

JACK HOFFMAN

*

NO. 2001-CA-1302

VERSUS

*

COURT OF APPEAL

**NEW ORLEANS POLICE
DEPARTMENT**

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 6050

JOAN BERNARD ARMSTRONG

JUDGE

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard
Armstrong and Judge James F. McKay III)

HARRY J. BOYER, JR.
FRANK G. DESALVO, APLC
201 SOUTH GALVEZ STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLANT

MAVIS S. EARLY, CITY ATTORNEY
FRANZ L. ZIBILICH, CHIEF DEPUTY CITY ATTORNEY
PATRICK R. BOSSETTA, DEPUTY CITY ATTORNEY
CITY HALL - ROOM 5E03
1300 PERDIDO STREET
NEW ORLEANS, LA 70112

COUNSEL FOR DEFENDANT/APPELLEE

REVERSED AND REMANDED

Jack Hoffman (“Hoffman”) appeals the decision of the Civil Service Commission (“the Commission”) dismissing his appeal of his termination from the New Orleans Police Department (“the NOPD”) for failure to state a right of action.

Hoffman was hired by the NOPD in December 1997. He graduated from the Police Academy in May 1998. He was appointed as a Police Officer I, probationary, on August 30, 1998. By letter dated August 6, 1999, from NOPD Superintendent Richard Pennington, he was terminated because of unsatisfactory performance during his probationary period.

Hoffman appealed his termination to the Commission. The Commission assigned the matter to a Hearing Examiner who conducted hearings on March 21 and April 11, 2000. At the hearings, the NOPD argued that Hoffman had no right of appeal because he had not completed the twelve-month probationary, or “working test period,” prior to his termination. It produced several witnesses who testified that Hoffman was a working test period employee at the time he was terminated, and thus he had no right to appeal the disciplinary action taken against him, absent an allegation of discrimination. The NOPD then rested its case and apparently,

off the record, objected to Hoffman's being allowed to present his case on the grounds of relevancy. For the purposes of efficiency and economy, however, the Commission allowed Hoffman to present his evidence.

Hoffman presented the testimony of Captain Ernest Demma ("Capt. Demma"), Commander of the 8th Police District. Capt. Demma testified that Hoffman had worked under him in the 8th District and that Hoffman was considered to be one of his better employees, consistently being the leader in arrests on the second platoon. He stated that Hoffman had been transferred into the 8th District's Task Unit, a tactical search and find section, due to his proactive work performance and his experience. Capt. Demma stated that an officer had to serve at least one year before being eligible to be appointed to the Task Force, and, to the best of his knowledge, Hoffman had met that requirement. In addition, Hoffman presented testimony and documentary evidence to rebut the merits of NOPD's claim that he had performed unsatisfactorily during his probationary period.

On June 12, 2001, the Commission dismissed his appeal for failure to state a right of action. In its ruling, the Commission noted that "[t]he appellant must complete a working test period in a classified position to attain regular employee status. The appellant clearly did not complete his working test period as a Police Officer I. If the Appointing Authority had

returned the Appellant to his previous position as a Police Recruit, he would have no appeal right in that position either since it is a probational position.” The Commission rejected Hoffman’s contention that he had attained regular employee status by remaining employed for over twelve months. Finding that he had not completed his working test period as a Police Officer I, the Commission ruled that he never attained regular employee status and, as such, had no appeal rights.

Hoffman appeals seeking to have this Court reverse the Commission’s decision denying his right to appeal his termination from the NOPD, and to have this matter remanded to the Commission for a hearing on the merits of his termination from the NOPD.

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 City of New Orleans, 454 So. 2d 106, 112-113 (La. 1984). (emphasis added). 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 Civil Service Rules (the “Rule(s)”) define a “Regular Employee” as “an employee who has been appointed to a position in the classified service in accordance with the Law and these Rules and who has completed the working test period. Civ. Serv. Rule I, § 1.59. A “Working Test Period Employee” is defined as “an employee who has been appointed to a position from an employment list, but who has not completed the working test period. That definition further provides that “the terms ‘probation period’ and ‘probation employee’ shall be considered identical with ‘working test period’ and ‘working test employee.’” Civ. Serv. Rule I, § 1.75.

