

NOT DESIGNATED FOR PUBLICATION

WARREN SMITH * **NO. 2000-CA-1488**
VERSUS * **COURT OF APPEAL**
DEPARTMENT OF POLICE * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 5900

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Judge Miriam G. Waltzer
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(Court composed of Judge Miriam G. Waltzer, Judge Terri F. Love and
Judge David S. Gorbaty)

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RULING REVERSED. ORIGINAL DISCIPLINE REINSTATED.

STATEMENT OF THE CASE

Appellant, the New Orleans Department of Police (NOPD), appeals from a 31 May 2000 decision of the Civil Service Commission of the City of New Orleans (the Commission) setting aside a thirty day suspension for neglect of duty imposed by the NOPD Superintendent on Officer Warren D. Smith.

We reverse and reinstate Officer Smith's original discipline.

STATEMENT OF FACTS

On 13 October 1998, Officer Smith appeared attended by counsel before the Civil Service Hearing Examiner to appeal his thirty day suspension from NOPD.

Officer Smith testified that on 16 April 1998, his one-person unit was dispatched to 4511 Cardenas, the residence of Ms. Nelson, to investigate a traffic accident involving her sons at the corner of Read Boulevard and Hammond Street. Ms. Nelson did not know exactly what had happened at the accident, but showed the officer the boys' damaged bicycle. Officer

Smith asked Ms. Nelson if she wanted to have an EMS unit come out, and she told him not to call the unit because the boys were not injured.

Officer Smith did not prepare a police report. He contacted the husband of the other vehicle's driver, but never spoke to the driver. He told the husband that his wife and his vehicle possibly were involved in an accident earlier that day, and advised him that the lady whose children were involved was adamant that she did not "want anything to happen, she just wanted to talk to both parties that were involved." Officer Smith gave him Ms. Nelson's telephone number, he contacted her, and they made arrangements to meet the next day.

Officer Smith testified to his record of prior disciplinary actions, consisting of a one-day suspension for neglect of duty in 1995; a ten day suspension for neglect of duty in November, 1996; and a five day suspension for neglect of duty in January, 1998. Only the last suspension was appealed.

Officer Smith identified and NOPD placed in evidence the disciplinary letter of 19 August 1998 issued by NOPD Superintendent Richard Pennington to Officer Smith. The letter noted the following factual

finding:

[O]n April 16, 1998, at 5:00 PM, while at Read Blvd. and Hammond Street, you failed to write a report on a traffic accident that you were dispatched to, in which a vehicle struck two (2) juveniles who were riding on a bicycle. Instead, you marked up the item "Civil Matter-Necessary Action Taken (N.A.T.)

The letter referred to the 29 June 1998 hearing before Captain Swain, concluding that at that hearing Officer Smith "offered nothing which would tend to mitigate, justify or explain [Officer Smith's] behavior." The Superintendent concluded, after what the letter describes as his "thorough and complete review of the entire investigative report," that the noted conduct constitutes a neglect of duty as defined in NOPD Rule 4.4; violation of instructions from an authoritative source as defined in NOPD Rule 4.2; and violation of Rule IX, Section 1, paragraph 1.1 of the Rules of the Commission.

NOPD Rule 4 defines neglect of duty as failure to perform the duties or assume the responsibilities of an officer's grade and assignment. NOPD Rule 4.2 provides that a member shall professionally, promptly, and fully abide by or execute instructions from any authoritative source, subject to exceptions not relevant to the instant case. Civil Service Rule IX provides in

pertinent part that when a classified employee is unable or unwilling to perform his duties in a satisfactory manner or has omitted to perform any act it was his duty to perform, the appointing authority shall take action warranted by the circumstances. This action may include, *inter alia*, suspension without pay not exceeding one hundred twenty calendar days.

The Superintendent approved the thirty day suspension recommended by Captain Swain and advised Officer Smith of his right to appeal the decision to the Commission. The letter concludes, "You are also advised that any future violations of a similar nature will result in far more severe disciplinary action taken by this office."

Captain Lonnie H. Swain testified that he reviewed the evidence in Officer Smith's case and held a commander's hearing in the matter. Officer Smith was charged with violation of Rule 4.4 and Rule 4.2, and both charges were sustained at the commander's hearing.

