

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0390

DAIMIAN MCDOWELL

VERSUS

DEPARTMENT OF REVENUE, ALCOHOL AND TOBACCO  
CONTROL

**DATE OF JUDGMENT:** DEC 23 2014

ON APPEAL FROM THE STATE CIVIL SERVICE COMMISSION  
NUMBER 17538  
STATE OF LOUISIANA

DAVID L. DUPLANTIER, CHAIRMAN  
JOHN MCLURE, VICE CHAIRMAN  
G. LEE GRIFFIN, D. SCOTT HUGHES, C. PETE FREMIN,  
RONALD M. CARRERE, AND SIDNEY TOBIAS, MEMBERS  
SHANNON S. TEMPLET, DIRECTOR  
KATHE ZOLMAN-RUSSELL, REFEREE  
DEPARTMENT OF STATE CIVIL SERVICE

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

**Disposition: AFFIRMED.**

*Handwritten initials:*  
JA  
JES  
D

KUHN, J.

Daimain McDowell, a former employee with permanent status of the Louisiana Office of Alcohol and Tobacco Control (ATC), appeals the decision of the Civil Service Commission referee, upholding the disciplinary action of ATC Commissioner, Troy Hebert, the appointing authority, imposing a three-day suspension without pay against McDowell for insubordination. We affirm.

The referee's fully articulated factual findings are not manifestly erroneous. See *Bannister v. Dep't of Streets*, 95-0404 (La. 1/16/96), 666 So.2d 641, 647. And her determination that the disciplinary action is both based on legal cause and commensurate with the infraction is not arbitrary, capricious, or characterized by abuse of discretion. *Id.* Thus, the referee correctly upheld the appointing authority's disciplinary action.

On appeal, in addition to challenging the merits of the referee's decision, McDowell contends that his actions were warranted because the directive of Commissioner Hebert, reinforced by his immediate supervisor, Special Agent in Charge (SAC) Howard Caviness, was illegal. McDowell urges the referee's decision upholding the disciplinary action imposed against him was erroneous because a person cannot be guilty of insubordination for refusal to follow an illegal order. Thus, by way of a defense on appeal, which he did not assert before the referee, McDowell maintains that any directive ordering him not to carry his back-up weapon into the Internal Affairs investigation was illegal because it violated his constitutional rights to bear arms as well federal statutory law.

La. Const. Art. I, § 11 prohibits the infringement of the right to keep and bear arms. The Louisiana Legislature recently enacted 2012 La. Acts, No. 874, § 1 to amend Art. I, § 11, which, as a result, specifically states that the right of each citizen to keep and bear arms is "fundamental and shall not be infringed." The amended

version of Section 11 further states that “[a]ny restriction on this right shall be subject to strict scrutiny.”

While the amended version of Art. I, § 11 was not in effect at the time of this disciplinary action against McDowell, arising from insubordination on September 6, 2012, the amendment has prospective effect from its effective date of December 10, 2012, and has retroactive effect to this case and all other cases pending on direct review or not yet final. See *State v. Wiggins*, 2013-0649 (La. App. 1st Cir. 1/31/14), 139 So.3d 1, 6 n.6. Thus, our analysis is under the strict scrutiny standard of review.<sup>1</sup>

Under a strict scrutiny review, the government bears the burden of proving the constitutionality of the state action by showing: (1) that the state action serves a compelling governmental interest, and (2) that the state action is narrowly tailored to serve that compelling interest. Strict scrutiny requires a careful examination by our courts, keeping in mind that the fundamental right at issue is one where some degree of regulation is likely to be necessary to protect the public safety. See *State v. Eberhardt*, 2013-2306 (La. 7/1/14), 145 So.3d 377, 381.

The right to keep and bear arms, like other rights guaranteed by our State constitution, is not absolute. *Eberhardt*, 145 So.3d at 383. The voters’ ratification of strict scrutiny as a standard of review to be applied to alleged infringements on the right to keep and bear arms was not meant to invalidate every restriction on firearms, whether in existence at the time the amendment was ratified or yet to be enacted. Rather, the strict scrutiny standard adopted by the voters is “designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker” for firearm regulation within the context of the fundamental right to keep and bear arms. *Id.*, 145 So.3d at 383-84.

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<sup>1</sup> Although McDowell urged a violation of his U.S. Constitutional right to bear arms, see U.S. Const. Amend. II, because strict scrutiny is the highest level of review on this issue, it is not necessary to review the statute under the U.S. Constitution. See *State v. Wiggins*, 2013-0649 (La. App. 1st Cir. 1/31/14), 139 So.3d 1, 7 n.7.

A law enforcement officer by voluntarily accepting a commission and becoming an employee consents to being subject to all reasonable regulations. See Lally v. Dep't of Police, 306 So.2d 65, 66 (La. App. 4th Cir. 1974).

The undisputed evidence showed that the September 4, 2012 directive issued by Commissioner Hebert, advising all the agents hailed to ATC headquarters for the Internal Affairs investigation, "Your firearms and other gear are not needed," was a one-time order implemented solely while the agent was accounting for his "activities, time sheets, locations, work quality, directives, phone records and other related matters for the last six months."

The undisputed evidence also established that the investigation was conducted for the activities of specified agents for the purpose of accounting for inconsistencies in their representations in time sheet records and data independently compiled from GPS technology. The ATC concern that prompted the short-term weapon restriction directive was the possibility of emotional responses by agents in light of the contentious nature of the investigation.

McDowell, by voluntarily accepting his position as an ATC agent and becoming an ATC employee, consented to being subject to all reasonable ATC regulations. In this case, the undisputed evidence established that the September 4, 2012 directive was a temporary measure implemented for the duration of the questioning of an ATC agent to prevent any workplace violence in a volatile scenario. Thus, it was reasonable. Moreover, we find that the directive was a narrowly tailored measure designed to serve ATC's compelling interest in preventing workplace violence. As such, the Commissioner's September 4, 2012 directive, reinforced by McDowell's SAC, was not an unconstitutional violation of La. Const. Art. I, § 11.

McDowell also asserts that the Commissioner's directive was in violation of the Law Enforcement Officers' Safety Act (LEOSA), 18 U.S.C.A. § 926B,<sup>2</sup> and therefore, illegal. But by its own terms, LEOSA is discretionary and expressly does not "supersede or limit the laws of any State that prohibit or restrict the possession of firearms" on any State property, installation, or building, among other things. See 18 U.S.C.A. § 926B(b)(2). The undisputed evidence showed that the September 4, 2012 directive was limited to certain agents while present in a specific room in the building that housed the ATC headquarters. Thus, LEOSA did not supersede or limit the Commissioner's directive as it applied to ATC property. McDowell's reliance on LEOSA is inapposite.

#### **DECREE**

For these reasons, we affirm the decision of the Civil Service Commission referee. Appeal costs are assessed against appellant, Daimian McDowell.

**AFFIRMED.**

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<sup>2</sup> 18 U.S.C.A. § 926B provides in relevant part:

(a) Notwithstanding any other provision of the law of any State ... an individual who is a qualified law enforcement officer ... may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

(b) This section shall not be construed to supersede or limit the laws of any State that ...

(2) prohibit or restrict the possession of firearms on any State ... property, installation, building, base, or park.