

NOT DESIGNATED FOR PUBLICATION

JULIE WILSON * **NO. 2001-CA-0106**
VERSUS * **COURT OF APPEAL**
NEW ORLEANS POLICE * **FOURTH CIRCUIT**
DEPARTMENT * **STATE OF LOUISIANA**
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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 5935, “”

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Judge David S. Gorbaty
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(Court composed of Judge Charles R. Jones, Judge James F. McKay III,
Judge David S. Gorbaty)

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REVERSED

In this appeal, the New Orleans Police Department (the “NOPD”) contends that the Civil Service Commission (the “Commission”) erred in reducing by two days a four-day suspension imposed on Sergeant Julie Wilson by the Superintendent of the NOPD for violations regarding professionalism and instructions from an authoritative source.

FACTS AND PROCEDURAL HISTORY

Officer Wilson is a police sergeant with permanent status in the civil service system. The charges levied against Sgt. Wilson by the NOPD concerned her activities while working off-duty paid details for the Uptown Triangle Association (the “Uptown detail”) and the Maple Area Merchants’ Association (the “Maple detail”).

An administrative investigation determined that between November 2, 1997 and May 18, 1998, Sgt. Wilson worked the Maple detail on eight occasions without submitting a Paid Detail/Outside Employment Form and without authorization. It further determined that she had worked both the Maple detail on eight occasions and the Uptown detail on eight occasions

without entering, or causing her name to be entered, into the Second District Detail Log. Finally, the investigation determined that Sgt. Wilson had worked the Maple detail and the Triangle detail on three occasions where the hours worked for each overlapped for one hour.

The NOPD rules regarding professionalism state that employees shall conduct themselves in a professional manner with the utmost concern for the dignity of those with whom they are interacting. In addition, employees shall not act in a manner that brings discredit to the employee or the Police Department. Rule 3(1). The NOPD regulations concerning off-duty paid details come under the ambit of Rule 4(2), entitled, “Performance of Duty – Instructions from Authoritative Source.” Pursuant to those regulations, members wishing to work any paid details shall complete a New Orleans Police Paid Detail/Outside Employment Authorization Form #21 prior to working the paid detail. ASOP 85.0(4). The regulations further require that each officer working a paid detail have his or her name, along with the date, time, and exact location of the detail, entered into the logbook of the district station wherein the off-duty detail is located. ASOP 85.0(8).

After a hearing before Bureau Chief Ronal Serpas, the NOPD suspended Sgt. Wilson for four days. Sgt. Wilson appealed her suspension to the Commission, and the matter was assigned to a hearing examiner, who

heard testimony on three separate dates. The Commission reviewed a copy of the transcripts of those hearings, along with the documentary evidence presented at the hearings. The Commission found that the appointing authority had met its burden of proof regarding the professionalism charge, i.e. working overlapping details, and one of the instructions from an authoritative source charges, i.e. failing to complete the paid detail authorization form. As to the second instructions from an authoritative charge, the Commission gave credit to Sgt. Wilson's testimony that she had called in her details, notwithstanding the fact that her name was not entered into the Second District logbook on sixteen occasions. Accordingly, the Commission granted the appeal in part, returning two days of back pay to Sgt. Wilson.

DISCUSSION

The NOPD argues that the Commission acted arbitrarily and capriciously and committed clear error in reducing the suspension by half, and that the Commission exceeded its constitutional authority by substituting its judgment for that of the appointing authority.

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).

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.

Where testimony is taken by a hearing officer, 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 1223.

In Chapman v. Department of Police, 97-1384 (La. App. 4 Cir. 1/28/98), 706 So.2d 656, this court rejected the Commission's reduction of a suspension from thirty to ten days, holding that the Commission is not charged with the operation of the NOPD or disciplining its employees. Importantly, we noted that the Commission had concluded that Chapman had violated departmental regulations, but it believed that the thirty-day suspension was "too harsh" under the circumstances. We concluded that the Commission's action was simply a substitution of its judgment for the Superintendent's judgment. We found that the Superintendent had sufficient cause to impose the penalty and that the NOPD carried its burden of proof. As such, we held that the Commission's action was an arbitrary and capricious interference with the authority of the Superintendent to manage his department.

