

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1483

DAVID BLANCHARD

VERSUS

LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

Judgment Rendered: MAY 29 2014

APPEALED FROM THE STATE CIVIL SERVICE COMMISSION
STATE OF LOUISIANA
DOCKET NUMBER S-17059
HONORABLE DAVID DUPLANTIER, CHAIRMAN;
JOHN MCCLURE, VICE-CHAIRMAN;
C. PETE FREMIN, D. SCOTT HUGHES
AND SIDNEY TOBIAS; MEMBERS

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

This is an appeal of a decision of the State Civil Service Commission (CSC) dated May 22, 2013, filed by the Department of Health and Hospitals (DHH). It follows a prior ruling of this court on March 23, 2012, in *Blanchard v. Department of Health and Hospitals*, 2011-1583, (La. App. 1 Cir. 3/23/12), writ denied, 2012-1247 (La. 9/21/12), 98 So.3d 345 (unpublished) (hereafter *Blanchard I*). That decision reversed the termination of Mr. Blanchard, ordered him reinstated, and remanded the matter for a determination of a lesser penalty. On remand, the CSC held a hearing on May 7, 2013, and approved the hearing officer's recommendation of a 720-hour suspension and back wages. That hearing was limited to issues related to reinstatement of Mr. Blanchard and back wages. For the following reasons, we affirm.

Initially, we note that the DHH's understanding of this court's decision in *Blanchard I* seems to be mistaken. DHH submits that the court's "earlier rulings" are "essentially interlocutory and now postured for a final and definitive ruling" by this court. Decisions of this court become final and definitive when writs to the Louisiana Supreme Court are denied or not sought. La. Code Civ. P. art. 2166. Our decisions are based on the record presented to us and the issues that are appealed. La. Code Civ. P. art. 2164. DHH filed a writ application with the Louisiana Supreme Court on June 6, 2012, to review this court's decision in *Blanchard I*. On September 21, 2012, the supreme court denied the writs making that decision final; therefore, any errors attributable to that decision are not subject to review. The appeal here is from the CSC decision dated May 22, 2013. Specifically, the CSC found:

We conclude that the seven-hundred and twenty (720) hour suspension imposed by the referee is commensurate with Mr. Blanchard's offense. DHH shall return Mr. Blanchard to his Engineering Technician 5 position effective November 18, 2010, and pay him back wages, except for the period of suspension imposed

herein, subject to an offset in favor of DHH, for all wages earned and/or unemployment compensation received by Mr. Blanchard, with legal interest on the difference.

DHH alleges four errors in the CSC's decision: (1) Error of forced substituted judgment on severity; (2) Error to order reinstatement; (3) Error to award back wages; and (4) Error to limit hearing on remand. Before rendering its decision, the CSC ordered an evidentiary hearing to be conducted on May 7, 2013, limited to issues related to Mr. Blanchard's reinstatement and back wages. At the conclusion of that hearing, the CSC issued the order that is appealed herein.

The first error submitted by DHH alleges "[e]rror of forced substituted judgment on severity" and the second is "[e]rror to order reinstatement." Both pertain to *Blanchard I* and have nothing to do with the CSC's decision of May 22, 2013. DHH complains that this court had no authority to substitute its judgment for that of the CSC in terms of the severity of the discipline and that it was error to order Mr. Blanchard reinstated to his former position. The present appeal is limited to the CSC's decision on May 22, 2013, and not our decision in *Blanchard I*. As noted, that decision is final and is no longer subject to review.

In error number three DHH alleges that it was "[e]rror to award back wages". The May 7, 2013 hearing was limited to the issues of reinstatement and back pay. DHH requested that the record be reopened for the introduction of additional testimony, but this request was denied. In its written opinion, the CSC noted:

One issue before us in this appeal is a determination of whether Mr. Blanchard is entitled to back pay upon reinstatement. DHH argues that Mr. Blanchard is not entitled to back pay because he did not specifically request an award of back pay in his original appeal; he only requested to be "reinstated."

