

**ALBERT MACKLIN**

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**NO. 2001-CA-0369**

**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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APPEAL FROM  
CIVIL SERVICE COMMISSION  
OF THE CITY OF NEW ORLEANS  
NO. 6020

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**Charles R. Jones**  
**Judge**

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,  
and Judge Terri F. Love)

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**AFFIRMED**

Albert Macklin hereinafter (“Macklin”) appeals the decision of the Civil Service Commission of the City of New Orleans hereinafter (“the Commission”) upholding his termination from the New Orleans Police Department hereinafter (“the NOPD”) for violations of departmental rules and/or policies regarding unauthorized force, neglect of duty, truthfulness, and professionalism. We affirm for the reasons that follow.

**FACTS AND PROCEDURAL HISTORY**

Macklin was employed by the NOPD as a Correctional Officer I and had achieved permanent status in the Civil Service System having been hired by the City of New Orleans in 1974. On the evening of July 25, 1998, while out on suspension for an unrelated matter, Macklin was involved in a physical altercation with a private citizen, Lem Holmes, at the Shell station located at the corner of Earhart Boulevard and South Carrollton Avenue. During that altercation, Macklin struck Holmes several times with his police asp, causing him injuries.

Sergeant Gary Gremillion of the NOPD’s Public Integrity Division

("PID") conducted an administrative investigation into the incident.

Following that investigation, a hearing was held before the Bureau Chiefs' Disciplinary Committee hereinafter ("the Committee") where Macklin was given the opportunity to present facts in mitigation of his conduct. After determining that Macklin offered nothing at the hearing which would tend to mitigate, justify or explain his behavior, the Committee sustained violations of unauthorized force, neglect of duty, truthfulness, and professionalism and found that Macklin be dismissed from the NOPD. Based on the Committee's recommendation, NOPD Superintendent Richard Pennington issued a disciplinary letter to Macklin on February 17, 2000 dismissing him from the NOPD. The letter stated in part:

This investigation determined that on July 25, 1998, at or about 10:35 PM, while at 3101 South Carrollton Avenue, off-duty and out on suspension, you became involved in a physical altercation with a Mr. Lem Holmes, striking him repeatedly with you [sic] asp (police baton), causing visible injuries to him. After taking this police action, you failed to get medical treatment for Mr. Holmes and allowed him to leave the scene without being arrested. You failed to notify a supervisor, communications, or write a police report. You failed to see that a Use of Force Form was completed.

Evidence in this case revealed that you were the aggressor in this incident and that your force was unauthorized. You failed to use the asp in the manner in which it was designed when you struck Mr. Holmes in the head area as indicated in the Crime Lab photos taken for this investigation.

Statements from witnesses indicated that you were untruthful several times on the scene, in your formal statement and again in an interoffice correspondence to the Superintendent's office.

Macklin appealed his termination to the Commission. Hearings were held before a Civil Service Hearing Examiner on the 9<sup>th</sup> and 25<sup>th</sup> of May, 2000. On January 3, 2001, the Commission rendered its decision. It found that the Appointing Authority had met its burden of proof and, accordingly, it dismissed Macklin's appeal. Macklin then perfected this devolutive appeal.

### **DISCUSSION**

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). However, where there is a conflict in testimony reasonable inferences of fact should not be disturbed on review.

Courteaux v. State Through Department of Transportation, 99-0352, 99-0353 (La. App. 4 Cir. 9/22/99) 745 So.2d 91.

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.

When a hearing officer has taken testimony, the Commission has no advantage over an appellate court in evaluating the credibility of the witnesses, as does the usual trier-of-fact. Under such circumstances, this Court need not defer to the Commission's determination of credibility issues and is free to reject the Commission's ultimate conclusions. Tobias v. Department of Streets, 454 So.2d 835, 836-837 (La. App. 4 Cir. 1984).

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. The Civil Service Commission is not charged with such operation or such disciplining. Id. at p. 1223.

Macklin is alleged to have violated NOPD rules which were laid out

in the February 17, 2000 disciplinary letter terminating Macklin, which read as follows:

RULE 2 MORAL CONDUCT

3. TRUTHFULNESS

Upon the order of the Superintendent of Police, the Superintendent's designee, or a superior officer, employees shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the Department which may be asked of them.

