

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1105

JENNIFER TOMS AND LOREN JAMES

VERSUS

**DEPARTMENT OF HEALTH AND HOSPITALS - OFFICE
FOR CITIZENS WITH DEVELOPMENTAL DISABILITIES
- PINECREST DEVELOPMENTAL CENTER**



Judgment Rendered: DEC 23 2008

On Appeal from the Civil Service Commission
Number 16,277

Honorable James A. Smith, Chairman

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a ruling of the Louisiana Civil Service Commission denying the plaintiffs a salary adjustment. For the reasons that follow, we vacate the Civil Service Commission ruling and dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are thoroughly detailed in the decision rendered by the Civil Service Commission, stating:

Statement of the Appeal

Jennifer Toms and Loren James work for the Department of Health and Hospitals (DHH) at Pinecrest Developmental Center (PDC). Both served with permanent status. Ms. Toms served as an OCDD Active Treatment Specialist 4 until her detail to Residential Services Specialist 8 (RSS-8) on May 29, 2007. Ms. Toms was promoted to the RSS-8 position on August 6, 2007. Mr. James served as an OCDD Active Treatment Specialist 3B until his detail to RSS-8 on August 20, 2007. Mr. James continues in this detail.

On October 11, 2007, Ms. Toms and Mr. James filed a notice of appeal complaining that they were denied a seven percent optional pay adjustment to their salaries for additional duties. They contend that other RSS-8's at PDC received the optional pay pursuant to a July 30, 2007 settlement that was reached in the appeal of **Matt Harmson, [et al. v. T]he Department of State Civil Service**, Docket 16155. They argue that they perform the same duties that the Harmson appellants perform, and thus, they are entitled to the same optional pay. They further claim that denying them optional pay constitutes a violation of *Article X, §10 of the Louisiana Constitution* and the principle of equal pay for equal work.

On November 13, 2007, the Department of State Civil Service (Civil Service) filed a motion for summary disposition. In moving for summary disposition, Civil Service points out that Ms. Toms and Mr. James do not contest the allocation and pay range of their jobs. That is, Ms. Toms and Mr. James do not allege the duties they are now performing are not the duties of a RSS-8, nor do they allege the duties of an RSS-8 changed after they moved into the RSS-8 jobs. Civil Service contends that a uniform pay and classification plan requires only that employees performing the same work be paid within the same pay range. Civil Service also contends that it was the additional duties added to the Harmson appellants while they were RSS-8s

in November 2005, which supported their seven percent optional pay. Civil Service points out that Ms. Toms and Mr. James did not come into the RSS-8 jobs until 2007. In addition, Civil Service maintains that a proper interpretation of *Rule 6.16.2* regarding optional pay for additional duties requires that the additional duties be given to an employee after they are already in the job.

Finally, Civil Service warns that it would effect a profound shift in public policy to award a promoted employee both a promotional increase and optional pay for duties that were in existence and comprised the position at the time of the promotion. Civil Service therefore urges that summar[y] dismissal is appropriate as Ms. Toms and Mr. James have failed to state a basis of appeal.

On November 15, 2007, Ms. Toms and Mr. James were afforded fifteen days to respond to Civil Service's motion for summary disposition. On December 7, 2007, Mr. Toms and Mr. James responded to the motion claiming that all RSS-8 employees at PDC except them are getting optional pay, and that they have been excluded from this optional pay simply because of the date of their employment. They disagree with Civil Service's interpretation that *Rule 6.16.2* applies only when additional duties are given to an employee after they are holding the position. They claim that this view is not supported in the language of the rule, that the rule does not set forth this requirement, and that the basis for the rule is additional duties and responsibilities, not timing.

Ms. Toms and Mr. James further disagree with Civil Service's contention that it will effect a profound shift in public policy if they are afforded optional pay. They claim that optional pay is due them solely because of the facts and circumstances pertaining to the RSS-8's at PDC, and that *Rule 6.16.2's* application will be limited. Finally, Ms. Toms and Mr. James contend that while their appeal is not an attack on the pay plan or a discrepancy between pay ranges, a violation of the uniform pay plan occurs when members of the same Civil Service class, especially those who are similarly situated, are paid differently. They urge that the motion be denied.

