

NOT DESIGNATED FOR PUBLICATION

ANTHONY MITCHELL * **NO. 2012-CA-1044**
VERSUS *
DEPARTMENT OF POLICE * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 7763,
Honorable Jay Alan Ginsberg, Hearing Officer

* * * * *
Judge Dennis R. Bagneris, Sr.
* * * * *

(Court composed of Chief Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,
Judge Daniel L. Dysart)

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NOVEMBER 21, 2012

AFFIRMED

In this appeal, the Appointing Authority, the New Orleans Police Department (NOPD), seeks review of the decision of the Civil Service Commission (Commission), that granted the appeal of Sgt. Anthony Mitchell regarding disciplinary action imposed for use of unauthorized force and neglect of duty. For the following reasons, we affirm.

STATEMENT OF FACTS/PROCEDURAL HISTORY

On July 12, 2010, the NOPD issued a disciplinary letter to Sgt. Mitchell. Therein, the NOPD detailed the reasons it determined that Sgt. Mitchell had violated departmental rules relative to courtesy, unauthorized force, and neglect of duty. The NOPD imposed a six-day suspension for the violation of the rules on courtesy and neglect of duty and demoted Sgt. Mitchell to Police Officer II for the violation of the rule regarding unauthorized force.

Sgt. Mitchell appealed the suspension to the Commission. The Commission appointed a hearing officer to receive testimony.

At the hearing, the NOPD called Sgt. Jenerio Sanders to testify. Sgt. Sanders advised that he is assigned to the Public Integrity Bureau (PIB). Sgt. Sanders stated that the PIB received allegations of improprieties during a traffic

stop. Darrin Smith alleged that during a traffic stop, Sgt. Mitchell damaged his cell phone and car seat, hit Mr. Smith, and used vulgar language. Sgt. Sanders viewed the video of the traffic stop recorded on the dashboard camera from Sgt. Mitchell's police vehicle. Sgt. Sanders noted that Sgt. Mitchell was responding to several calls about a suspect in a vehicle shooting into homes and parked vehicles. While interviewing a witness, the witness indicated that Mr. Smith's vehicle was involved in the shooting. Several officers gave chase, and Mr. Smith eventually stopped his vehicle. Sgt. Sanders said the video showed that Sgt. Mitchell got Mr. Smith out of the vehicle, had Mr. Smith go down to his knees, and then placed on the ground where he was handcuffed. The video indicated that Sgt. Mitchell directed vulgarity and threats at Mr. Smith, hit Mr. Smith with a hat, and tossed several items from Mr. Smith's car to the ground. Sgt. Sanders acknowledged that the property removed from Mr. Smith's vehicle was returned to the vehicle. He stated that there was no indication that Sgt. Mitchell damaged any property belonging to Mr. Smith.

Sgt. Sanders admitted that Mr. Smith lied about several things in his statement. For instance, Mr. Smith lied about his claim that Sgt. Mitchell hit him with a pistol and kicked him in the back. Mr. Smith also lied about the amount of vulgarity Sgt. Mitchell utilized during his interaction with Mr. Smith and the items that Sgt. Mitchell allegedly threw to the ground and damaged. In particular, Sgt. Sanders noted that Mr. Smith claimed that a car seat was thrown to the ground; yet, the video did not show that a car seat was thrown. Sgt. Sanders also verified that Mr. Smith never accused Sgt. Mitchell of hitting him with a baseball cap. Sgt. Sanders added that he could not find anything wrong with Mr. Smith's cell phone, although Mr. Smith had indicated that the police damaged his phone.

Next, the NOPD called Deputy Chief Kirk Bouyelas, who was deputy chief of the Operations Bureau at the time. Deputy Chief Bouyelas testified that he viewed the video of the traffic stop of Mr. Smith and recommended that the alleged rule violations be sustained based on what he saw in the video. Deputy Chief Bouyelas observed that Sgt. Mitchell threw Mr. Smith's property to the ground. He determined that Sgt. Mitchell's treatment of Mr. Smith's property violated the rules, even though none of the property received damage. He opined that although Mr. Smith initially ignored Sgt. Mitchell's instructions during the traffic stop, this was not a justification to threaten Mr. Smith. Deputy Chief Bouyelas noted that Sgt. Mitchell told Mr. Smith, "Get on the ground before I knock your ass down." He averred that Sgt. Mitchell's use of this threatening language violated the NOPD rule on courtesy. Lastly, Deputy Chief Bouyelas said that Sgt. Mitchell struck Mr. Smith with a baseball cap after removing the baseball cap from Mr. Smith's head. He concluded that these acts as depicted on the video affected Sgt. Mitchell's job performance.