Rule VII is entitled “Working Tests”. Section 1.1 of that rule provides, in pertinent part, the following:

Every person appointed to a position in the classified service ... shall be tested by a working test while occupying the position. At any time during his working test period, after the first two months thereof, the appointing authority may remove an employee if, in the opinion of the appointing authority, the working test indicates that (1) the employee is unable or unwilling to perform his duties satisfactorily or (2) his habits and dependability do not merit his continuance in the service... Upon the removal, the appointing authority shall forthwith report to the Director and to the employee removed his action and the reason therefore.

According to Rule IX, § 1.2, “in every case of termination of employment of a regular employee, the appointing authority shall conduct a pre-termination hearing as required by law and shall notify the employee of

the disciplinary action being recommended prior to taking the action. Rule II, §4.1 provides that “[r]egular employees in the classified service shall have the right to appeal disciplinary actions to the Commission.”

Probationary employees have no such rights. Mariani v. Police Dept., 96-0871 (La. App. 4 Cir. 12/27/96), 686 So. 2d 1012 (As probational employees, police recruits did not have a right to appeal their dismissals). Rule II, § 4.5 and 4.6 authorize limited appeal rights for a probational employee who alleges discrimination.

The burden of proof is on the appointing authority to prove that an employee does not have permanent status. Walton v. French Market Corp., 94-2457 (La. App 4 Cir. 4/26/95), 654 So. 2d 885, 886.

In his sole assignment of error, Hoffman alleges that the decision of the Commission is arbitrary, capricious, and clearly erroneous because he was actually employed by the NOPD in excess of twelve months subsequent to his graduation from the Academy. Accordingly, he claims the right to appeal his termination, even though he was not promoted to Police Officer I, probationary, until August 30, 1998.

Hoffman contends that he was actually performing the duties of a Police Officer I prior to his official classification on August 30, 1998. He claims that since his graduation from the Academy in May 1998, he was

being trained and regularly rated by his Field Training Officers. While Hoffman admits that the first two weeks of his training were mainly observational, he claims that thereafter he was actually working and performing the duties of a Police Officer I, albeit under the supervision of a Field Training Officer.

Once a recruit graduates from the Police Academy, he is eligible to be classified as a Police Officer I, probationary. Hoffman argues that the fact that the NOPD fails to so classify him, but nevertheless assigns him the duties of a probationary Police Officer I, should entitle him to count the time served before his official classification, thereby entitling him to appeal the disciplinary action taken against him by the appointing authority. Otherwise, the NOPD could hold a non-classified officer in limbo, thus defeating the purpose of the Civil Service rules.

The NOPD contends that the one-year working test period for a police recruit does not begin until the date that recruit is promoted to the permanent civil service grade for which he was hired. As such, Hoffman had never attained regular employee status and, therefore, he had no right to appeal his termination from the NOPD.

In Maggio v. Department of Public Safety, Drivers License Division, 234 So. 2d 844, 846 (La. App. 1 Cir. 1970), the First Circuit found that “**the**

probationary period commences the first day the employee starts performance of the duties for which he is engaged.” In so finding, the court disagreed with the Commission’s finding that the probationary period commenced on the date a position was offered to a prospective employee, reasoning that until the employee actually commences working, his supervisors were in no position to judge the quality of his performance and to supervise his activities.

The NOPD states in its brief to this Court that “[a]n applicant wishing to become a New Orleans Police Officer is first hired as a recruit and must undergo the rigorous training administered by the Municipal Training Academy (MTA).” It goes on to state that “[u]pon graduation from the MTA, the recruit is appointed as a PO-1.” (emphasis added).

We hold that Hoffman did acquire the right to appeal his termination from the NOPD, despite his not occupying the technical classification of Police Officer I, probationary, for one year prior to his termination. Hoffman was working in the field from the time of his May 1998 graduation from the Police Academy until his August 30, 1998 classification as a Police Officer I, probationary. The NOPD admitted that Hoffman was eligible to be appointed as a Police Officer I upon his graduation. Even upon pointed questioning from the Hearing Examiner, the NOPD never provided an

explanation of the reason for the delay between his graduation and his official classification. Hoffman was actually performing the duties for which he was hired, and being evaluated in that performance, since completing the two weeks of training after his May 1998 graduation. He should not be penalized for the NOPD's delay in officially classifying him.

The decision of the Commission is reversed and this matter is remanded for a hearing on the merits of whether Hoffman was properly terminated from the NOPD.

REVERSED AND REMANDED