The parties agreed that this matter be submitted for decision on the record. On January 8, 2008, we considered this appeal submitted. Pursuant to the provisions of *Louisiana Constitution Article X, §12(A)*, we make the following findings of fact and conclusions of law.

Findings of Fact¹

[FN1. In determining these findings of fact, we take notice of the appeal of Matt Harmson v. Department of State Civil Service, the pleading filed by appellants, and the briefs of the parties.]

1. Prior to November 2005, additional duties were added to the work of six RSS-8's at PDC. PDC reviewed the RSS-8s' duties and concluded that the additional duties merited reallocation to Mental Retardation Developmental Disability Regional Associate Administrator 1's. This was a promotion, so the RSS-8's received a seven percent promotional raise in pay.
2. During a routine audit, Civil Service reviewed the six reallocations and concluded that even with the additional duties, the positions did not merit reallocation to Mental Retardation Development Disability Regional Associate Administrator 1's.
3. On February 3, 2007, Civil Service directed PDC to return the RSS-8s who were reallocated to Mental Retardation Developmental Disability Associate Administrator 1's to the classification of RSS-8 and to remove the 7% promotional pay retroactive to February 3, 2007.
4. On February 2, 2007, the six RSS-8's filed an appeal contesting Civil Service's conclusions. This appeal was docketed as **Matt Harmson, et [al.] v. The Department of State Civil Service**, Docket No. 16115.
5. On May 29, 2007, Ms. Toms was detailed to the position of RSS-8 and she received a seven percent raise in pay pursuant to *Civil Service Rule 6.11*. On August 6, 2007, Ms. Toms [was] promoted into that position. She did not receive promotional pay because she had already received the 7% pay adjustment upon her detail to RSS-8.
6. On July 30, 2007, Ms. Toms was present during a settlement meeting between the six **Harmson** appellants and Civil Service. During the meeting, Civil Service recognized that since 2005, the [**Harmson**] appellants had been performing duties in addition to the duties that were required of their positions when they became RSS-8s. Civil Service concluded that the proper action that PDC should have taken was to give the [**Harmson**] appellants optional pay.
7. Pursuant to the July 30, 2007 settlement and *Rule 6.16.2*, PDC gave the appellants a five percent optional pay adjustment and then requested approval from the Civil Service Commission for an additional two percent optional pay adjustment.
8. On August 20, 2007, Mr. James was detailed to RSS-8 and received a 10.5% pay adjustment. Mr. James continues in this detail.
9. At some point after August 20, 2007, Ms. Toms and Mr. James requested optional pay, contending that they perform the same duties that the six **Harmson** appellants perform. On

September 13, 2007, DHH denied Ms. Toms' and Mr. James' request.

10. *Civil Service Rule 6.7* provides that when an employee is promoted, the employee shall be given an increase in pay of 7%, 10.5% or 14% based upon the number of pay grades the employee goes up. *Civil Service Rule 6.11* provides that when an employee is detailed to special duty into a higher job "his pay shall be increased to the rate he could receive upon promotion."

Discussion and Conclusions of Law

Ms. Toms and Mr. James contend that the other RSS-8's received optional pay pursuant to a July 30, 2007 settlement that was reached in the appeal of **Matt Harmson, [et al. v. T]he Department of State Civil Service**, Docket 16155. They argue that they perform the same duties that the **Harmson** appellants perform, and thus they are entitled to the same optional pay. They further claim that denying them optional pay constitutes a violation of *Article X, §10 of the Louisiana Constitution* and the principle of equal pay for equal work.

Additional duties were added to the work of the [**Harmson**] appellants in November 2005. To compensate them for the additional duties they were performing since November 2005, they received a discretionary optional pay adjustment pursuant to *Civil Service Rule 6.16.2*. Ms. Toms and Mr. James were not permanent RSS-8's when the additional duties were added to the RSS-8 positions in November 2005, or when the [**Harmson**] settlement was reached. What constituted additional duties for the [**Harmson**] appellants in November 2005, were simply the duties of the RSS-8 position in August 2007, when Ms. Toms was promoted and Mr. James was detailed. They accepted the higher level RSS-08 position with its concomitant duties, and were compensated pursuant to *Civil Service Rules 6.7* and *6.11*. Ms. Toms received a 7% promotional increase in pay and Mr. James received a 10.5% increase in pay for the detail. When an employee accepts a position, the employee agrees to perform the duties that comprise the position.