In his defense, Sgt. Mitchell testified that the NOPD received numerous calls about shots being fired at homes and vehicles from an automobile. While responding to the calls, Sgt. Mitchell interviewed a witness. During the interview, the witness identified a vehicle as being the one from which shots were fired at homes and other vehicles. Sgt. Mitchell stated that he and other officers drove off in pursuit of the identified vehicle. Sgt. Mitchell managed to locate and stop the vehicle.

Sgt. Mitchell admitted that he was the individual depicted in the video of the traffic stop. He conceded that he used the word "ass" once. Sgt. Mitchell testified that he resorted to the "verbal judo" technique taught at the police academy as the

suspect did not obey his initial orders to exit the vehicle. Once a verbal instruction is ignored, Sgt. Mitchell explained that “verbal judo” instructs an officer to repeat the instruction and add a consequence.

After the suspect exited the vehicle, Sgt. Mitchell secured the suspect and removed the suspect’s baseball cap to check for narcotics. Sgt. Mitchell testified that in his past dealings as a police officer, he has observed narcotics hidden in baseball caps. He “popped” the baseball cap so that any hidden narcotics would become loose. When no drugs were found, Sgt. Mitchell attempted to return the baseball cap to Mr. Smith’s head. Sgt. Mitchell admitted that the soft part of the baseball cap hit Mr. Smith’s head. He surmised that he might have tried to put the cap back on Mr. Smith’s head too quickly.

Sgt. Mitchell acknowledged that he and the other officers searched Mr. Smith’s vehicle. In the course of searching the vehicle for a weapon and other evidence, Sgt. Mitchell removed several t-shirts and baseball caps that were in the vehicle. He expounded that criminals often carry extra t-shirts and baseball caps to affect a disguise. Sgt. Mitchell stated that he removed the items from the vehicle in a manner that would allow anything hidden in them to fall to the ground.

Sgt. Mitchell approached the suspect’s vehicle with his gun drawn. He testified that he did so to protect himself from the possibility of being shot. When asked about the rule on courtesy, Sgt. Mitchell said that “[i]t’s kind of hard to - - the rules are the rules, but it’s almost impossible to be courteous with a gun in your hand, pointed at someone.”

Officer Carolyn Dalton testified that Sgt. Mitchell was her supervisor on the day in question. Officer Dalton acknowledged that she arrived on the scene after Mr. Smith was on the ground and in handcuffs. She revealed that she did not see

Sgt. Mitchell engage in discourteous behavior. She noted the clothing on the ground and moved it around with her foot to see if any items were located in the clothing. After determining that the clothing did not contain evidence, Officer Dalton placed the clothing back in Mr. Smith's vehicle. Next, Officer Dalton transported Mr. Smith to central lockup. Officer Dalton stated that Mr. Smith and she engaged in conversation during the trip to Central Lockup. During that time, Mr. Smith informed Officer Dalton that he wanted to pursue a career with the fire department and requested that a citation for the traffic violations be issued in lieu of booking at central lockup. When informed as to why he was pulled over, Mr. Smith responded that he did not shoot any homes or vehicles. Officer Dalton contended that Mr. Smith never indicated that Sgt. Mitchell acted inappropriately or improperly.

Lt. Michael Brenckle testified that he was assigned to the Fifth District with Sgt. Mitchell. Lt. Brenckle received the complaint from Mr. Smith and his father regarding the traffic stop. Mr. Smith alleged that Sgt. Mitchell pistol-whipped him during the traffic stop; however, Mr. Smith never alleged that Sgt. Mitchell hit him with a baseball cap. Based on Mr. Smith's complaint, Lt. Brenckle viewed the videotape. Lt. Brenckle stated that he did not see Sgt. Mitchell do anything wrong in the video. Lt. Brenckle contacted PIB because he believed Mr. Smith falsified a police report.

