



2714 Canal Street Suite 201 New Orleans LA 70119

www.nolaipm.gov

(504) 309-9799

OFFICE OF THE INDEPENDENT POLICE MONITOR
CASE REVIEW: 2020-0637-P

The Office of the Independent Police Monitor (OIPM) is an independent branch of city government responsible for providing oversight to the New Orleans Police Department (NOPD). The OIPM provides transparent assessments of the NOPD's work, progress, and obstacles. Based on those assessments, the OIPM provides the NOPD with detailed recommendations on policy, practice, and how to become or remain compliant with the Federal Consent Decree. Most importantly, at the center of the OIPM's work is the community. The OIPM is responsible for issuing public reports to the people of New Orleans and the NOPD regarding the state of policing in New Orleans. This case review is one such example and is created in conformity with the Memorandum of Understanding between the NOPD and the IPM executed on November 10, 2010; as well as being consistent with La. R.S. § 40:2531 Chapter 25 and Municipal Code of Ordinances, Part II, Chapter 2, Article XII Section 2-1121.

The purpose of case reviews is to examine the misconduct investigations conducted by the NOPD to ensure they are compliant with law and internal policies, including Chapter 26.2: Adjudication of Misconduct, Chapter 26.2.1: Disciplinary Matrix / Penalty Schedule, Chapter 52.1.1: Misconduct Complaint Intake and Investigation, and Chapter 52.1.2: Misconduct Complaint Investigator Responsibilities.

PIB COMPLAINT TRACKING NUMBER (CTN): 2020-0637-P
OIPM COMPLAINT TRACKING NUMBER(CTN): CR2022-0003
COMPLAINANT: ERIC HESSLER, ESQ.

INVOLVED NOPD EMPLOYEES:

Lt. Kevin Burns (Employee ID [REDACTED] FOB/6th District)

Deputy Superintendent John Thomas (Employee ID [REDACTED], FOB) - *Investigation conducted by Office of the Inspector General due to employee being an appointed bureau chief**

Deputy Chief Arlinda Westbrook (Employee ID [REDACTED], PIB) - *Investigation conducted by Office of the Inspector General due to employee being an appointed bureau chief**

Deputy Chief Christopher Goodly (Employee ID [REDACTED], MSB) - *Investigation conducted by Office of the Inspector General due to employee being an appointed bureau chief**

DATE OF INCIDENT(S): SEPTEMBER 16, 2020

INVESTIGATING OFFICER: CAPTAIN LAWRENCE DUPREE; Field Operations Bureau (FOB)

ALLEGATIONS RAISED, INVESTIGATION RECOMMENDATIONS:

ACCUSED OFFICER	ALLEGATION	I/O RECOMMENDATION
LT. KEVIN BURNS	Rule 4: Performance of Duty, Par. 4: Neglect of Duty (C)(6) to wit: NOPD Chapter 82.1: Report Preparation Par. 8: <i>Members shall not suppress, conceal or distort the facts of any reported incident, nor shall any member make an intentionally false, inaccurate or incomplete report orally or in writing.</i>	UNFOUNDED

*The OIPM does not know the status of these investigations. The OIPM requested status updates from the OIG and the NOPD.

SUMMARY OF THE FACTS

This complaint under CTN 2020-0637-P stems from the signed investigation and disciplinary notification for CTN 2020-0168-R. These materials were prepared by Lt. Burns of the Public Integrity Bureau.

The complainant, attorney for the Police Association of New Orleans, Eric Hessler, was representing a client, Officer Jonathan Mykulak, in CTN 2020-0168-R. Officer Mykulak was facing disciplinary action at a Superintendent's Panel Hearing for allegedly violating Rule 2: Moral Conduct, Paragraph 6: Unauthorized Force. According to the signed investigation in CTN 2020-0168-R, Officer Jonathan Mykulak was accused of delivering a "downward knee strike" to the subject of force then remaining on top of the individual for "what appeared to be an unreasonable amount of time" applying pressure in the form of body weight to a cuffed and prone individual. This type of force could lead to the possibility of positional asphyxia.

This matter was previously heard by the Use of Force Review Board on Thursday, June 11, 2020, and the alleged force was found to be unjustified. The hearing on Tuesday, September 22, 2020, was to hear whether the unjustified force should be sustained as a policy violation, and if so, what disciplinary action was appropriate.