Louisiana Constitution Article X, §10(A)(1) empowers the Commission "to adopt a uniform pay and classification plan." The constitutional requirement for a uniform pay plan means that the same schedule of pay must apply to all positions in the same job classification.² [FN2. **Clark v. State**, 434 So.2d 1276 (La. App. 1 Cir.), writ denied, 440 So.2d 152 (La. 1983).] A uniform pay plan is not required to pay individuals in the same class the exact same pay.³ [FN3. **Gaspard v. Department of State Civil Service**, 93-0311 (La. App. 1 Cir. 3/11/94), 634 So.2d 14, and **Gorbaty v. Department of State Civil Service**, 99-1389 (La. App. 1 Cir. 6/23/00), 762 So.2d 1159, writ denied,

2000-2534 (La. 11/13/00), 774 So.2d 147.] Uniformity of a pay plan does not require that all classifications be treated equally at all times. Pay discrepancies to a slight extent exist throughout the system.⁴ [FN4. **Hollingsworth v. State, Through Department of Public Safety**, 354 So.2d 1058 (La. App. 1 Cir. 1977), writ denied, 356 So.2d 1010 (La. 1978).] Such discrepancies are caused primarily by the provisions of the Civil Service pay rules and the way the pay plan is structured.⁵ [FN5. **Hollingsworth v. State**, *supra*.] Here, Ms. Toms and Mr. James accepted the RSS-8 position with its job duties, as they existed in August 2007, and its yearly pay range. As compensation for performing the duties of the higher RSS-8 position, pursuant to *Civil Service [Rule] 6.11*, Ms. Toms received a 7% increase in pay and Mr. James received a 10.5% increase in pay. Both Ms. Toms and Mr. James are within the pay range for the RSS-8 position. We find that Ms. Toms and Mr. James are being paid in accordance with the uniform pay and classification plan.

Ms. Toms and Mr. James do not allege the duties they are performing are not the duties of a RSS-8, nor do they allege the duties of the RSS-8 changed after they moved into the RSS-8 positions. Consequently, we find that Ms. Toms and Mr. James have failed to state a basis of appeal.

For the foregoing reasons, the Department of State Civil [Service's] motion for summary disposition is granted. Accordingly, this appeal is dismissed.

Following this ruling by the Civil Service Commission, plaintiffs appealed to this court, and on appeal, assert that the Civil Service Commission erred: (1) in denying them a seven percent optional pay adjustment to their RSS-8 salaries retroactive to the date they assumed the position; (2) in its interpretation of Rule 6.16.2; and (3) in finding that they were not entitled to the same optional pay adjustment as other employees in the same classification and performing the same duties at Pinecrest Developmental Center.

LAW AND ANALYSIS

It is the duty of a court to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the litigants. **McGehee v.**

City/Parish of East Baton Rouge, 2000-1058, p. 3 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260.

The Louisiana Constitution explicitly states that original jurisdiction over all civil and criminal matters is to be in the district courts "unless otherwise authorized by the constitution." LSA-Const. Art. V, §16; **Moore v. Roemer**, 567 So.2d 75, 79-80 (La. 1990). See also LSA-Const. Art. IV, §21; Art. V, §§15, 18, and 20; and Art. X, §§12, 46, and 50 (expressly providing for original jurisdiction of certain claims in the Public Service Commission, the Civil Service Commission, the State Police Commission, the juvenile and family courts, the limited jurisdiction courts, and the justice of the peace courts). Matters under the original jurisdiction of administrative bodies are civil matters that would otherwise come under the original jurisdiction of the district court. **Id.**

The Civil Service Commission is given the right to hear appeals as stated in LSA-Const. Art. X, §§8 and 12, which provide:

§ 8. Appeals

(A) **Disciplinary Actions.** No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. *A classified employee subjected to such disciplinary action shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part.* The burden of proof on appeal, as to the facts, shall be on the appointing authority.