Lastly, Lt. Kim Lewis Williams testified. Lt. Williams was assigned to the Fifth District with Sgt. Mitchell and Lt. Brenckle. At the time of the incident, she was the integrity control officer. As the integrity control officer, Lt. Williams acted as a liaison with PIB and monitored activity to insure compliance with departmental rules and regulations. Lt. Williams testified that Lt. Brenckle

approached her about the complaint filed by Mr. Smith. Lt. Williams viewed the video of the traffic stop. Based on her review of the videotape, Lt. Williams concluded that Sgt. Mitchell did nothing improper.

The hearing officer's report recommended that Sgt. Mitchell's appeal be denied relative to the violation of the rule regarding courtesy. However, it recommended that the appeal be granted concerning the violation of the rules regarding unauthorized force and neglect of duty.

The Commission determined that the video revealed that Sgt. Mitchell removed Mr. Smith's hat, inspected the hat, and threw it on the ground. The Commission found that Sgt. Mitchell did not strike Mr. Smith. Moreover, the Commission found that while the items were tossed out of the car, there was no evidence that the items were lost or damaged as a result of the lawful search of the vehicle.

Based on these findings, the Commission agreed with the report of the hearing officer. The Commission then issued a decision that followed the hearing officer's recommendation to deny Sgt. Mitchell's appeal of his suspension for violating the rule on courtesy and to grant Sgt. Mitchell's appeal of his demotion and suspension for violating the rules on unauthorized force and neglect of duty. The Commission ordered that all back pay and emoluments of office be restored to Sgt. Mitchell. From that decision, the NOPD filed the instant appeal.

STANDARD OF REVIEW

The Commission has 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; *Pope v. New Orleans Police Dept.*, 2004-1888, p. 5 (La. App. 4 Cir. 4/20/05), 903 So.2d 1, 4. The appointing authority is charged

with the operation of its department, and it is within its discretion to discipline an employee for sufficient cause. The Commission is not charged with such disciplining. The authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. *Pope*, 2004-1888, pp. 5-6, 903 So.2d at 4.

The appointing authority has the burden of proving, by a preponderance of the evidence, that the complained of activity or dereliction occurred, and that such dereliction bore a real and substantial relationship to the efficient operation of the appointing authority. *Cure v. Dept. of Police*, 2007-0166, p. 2 (La. App. 4 Cir. 8/1/07), 964 So.2d 1093, 1094, citing *Marziale v. Dept. of Police*, 2006-0459, p.10 (La. App. 4 Cir. 11/8/06), 944 So.2d 760, 767. The protection of civil service employees is only against firing (or other discipline) without cause. La. Const. art. X, §12; *Cornelius v. Dept. of Police*, 2007-1257, p. 7 (La. App. 4 Cir. 3/19/08), 981 So.2d 720, 724, citing *Fihlman v. New Orleans Police Dept.*, 2000-2360, p. 5 (La. App. 4 Cir. 10/31/01), 797 So.2d 783, 787.

The decision of the Commission is subject to review on any question of law or fact upon appeal to this Court, and this Court may only review findings of fact using the manifestly erroneous/clearly wrong standard of review. La. Const. art. X, §12; *Cure*, 2007-0166, p. 2, 964 So.2d at 1094. In determining whether the disciplinary action was based on good cause and whether the punishment is commensurate with the infraction, this Court should not modify the Commission order unless it was arbitrary, capricious, or characterized by an abuse of discretion. *Id.* A decision of the Commission is “arbitrary and capricious” if there is no rational basis for the action taken by the Commission. *Cure*, 2007-0166, p. 2, 964 So.2d at 1095.

DISCUSSION

The NOPD alleges that the Commission erred in granting the appeal of Sgt. Mitchell because there was lawful cause to discipline Sgt. Mitchell and the discipline was commensurate with the violation. This argument is premised on its contention that Sgt. Mitchell used unauthorized force and failed to insure the safety of Mr. Smith's property while he was in his custody. Moreover, NOPD argues that Sgt. Mitchell's violation of the rules impaired the efficiency of the public service which justified the punishment imposed.