The Disciplinary Hearing Notification, dated September 16, 2020, stated:

"You [Officer Mykulak] then inflicted an intentional, punitive, downward knee strike to the subject after he was no longer resisting. After the knee strike, you moved your shin higher and applied downward force. The subject stated, 'You are on my neck. I can't breathe!' You responded and said, 'Shut the fuck up!' At that point, you partially helped the subject to his feet, but then allowed him to fall back to the ground."

Later in the same Disciplinary Hearing Notification, under the justification for the recommendation of sustaining the violation, it states: "The subject told you that he could not breathe as you continued to apply pressure."

In the signed investigation, there are multiple references to the individual stating he could not breathe. On page 2, when describing the Body Worn Camera Footage of Officer Sasha Winchester, Lt. Burns wrote: "The officers commanded the subject of force to stop moving after he stated he could not breathe." Later, Lt. Burns wrote: "The subject of force notified the officer that he could not breathe and begged the officer to get off him. The placement of the shin across the neck and the subject stating he could not breathe gave Lt. Burns reason to believe a lateral neck restraint, positional asphyxia or both were likely."

Later in the signed investigation, Lt. Burns described his interview of Officer Mykulak and stated, "Officer Mykulak had no explanation to offer as to his reason for remaining on the suspect's neck after the suspect told him he could not breathe."

According to OIPM review, Lt. Burns wrote that the subject of force used the phrase: "You are on my neck" in the Disciplinary Hearing Notice and in summary section of CTN 2020-0168-R, Lt. Burns wrote: "The was [sic] even more evident when the driver uttered to the officer, "You are on my neck, I can't breathe!"

During the disciplinary hearing, Eric Hessler challenged the allegation that the involved civilian said: "You are on my neck, I can't breathe!" The Superintendent's Committee Panel along with the investigating officer, Lt. Burns, and the IPM watched footage from the incident and could not identify that quote. The individual was heard stating: "I can't breathe" and "Please get off me" but did not state: "You are on my neck."

Chief Arlinda Westbrook questioned Lt. Burns about the origin of the statement "You are on my neck, I can't breathe!" and Lt. Burns stated that the statement was not made by anyone on the scene of the incident and that the arrested subject was never interviewed during the investigation for 2020-0168-R so the statement was not made during the investigation. Lt. Burns stated during the hearing that this was a "misquote" but it did not change the force that he observed and described in the investigation.

The complainant, Eric Hessler, argued that this statement was material to the investigation finding since the quote was used to explain and establish that Officer Mykulak knowingly and intentionally placed his knee on the individual's neck; however, since the quote was never said, it is reasonable that his client did not know that his knee was on the individual's neck. Eric Hessler maintained during the hearing that his client's knee was not on

the individual's neck, and if it was, it was an accidental graze due to Officer Mykulak slipping while handling the individual. Eric Hessler maintained the described force was not intentional. Eric Hessler argued if his client knew he was on or near the individual's neck, Officer Mykulak would have corrected that action.

Under Chapter 26.1.1: Disciplinary Matrix / Penalty Schedule, Officer Mykulak was facing a Level F violation because this was a Level 4 use of force. For a first offense of a Level F violation, Officer Mykulak was facing a possible discipline of "60-80-D" which means the mitigated penalty would be 60 days suspension, the presumptive penalty is 80 days suspension, and the aggravated penalty is dismissal or demotion. Under Chapter 26.1.1 there are additional factors which can be considered in the aggravation of the penalty or mitigation of the penalty. Some of these factors include: the "notoriety of the offense or its impact upon the reputation" of the NOPD, whether the violation was "intentional" or "inadvertent," and whether the violation "caused injury and/or had a harmful impact on a citizen or the community." Therefore, the language used at the scene was considered when looking to possible aggravating factors during the disciplinary phase of the hearing. Specifically, the language was used to determine if there was intentionality.

During the hearing, on the record, Lt. Burns stated that this was a "misquote." In CTN 2020-0637-P, Lt. Burns stated that when the error was caught, he immediately apologized and accepted responsibility, and that the error was identified before any deliberations had taken place or a penalty was imposed in the case.

Additionally, the similarities between this force and the force used in the death of George Floyd Jr. (discussed in more detail below) were drawn during the hearing – leading to the potential for this case to gain notoriety and have a negative impact on the NOPD and the community. On May 25, 2020, George Floyd Jr. died due to asphyxia when Minneapolis Police Officer Derek Chauvin knelt on George Floyd's neck for almost ten minutes. Prior to dying due to positional asphyxia and thus being unable to breathe, George Floyd was heard saying: "I can't breathe" more than twenty times. This phrase became a rallying cry in the coming months as protestors took the street to protest the death of George Floyd. This disciplinary hearing occurred in September of 2020 after a summer of protests in New Orleans and while some of these protests were still occurring across the country.