(B) **Discrimination.** *No classified employee shall be discriminated against because of his political or religious beliefs, sex, or race. A classified employee so discriminated against shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part.* The burden of proof on appeal, as to the facts, shall be on the employee.

§ 12. Appeal

(A) **State.** *The State Civil Service Commission shall have the exclusive power and authority to hear and decide all*

removal and disciplinary cases, with subpoena power and power to administer oaths. It may appoint a referee, with subpoena power and power to administer oaths, to take testimony, hear, and decide removal and disciplinary cases. The decision of a referee is subject to review by the commission on any question of law or fact upon the filing of an application for review with the commission within fifteen calendar days after the decision of the referee is rendered. If an application for review is not timely filed with the commission, the decision of the referee becomes the final decision of the commission as of the date the decision was rendered. If an application for review is timely filed with the commission and, after a review of the application by the commission, the application is denied, the decision of the referee becomes the final decision of the commission as of the date the application is denied. The final decision of the commission shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located, upon application filed with the commission within thirty calendar days after its decision becomes final. Any referee appointed by the commission shall have been admitted to the practice of law in this state for at least three years prior to his appointment.

* * *

(Emphasis added.)

In **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 (La. 3/2/99), 728 So.2d 1254, the Louisiana Supreme Court concluded that Article X of the Louisiana Constitution serves as a limit on the State Civil Service Commission's quasi-judicial power to hear the appeals of state civil service employees to two categories of claims: (1) discrimination claims provided for in § 8(B); and (2) removal or disciplinary claims provided for in § 12(A) and § 8(A).¹ The supreme court noted the Commission's authority to enact rules, though broad and general, is nonetheless limited by the terms expressed in the constitution. Therefore, the court found that any Commission rules expanding its power beyond constitutional limits were unconstitutional. Specifically, the supreme court held unconstitutional particular civil service rules to the extent they

¹ Although Section 12 establishes that the Commission has exclusive original jurisdiction over all removal and disciplinary cases, the section is silent on discrimination cases. Thus, Sections 8 and 12 must be read together in order to assess the Commission's quasi-judicial authority. **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at pp. 6-7, 728 So.2d at 1259.

purported to authorize appeals to the Commission on discrimination claims outside the scope of the Commission's limited jurisdiction as defined under Article X, §§ 8 and 12. See Berry v. Department of Public Safety and Corrections, 2001-2186, p. 15 (La. App. 1 Cir. 9/27/02), 835 So.2d 606, 616-17 (citing Louisiana Department of Agriculture and Forestry v. Sumrall, 98-1587 at pp. 6-15, 728 So.2d at 1259-64). See also Flanagan v. Department of Environmental Quality, 99-1332, p. 4 (La. App. 1 Cir. 12/28/99), 747 So.2d 763, 765.

In Sumrall, the Louisiana Department of Agriculture and Forestry filed suit in the district court seeking a judicial declaration that the Commission's rules, purporting to extend its jurisdiction relative to discrimination claims beyond the four instances set forth in LSA-Const. Art. X, §8 (political beliefs, religious beliefs, sex, or race), were unconstitutional. Following denial by the lower courts of the relief sought, the supreme court reviewed the matter and held that the Commission may constitutionally exercise its appellate jurisdiction only when a classified employee brings a discrimination claim based upon one of the four enumerated categories set forth in Section 8(B). In so ruling, the supreme court reasoned that it is clear from a straightforward reading of Section 8(B) that the provision prohibits only four categories of discrimination: those based on political or religious beliefs, sex or race. Thus the court held that the section limits the Commission's appellate jurisdiction to only those cases by classified employees asserting that they have been so discriminated against, stating that no other meaning can be ascertained from the plain text of the article. Louisiana Department of Agriculture and Forestry v. Sumrall, 98-1587 at p. 5, 728 So.2d at 1258-59. The supreme court ruled that the constitutional provisions relative to the Civil Service Commission do not

include the authority to enact rules to expand the Commission's own jurisdiction to hear appeals, and that noticeably absent from the rulemaking provisions are the words "other matters pertaining to appeals." **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at pp. 10-11, 728 So.2d at 1262.