Civil Service Rule 13.38¹(c) provides:

"If the Commission after any hearing orders a dismissed or suspended employee reinstated, it may reinstate such employee under

¹ The rule is actually Civil Service Rule 13.28(c).

such conditions as it deems proper and subject to Rule 13.18 may order full pay for loss [sic] time.”

This rule indicates that the CSC has the discretion to order back pay to the suspended employee.

Louisiana Revised Statutes 49:113 is applicable to employees who have been reinstated by the appellate court. It states:

Employees in the state or city civil service, who have been **illegally** discharged from their employment, as found by the appellate courts, **shall** be entitled to be paid by the employing agency all salaries and wages withheld during the period of illegal separation, against which amount shall be credited and set-off all wages and salaries earned by the employee in private employment in the period of separation. [Emphasis added.]

This statute requires that the employing agency pay an illegally discharged employee “all salaries . . . withheld during the period of illegal separation.” The statute makes it mandatory to pay back wages. However, a condition precedent to the payment is a finding that the employee was illegally discharged. DHH argues that there has been no finding that Mr. Blanchard was illegally terminated. Normally, an illegal discharge is based on a violation of the employee’s due process rights. See *Perry v. City of New Orleans*, 2011-0901 (La. App. 4 Cir. 2/1/12), 104 So.3d 453, 457. This is because an employee who has been illegally terminated, has not been terminated at all, and is still employed. He or she retains the status of a civil service employee until being lawfully removed or suspended. See *Maurello v. Department of Health and Human Resources, Office of Management and Finance*, 546 So.2d 545, 548 (La. App. 1 Cir. 1989). It may be argued that our decision in *Blanchard I* reversing Mr. Blanchard’s termination is, effectively, a finding that he was illegally terminated. However, we feel Civil Service Rule 13.28(c) is the more applicable statutory authority for Mr. Blanchard’s situation.

Civil Service Rule 13.28(c) provides, “If the Commission after **any** hearing orders a dismissed or suspended employee reinstated, it may reinstate such employee under such conditions as it deems proper and subject to Rule 13.18 may order full pay for lost time.” (Emphasis added). Upon remand from this court, the CSC held a hearing and suspended Mr. Blanchard for 720 hours. Regardless of the reason for holding the hearing, a hearing was, in fact, held. After the hearing in which Mr. Blanchard was ordered reinstated, the CSC ordered that he receive his back pay. Whether to order back pay to Mr. Blanchard was within the discretion of the CSC, and we find nothing arbitrary in this decision.

Assignment of error number four posits that it was “[e]rror to limit [the] hearing on remand.” The CSC, on remand, was only called upon to decide an appropriate penalty for Mr. Blanchard’s behavior. Both parties, Mr. Blanchard and the appointing agency, DHH, were given an opportunity to submit recommendations to the referee on this issue. The CSC referee limited the scope of the hearing to what was necessary to render an appropriate decision. This was the same CSC referee who had rendered the original decision to terminate Mr. Blanchard. The referee stated:

On December 12, 2012, DHH filed a motion requesting that I reopen the record for the introduction of additional evidence. On December 14, 2012, I denied this motion, as I had denied Mr. Blanchard’s earlier motion for an evidentiary hearing, because I had conducted a full hearing on the merits on April 15, 2011, and additional evidence was unnecessary to determine a commensurate penalty.

The parties are not authorized to decide which issues they want reviewed. We find no error in the referee’s decision to limit the issues before him on remand. The decision of the referee was confirmed by the CSC, who thereafter issued the decision that we are reviewing.

Having found no error in the CSC's opinion of May 22, 2013, the decision is affirmed. The costs of this appeal in the amount of five hundred twenty-three dollars (\$523.00) are assessed against the Department of Health and Hospitals.

AFFIRMED.