Despite this error being identified in front of rank at the NOPD, no disciplinary investigation or supervisory intervention was initiated. The complaint, and subsequent Formal Disciplinary Investigation, was initiated on December 29, 2020, under CTN 2020-0637-P after a civilian complainant, attorney Eric Hessler, filed the complaint.

Captain Dupree was assigned to CTN 2020-0637-P. After during his investigation, the Investigating Officer, Captain Dupree (herein referred to as "Investigating Officer Dupree") elected to memorialize this incident in Lt. Burns's Supervisor Feedback Log (reference #202107514) and determined the allegation against Lt. Burns of Rule 4: Performance of Duty, Par. 4: Neglect of Duty (c)(6) to wit: NOPD Ch. 82.1 Report Preparation; Report Preparation, #8 to be "unfounded." Deputy Chief Sandifer approved the investigation on April 27, 2021, and signed an approval on behalf of Superintendent Chief Ferguson. Deputy Chief Sandifer appeared to be the proxy for Deputy Chief Westbrook on the investigation. The OIPM cannot determine from the investigation if the Public Integrity Bureau, or any of its employees, were recused from this investigation.

Upon the completion of the investigation, the complainant, Eric Hessler, reached out to the OIPM and requested that a case review be conducted of CTN 2020-0637-P.

The OIPM will note that the Superintendent's Panel sustained the allegations of unauthorized force against Officer Mykulak and suspended him for 80 days. This ruling was appealed to Civil Service under Docket No. 9245 and Civil Service denied the appeal upholding the ruling and the penalty.

OIPM ANALYSIS

I. Are there disciplinary charges not included in the PIB investigation which OIPM asserts could have been brought?

Yes. There are two additional charges that could have been raised by the Investigating Officer.

Failure to Interview Involved Civilian

First, Lt. Burns failed to interview the arrested subject / individual who was the subject of force during his investigation of PIB 2020-0168-R. This is a potential violation of Rule 4: Performance of Duty, Par. 4: Neglect of Duty (c)(6) to wit: NOPD Ch. 52.1.1, Investigation and Investigator Protocols, Par. 72¹, which states:

All witnesses, including officers witnessing or involved in an incident that becomes the subject of a misconduct complaint, shall provide a written statement regarding the incident or be interviewed as described below.

(a) Where the alleged misconduct is particularly serious or interviews of the subject officer(s) or other witnesses may be necessary to sufficiently investigate the allegation, the investigator shall conduct an in-person interview. The interview shall be recorded in its entirety, absent, in the case of non-officer witnesses, specific documented objection.

Here, Lt. Burns failed to interview the subject of force, Calvin Thompson. An interview with the civilian involved who was the subject to force would have clarified: (1) the impact and injuries of the alleged force; (2) whether Officer Mykulak put force on the individual's neck or upper back and how long that pressure occurred. Instead, Lt. Burns relied on footage from Officer Winchester's Body Worn Camera, which left open questions in the investigation.

Intentional False Statements / Honesty and Truthfulness

Here, the Investigating Officer could have raised a violation for Rule 2: Moral Conduct, Par. 3: Intentional False Statements for Lt. Burns including information within the Disciplinary Notice that was not included in the signed investigation or actual investigation. This would require the Investigating Officer to determine if the statement: "You are on my neck" is: (1) material to the investigation; and (2) was included with an intent to deceive. NOPD policy defines material as information that would have affected the course or outcome of an investigation.

Here, the statement: "You are on my neck" was considered to determine knowledge of the force while it was being applied and possibly intent, however, since Officer Mykulak was still sustained on the unauthorized use of force without the statement, there is debate to how material the quote may be considered. Additionally, the quote could be considered as an aggravating factor that indicates intentionality.

II. Were there any other OIPM concerns with the investigation and if so, what allegation do they pertain to?

Yes, the OIPM has the following concerns regarding the investigation.

1. Reclassification of the Formal Disciplinary Investigation to a Non-Disciplinary Classification

The OIPM is concerned about both Investigating Officer Dupree's choice to utilize a SFL instead of utilizing the formal disciplinary procedures as required under policy and that this sidestep was approved by Deputy Chief Sandifer.