6. UNAUTHORIZED FORCE

Employees shall not use or direct unjustifiable physical abuse, violence, force or intimidation against any person.

RULE 3 PROFESSIONAL CONDUCT

1. PROFESSIONALISM

Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or otherwise act in a manner which brings discredit to the employee or the Police Department.

RULE 4 PERFORMANCE OF DUTY

4. NEGLIGENCE OF DUTY

a. Each member, because of his grade and assignment, is required to perform certain duties and assume certain responsibilities. A member's failure to properly function in either or both of these areas constitutes a neglect of duty.

c. The following acts or omissions to act, although not exhaustive are considered neglect of duty:

1. Failing to take appropriate and necessary police action;
4. Failing to make a written report when such is indicated;
7. Failing to take necessary actions

so as to insure that a prisoner shall not escape as a result of carelessness or neglect.

Civil Service Rule IX prescribes standards of service and authorizes an appointing authority to take various disciplinary actions to maintain those standards of service. Rule IX provides, in pertinent part, that when a classified employee is unable or unwilling to perform his duties in a satisfactory manner, has committed any act to the prejudice of the service, or has omitted any act it was his duty to perform, the appointing authority shall take action warranted by the circumstances. This action may include, *inter alia*, removal from the service. Rule IX, Section 1, paragraph 1.1, Rules of the Civil Service Commission for the City of New Orleans.

Macklin testified at the hearing that upon entering the Shell station's convenience store, cashiers Brandy Brown and Michelle Jackson requested that he ask a man, Holmes, to leave the premises. They told him that Holmes had become angry after they had refused to sell him cigarettes, and that they had asked him to leave the store. They further stated that Holmes had left the store, but was lingering in the parking area "acting crazy" and causing them to become concerned for their safety.

Macklin testified that he retrieved his badge, his police radio, and his asp from the trunk of his car. He then radioed the police dispatcher to



inform the NOPD of the situation, but during the transmission he recalled that he was on suspension and should not use his radio. Accordingly, he told the dispatcher to stand-by, intending to finish the call from a telephone at the Shell station. Upon re-entering the store, he saw Officer Damien Cornier (“Officer Cornier”). Officer Cornier told Macklin that the cashiers had informed him of the situation, but he stated he was off-duty and had been drinking and did not want to get involved.

Macklin testified that he then approached Holmes and asked him to leave, explaining that he could go to jail if he remained on the premises. When Holmes refused to do so, Macklin put his hands on Mr. Holmes’ elbow to guide him off of the property. He testified that Holmes then hit him in the jaw, knocking off his glasses. He then pulled out his asp and began striking Holmes on the shoulder. When Holmes reacted violently, he defended himself. He admitted that although he did not intentionally aim for Holmes’ head, that he might have struck him there. Macklin stated that Officer Cornier came out to help subdue Holmes and that Officer Cornier sat Holmes down, talked to him and tried to calm him down. Macklin further testified that at that time, he was not aware that Holmes had been injured in the struggle. Macklin then went into store to see if he had suffered any injuries. While inside, Officer Cornier informed him that Holmes had run

away. Officer Cornier left the scene, giving Macklin a telephone number where he could be reached.

Macklin testified that forty-five minutes later, Officer Horace Smith arrived on the scene. He told Officer Smith what had happened and asked him to call in a 103 (altercation) and to mark it up NAT (necessary action taken).

Macklin admitted that he did not call a supervisor after the incident. He testified, however, that upon hearing a call over the radio concerning an earlier incident at the Shell station, he had voluntarily went to Baptist Hospital and explained the entire situation to Sergeant Duane Sherman. He testified that he did not write up an incident report because he was the victim of the attack, and because he was under suspension.

Holmes testified that he had had words with the cashiers and that they had asked him to leave. He testified that Macklin had then approached him outside the store and asked him to leave as well. Macklin then said “[d]idn’t I tell you to leave?” and began hitting him on the head with a billy, striking him about three times. He testified that he did not flee the scene, but instead left after Macklin asked him “[i]f I let you go, would you have somewhere to go?” Holmes relayed that he is a paranoid schizophrenic. He testified that he went to his sister’s house after the incident, and she had taken him to the

hospital where he got stitches in his head. He identified the photographs marked as City Exhibit 2 as having been taken at Baptist Hospital the night of the incident.