In **Berry**, a state trooper appealed a demotion resulting from a disciplinary action and further sought review of an annual "Performance Planning and Review" rating of "poor" (later upgraded to "needs improvement"). The State Police Commission upheld the trooper's demotion, but held that it did not have jurisdiction to hear the appeal of the unfavorable performance rating, citing **Louisiana Department of Agriculture and Forestry v. Sumrall**.² On appeal of the matter, this court stated that the State Police Commission had no authority to entertain the appeal of the trooper's performance rating unless it constituted a discrimination, removal, or disciplinary action, and that no such allegation was made in the case. This court concluded that the trooper's "needs improvement" rating was not discriminatory, nor was it a removal or disciplinary claim; therefore, as a matter of law, the State Police Commission lacked jurisdiction over the issue. **Berry v. Department of Public Safety and Corrections**, 2001-2186 at pp. 16-17, 835 So.2d at 617-18.

In **Flanagan**, a classified employee serving with permanent status as an Environmental Specialist III with the Louisiana Department of

² The State Police Commission has substantially the same jurisdictional basis as the Civil Service Commission, as provided in LSA-Const. Art. X, § 46: "A classified state police officer subjected to ... disciplinary action shall have the right of appeal to the [State Police] commission[;] ... [n]o classified state police officer shall be discriminated against because of his political or religious beliefs, sex or race ... [and a] classified state police officer so discriminated against shall have the right of appeal to the commission...." See also LSA-Const. Art. X, § 50 (which provides that the State Police Commission has the exclusive power and authority to hear and decide all removal and disciplinary cases).

Environmental Quality (DEQ) appealed the denial of a promotion, alleging that he was denied promotion in retaliation for his having previously filed an appeal of a disciplinary matter in which he prevailed, and because he had previously filed a lawsuit against DEQ based on age discrimination. Mr. Flanagan contended that the denial of promotion in retaliation for his prior disciplinary appeal and lawsuit constituted "discrimination" based upon "non-merit factors." The Civil Service Commission denied relief. On appeal, this court, citing **Louisiana Department of Agriculture and Forestry v. Sumrall**, held that DEQ was without jurisdiction to hear Flanagan's claim of discrimination through DEQ's consideration of "non-merit factors" since LSA-Const. Art. X, §§8 and 12 provide appellate jurisdiction to the DEQ upon only four bases of discrimination: political beliefs, religious beliefs, sex, or race. **Flanagan v. Department of Environmental Quality**, 99-1332 at pp. 4-6, 747 So.2d at 765-66.

Most recently, in the case of **Gurba v. Department Of Transportation & Development - Crescent City Connection**, 2008-0264 (La. App. 1 Cir. 10/14/08) (unpublished opinion), this court held that a state employee contending that he was denied a promotion because of discrimination on account of his leave for active military service did not have a right of appeal to the Civil Service Commission because his claim did not arise following disciplinary action or from discrimination on the basis of political beliefs, religious beliefs, sex, or race, and the supreme court's interpretation, in **Louisiana Department of Agriculture and Forestry v. Sumrall**, of the constitutional grant of appellate jurisdiction to the Civil Service Commission limits those appeals to one of those enumerated bases.

Likewise, in the instant case, Ms. Toms and Mr. James' appeal to the Civil Service Commission did not arise from either disciplinary action or

discrimination on the basis of political beliefs, religious beliefs, sex, or race. Therefore, the Civil Service Commission had no jurisdiction in this matter and the appeal should have been dismissed.³

CONCLUSION

For the reasons assigned herein, the ruling of the Louisiana Civil Service Commission is vacated and the appeal is dismissed. Each party is to bear its own costs of this appeal.

RULING VACATED; APPEAL DISMISSED.

³ Even so, the supreme court has recognized that, for causes of action based on another form of discrimination or other deprivation of constitutional right not within the scope of the Commission's quasi-judicial power as expressed in Article X, §§ 8 and 12, recourse is available in the district courts, and plaintiffs seeking protection under any other law may take refuge in the district courts of this state. **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at p. 15, 728 So.2d at 1264.