First, Investigating Officer Dupree independently determined that he is "a Captain with the New Orleans Police Department" and therefore "holds the authority to document the incident via Supervisor Feedback Log (SFL) to memorialize the incident" (p. 4 of the investigative report) in lieu of conducting the Formal Disciplinary

¹ OIPM is utilizing the Chapter 52.1.1: Misconduct Intake and Investigation Policy that was approved 3/18/2018 because that was the policy implemented at the time of this investigation.

Investigation he was assigned to complete. Investigating Officer Dupree decided to document the incident under SFL #202107514 and determine the allegation against Lt. Burns to be unfounded.

In reviewing these actions, the OIPM reviewed NOPD Policy Ch. 52.1.1 and determined that SFLs are only permitted in cases of non-disciplinary counseling which is defined as follows:

“Non-disciplinary counseling—A non-punitive process used to correct a subordinate’s behavior that is not fully compliant with Department rules, regulations, Chapters, or policies but is not sufficiently egregious to elevate the action to formal discipline. A supervisor must meet with the non-compliant member, explain the manner in which his or her actions are not compliant, and review the relevant policy (or Chapter, rule, or regulation) with him or her. The non-disciplinary counseling shall be documented in the Supervisor Feedback Log.”

Here, Investigating Officer Dupree’s decision to document the incident in Lt. Burns’s SFL instead of sustaining the allegations in the investigation effectively reclassified what was a formal disciplinary investigation into non-disciplinary counseling. Moreover, Investigating Officer Dupree failed to follow the proper protocol for non-disciplinary counseling as outlined above. Specifically, the Investigating Officer failed to take the following actions:

- Document what led to his determination that Lt. Burns’s actions were not egregious enough to elevate the action to formal discipline (or, in this case, reclassify the investigation as it had already been classified as a formal disciplinary investigation).
- Document that he (or another supervisor) met with Lt. Burns to discuss the manner in which his actions were non-compliant with NOPD policy and review the relevant policy with him in a counseling session.
- Document the counseling in Lt. Burns’s SFL. Instead, Investigating Officer states that Chief Westbrook addressed the matter on the record (referencing the discussion that occurred during the disciplinary hearing for CTN 2020-0168-R), which the OIPM believes does not qualify as counseling as anticipated under policy. See Exhibit I: “Supervisor Feedback Log #202107514.”

This action to effectively reclassify a complaint does not appear to be supported by policy or practice. Under Chapter 52.1.1: Misconduct Complaint Intake and Investigation, the proper way to cancel or reclassify a complaint is to utilize the procedure listed in paragraphs 36-38: “Request for Cancellation of a Complaint Action Originally Requested by an NOPD Supervisor,”² which read as follows:

36. The supervisor who is also documented as the complainant may request to “CANCEL” or change that complaint action to another form of complaint action (e.g., “Internally Generated Complaint” to “Documentation of Minor Violation/Infraction Resolved Through Non-Disciplinary Counseling”) utilizing an inter-office correspondence (NOPD Form 105) through his/her chain of command to the PIB Deputy Superintendent of Police. The 105 must contain the reason(s) the supervisor is requesting to cancel the complaint or to utilize a different form of complaint action.

37. The original 105 must be delivered with the chain of command approvals and/or disapprovals to PIB within five (5) days of the cognizance date of the alleged violation. If any person in the requesting supervisor’s chain of command disapproves the request, the initial complaint shall proceed as written and submitted. The 105 requesting the change will continue through the approval process and will be made a part of the investigative file on the complaint. The person disapproving the request must document his/her reasons in a cover 105 which will become a part of the request and follow through the chain of command.

38. The PIB Deputy Superintendent of Police has the final judgment in any request to cancel a complaint or change the complaint action type to another. If the request is not approved, the original complaint action shall continue uninterrupted in its original classification. If another form of complaint action is approved, the investigation shall continue to be governed by the original complaint action due dates.

² OIPM is utilizing the Chapter 52.1.1: Misconduct Intake and Investigation Policy that was approved 3/18/2018 because that was the policy implemented at the time of this investigation.

Applying this policy to CTN 2020-0637-P, the necessary circumstances to support the reclassification or cancellation of a formal disciplinary investigation are not present.