David Luke testified at the May 9, 2000 hearing that he had gone to the Shell station that evening with his cousin, Damien Cornier, an off-duty NOPD officer. Luke was inside the convenience store when the altercation began. He testified that it appeared to him that Macklin had initiated the altercation by grabbing Holmes by the throat and pushing his head against the glass wall of the store. He further testified that Macklin and Holmes had begun wrestling after Holmes continued to refuse Macklin's requests that he leave the premises. Luke further testified that Macklin had pulled out his asp after Holmes appeared to be getting the best of him and that he began striking Holmes in the head. He added that Macklin had continued to strike Holmes even after he was no longer attacking him. Luke further testified that Officer Cornier had then come outside the store and separated Macklin and Holmes. Officer Cornier then sat Holmes down, telling him that he was going into the store to get something to clean up his injuries. At that point, Holmes fled the scene. Luke testified that Macklin was still outside near the gas pumps and had seen Holmes leave, but that he was trying to gather himself after the confrontation and had not given chase to Holmes.

Upon questioning by the attorney for the NOPD regarding a statement he gave to Sergeant Gremillion during his investigation of the incident, Luke remarked several times that the statement was incorrect and misleading in several respects. As a result, the hearing examiner had stepped in and asked Luke many questions to ensure that the Commission had a true picture of what Luke had witnessed that evening. Upon questioning by the hearing examiner as to the exact sequence of events, Luke testified that after the wrestling had begun, there was a brief period when Macklin and Holmes had separated. He testified that Macklin had then stepped back, pulled out his asp, and begun striking Holmes when he was just standing there.

Officer Cornier testified that he was off-duty the night in question and had stopped at the Shell station with his cousin, Luke, to get something to drink. Upon his arrival, a cashier told him about the situation with Holmes. He told her that he was off-duty and was not going to get involved. Someone came into the store several minutes later and told him that Macklin and Holmes were fighting. He then went outside and separated them, grabbing Holmes and trying to calm him down. He then sat Holmes down and said he would be right back with something to wipe the blood off of his face. Holmes replied "fine" but ran off when Officer Cornier was inside of the store. He then gave Macklin the telephone number where he was going

to be in case anyone needed to speak with him.

Cashier Michelle Jackson also testified before the hearing examiner. She testified that she and the other cashier had been frightened by Holmes' actions after they had asked him to leave the store. As a result, they had locked the door to the store and had begun serving customers through the window. Although she could not specifically recall whether the other cashier had asked Macklin for assistance, the parties later stipulated that, if called to testify, the cashiers would testify that they had asked Macklin for assistance.

Sergeant Gremillion testified that he was assigned to conduct the PID investigation of the incident. He testified that the District Attorneys Office originally criminally charged Macklin with aggravated battery, and that Macklin had been found not guilty in Criminal District Court. Nevertheless, Sergeant Gremillion recommended that Macklin be administratively charged with violating several NOPD rules.

Sergeant Gremillion concluded that Macklin had used unauthorized force. He based that conclusion primarily on the statement of Luke, along with Holmes' medical records from his admission to Baptist Memorial Hospital and the police photographs showing the injuries to Holmes's head. He further testified that the NOPD specifically instructs its officers never to

strike a suspect directly in the head with a police asp. He also determined, again based upon Luke's statement, that Macklin had been the aggressor in the altercation. Upon pointed questioning by the hearing examiner, Sergeant Gremillion testified that even if Holmes had been the aggressor, Macklin would still have been in violation of NOPD regulations for striking Holmes on the head with the asp.

Sergeant Gremillion also recommended that Macklin be charged with several violations of neglect of duty for his failure to take appropriate and necessary police action on the night in question. Specifically, he testified that Macklin should have called or radioed for a supervisor and a district car to come out to the scene so that a Use of Force Form and an incident report documenting the entire episode. Additionally, as a result of Macklin's carelessness and neglect, Macklin failed to prevent Holmes' escape and failed to cause Holmes to be arrested. Sergeant Gremillion testified that he did not believe the statements of Macklin and Officer Cornier that Holmes had fled the scene. He based this conclusion solely on the testimony of Holmes and on the fact that Holmes had immediately returned to the gas station with his sister to summon the police, and had again summoned the police after arriving at the hospital. He felt the evidence showed that Holmes would not have returned to the scene and notified the police if he

had run from them earlier in the evening.

