing Authority is ordered to return to the Appellant fourteen days of back pay with all benefits.

On October 21, 2004, the NOPD timely filed a motion for rehearing and request for oral argument. That motion was summarily denied on November 14, 2004. The NOPD now appeals the Commission's decision.

STANDARD OF REVIEW

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. La. Const. art. X, § 8(a) (1974); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106, 112-113 (La. 1984); *Williams v. New Orleans Police Department*, 2000-2759, p.2 (La.

App. 4 Cir. 10/31/01), 800 So. 2d 1086, 1088. The employee may appeal from such disciplinary action to the City Civil Service Commission. *Id.* The burden of proof on appeal, as to the facts, shall be on the appointing authority. *Id.* 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 Superintendent of Police is charged with the operation of his department, and it is within his discretion to discipline an officer for sufficient cause. *Williams v. New Orleans Police Department*, 2000-2759, p.3 (La. App. 4 Cir. 10/31/01), 800 So. 2d 1086, 1089. The Civil Service Commission is not charged with such operation or such disciplining. *Branighan v. Department of Police*, 362 So. 2d 1221,1223. *See also, Joseph v. Department of Health*, 389 So. 2d 739, 741 (La. App. 4 Cir. 1980).

DISCUSSION

In its sole assignment of error, the NOPD contends that the Commission acted arbitrarily and capriciously and committed legal error by reducing the penalty imposed by the Superintendent of the NOPD, and exceeded its constitutional authority by substituting its own judgment for that of the appointing authority with regard to the seriousness of the infraction and the appropriate penalty to be imposed on Officer Payne for his

neglect of duty. The NOPD further asserts that the choice of penalty, if reasonable, is clearly within the discretionary authority of the Superintendent, and that any arbitrary reduction of that penalty seriously undermines its employees' respect for the authority of their supervisors and the Superintendent. We agree and reverse the portion of the Commission's judgment reducing the fifteen-day suspension to a one-day⁶ suspension and reinstate the penalty originally imposed upon Officer Payne by the NOPD.

In *James v. Sewerage and Water Board of New Orleans*, 505 So. 2d 119 (La. App. 4 Cir. 1987), this Court considered a decision of the Commission that reversed a five-day suspension of an employee and suggested a reprimand instead. In reversing the Commission and reinstating the suspension, we reaffirmed and reiterated the holdings in *Joseph* and *Branighan*, stating:

It is not the job of the Commission to decide who should be disciplined how. The Appointing Authority is charged with the operation of his department. He is the one who must run the department, an obviously necessary part of which is dismissing or disciplining employees. While he may not do so without cause, he may, and indeed must, within the exercise of sound discretion, dismiss or discipline an employee for sufficient cause. The Commission is not charged with such operation or such disciplining. [Citations omitted].

James, 505 So. 2d at 121.

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 that needed to be taken into account in determining whether Officer Palmer's actions had impaired the efficient operation of the public service. This Court, however, noted that Officer Palmer's actions either did or did not impair the efficiency of the public service, *despite mitigating circumstances*. Finding that Officer Palmer's actions clearly impaired the efficiency of the public service, this Court found 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. *Palmer*, 706 So. 2d at 659-660 (Emphasis added).

In the instant case, the Commission did not find that the NOPD failed in its burden of showing sufficient cause for the discipline imposed on Officer Payne. To the contrary, it specifically found that the Appointing Authority had established by a preponderance of the evidence that Officer Payne violated the internal rules concerning neglect of duty. However, the Commission found that the Appointing Authority's characterization of the

infraction as “serious” was in error. The Commission found that the infraction was “minor” and thus, that the imposition of a fifteen-day suspension was outside the penalty schedule for a “minor” offense. Under the NOPD penalty schedule, an offense may be classified as minor, moderate, or serious for purposes of assessing the appropriate range of penalties. The penalty schedule for the offense of neglect of duty clearly shows that the fifteen-day suspension imposed by the Appointing Authority falls within the appropriate penalty range for moderate or serious offenses.

We find that the Commission acted arbitrarily in reducing the discipline imposed by the NOPD. As we found in *James* and *Palmer*, the Commission’s action was simply a substitution of its judgment for that of the appointing authority. There was no finding that the Superintendent lacked sufficient cause to impose the penalty or that the NOPD failed to carry its burden of proof.

As this Court has consistently held, the Commission is constitutionally prohibited from substituting its authority for that of the Appointing Authority. Here, we are convinced that the Superintendent acted reasonably and with sufficient legal cause in imposing a fifteen-day suspension upon Officer Payne under the totality of circumstances in this case.

DECREE

Accordingly, the judgment of the Civil Service Commission in this matter is reversed insofar as it reduces the fifteen-day suspension imposed on Officer Neville Payne to one-day. The original suspension of fifteen days imposed by the Appointing Authority is reinstated, and the Commission's decision is affirmed in all other respects.

**AFFIRMED IN PART;
REVERSED IN PART**