Most importantly, the policy above was intended to apply to an internally generated FDI; whereas here, the complainant, Eric Hessler, is a civilian, not an NOPD supervisor; therefore, this complaint is already ineligible for cancellation. Additionally, the spirit of this policy appears to differentiate a complaint that is internally generated, that may be modified or cancelled in the circumstances described above, compared to one that is publicly initiated which need to be fully and transparently investigated to promote public trust. This is clearly stated in Chapter 35.1.7: Non-Disciplinary Responses to Minor Violations, Par. 6:

A public complaint cannot be handled through non-disciplinary corrective action and requires formal disciplinary investigation, even if the complained-of behavior is, or appears to be, a minor violation/infraction.

Therefore, NOPD policy clearly states that a public complaint, like this one, cannot be resolved through non-disciplinary corrective action like a SFL.

In support for the decision to modify the FDI into a SFL entry, Investigating Officer Dupree stated that the complainant “never suggested a specific outcome other than a fair process and conclusion be reached.” However, the OIPM disagrees with this reasoning. Whether a complainant suggests a desired outcome pertaining to an investigation does not absolve the Investigating Officer from making an appropriate determination based on the facts presented in a case. Nor does it grant the Investigating Officer authority to reclassify a formal disciplinary investigation into non-disciplinary counseling. See NOPD Chapter 52.1.1. Although NOPD policy does not specifically address the weight of a complainant’s desired outcome on an ongoing formal investigation, one can reasonably infer the general spirit of the policy is one that supports full and fair internal investigations despite the level of input from a complainant. To support this analysis, the OIPM looks to Chapter 52.1.1, Paragraph 76³ which states:

A misconduct investigation shall not be closed simply because the complaint is withdrawn or because the alleged victim is unwilling or unable to provide additional information beyond the initial complaint. In such instances, the investigation shall continue as necessary within the allowable investigation timeframes established under this Agreement to resolve the original allegation(s) where possible based on the evidence and investigatory procedures and techniques available. In each investigation, the fact that a complainant pled guilty or was found guilty of an offense shall not be the deciding factor as to whether an NOPD officer committed the alleged misconduct, nor shall it justify discontinuing the investigation.

While this paragraph refers to incidents where a complainant wishes to withdraw a complaint, the policy reaffirms the principle that the Department has an independent duty to fully investigate a complaint, which the OIPM would assert includes issuing conclusions / findings. Applying this principle here, it was inappropriate, and against the spirit of Chapter 52.1.1, for Investigating Officer Dupree to use the justification that the complainant did not state a desired outcome for the investigation as grounds to determine that the allegation against Lt. Burns was “Unfounded” or that the FDI could be modified into a SFL entry.

The OIPM also disagrees with Investigating Officer Dupree’s interpretation of the statement made by the complainant during their call. The complainant stated:

“Well, I mean, Captain, and I really mean this when I say this. A system of discipline is necessary within a paramilitary organization, but it’s got to be consistent. You can’t turn your head to some people and apply it differently because it doesn’t work. People lose respect for it and one they lose respect for the disciplinary system, it’s useless. And I think, in this particular incident it was so clear that, at the very least, an investigation was warranted to determine how this happened. And if it happened intentionally, and I can’t imagine the circumstances where this would’ve been a typographical error, but it should have been looked into. And it’s very

³ OIPM is utilizing the Chapter 52.1.1: Misconduct Intake and Investigation Policy that was approved 3/18/2018 because that was the policy implemented at the time of this investigation.

disturbing that it wasn't. I think my letter pretty much supports my stance on what occurred, and I trust you to investigate it adequately.”

See Recorded telephone interview between Investigating Officer Captain Dupree and Eric Hessler, beginning at minute mark 3:10.

It should be noted that this quote is from a phone call that does not appear to be received as part of a formal interview / statement. Additionally, the phone call appears to be recorded in a one-sided recording since the Investigating Officer only recorded part of the call, failing to capture parts of what was said by the complainant. Finally, this call was not transcribed to be an exhibit in this investigation.

More importantly, the complainant's comments further affirm the importance of not just an investigation but that the disciplinary measures be applied uniformly, and an investigation occur, despite the accused officer's rank. Even if the Department's policies allowed for it, complainant's comments do not reflect mitigating circumstances that would permit a deviation under NOPD policy. To the contrary, the fact that the complainant proceeded with filing this complaint after witnessing the "counseling" that the Investigating Officer referenced during the hearing for 2020-0168-R, and the complainant named Deputy Superintendent John Thomas, Deputy Chief Arlinda Westbrook and Deputy Chief Christopher Goodly in the complaint along with Lt. Burns, is a strong indication that the complainant wanted this complaint to be fully and fairly investigated pursuant to NOPD policy since the complainant was not satisfied by what happened during the hearing for CTN 2020-0168-R.

