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REVERSED

The New Orleans Police Department (“the NOPD”) appeals a decision of the Civil Service Commission of the City of New Orleans (“the Commission”) reversing a one-day suspension imposed by the Superintendent of the NOPD on Officer Kenya Huggins for violation of NOPD regulations regarding radio protocol.

FACTS AND PROCEDURAL HISTORY

Officer Huggins is a Police Officer I who has achieved permanent status in the classified city service. On September 3, 1998, during the course of a high-speed chase, Officer Huggins was heard making the following statement over an active NOPD radio frequency: “Get out, bitch”.

Following an investigation, it was determined that Officer Huggins had violated NOPD regulations, which provide, in pertinent part:

Chapter 81.11 RADIO PROTOCOL

4. Employees shall maintain a courteous, professional demeanor in all radio transmissions. Employees shall not engage in disputes, arguments, or disagreements on the radio. Employees shall not use obscene language or degrading remarks on the radio.

By letter dated April 26, 2000, NOPD Superintendent Richard Pennington informed Officer Huggins that he had approved Bureau Chief Ronald Serpas' recommendation that Officer Huggins receive a one-day suspension for his violation.

Officer Huggins timely appealed his suspension to the Commission. Testimony was taken before a hearing examiner on January 18, February 7, and March 21, 2001. In an opinion rendered on October 24, 2001, the Commission reversed Officer Huggins' one-day suspension, finding that "the inadvertent use of the word bitch while in a high-speed chase is not the situation calculated by the radio protocol rule. We find that the Appellant's use of the word bitch while talking to himself only makes the Appellant human and is excusable conduct."

The NOPD thereafter filed a motion for rehearing, which the Commission denied. This timely appeal followed.

STANDARD OF REVIEW

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, supra, 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. 4th 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.

Upon review of the Commission's exercise of its discretion in determining whether the disciplinary action is based on legal cause and whether 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, supra, 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.

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. 4th 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.

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 p. 1223.

DISCUSSION

In its sole assignment of error, the NOPD asserts that the Commission acted arbitrarily and capriciously and committed clear error in reversing the one-day suspension imposed by the Superintendent of the NOPD, and that the Commission exceeded its constitutional authority by substituting its

judgment for that of the appointing authority. More specifically, the NOPD argues that the Commission erred by finding that Officer Huggins' committed only a technical violation of the rule which it concluded was not actionable because Officer Huggins had uttered the subject phrase to himself, rather than to the suspect directly. The NOPD points out that this distinction has no significance because the regulation prohibits the transmission of "obscene language or degrading remarks on the radio" without regard to whom those remarks are directed. Accordingly, the NOPD claims that the Commission's decision was merely a substitution of its judgment for that of the appointing authority. It further argues that the NOPD proved that it had cause for disciplining Officer Huggins and that the modest one-day suspension imposed was commensurate with the offense. Thus, the NOPD requests that this court reverse the Commission and reinstate the original one-day penalty assessed against Officer Huggins for his breach of the radio protocol regulation.

In response, Officer Huggins focuses on the Commission's finding that he did not intend to transmit his comment over the radio. He also quotes the following portion of a statement that the Commission made regarding the NOPD's Motion for Rehearing:

Contrary to the Appointing Authority's representations in support of the motion, the misconduct alleged in the disciplinary letter that resulted in the portion of the suspension

that we reversed was not supported by the facts. The disciplinary letter contends that the Appellant stated to the suspect, "Get out, bitch". However, the testimonial evidence obtained during the hearing merely established that the Appellant while in pursuit of the suspect stated to himself, "bitch", as the suspect tried to avoid capture. To suspend the Appellant for making this statement to himself is arbitrary, and the Motion for Rehearing is denied.

Officer Huggins contends that his comment "was merely an aside in the privacy of his vehicle, made without realizing the same was being transmitted" and that "he was not using his statement to communicate this remark over the radio". He contends that because the appointing authority failed to prove any facts to the contrary, it failed to carry its burden of proof, and thus the Commission's decision should be affirmed.

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 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. Similarly, 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 to ten days, holding that the Commission is not charged with the operation of the NOPD or the disciplining of its employees. Importantly, we noted that although the Commission concluded that Chapman had violated departmental regulations, 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 had carried its burden of proof. Accordingly, the Commission's decision was an arbitrary and capricious interference with the authority of the Superintendent to manage his department.

Similarly, in the instant case, we find that the Commission improperly substituted its judgment for that of the appointing authority when it reversed the one-day suspension imposed on Officer Huggins for violation of radio protocol. While it is true that Officer Huggins' disciplinary letter inaccurately states that the offensive statement transmitted over his police

radio was made directly to the arrested subject, that inaccuracy was pointed out at the hearing. Furthermore, the NOPD presented sufficient testimony to show that the inaccuracy was not relevant to the validity of disciplinary action taken against Officer Huggins, although that testimony is not mentioned in the Commission's decision. Sergeant Jacklean Davis investigated the charges brought against Officer Huggins. She testified that she recommended that a discourtesy violation be sustained against Officer Huggins because of his lack of discretion in his on-air transmission, even though his statement was not made to the suspect directly. In response to questioning by the hearing examiner, Sgt. Davis testified that the NOPD would consider *any* transmittal of the language used by Officer Huggins over the air as improper, and that transmittal of the same language directed to an individual would simply be viewed as more inappropriate. Captain Lonnie Swain testified that he had reviewed Sgt. Davis' investigative report and that he agreed with the recommendation that a charge of misconduct regarding radio protocol should be sustained against Officer Huggins. NOPD Assistant Superintendent Ronal Serpas testified that he, too, recommended that charges of improper radio protocol be sustained against Officer Huggins because of the inappropriate language that he transmitted over his radio, and that it made no difference whether or not the statement

had been made directly to the suspect. He further testified that the department was striving to create a professional class of police officers and that the exclamation of an expletive over the radio is, as a rule, viewed as a problem by the NOPD.

The hearing officer made it clear that he believed that Officer Huggins should not be disciplined for his inadvertent use of an expletive that was broadcast over his police radio during the heat of a high-speed chase because the statement was not directed at anyone. However, the NOPD produced three witnesses who each testified that the NOPD deemed any use of inappropriate language over its airways as warranting disciplinary action. By presenting this testimony, the appointing authority more than sufficiently sustained its burden of proving that a factual basis existed for the one-day suspension levied against Officer Huggins for his violation of radio protocol, that such conduct impaired the efficiency of the police department, and that the discipline imposed was commensurate with the infraction. The Commission heard this testimony and chose to ignore it. In doing so, it improperly substituted its judgment for that of the appointing authority and impermissibly interfered with Superintendent Pennington's authority to manage the police department.

As we noted in Stevens v. Department of Police, 2000-1682, p. 8 (La.

App. 4 Cir. 5/9/01), 789 So. 2d 622, 627:

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. 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. [citation omitted]

We conclude that the Commission acted arbitrarily and capriciously in reversing the NOPD's limited suspension of Officer Huggins simply because it viewed his actions as excusable conduct; the Commission therefore abused its discretion.

CONCLUSION

For the foregoing reasons, the Commission's decision to reverse the one- day suspension imposed on Officer Huggins for violation of the radio protocol regulation is reversed, and the suspension is reinstated.

REVERSED