

CHIEF DEPUTY CITY ATTORNEY
MAVIS J. EARLY, CITY ATTORNEY
1300 PERDIDO STREET
CITY HALL - ROOM 5E03
NEW ORLEANS, LA 70112
COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED.

This is an appeal by New Orleans Fire Department (“NOFD”) Captain Joseph Boyd from a decision of the Civil Service Commission (“Commission”), affirming his transfer from the training academy. For the following reasons, we affirm the decision of the Commission.

Captain Boyd was a thirty-year veteran of the NOFD and had been an instructor at the training academy for ten years. In May 2000, NOFD District Chief David Tibbetts was appointed as director of the training academy. Upon his arrival at the academy, Chief Tibbetts announced that he intended to evaluate and make changes in the training process, as well as changes in personnel.

In August 2000, Captain Boyd and Captain Earl Valois, another instructor at the academy, complained that a training exercise employed by Chief Tibbetts was unsafe because it required a recruit to enter a burning building without breathing apparatus. Despite the complaints, Chief

Tibbetts continued the exercise.

Approximately two months later, Chief Tibbetts requested that several captains, including Captains Boyd and Valois, be transferred from the training academy to new assignments. The transferees included Captains who did not complain about the training exercise.

Captains Boyd and Valois appealed their transfers to the Commission, complaining that the transfers were in retaliation for their earlier complaints about the training exercise. They contended that the transfers resulted in a reduction in their rate of pay. On the other hand, Chief Tibbetts contended that the transfers were not retaliatory but were part of the changes he announced at the time of his appointment. The NOFD further disputed that the transfers resulted in a reduction of pay.

The Commission heard the matter and ruled on 9 October 2001, upholding the transfers of Captains Boyd and Valois. The Commission found that while the Captains' activities were protected, they failed to establish a causal relationship between their complaints and the transfers. It also found that the pay differential did not evidence an adverse action and was clearly not discipline. Because fire instructors cannot earn overtime, the

pay differential was created to compensate fire instructors for the overtime they could not earn. After the transfers, they could earn overtime and had no further need for a pay differential.

Captain Boyd appeals from this decision.

In civil service disciplinary cases, an appellate court is presented with a multifaceted review function. *Muhammad v. New Orleans Police Department*, 2000-1034 (La. App. 4 Cir. 7/11/01), 791 So. 2d 788. First, as in other civil matters, deference is given to the factual conclusions of the Commission. Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court applies the clearly wrong or manifest error rule prescribed generally for appellate review. *Walters v. Department of Police of the City of New Orleans*, 454 So.2d 106 (La.1984).

Second, in evaluating the Commission's determination as to whether the alleged disciplinary action is both based on legal cause and commensurate with the infraction, the reviewing court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by abuse of discretion. La. R. S. 49:964.

"Arbitrary or capricious" is defined as the lack of a rational basis for

the action taken. *Shields v. City of Shreveport*, 579 So.2d 961 (La. 1991).

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).

Captain Boyd testified that he complained twice to Chief Tibbetts about the lack of breathing equipment before the burning exercise. Approximately two weeks before his transfer, Captain Boyd complained directly to the NOFD Superintendent McDaniels. After the transfer, Captain Boyd met with the superintendent face-to-face. Superintendent McDaniels offered Captain Boyd a position at fire headquarters, but Captain Boyd refused. However, Superintendent McDaniels would not discuss the transfer other than to say that Chief Tibbetts had requested it. It is undisputed that Captain Boyd had a clean record while at the training academy.

Chief Tibbetts testified that his task when assigned to head the

training academy was to “aggressively” restructure and modernize the school. Following that directive, he compiled the transfer list in question. He understood that all personnel assigned to the academy, including him, were under a *provisional* status. Chief Tibbetts denied that Captain Boyd’s transfer was in retaliation for his complaints about the training exercise, but instead for his attitude and the fact that Captain Boyd had been at the academy for so long.

Terry Tullier, Deputy Chief of Administration, also testified. He was part of the decision-making process that hired Chief Tibbetts. It was the feeling of Superintendent McDaniels and Assistant Superintendent Conrad that the training division had languished for some time. They wanted to see it move in a more progressive and aggressive direction through more contemporary training. Chief Tibbetts, who was then the Director of Special Operations, had exhibited a progressive attitude and had an extensive training background. They promoted Chief Tibbetts and offered him the opportunity to make the changes he thought necessary. Those changes could include materials, such as computers, the physical facility itself, and personnel.

Deputy Chief Tullier testified that he believed Captain Boyd was transferred because Chief Tibbetts thought he had been in the job for too long and had developed a lackadaisical attitude. He was not, however, aware of anything in writing to reflect that.

J. Michael Doyle, Director of Personnel of the Department of Civil Service, testified that the position of Fire Education Officer was established by the Commission years earlier as a provisional appointment to which classified employees, holding the position of Captain, are assigned while serving in an educational and training function with the NOFD.

In establishing the provisional position, the Commission recognized that Captains who were appointed as Fire Education Officers would work a “9-to-5” day during a five-day workweek on a salaried basis. Consequently, they would lose compensation for overtime hours that are customarily worked by Captains on regular tours of duty with a platoon. To adjust for the inequity in pay, the Commission established the position of Fire Education Officer with a higher base pay to compensate those who held the position for the loss of overtime hours.

We find no evidence in the record to support Captain Boyd’s

allegation that his transfer was retaliatory. Admittedly, the timing of the transfer, coming about two weeks after Captain Boyd complained to Chief Tibbetts' superiors, appears suspicious. However, without more we cannot reverse the Commission. In support of the Commission's findings, Chief Tibbetts announced shortly after his arrival at the academy that changes in personnel would occur. Several of the Captains transferred did not complain about the burning exercise. Further, the position as a Fire Education Officer was a provisional one; no one was permanently assigned to the academy. Finally, we find that there was no reduction in pay since Captain Boyd could work overtime to make up the differential.

Accordingly, we affirm the decision of the Commission. All costs of this appeal are assessed against the appellant.

AFFIRMED.

