

JOSEPH SCANIO

*

NO. 2004-CA-1465

VERSUS

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COURT OF APPEAL

**NEW ORLEANS POLICE
DEPARTMENT**

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 6765

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CHARLES R. JONES
JUDGE

* * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge
Roland L. Belsome)

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AFFIRMED

The City of New Orleans, Department of Police (hereinafter, “NOPD”) appeal the decision of the New Orleans Civil Service Commission, which reversed the disciplinary action by the NOPD, against Officer Joseph Scanio. We affirm.

Officer Scanio is assigned to the Seventh Police District and has achieved permanent status in the Civil Service System. On August 19, 2003, Officer Scanio was involved in a traffic accident while driving a department vehicle. Following an administrative inquiry, the NOPD suspended Officer Scanio for three days for failing to maintain control of the vehicle, and for violating Rule IX of the Rules of the Civil Service Commission for the City of New Orleans relative to maintaining standards of service. Officer Scanio appealed to the Civil Service Commission, and hearings were held on February 11, 2004 and March 10, 2004. The Commission reversed the three-day suspension, and the NOPD now appeals this decision.

The Traffic Accident Review Board conducted an administrative

inquiry into the accident. That inquiry determined that:

...on August 19, 2003, at approximately 9:28 p.m., you were involved in a traffic accident at the location of I-10 West and its intersection with Read Boulevard, while driving a department vehicle. This accident occurred as you were responding to a call for assistance by plain clothes officers in an unmarked car which was following behind a stolen vehicle on I-10 West toward Crowder Boulevard. You entered the interstate system at Bullard Avenue without utilizing your vehicle's overhead emergency lights or siren and was traveling westbound in the center travel lane. Another unknown marked police car entered the interstate system at Bullard Avenue and was traveling behind you. Upon reaching the Read Boulevard overpass, you decided to initiate a lane change to the right westbound travel lane. You checked the interior and exterior rearview mirror of your patrol vehicle before initiating the lane change and did not see any vehicles to the right. As you initiated the lane change, you observed the unmarked police car at the last moment passing on your right at a high rate of speed. You immediately steered your patrol vehicle back to the left to avoid colliding with the unknown police car when the rear of your patrol vehicle began to rotate back and forth. As a corrective maneuver, you steered your patrol vehicle back to the right when the vehicle began to slide toward the right striking the concrete guardrail. You failed to maintain control of the department's vehicle...

Disciplinary letter, December 1, 2003.

Based upon the facts contained in the disciplinary letter dated December 1, 2003, and the Accident Review Board Recommendation dated October 29, 2003, it appears that the Traffic Accident Review Board accepted Officer Scanio's version of the facts, that the accident resulted from a sequence of events caused by another vehicle's unsafe lane change, and that Officer Scanio damaged his department vehicle in an attempt to avoid a more serious collision.

Nevertheless, the Board classified the accident as preventable.

Thereafter, Superintendent Edwin P. Compass, III suspended Officer Scanio for three days for failing to maintain standards of service as prescribed by Rule IX, Section 1, paragraph 1.1 of the Rules of the Civil Service Commission for the City of New Orleans. That rule provides, in pertinent part, that when a classified employee is unable or unwilling to perform his duties in a satisfactory manner or has committed any act to the prejudice of the service, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service. This action may include, *inter alia*, suspension without pay not exceeding one hundred twenty calendar days. Superintendent Compass noted that he considered Officer Scanio's past driving record with the department in assessing the penalty against him.

At the February 11, 2004 hearing before the Commission, the NOPD called the investigating officer, Officer Edwin Ducote, Jr., and the supervising officer, Sergeant Salvator Corona, to testify on behalf of the appointing authority. Officer Ducote testified that at the scene of the accident he spoke to both Officer Scanio and his partner, Officer McDonald; however, he did not take a statement from Officer McDonald. He further testified that the entire right side of the vehicle had been damaged by a

sideswipe of the guardrail at Read Boulevard, that Officer Scanio reported he had entered the I-10 westbound at Bullard Avenue to assist an unmarked vehicle following a stolen vehicle, that another unmarked car entered the I-10 behind him, and that while approaching Read Boulevard, he attempted a lane change, looked in the rearview mirror and did not see the unmarked car. Officer Scanio reported to Officer Ducote that he then started into the lane, but the unmarked car had already gained the lane and was traveling at a high rate of speed, therefore he turned back to the left to avoid hitting this unknown, unmarked vehicle. Officer Scanio's car began to "fishtail" so he swerved back to the right and hit the guardrail.

The supervisor on duty, Sergeant Salvator Corona, reported to Officer Ducote that he did not know the identity of the driver of the unmarked car. Nevertheless, Officer Ducote testified that he had no reason not to believe that Officer Scanio was truthful in reporting the presence of the "phantom" vehicle. While Officer Ducote determined that Officer Scanio was in violation of careless operation of a vehicle, he issued no citations.