Similarly, in Palmer v. Department of Police, 97-1593 (La. App. 4 Cir. 1/28/98), 706 So.2d 658, this court reversed the Commission's reversal of the NOPD's imposition of a two-day suspension where a prisoner in an

officer's custody had escaped because the officer had not followed police procedure. In its decision, the Commission noted that it had found mitigating circumstances that needed to be taken into account in determining whether Officer Palmer's actions had impaired the efficient operation of the public service. We stated that Officer Palmer's actions either did, or did not impair the efficiency of the public service, *despite mitigating circumstances*. Finding that Officer Palmer's actions clearly impaired the efficiency of the public service, we held that the Commission's opinion that the two-day suspension was inappropriate was simply a substitution of its judgment for that of the appointing authority.

In Smith v. New Orleans Police Department, 00-1486 (La. App. 4 Cir. 4/11/01), __ So.2d __, we reversed the Commission's reduction of a suspension from five days to two days for an officer's failure to complete an investigation of a shoplifting incident by writing a police report and confiscating surveillance tapes that showed the alleged perpetrator fleeing the scene. We found there was ample evidence to show that the Superintendent acted reasonably and with sufficient legal cause in imposing a five-day suspension under the circumstances of the case.

Recently, in Stevens v. Department of Police, 2000-1682 (La. App. 4 Cir. 5/9/01), __ So.2d __, we reversed the Commission's reduction of a

suspension from fifteen days to ten days for an officer's running of a stop sign and causing an accident with another vehicle. The Commission concluded that the appointing authority had suspended Officer Stevens for just cause; nevertheless, it found that the fifteen day suspension was not commensurate with the dereliction and reduced it to ten days in view of Officer Stevens' exemplary record and the appointing authority's previously imposed disciplinary action in similar cases. We held that the Commission's reduction of the suspension was an arbitrary and capricious interference with the Superintendent's authority to manage the police department.

At the commission hearing, Sgt. Wilson testified that on every occasion that she worked a detail, she called the Second District station and asked the desk officer to enter her name into the detail log. She claimed that she normally used the detail cell phone to call in her details, and that there were toll records indicating such calls. She failed to produce any such records. Nevertheless, the Commission found her testimony in this regard credible, noting that Sgt. Wilson's name was in the logbook on many other occasions when she had worked paid details. Further, the Commission noted that because Sgt. Wilson was not employed in the Second District, it was not reasonable for her to take the steps necessary to ensure that her name was in the log.

Sergeant Reid Noble, an officer assigned to the Public Integrity Division, testified that she conducted an investigation into the charges filed against Sgt. Wilson. In the course of that investigation, she obtained the cell phone records from both the Maple and the Uptown details to determine whether calls had been made to the Second District as claimed. Sgt. Noble found no evidence of any such calls during the relevant time period. Sgt. Noble testified that although an officer could call in to have his name entered into the logbook, the officer had the responsibility of ensuring that his name was in the book.

Assistant Superintendent Ronal Serpas, Chief of Operations, also testified before the commission. He noted that because Wilson was a sergeant, more was expected of her, especially in the area of paid details, where there was a history of misconduct. Chief Serpas testified that the charges against Sgt. Wilson were not mitigated by her claim of asking someone to enter her name into the logbook, because ultimately accountability rested with her.

We conclude that the Commission erred in giving credit to Sgt. Wilson's self-serving testimony that she called in all of her paid details. Sgt. Wilson did not dispute that there were sixteen occasions when she worked details that were not recorded in the logbook. If she had used the detail cell

phones to call in those details, the cell phone records would have reflected such calls. However, there was no evidence of even one such call being made. We reject the Commission's determination that Sgt. Wilson called in all of her paid details.

In sustaining the charge that Sgt. Wilson had worked the Maple detail on eight occasions without submitting a paid detail form and without prior authorization, the Commission opined that it believed Sgt. Wilson's testimony that she submitted the requisite form. Nevertheless, it concluded that her responsibility did not end when she placed the form in the mail. As such, the Commission held her accountable for not following up to ensure that her request to work the detail was approved. The Commission's rejection of the testimony of Sgt. Noble and Chief Serpas that Sgt. Wilson also had the responsibility of ensuring that her name was in the Second District logbook on every occasion that she worked a detail therein was simply an improper substitution of its judgment for that of the appointing authority.

Sgt. Noble testified that it is a privilege for an officer to work a paid detail, not a right. The NOPD has a legitimate interest in ensuring that its officers comply with all of the regulations associated with the privilege of working paid details.

CONCLUSION

Accordingly, for the foregoing reasons, the decision of the Commission returning two days of back pay to Sgt. Wilson is reversed, and the original discipline imposed by the NOPD is reinstated.

REVERSED