

RAY BYRD

CIVIL SERVICE COMMISSION

VERSUS

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 7878

Ray Byrd (“Appellant”) is employed by the Department of Police (“Appointing Authority”) as a Police Sergeant with permanent status. The Appellant received a forty day suspension for violation of the Appointing Authority’s internal regulation concerning Unauthorized Force (30 days) and Professionalism (10 days). The factual basis for the violation is contained in the second and third paragraphs of the June 3, 2011 disciplinary letter, which provides as follows:

The investigation determined that on Sunday, June 27, 2010, at approximately 6:30 p.m., you were working a paid detail near the intersection of Broad and Orleans Streets. During the assignment you participated in the arrest of Mr. Muhammad Esmail. Mr. Muhammad Esmail’s brother, Mr. Mubarak Esmail interfered with the investigation and you elected to place him under arrest. You attempted to restrain and place Mr. Mubarak Esmail in handcuffs and he resisted by pulling away from you and did not make any attempt to strike you. You then attempted to overcome Mr. Mubarak Esmail’s resistance by striking him one time to the head or side of the face, which you referred to as a “stun punch”. The force you used was not an acceptable level of force against Mr. Mubarak Esmail, which is a violation of Rule 2: Moral Conduct, paragraph 6, Unauthorized Force.

As a result of your actions, the level of force you used to overcome Mr. Mubarak Esmail’s resistance was excessive and therefore unauthorized. This incident was covered by the media and caused embarrassment to the New Orleans Police Department...

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on August 11, 2011. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and all documentary evidence.

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The facts contained in the disciplinary letter are not in dispute. The issue before this panel is whether the steps taken by the Appellant to secure a non-compliant subject were an excessive use of force. Sgt. Kevin Stamps, assigned to the Public Integrity Bureau, conducted the internal investigation. He testified that, because he was unsure from his review of video surveillance footage whether the use of force taken by the Appellant was excessive, he consulted with Police Officer Charles Badon, who is employed as a defensive tactics instructor at the New Orleans Police Department Training Academy. Both Sgt. Stamps and Officer Badon testified that the Appellant struck Mr. Esmail with less than full force in an attempt to get Mr. Esmail's compliance. They both concluded that the Appellant was not attempting to injure Mr. Esmail.

Officer Badon testified further that the technique used by the Appellant to subdue Mr. Esmail is no longer taught at the police academy. He stated that police officers are currently taught techniques that do not include striking subjects that are refusing to place their hands behind their backs for handcuffing. Officer Badon described a technique called an arm bar used to force a subject to the ground. Officer Badon acknowledged that the Appellant was struggling with Mr. Esmail and he was unable to get him into a position for an arm bar. Officer Badon stated that an arm bar would have been more appropriate if the Appellant could have gotten into a position to use it.

The Appellant testified without challenge that he informed the brother that he was under arrest for interfering with an investigation. Mr. Esmail's brother had threatened the safety of a number of private citizens at a gas station by brandishing a gun that he had taken from a tow truck parked at the gas station. Mr. Esmail disregarded instructions to

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stay away from the tow truck, which was part of the crime scene. The scene was fairly chaotic and the Appellant, along with other police officers, was trying to restore order. Mr. Esmail refused to comply with the Appellant's verbal instructions, insisting that he was not going to jail. When the Appellant grabbed Mr. Esmail's wrist, he pulled and twisted away. While Mr. Esmail had not acted violently towards him, the Appellant chose to strike Mr. Esmail in the head neck area with enough force to "stun him" and get him handcuffed. Ultimately, the technique did not work and it required several police officers to secure Mr. Esmail. The Appellant further testified he relied upon the training he received while at the academy, which included the technique that he employed.

LEGAL PRECEPTS

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide, independently from the facts presented, whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters, v. Department of Police of New Orleans, supra*. Legal cause exists whenever the employee's conduct impairs the efficiency of the public service in which

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the employee is engaged. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

Chapter 1.2 of the New Orleans Police Department Operations Manual titled "Use of Force" defines force used by a police officer as excessive when its application is illegal, inappropriate, or unreasonable under the circumstances. According to the manual, the force may result in serious injury or death to the suspect, but this is not absolutely necessary for the force to be excessive. The definition concludes by stating that no single objective definition of excessive force can be offered, rather each situation must be evaluated according to its particular circumstances and within the guidelines established herein.

In the instant case, the Appointing Authority concluded that the Appellant's use of a closed hand technique to compel compliance was inappropriate under the circumstances because Mr. Esmail was not acting aggressively towards the Appellant and because the closed fist technique is no longer taught at the academy. Mr. Esmail, while not violent, was clearly not passive. He verbalized his intention not to comply with verbal commands and physically resisted arrested by blocking the Appellant's attempts to place handcuffs on his wrist. The Appellant was punished for doing his job in a manner

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that is no longer sanctioned by the Appointing Authority. While we believe there were mitigating circumstances that the Appointing Authority could have taken into consideration, we cannot say that the Appointing Authority acted arbitrarily or abused its discretion.

Considering the foregoing, the Appellant's appeal is DENIED.

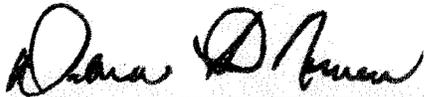
RENDERED AT NEW ORLEANS, LOUISIANA THIS 13TH DAY OF APRIL,
2012.

CIVIL SERVICE COMMISSION
CITY OF NEW ORLEANS



JOSEPH S. CLARK, COMMISSIONER

CONCUR:



DEBRA S. NEVEU, COMMISSIONER



AMY L. GLOVINSKY, COMMISSIONER