Sergeant Corona also testified that he went to the accident scene, and spoke to both officers. Sergeant Corona opined that the accident had been unavoidable because Officer Scanio responded in a manner which was necessary to preserve the lives of the persons involved resulting in "only

moderate damage, property damage.”

At the March 10, 2004 hearing, Officer Scanio testified that on August 19, 2003, at 9:28 p.m., he was driving a marked police vehicle, responding to assist an unmarked red Chevrolet van that was chasing a stolen vehicle, traveling west. He entered the service road to I-10 on Bullard Avenue, and then entered the I-10. A marked vehicle was immediately behind him. Both were in the center lane. Neither had their lights or sirens on so as not to alert the stolen vehicle. As the vehicles approached Read Boulevard, a black SUV was in the center lane, uninvolved in the chase. Officer Scanio began to change into the right lane, and turned on his turning indicator, expecting the other marked car to give him access to the lane, but the other marked car had entered the lane first and then hit the brakes. Officer Scanio swerved hard, back into the center lane, to avoid striking the other marked vehicle. The rear of his car began to skid, and to avoid hitting a guardrail, he swung back to the right. The driver of the SUV hit the brakes, and Officer Scanio was unable to continue straight to allow his car to gain traction. To avoid striking the SUV, he struck the guardrail. He did not learn the identity of the driver of the other marked vehicle because it did not stop following the collision.

The NOPD introduced into evidence the Accident Review Board

Recommendation which states that damages to the vehicle totaled \$8,542.78.

The Commission reviewed a copy of the transcript and all documentary evidence presented at the hearings. In its decision rendered on July 27, 2004, the Commission found that the appointing authority's finding that Officer Scanio lost control of the car and caused an otherwise avoidable accident was wrong, and reversed, stating:

Based upon the facts contained in the disciplinary letter, it appears that the Appointing Authority accepted the Appellant's explanation of the facts. The accident resulted from a sequence of events that were triggered by another vehicle's unsafe lane change. The Appellant damaged his departmental vehicle in an attempt to avoid a more serious accident. Consequently, the loss of control that resulted in the collision with the guardrail was unavoidable. Considering the foregoing, the Appointing Authority has failed to establish that it disciplined the Appellant for cause. Accordingly, the Appeal is GRANTED.

This timely appeal followed.

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. La. Const. art. X, Sec. 8 (A); *Fihlman v. New Orleans Police Department*, 2000-2360 (La. App. 4 Cir. 10/31/01), 797 So. 2d 783, 786, reh'g denied (Nov. 16, 2001). The employee may appeal from such disciplinary action to the City Civil Service Commission.

Id. 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); *Fihlman* at 786.

The Civil Service Commission has a duty to decide independently from the facts presented whether the appointing authority has a good or lawful cause for taking disciplinary action and, if so, whether punishment imposed is commensurate with the dereliction. *Walters v. Department of Police of New Orleans*, 454 So. 2d 106, 113 (La.1984). 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, 1315 (La. App. 4 Cir. 3/14/90). The appointing authority has the burden of proving by the preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* at 1315; La. Const. art. Sec. 8 (A).

In civil service disciplinary cases, an appellate court is presented with a multifaceted review function. First, as in other civil matters, deference will be given to the factual conclusion of the Commission. Hence,

in deciding whether to affirm the Commission's factual finding, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review. *Walters*, 454 So. 2d at 114.

Second, in evaluating the Commission's determination as to 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. *Id.* "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; *Walters*, 454 So. 2d at 114.

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, 754 (La 1983).

The appointing authority is charged with the operation of his or her department and it is within his or her discretion to discipline an employee for sufficient cause. *Joseph v. Department of Health*, 389 So. 2d 739, 741 (La. App. 4 Cir.9/19/80); *Branighan v. Department of Police*, 362 So. 2d 1221, 1223 (La. App. 4 Cir. 9/12/78). He is the one who must run the department,

an obviously necessary part of which is dismissing or disciplining employees. While he may not do so without cause, he may, and indeed must, within the exercise of sound discretion, dismiss or discipline an employee for sufficient cause. The Commission is not charged with such operation or such disciplining. *Id.* However, 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* at 1223.

In *Stevens v. Department of Police*, 2000-1682 (La.App. 4 Cir. 5/9/01), 789 So. 2d 622, the officer was responding to a call of an undercover officer in distress. The officer ran a stop sign on a prominent, busy Uptown street and totaled the police vehicle. The parties stipulated that his view was blocked by an oak tree. Additionally, the NOPD called Deputy Superintendent Johnson, Chairman of the Traffic Accident Review Board that had investigated the accident, who testified that the Board had voted to suspend the officer based on his failure to yield the right of way and the severity of the accident. He further testified that the department vehicle sustained significant damage and had remained inoperable for nearly a year which further burdened the NOPD's already heavily burdened fleet of patrol vehicles. The Commission concluded that the appointing authority had

suspended the officer for just cause; however, it found that the fifteen-day suspension was not commensurate with the dereliction and reduced it to ten days in view of the officer's exemplary record and the appointing authority's previously imposed disciplinary action in similar cases. This Court reversed, reinstating the fifteen-day suspension, finding that legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged.