Sergeant Gremillion also determined that Macklin had been untruthful in several respects. First, Sergeant Gremillion found that Macklin had been untruthful in a statement he gave the day after the incident wherein he indicated that he told Officer Cornier at the scene that he was out on suspension and that Officer Cornier would have to handle the incident. He also determined that Macklin's assertion that Holmes had fled the scene was untruthful. Finally, he found that Macklin had been untruthful in a 105 correspondence to the Superintendent wherein he stated that Officer Smith was working a paid detail on the night in question and that he had articulated the entire incident to Officer Smith who had arrived on the scene later that night.

Additionally, Sergeant Gremillion recommended that Macklin be charged with a violation of professionalism because of the negative image that the incident displayed upon the NOPD.

Sergeant Barbara Sharp was called by the NOPD as a rebuttal witness to testify as to proper NOPD rules and procedures. She had been assigned to the PID for the past thirteen years. She testified that when any member of the NOPD is out on suspension, that officer has no police powers and that his immediate supervisor should confiscate all of his police equipment, i.e.,

his identification, radio, gun, etc. She testified that faced with the situation at the Shell station, Macklin should have told the cashiers that he was suspended and that he would get another officer there as soon as possible. She admitted that Macklin could not have filled out the Use of Force Form on his own, but that he should have notified a supervisor so that the form could be completed.

### Assignment of Errors

Macklin argues in his four assignments of error that the City of New Orleans did not meet its burden of proof with respect to each of the four violations of NOPD rules and/or procedures levied against him, i.e., unauthorized force, neglect of duty, truthfulness, and professionalism. Accordingly, he contends that a review of the testimony given and the evidence presented during the hearings on this matter will reveal that the Commission's decision was clearly wrong and manifestly erroneous.

In opposition, the NOPD argues that there was considerable evidence upon which the Commission could rely on to sustain all of the charges against Macklin.

### Unauthorized Force

Sergeant Gremillion testified at length as to why he recommended that the charge of unauthorized force be brought against Macklin. Macklin did



not deny hitting Holmes with his asp. He simply claims that Holmes was the aggressor in the altercation and that he only used his asp in self-defense.

The Commission recognized that Holmes was a paranoid schizophrenic and had probably acted irrationally and perhaps even violently when Macklin asked that he leave the premises. Nonetheless, based on Luke's testimony, the Commission found that Macklin had used excessive force in striking Holmes several times on the head when it was unnecessary to do so in order to defend himself.

The crime lab photographs clearly indicate an injury to the top of Holmes' head. Sergeant Gremillion testified that officers are instructed never to strike a suspect directly in the head. Luke testified that Macklin had been the aggressor in the altercation and that he had continued striking Holmes even though Holmes was no longer attacking him. We conclude that the evidence presented at the hearings provides overwhelming support for the Commission's finding that the NOPD met its burden of proof as to the charge of unauthorized force.

### Neglect of Duty

Macklin argues that the NOPD's charge against him for neglect of duty for failure to complete a Use of Force form was manifestly erroneous, because only a supervisor may fill out such a form. He asserts that the

incident was reported when Officer Smith called in a 103. He added that because he was out on suspension, he lacked the power to initiate an incident report. In addition, he challenged Sergeant Gremillion's conclusion that he had allowed Holmes to leave the scene. He argues that both he and Officer Cornier testified that Holmes had fled the scene and that Sergeant Gremillion was wrong to have given more credibility to the testimony of Holmes than to their testimony. Macklin further argues that Holmes was under the control of Officer Cornier at the time he fled the scene.

Both Sergeant Gremillion and Sergeant Sharp testified that even though he was out on suspension, Macklin should have called for a supervisor and a district car to come out following the incident so that a Use of Force Form and an incident report could be completed. Sergeant Gremillion testified that he believed that Holmes had not fled the scene based on Holmes' statements and on the fact that Holmes returned to the scene and reported the incident to the police later that night.