According to Captain Swain, Officer Smith should have written a police report, because the bicycle obviously was damaged and the custodian of the injured child called the police station after the accident looking for the accident report. She was obviously under the impression that the officer had written the report.

Captain Swain noted that this was Officer Smith's third sustained

violation of Rule 4.4, neglect of duty. According to the NOPD penalty schedule, a thirty day suspension was the minimum required penalty.

Captain Swain testified that Officer Smith's conduct adversely impacted the NOPD. He violated the public's certain expectation that when NOPD is called to an accident scene, its officers will conduct a thorough investigation and prepare whatever reports are necessary. Officer Smith's claim that the children were not injured does not mitigate his failure to write a report. The damage to the bicycle proved an accident had taken place. Police records showed that Ms. Nelson called the day after the accident to obtain an accident report.

Captain Swain testified that officers must always take into consideration that the person involved in the accident could have been injured. According to Captain Swain, in most cases in which an officer does not write a report, the officer should contact his supervisor to make sure he is making the right decision.

The civil service hearing was recessed and resumed on 17 November 1998.

Ruth Theocharides, a Seventh District NOPD officer, testified that she conducted a follow-up investigation of the accident at the request of Sergeant Joseph Miestchovich, because a child had been injured. Officer

Theocharides went to the Nelson home and observed that the bicycle was inoperable because the front wheel had been run over and was bent against the frame. She also observed obvious injuries to one of the boys, consisting of an obviously swollen shoulder, bruising, a large bruise and a scrape on his knee and a lump on his head. The children claimed pain and dizzy spells the day after the accident, which prompted Ms. Nelson to inquire about the police report.

After having met with the Nelson family, Officer Theocharides went to West Rocking Circle to speak to the other party involved and determined that there had been an accident.

According to Officer Theocharides, an officer should consider the facts that there was property damage, there were injuries or possible injuries and children were involved, when deciding whether or not to make a police report. The fact that no criminal citations were issued absolutely is not a consideration in determining whether to make a police report.

Sergeant E. Joseph Walter Miestchovich testified that he received correspondence on or about 20 April from Lieutenant Frank VanDalen, Assistant Commander of the Seventh NOPD District, asking him to look into the question of the lack of a police report on the accident in question. Sergeant Miestchovich spoke with Ms. Nelson and accompanied Officer

Theocharides to investigate. Following their investigation, he recommended that charges of neglect of duty be sustained against Officer Smith.

Sergeant Miestchovich opined that the incident deserved a police report because it was clear a vehicle struck a bicycle, causing damage. Two children were on the bicycle when it was struck. One of the children wrote down the license plate number, and one of the children claimed injury. Had Officer Smith contacted his sergeant during the initial investigation, the sergeant would have told him to document the incident and would have insisted that a report be written either as an accident or as a hit and run. No deviation from documentation would have been acceptable. He observed no factors that would have led him to determine that a report should not have been prepared.

Sergeant Miestchovich testified that there was no evidence to indicate that Ms. Nelson did not want a police report of the accident. He understood that she had wanted to speak with the driver, and, when she did not obtain satisfaction, was advised by friends that she would need a copy of the police accident report.

Officer Smith testified that a police officer has discretion to write a report and denied that the circumstances of this case, involving property damage, children and a possible hit and run warranted preparation of a

police report.

The Commission reviewed the transcript of the October and November, 1998 hearings, together with the documentary evidence and reversed the NOPD's imposition of a thirty day suspension.

STANDARD OF REVIEW

For a full discussion of the applicability of the arbitrary and capricious standard of review in this case, see our opinion in the companion case, Smith v. Department of Police, 2000-CA-1486.

ASSIGNMENT OF ERROR: The Commission acted arbitrarily and capriciously and committed clear error in reducing the 30-day suspension imposed by the Superintendent of the New Orleans Police Department and exceeded its constitutional authority by substituting its judgment for that of the appointing authority.

The issue in the case at bar is whether the Commission exceeded its Constitutional authority pursuant to La.Const. of 1974, Art. X, §8 to hear and decide cases involving discipline of civil service employees having permanent status when it overturned the thirty day suspension imposed by the NOPD. NOPD contends that the Commission may modify, reverse or

affirm a penalty only as this may be necessary to effectuate the purposes of the civil service merit system. Any other interference infringes upon the constitutional powers granted to the executive branch of government to supervise and manage the departments entrusted to them and to exercise discretion in employee discipline.