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 which needed to be taken into account in determining whether the officer's actions had impaired the efficient operation of the public service. We stated that the officer's actions either did or did not impair the efficiency of the public service, despite mitigating circumstances. Finding that the officer's actions clearly impaired the efficient operation of the public service, we held that the Commission erred when it substituted its judgment for that of the appointing authority.

On the other hand, in *Smothers v. Department of Police*, 2000-1518

(La. App. 4 Cir. 5/16/01), 787 So. 2d 1110, we affirmed the Commission's reversal of the NOPD's imposition of a three-day suspension where an officer was charged with failure to appear as a witness in municipal court in response to a subpoena. We found that the record supported the Commission's view of the facts and its decision. Accordingly, we held that the Commission was within its authority to reverse the NOPD's action because the Commission determined that Smothers was not disciplined for cause. In so holding, we noted that the Commission had done what it was supposed to do when it prevented the NOPD from acting arbitrarily.

Also, in *Fihlman v. New Orleans Police Department*, 2000-2360 (La. App. 4 Cir. 10/31/01), 797 So. 2d 783, we affirmed the Commission's finding that an officer involved in a vehicular collision was not disciplined for cause where he testified that several obstructions blocked his view of traffic on the street where the collision occurred. In *Fihlman*, the visual obstructions were clearly noted in the accident report which the parties stipulated to. Moreover, the department offered no evidence of how the officer's actions impaired the efficient operation of public service other than a conclusory statement in the superintendent's disciplinary letter that the officer had disregarded the laws and policies governing traffic.

In *Fihlman*, the Commission held that the officer acted responsibly

and did not intentionally cause the accident. The Commission further found that the fact that the officer's vision was obstructed by a building and the absence of a proper four-way stop light made the accident unavoidable. Thus, the Commission found that the action of the appointing authority was not supported by the testimony and evidence.

In its sole assignment of error, the NOPD argues that the Commission acted arbitrarily and capriciously in reversing the three-day suspension imposed by the Superintendent and exceeded its constitutional authority by substituting its judgment for that of the appointing authority.

We disagree. The NOPD had the burden of proving to the Commission, by a preponderance of the evidence, the facts upon which it based its disciplinary action against Officer Scanio. At the hearings, the NOPD called two witnesses, the investigating and supervising officers, and questioned Officer Scanio about the accident. The testimony of both witnesses called by the NOPD, supports the Commission's finding that the appointing authority failed to prove that the accident was preventable. The investigating officer testified that he had no reason not to believe Officer Scanio's version of how the accident occurred, and that there was a "phantom" vehicle as described by Officer Scanio. Additionally, the supervising officer testified that in his opinion the accident was unavoidable.

As such, we cannot say that the Commission's finding that the appointing authority failed to prove that the accident was preventable was manifestly erroneous.

More importantly, the NOPD offered no evidence of how Officer Scanio's actions impaired the efficient operation of the public service other than the conclusory statement in Superintendent Compass' disciplinary letter that Officer Scanio had disregarded laws and policies governing traffic laws and safe driving practices and that his conduct was contrary to the standards of service prescribed by Rule IX of the rules of the Commission.

Finally, although Superintendent Compass referred to Officer Scanio's past driving record with the department in his decision to impose the three-day suspension, the NOPD offered no evidence with regard to Officer Scanio's prior driving record.

The Commission found that "the Appointing Authority has failed to establish that it disciplined the Appellant for cause." Viewing the record as a whole, we cannot say that the Commission's decision was manifestly erroneous. As we found in *Smothers and Fihlman*, there is ample evidence in the record to support the Commission's view of the facts and its decision. The NOPD simply failed to prove to the Commission that it had legal cause to suspend Officer Scanio or that a three-day suspension was commensurate

with the infraction. As such, the Commission's decision to reverse that suspension was not arbitrary nor capricious, nor can its decision be viewed as an improper substitution of its judgment for that of Superintendent Compass.

We find this case to be distinguishable from *Stevens and Palmer*, because herein, the NOPD offered no testimony regarding how Officer Scanio's actions impaired the efficient operation of the police department as in *Palmer*. Moreover, herein, the testimony of the NOPD's own witnesses supports the Commission's conclusion that the accident was unavoidable, unlike in *Stevens* where the NOPD's witnesses testified that the officer did not follow police procedure.

DECREE

Accordingly, the judgment of the Civil Service Commission reversing the three-day suspension imposed upon Officer Scanio by the NOPD is affirmed.

AFFIRME

D.