Accordingly, the OIPM finds that Investigating Officer Dupree's decision to memorialize this incident in the accused officer's SFL was an improper reclassification of a formal disciplinary investigation to a non-disciplinary counseling / training under policy and that a SFL was an ineligible approach to this publicly initiated complaint.

2. Determination of "Unfounded"

The OIPM disagrees with the finding of "unfounded" on CTN 2020-0637-P. Under NOPD Policy Ch. 52.1.1, there are specific policies and procedures by which an allegation could be determined as unfounded.

NOPD Policy Ch. 52.1.1 Paragraph 95⁴ outlines the following definitions related to disposition of misconduct investigations:

Each allegation shall result in one of the following dispositions based on a finding of fact and considering the totality of circumstances:

Unfounded—the investigation determines by a preponderance of the evidence that the alleged misconduct did not occur or did not involve the accused officer.

Sustained—the investigation determines by a preponderance of the evidence that the alleged misconduct did occur.

Not sustained—the investigation is unable to determine by a preponderance of the evidence whether the alleged misconduct occurred.

Exonerated—the investigation determines by a preponderance of the evidence that the alleged conduct did occur but did not violate NOPD policies, procedures, or training.

Here, it is uncontested that the alleged misconduct did in fact occur, which should warrant a finding of "sustained" based on the definitions. A finding of "unfounded" is not supported in any way by the facts of this investigation. Even if Investigating Officer Dupree believed the matter was fully addressed on the record during the hearing for 2020-0168-R, then Investigating Officer Dupree should have made a finding of "exonerated," but even that finding is not supported by the facts of this case.

⁴ OIPM is utilizing the Chapter 52.1.1: Misconduct Intake and Investigation Policy that was approved 3/18/2018 because that was the policy implemented at the time of this investigation.

III. Should training or other programs have been required of the accused employee?

Since this case was adjudicated and completed, Lt. Burns has been sustained on another case that also touches on report preparation under CTN 2021-0229-R. Considering this, the OIPM would now recommend that Lt. Burns be retrained on report preparation. However, at the time of this investigation, there was nothing to demonstrate that this incident demanded training from the accused employee.

The OIPM will also highlight those determinations about training are often made after the accused employee gives a statement explaining their reasoning or thought process or interpretation of the policy or prior training that led them to take the action (or fail to take the action) required of them. In this investigation, Investigating Officer Dupree did not interview the accused employee; therefore, the Investigating Officer missed the opportunity to get additional information that could have informed training recommendations.

IV. Does the investigation suggest policy/procedure, other risk management or liability issues that were not adequately addressed by the Department?

1. Clarity on Policy

Clarification on False Statements and Report Preparation

First, the OIPM seeks departmental clarity on the appropriateness Rule 2: Moral Conduct, Par. 3: Intentional False Statements and Rule 4: Performance of Duty, Par. 4: Neglect of Duty (c)(6) to wit: NOPD Ch. 82.1: Report Preparation; Report Preparation, Para. 8. The language of both policies is included below:

Rule 2: Moral Conduct, Par. 3: Intentional False Statements / Honesty and Truthfulness

Employees are required to be truthful at all times, in their spoken, written, or electronic communications, whether under oath or not, in all matters and official investigations relating to the scope of their employment and operations of the Department. An employee shall not make any material false statement with the intent to deceive. A statement is material when it could have affected the course or outcome of an investigation or official proceeding relating to the scope of their employment and operations of the Department.

Rule 4: Performance of Duty, Par. 4: Neglect of Duty (c)(6) to wit: NOPD Chapter 82.1 Report Preparation, Par. 8

Members shall not suppress, conceal or distort the facts of any reported incident, nor shall any member make an intentionally false, inaccurate or incomplete report orally or in writing.

The language between these two policies both include omissions or distortion of information and both policies include intentionality. **For these reasons, the OIPM seeks clarity between the two policies and when one will be applied over another.**

The reason this difference is important is because under NOPD Chapter 26.2.1: Disciplinary Matrix / Penalty Schedule, the penalties for the two offenses differ greatly. Rule 2, Par. 3 is a Level G offense which is punishable by an automatic demotion or dismissal. Comparably, Rule 4, Par. 4 (c)(6) is a Level B offense which is punishable by a letter of reprimand for mitigated penalties, one-day suspension for presumptive penalties, and three-day suspension for an aggravated penalty.