Macklin was under suspension at the time of the incident, nonetheless, he chose to intervene when the cashiers asked him for help in getting Holmes to leave the premises. The cashiers were in no immediate danger when they asked Macklin for help. They had locked the doors to the Shell station's convenience store and were serving customers through the window.

Instead of using the store's telephone or his police radio to call the NOPD for help, Macklin chose to take police action and personally deal with the situation. Macklin was a seasoned officer, having worked for the NOPD for over twenty-six years. Thus, he knew that certain reports needed to be completed whenever any police action was taken, especially when a suspect had been injured. Macklin's assertion that he could not fill out an incident report or see that a supervisor fill out both an incident report or a Use of Force Form because he was on suspension is unpersuasive. Having chosen to take police action while he was on suspension, Macklin was required to follow the police procedures incident to that action. Whether Holmes fled the scene or was asked to leave by Macklin clearly entails a credibility determination. Weighing the testimony and evidence put forth at the hearings on this issue, the appointing authority proved that Macklin violated numerous NOPD rules regarding neglect of duty.

### Truthfulness

Macklin argues that he had no reason to be untruthful in the statement that he gave the day after this incident. He pointed out that Sergeant Gremillion testified that he based this charge, in part, on the statements that Macklin and Officer Cornier gave in the investigation of this matter. As none of those statements were introduced at the hearings before the

Commission, Macklin argues that there is no evidence upon which the legality of this charge can be proven. He further argues that Officer Cornier's denying that he told him he was on suspension does not alone equate to his being untruthful. In addition, Macklin argues that the facts show that Holmes fled the Shell station, and that Sergeant Gremillion admitted that both Macklin's and Officer Cornier's testimony was consistent in this regard. With respect to the charge that he was untruthful in his 105 communication to the Superintendent, Macklin argues that he did advise Officer Smith of the entire incident upon his arrival at the Shell station. He added that Officer Smith testified that Macklin told him that there had been an altercation when he arrived at the Shell station, in direct contradiction to Sergeant Gremillion's claim of untruthfulness in this regard.

Whether the NOPD met its burden concerning the truthfulness charges levied against Macklin also rests on a determination of which witnesses were more credible at the hearing. Macklin admitted as much, at least in regard to the issue of whether Holmes had fled the scene. If Macklin wanted the Commission to have Sergeant Gremillion's full report of the incident, including the statements given by himself, Officer Cornier, Officer Smith, and Mr. Luke, he should have sought to introduce them at the hearings. It is too late for him to now claim that all the relevant evidence was not before

the Commission or this Court.

The Commission found that he was untruthful when he testified that he only used the asp in self-defense and that he had thought that another police officer would file a formal report of the incident.

Following a review of the evidence in its entirety, we find that the NOPD proved by a preponderance of the evidence that Macklin was untruthful in several respects during the investigation that followed this incident.

#### Professionalism

Macklin testified that he followed his police training to the letter in his handling of the incident with Holmes. He asked Holmes to leave and informed him of the consequences of his failure to do so. Macklin testified that he only used his asp in a defensive manner after having been attacked by Holmes and after it became evident that he could not control Holmes in any other way. He also claims that Sergeant Gremillion was not clear as to how the incident discredited the police department.

Sergeant Gremillion testified that the entire incident, including Macklin's arrest and his subsequent criminal trial on charges of aggravated battery brought discredit to the NOPD.

We agree that the actions of Macklin, both in the initial incident and

in the investigation and criminal trial that followed, brought discredit to the NOPD.

The NOPD proved by a preponderance of the evidence that it had sufficient cause to discipline Macklin and that termination was the proper punishment for the offenses committed by him. We recently stated in Stevens v. Department of Police, 2000-1682, p. 5 (La. App. 4 Cir. 5/9/01), 789 So. 2d 622, 627, that:

The public puts its trust in the police department as a guardian of its safety, and it is essential that the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust. (Citation omitted). Indeed, the Commission should give heightened regard to the appointing authorities that serve as special guardians of the public's safety and operate as quasi-military institutions where strict discipline is imperative.

**DECREE**

The decision of the Civil Service Commission upholding the termination of Officer Macklin is hereby affirmed.

**AFFIRMED**

