NOT DESIGNATED FOR PUBLICATION

RUDOLPH FASCIO	*	NO. 2004-CA-1535
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. 6752

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris Sr., Judge Michael E. Kirby, and Judge Terri F. Love)

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REVERSED

The appellee, Rudolph Fascio, was on furlough (annual leave) from December 1, 2002 through December 7, 2002 and again from December 15, 2002 through December 21, 2002. During the first of the above two weeks, he worked fifty-six hours and fifteen minutes doing paid detail work. During the second week, he worked twenty-five hours and fifteen minutes. The Appointing Authority disciplined him by suspending him for one day for violating General Order No. 519, Paid Details which provides:

> The purpose of this General order is to establish a twenty four (24) hour per week limitation on paid details. This limitation shall supersede the twenty (20) hour limitation previously set by the Superintendant of Police in January, 1995, and subsequently reiterated in General Order 499, dated September 14, 1995. Effective Sunday March 31, 1996, members shall not exceed twenty-four (24) hours of paid detail in any one week.

Appellee appealed his one-day suspension, and the Civil Service Commission in an opinion rendered August 2, 2004, found that the appellant (NOPD) had failed to show how the number of detail hours a police officer worked, while on vacation, affected his performance as a police officer. The Commission reversed the Appointing Authority and ordered that all back pay and benefits be restored.

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 (La. 1984). 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. *Cittadino v. Department of Police,* 558 So.2d 1311 (La. App. 4 Cir.3/14/90). In reviewing the decisions of a Civil Service Commission, a reviewing court should not reverse a Commission conclusion as to the existence or absence of cause for dismissal, unless the decision is arbitrary, capricious or an abuse of the Commission's discretion. *Jones v. Louisiana Dept. of Highways,* 259 La. 329, 250 So.2d 356 (1971); *Konen v. New Orleans Police Department,* 226 La. 739, 77 So.2d 24 (1954).

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.

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. He alleged his view was blocked by an oak tree. The Superintendent issued a disciplinary letter, imposing a fifteen day suspension. The Commission reduced the suspension to ten days, and 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. *Cittadino,* 558 So.2d at 1311. 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. *Id.* "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 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,* 558 So.2d at 1311. 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. 9/12/78). However, the authority to reduce a penalty can only be exercised

if there is insufficient cause for imposing the greater penalty. *Id.* at 1222.

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, supra.* The Commission is not charged with such operation or such disciplining. *Id.* In *James v. Sewerage and Water Bd of New Orleans,* 505 So.2d 119 (La. App. 4 Cir. 3/16/87), we considered a decision of the Commission that reversed a five day suspension of an employee and suggested a reprimand instead. In reversing the Commission and reinstating the suspension, we reaffirmed and reiterated the holdings in *Joseph* and *Branighan,* finding that it is not the job of the Commission to decide who should be disciplined how. The Appointing Authority is charged with the operation of his department. 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.* at 121.

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.

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.

Here, the appellant makes the point that even though the appellee was on vacation, he could have been called back into service at any time. The purpose of the rule that off-duty officers be limited to a specific amount of time they may commit themselves to detail work is that an officer not be exhausted when called into regular service. Even though we are sympathetic to the appellee whose industry was admirable during the holidays, we are constrained to find that the rule that the appellee violated did not make a distinction between working excessive overtime hours during vacation versus working that same amount of time during his regular employment. The rule does appear flawed. We are also impressed by the appellee's

outstanding record of service. Nevertheless, the appellee disobeyed the rule; and, regretfully, we must reverse the finding of the Commission.

REVERSE
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