The penalty differences between these two offenses are stark and severe; however, the language between the two offenses is alike to the point of being almost identical. The OIPM seeks clarity on the differences between these two policies in practice and how these two policies are applied and when they are applied.

Modification of Formal Disciplinary Investigation into a Supervisory Feedback Log Entry

Second, the Department needs to address whether an Investigating Officer has the authority to make the determination that an incident may be documented through a Supervisory Feedback Log in lieu of sustaining an allegation. The OIPM earlier analyzed: (1) that this practice is not currently supported under policy; (2) the ability for the investigating officers to circumvent their own investigations by allowing for this type of modification; and (3) how this type of modification for public complaints directly goes against the policy and the spirit and

intent of complaint investigation. The OIPM is concerned about this practice, particularly how it was implemented outside of current policy in this matter.

2. Necessity to Interview the Accused Officer

The OIPM seeks clarity regarding any requirement to interview the accused officer in formal disciplinary investigation. In this matter, the Investigating Officer choose not to interview the accused officer, however, as highlighted earlier by the OIPM, as a result information regarding the intentionality and the origin of the statement were not explored by the Investigating Officer.

3. Supervision

The OIPM identified three areas where the OIPM is concerned about supervision.

First, the Investigating Officer mentioned in his investigation that the accused officer is a supervisor and holds the highest rank in the Force Investigation Team; but then failed to consider whether this supervisory responsibility should require a different type of analysis. The OIPM asks, does the NOPD expect more from supervisors when they author reports? This investigation should have addressed this since this misquote in CTN 2020-0168-R could cause oversight and the NOPD to question if there are similar misquotes or errors in other investigations handled or approved by Lt. Burns.

Second, the Investigating Officer failed to consider whether the supervisor of Lt. Burns, Captain Richardson, should have identified the misquote in her review of the investigation prior to approving CTN 2020-0168-R. The position of the OIPM is that this investigation was a missed opportunity to reflect on the role of supervision and whether supervisors in PIB are equipped and able to identify errors in the investigations conducted within the bureau.

Third, there was a missed opportunity for the supervisor, Deputy Chief Sandifer, of this misconduct investigation, CTN 2020-0637-P, to cover this investigation and disagree with the findings on the grounds that this investigation did not comply with procedure or policy. Instead, Deputy Chief Sandifer approved an investigation that strays from policy by utilizing the SFL to effectively avoid sustaining the allegation.

4. Procedural Supports When Formal Disciplinary Investigations Occur Outside the PIB

The OIPM has observed confusion when investigations are conducted by those outside of the PIB, and the OIPM highlights the use of the SFL entry in lieu of sustaining the allegation in this matter as an example of policy confusion. In other disciplinary matters, the OIPM has recommended some procedural and policy clarifications to address this and now adopts those recommendations into this case review. Below is the recommendation previously made by the OIPM:

Contact Person from PIB

Under NOPD policy, Chapter 52.1.1. Par. 114, there is to be a "PIB Liaison" whenever a different bureau receives notification from PIB that a disciplinary investigation is assigned to that bureau. The OIPM recommends that the PIB liaison role should be more developed to ensure this individual is empowered to answer questions regarding policy, process, timelines, and provide additional resources to the assigned investigating officer (and rank) of that bureau.

In the case of a conflict requiring the recusal of the entire PIB, then a new liaison needs to be identified, or a PIB liaison must be "firewalled" from the rest of the PIB to continue to act in their capacity as the PIB liaison for the investigation.

Here, the OIPM questions whether the Investigating Officer consulted any PIB Liaison when he decided to utilize the SFL. Additionally, the OIPM seeks clarity and whether PIB was recused from this investigation and recommends that supports and resources are created when PIB is recused to ensure that the investigating officer (and Bureau) are equipped to conduct the investigation required under policy.

CONCLUSION / OIPM RECOMMENDATIONS

The OIPM disagrees with the finding of "unfounded." The signed investigation supports a finding of sustained based on Lt. Burns admitting to the misquote and no other justification being offered. Therefore, there was sufficient evidence by a preponderance of the evidence to sustain the allegation against Lt. Burns since he admitted to fault immediately.

Further, the OIPM finds it concerning Investigating Officer Dupree and the approver of the signed investigation, Deputy Chief Sandifer, created a remedy in this matter that contradicted the evidence in the case and the policy of the NOPD.