In Branighan v. Department of Police, 362 So.2d 1221, 1222 (La.App. 4 Cir.), writ denied 365 So.2d 247 (La. 1978), we held that 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.

"Cause" for dismissal of a classified civil servant who has gained permanent status, such as Officer Smith, has been interpreted to include conduct prejudicial to the public service in which the employee in question is engaged or detrimental to its efficient operation. The Commission has a duty to decide independently from the facts presented whether the NOPD in this case had good or lawful cause for taking disciplinary action and, if so, whether the imposition of a thirty day suspension was commensurate with the dereliction of duty. Walters v. Department of Police, 454 So.2d 106, 113 (La. 1984).

In Branighan we held:

The superintendent of police is charged with the operation of his department, and the Civil Service Commission is not his supervisor. The superintendent is the one who must run his department and exercise discretion in relation to disciplining his officers, and the Commission is not charged with exercising that discretion. The superintendent may not violate any rights of his officers, and he may not discipline without cause.

Branighan, 362 So.2d at 1223.

NOPD notes several other cases decided by this Court that are consistent with the Branighan decision: Chapman v. Department of Police, 97-1384 (La.App. 4 Cir. 1/28/98), 706 So.2d 656, writ denied 98-0828 (La. 5/8/98), 719 So.2d 55; Palmer v. Department of Police, 97-1593 (4 Cir. 1/28/98), 706 So.2d 658; Macelli v. Department of Police, 98-0253 (La.App. 4 Cir. 9/9/98), 718 So.2d 1021 and Dean v. Department of Police, 99-2454 (La.App. 4 Cir. 3/1/00), 756 So.2d 1150, writ denied 2000-0936 (La. 5/26/00). 762 So.2d 1107.

The Commissioner's judgment found insufficient legal cause for imposition of discipline for Officer Smith's failure to make a report. In support of its conclusion, the Commission wrote:

The Appellant [sic] has failed to establish by a preponderance of evidence that the Appellant neglected his duty. A police officer is provided a

certain amount of discretion in determining whether to prepare a police report. Obviously, if the police officer uses poor judgment he or she is responsible for the decision. In the instant case, the Appellant reasonably concluded that the accident was without injury and with only minor property damage. He also credibly testified that he had placed the parties in contact with each other and had reasonably concluded that they were resolving the matter between themselves. Ms. Nelson did not testify, and we do not know why she changed her mind. One can surmise that her attitude changed after the initial investigation when she discovered that one of her son's [sic] had suffered minor injuries [sic]. However, the Appellant did not neglect his duty by his failure to anticipate this change in circumstances.

The Commission did not find unworthy of belief the testimony of Captain Swain, Officer Theocharides and Sergeant Miestchovich that Officer Smith had an absolute responsibility to prepare an accident report where there was property damage, children were involved, there were possible injuries and the case was a possible hit and run. The only specific credibility call made by the Commission was its finding that Officer Smith testified credibly that he placed the parties in contact with each other. That fact standing alone does not mitigate the officer's duty to prepare an accident report under the circumstances of this case.

We find the Commission to have been manifestly erroneous and clearly wrong in rejecting the unanimous testimony of the three police

witnesses concerning police policy, in favor of Officer Smith's self-serving opinion that a report was not necessary under the particular circumstances of this case. Its judgment reversing the NOPD's thirty day suspension of Officer Smith is arbitrary and capricious and constitutes the substitution of the Commission's judgment for that of the appointing authority.

Based on the evidence of record, the constitutional principles and consistent jurisprudence thereunder, we find that the Commission acted arbitrarily in overturning the discipline imposed by the appointing authority. There is ample evidence to show that the Superintendent acted reasonably and with sufficient legal cause in imposing a thirty day suspension, the minimum allowed for an officer with Officer Smith's record, under the totality of circumstances in this case.

CONCLUSION AND DECREE

For the foregoing reasons, the ruling of the Civil Service Commission in this matter is reversed and the original discipline imposed by the appointing authority is reinstated.

RULING REVERSED. ORIGINAL DISCIPLINE REINSTATED.