The NOPD maintains that the video clearly depicts Sgt. Mitchell striking Mr. Smith with a baseball cap and throwing Mr. Smith's property on the ground. It represents that Sgt. Sanders' testimony supported the NOPD's conclusion that Sgt. Mitchell utilized excessive force when he struck Mr. Smith in the head with a baseball cap and failed to insure that Mr. Smith's property was safe by throwing the property onto the ground. The NOPD rule on unauthorized force provides that "[e]mployees shall not use or direct unjustifiable physical abuse, violence, force or intimidation against any person." Rule 2 Moral Conduct, 6. Unauthorized Force.

This Court's careful review of the video on the traffic stop reveals that after Mr. Smith was on the ground, Sgt. Mitchell removed Mr. Smith's hat and shook the baseball cap. This comports with Sgt. Mitchell's testimony that he removed the baseball cap to check for narcotics. After shaking the baseball cap, Sgt. Mitchell attempts to place the baseball cap back on Mr. Smith's head, before placing the cap on the ground. It appears that the soft portion of the baseball cap inadvertently struck Mr. Smith on the head. The video corroborates Sgt. Mitchell's testimony that he tried to put the baseball cap on Mr. Smith's head too quickly.

The video does not demonstrate that Sgt. Mitchell directed unjustifiable physical abuse, violence, force or intimidation against Mr. Smith.

We are additionally persuaded by the testimony of Lt. Benckle and Lt. Williams that Sgt. Mitchell did not use unauthorized force. Both testified that they did not observe any violation of any departmental rules by Sgt. Mitchell. Although the NOPD claims that Sgt. Mitchell's actions diminished his credibility with Mr. Smith and the public, we note that Mr. Smith himself **never** complained that Sgt. Mitchell struck him in the head with the baseball cap. These findings provided a rational basis for the Commission's decision that Sgt. Mitchell did not use unauthorized force. Therefore, the Commission did not abuse its discretion in its decision to grant the appeal on the charge of unauthorized force.

The NOPD also maintains it had cause to discipline Sgt. Mitchell for neglect of duty. The NOPD rule on neglect of duty provides that the following constitutes neglect of duty: "failing to insure that the health, welfare, and property of a prisoner is properly maintained while in individual custody." Rule 4 Performance of Duty, 4. Neglect of Duty (c)(9). The NOPD avers that it was unnecessary for Sgt. Mitchell to throw Mr. Smith's property out of the vehicle.

However, the testimony of Sgt. Mitchell and Officer Dalton successfully rebuts NOPD's claim of neglect of duty. Sgt. Mitchell explained that as he removed the clothing from Mr. Smith's vehicle, he tossed the clothing in a manner that would allow any evidence, such as a bullet casing, to fall out of the clothing. Officer Dalton testified that the items were placed back in Mr. Smith's vehicle. As the Commission noted, the NOPD presented no evidence that any item removed from Mr. Smith's vehicle was lost or damaged as a result of Sgt. Mitchell's actions. The evidence also revealed that the two items that Mr. Smith claimed to

have received damage were not, in fact, damaged by Sgt. Mitchell. Indeed, one item, the car seat, was not seen on the video. Thus, the evidence did not support that Sgt. Mitchell failed to insure that Mr. Smith's property was properly maintained and therefore, neglected his duty.

We conclude that the NOPD failed to prove that Sgt. Mitchell used unauthorized force or violated departmental rules on neglect of duty. Thus, the NOPD failed to show any impairment to the efficiency of the public service by Sgt. Mitchell that justified the disciplinary action imposed for those offenses. As there is a rational basis for the decision of the Commission, we find that the Commission's decision was not arbitrary, capricious, or characterized by an abuse of discretion that would mandate reversal by this Court.

CONCLUSION

Accordingly, the decision of the Commission to grant the appeal of Sgt. Mitchell as it pertains to disciplinary action imposed for unauthorized use of force and neglect of duty is affirmed.

AFFIRMED