KEVIN THOMAS	*	**NO. 2001-CA-1011**
VERSUS	*	**COURT OF APPEAL**
NEW ORLEANS POLICE DEPARTMENT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 6135

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JAMES F. MCKAY, III
JUDGE

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(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr.)

TOBIAS, J., DISSENTS.

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REVERSED AND REMANDED

The plaintiff, Kevin Thomas, appeals the judgment of the Civil Service Commission for the City of New Orleans (CSC), affirming the New Orleans Police Department's (NOPD) decision to terminate his employment.

Officer Thomas was hired by the Appointing Authority for the NOPD, on December 10, 1989 and promoted to his current class on October 11, 1996.

The charges in the case *sub judice* stem from an incident which occurred on June 26, 1999, when Officer Kevin was involved in a physical altercation with fellow officer, Antonius Charles. Officer Charles, prior to entering the police academy, worked in the Public Integrity Division (PID) of the NOPD on various "sting" operations against NOPD officers. After completing the academy, Officer Charles was assigned to the First District. On the day of the altercation Officer Thomas confronted Officer Charles

questioning him about his undercover activities. Words were exchanged between the two officers and resulted in Officer Thomas striking Officer Charles in the face; other NOPD officers broke up the fight. Officer Thomas received a municipal summons for simple battery which was dismissed. Officer Thomas apologized to Officer Charles after the incident.

The matter was reported to the Public Integrity Division. An investigation was conducted by Sergeant William H. Gay, which resulted in a disciplinary hearing. On February 11, 2000, based on the Appointing Authority's recommendation by Bureau Chief Ronald Serpas, Superintendent Richard Pennington suspended Officer Thomas for one hundred thirteen (113) days from July 6, 1999 through October 26, 1999, with a termination date of February 11, 2000. Officer Kevin Thomas' termination was for the violation of internal rules regarding professionalism and adherence to the law, to-wit battery. Officer Thomas timely appealed his termination decision to the CSC; a hearing was held and a ruling upholding his termination was rendered on April 24, 2001.

Kevin Thomas argues that the NOPD was without sufficient cause to terminate his employment. He further argues that the CSC's decision to

affirm the NOPD's termination decision was arbitrary and capricious by ignoring the plethora of testimony supporting a self-defense argument. He additionally argues that the termination of employment penalty was too harsh and not commensurate with the violation and that the CSC was arbitrary and capricious in its judgment. While we disagree with the appellant that the record supports a self-defense argument, we do find validity to his argument that the penalty was not commensurate with his infraction.

In two recent cases from this circuit, Smith v. New Orleans Police Department, 99-0024, (La.App. 4 Cir. 9/22/99), 743 So.2d 834, 837-838 and Stevens v. Department of Police, 00-682, (La. App. 4 Cir. 5/9/01), 789 So.2d 622, this Court set forth the standard of appellate review regarding civil service disciplinary cases as follows:

> In civil service disciplinary cases, an appellate court is presented with a multifaceted review function. Walters v. Department of Police of the City of New Orleans, 454 So.2d 106 (La.1984). First, as in other civil matters, deference will be given to the factual conclusions of the Commission. Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review. Walters, supra.
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> Second, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause

and commensurate with the infraction, the court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by abuse of discretion. La.R.S. 49:964.

Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which 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 the impairment. La. Const. Art. X, Sec. 8(A). The appointing authority must prove its case by a preponderance of the evidence. Cittadino, *supra.*

"Arbitrary or capricious" can be defined as the lack of a rational basis for the action taken. Shields v. City of Shreveport, 579 So.2d 961 (La.1991). A reviewing court should affirm the Civil Service Commission conclusion as to existence or cause for dismissal of a permanent status public employee when the decision is not arbitrary, capricious, or an abuse of the Commission's discretion, as presented in this case.

Employees with the permanent status in the classified civil service may be disciplined only for cause expressed in writing. La. Const., Art. X, Sec. 8(A). Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the public service. Newman v. Department of Fire, 425 So.2d 753 (La.1983).

In reviewing the Commission's findings of fact, the Court's appropriate standard of review suggests that this Court should not reverse or modify such a finding unless it is clearly wrong or manifestly erroneous. If the Commission's order is not arbitrary, capricious or characterized by abuse of discretion, this Court should not modify the Commission's decision. Cittadino, *supra.*

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). However, the authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. Id. at 1222.

In Chapman v. Department of Police, 97-1384 (La.App. 4 Cir. 1/28/98), 706 So.2d 656, we rejected the

Commission's reduction of a suspension from thirty days to ten days, holding that the Commission is not charged with the operation of the NOPD or disciplining its employees. 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. 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, we reversed the Commission's reversal of the NOPD's imposition of a two day suspension. In that case, the Commission substituted its judgment as to the appropriate sanction without an articulated basis for its action. We held the Commission acted arbitrarily and found legal cause for disciplinary action existed where the officer's actions clearly impaired the efficient operation of the public service.

Recently, in Smith v. New Orleans Police Department, 00-1486 (La.App. 4 Cir. 4/11/01), 784 So.2d 806, 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.

The public puts its trust in the police department as a guardian of its safety, and it is essential that the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust. Newman, *supra.* Indeed, the Commission should give heightened regard to the appointing authorities that serve as special guardians of the public's safety and operate as quasi-military institutions where strict discipline is imperative.

Despite the recent case law that this Court has generated, the facts of

this case cause us to take pause. After hearing consistent testimony from multiple witnesses, the Appointing Authority based it decision on a credibility determination on the conflicting testimony of both the appellant and Officer Charles. The conflict in testimony concerns events and colloquies that transpired between Officer Thomas and Officer Charles prior to the June 26, 1999 incident in the roll call room at the First District Police Station. The board simply believed Officer Charles more that the appellant. However, the Appointing Authority failed to offer any evidence that Officer Thomas' conduct impaired the efficient operation of public service.

We find no error in the CSC's affirmation of the Appointing Authority's conclusion that Officer Thomas should be subjected to disciplinary action. Nevertheless, we agree with the dissenting opinion in the CSC's opinion. The dissenting board member concluded that the penalty terminating Officer Thomas was not commensurate with the dereliction. He noted that the appellant had no previous violations of internal regulations during the period prescribed within the Appointing Authority's own Penalty Schedule (i.e., approximately three (3) years), nor was there any documentation that appellant had a previous history of violence. He recommended that one hundred twenty (120) day suspension would be more in line with this violation. We agree. We find Officer Thomas' termination

to be an abuse of discretion.

For the foregoing reasons, we reverse CSC's judgment terminating Officer Thomas, and remand the matter to the CSC for further proceeding consistent with this opinion.

REVERSED AND REMANDED