Accordingly, the OIPM recommends the following findings:

ACCUSED OFFICER	ALLEGATION	OIPM RECOMMENDATION
LT. KEVIN BURNS	Rule 4: Performance of Duty, Par. 4: Neglect of Duty (C)(6) to wit: NOPD Chapter 82.1: Report Preparation Par. 8: <i>Members shall not suppress, conceal or distort the facts of any reported incident, nor shall any member make an intentionally false, inaccurate or incomplete report orally or in writing.</i>	SUSTAINED

This review approved by:



Stella Cziment
Independent Police Monitor

First review conducted by: Mummi Ibrahim, Case Review Contract Attorney

CITY OF NEW ORLEANS



LaToya Cantrell
MAYOR

DEPARTMENT OF POLICE

P.O. BOX 51480
New Orleans, Louisiana 70151

"to protect and to serve"



Shaun D. Ferguson
SUPERINTENDENT

September 9, 2022

Office of Independent Police Monitor
2714 Canal Street, Suite 201
New Orleans, LA 70119

RE: OIPM Case Review: 2020-0637-P

Stella Cziment:

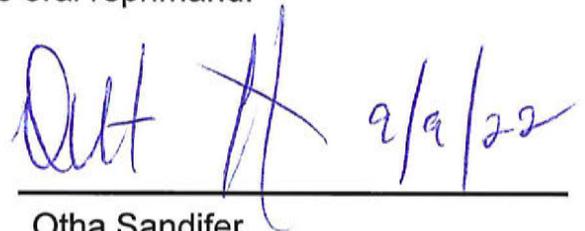
This interoffice correspondence serves as a response to the Office of the Independent Police Monitor (OIPM) Case Review: 2020-0637-P. The accused employee was listed as Lt. Kevin Burns, Deputy Superintendent John Thomas, Deputy Chief Arlinda Westbrook and Deputy Chief Christopher Goodly. It should be noted the investigations into the allegations against the deputy chiefs were conducted by the Office of the Inspector General. The investigation into the allegations against Lt. Kevin Burns was conducted by Captain Lawrence Dupree.

A review of the OIPM's case review documented opposition to Captain Dupree's disposition of P.I.B. C.T.N. 2020-0637-P, "unfounded". It is the OIPM's recommendation that the finding be "sustained". OIPM indicated the signed investigation findings substantiates the allegation based on Lt. Burns admitting to his misquote without providing any further justification. Therefore, based on the preponderance of the evidence the allegation against Lt. Burns is sustained.

In addition to the OIPM's case review, a review of P.I.B. C.T.N. 2020-0637-P was conducted. Captain Dupree was assigned the investigation where Lt. Burns was listed as the accused. The allegation of Rule 4: Performance of Duty; Paragraph 4: Neglect of Duty, (c)(6) to wit NOPD Chapter 82.1 Report Preparation; Report Preparation, #8: *Members shall not suppress, conceal, or distort the facts of any reported incident, nor shall any member make an intentionally false, inaccurate, or incomplete report orally or in writing.*

Captain Dupree's investigation revealed Lt. Burns admitted to documenting the statement in which he was accused. Lt. Burns admission was made on the record in a disciplinary hearing held for Officer Jonathan Mykulak (CTN 2020-0618-R). The recommendation of "unfounded" appears to be correct in this investigation. If Lt. Burns was suppressing, concealing, or distorting the facts in the reported incident he would not have admitted to his error during the hearing. This proves Lt. Burns did not make an intentionally false, inaccurate, or incomplete report orally or in writing. The quote was documented in the summary of the investigation (CTN 2020-0618-R), the reader should only rely on the content of the investigation and the official transcripts. By doing a thorough assessment of the typed document or investigation one can reasonably conclude that the information found in the summary was in error.

Captain Dupree elected to document the incident via a SFL #202107514. An SFL (Supervisor Feedback Log (SFL) is utilized to document actions such as a redirection, counseling, and support. Lt. Burns received an oral reprimand by Deputy Chief Arlinda Westbrook for his error during the hearing of Mykulak. Captain Dupree utilized the SFL to document the oral reprimand.

Handwritten signature in blue ink, appearing to read "Oth" followed by a stylized flourish, and the date "9/9/22" written to the right.

Otha Sandifer
Deputy Superintendent
Professional Standards &
Accountability Bureau