

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0727

C/W

2014 CA 0728

LONI BARBIER

VERSUS

DEPARTMENT OF CHILDREN AND FAMILY SERVICES

DATE OF JUDGMENT: DEC 23 2014

ON APPEAL FROM THE STATE CIVIL SERVICE COMMISSION
NUMBER 17271 CONSOLIDATED WITH S-17441
STATE OF LOUISIANA

HONORABLE DAVID DUPLANTIER, CHAIRMAN;
JOHN MCLURE, VICE-CHAIRMAN;
G. LEE GRIFFIN, RONALD M. CARRERE, JR.,
D. SCOTT HUGHES, C. PETE FREMIN,
AND SIDNEY TOBIAS; MEMBERS

SHANNON S. TEMPLET, DIRECTOR
DEPARTMENT OF STATE CIVIL SERVICE

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Disposition: AFFIRMED.

JP
Pettigrew, J. Concurs

KUHN, J.

Loni Barbier, a former employee with permanent status of the Department of Children and Family Services (DCFS), appeals the decision of the Civil Service Commission (the Commission) referee, upholding the disciplinary actions of the appointing authority, Brent Villemarete, Deputy Secretary of the Programs Division of DCFS. We affirm.

Initially we note that because an application for review was not timely filed by Barbier with the Commission, the decision of the referee is the final decision of the Commission as of the date the decision was rendered. See La. Const. Art. X, § 12. 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 conclusions of the Commission. Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review. *Bannister v. Dep't of Streets*, 95-0404 (La. 1/16/96), 666 So.2d 641, 647.

It is undisputed that Barbier worked for DCFS as a Licensing Specialist 2. His employment duties included monitoring child care facilities (providers) for compliance with licensing regulations, i.e., regularly inspecting provider facilities. On appeal, Barbier challenges the referee's finding that he had a personal relationship with Tiffany Brown, an employee of provider, Color Wheel Learning Center (CWLC). Barbier also asserts it was error for the referee to conclude that he made a derogatory comment referencing himself at the facility of provider, the Academy of Early Childhood Education (AECE), and that he made another remark, sexual in nature, to Kristi Blanchard in the presence of other AECE employees.

An evidentiary basis exists for the referee's factual findings that support the conclusion that Barbier had a personal relationship with provider CWLC employee Brown. Specifically, on March 1, 2010, Barbier sent a text to Brown who had

provided him with her personal cell phone number. The contents of the text, as found by the referee, were in accordance with Brown's testimony. The referee's finding that Barbier did not report his interactions with Brown to his DCFS supervisors is also supported by the evidence.

Our review also shows that the evidence the referee stated he relied upon to support the findings of derogatory remarks by Barbier at AECE is contained in the record. Insofar as the derogatory comment Barbier stated about himself, the referee's finding expressly relied solely on Barbier's testimony as to the contents of the statement. As to the other remark, Barbier points out that Blanchard recanted the contents of her signed statement to the DCFS Audit Department investigator. He also maintains that since the other AECE employees that allegedly overheard his sexual statement were not called to testify, he is entitled to a presumption that their respective testimony would be adverse to DCFS's case. As such, Barbier contends there is insufficient evidence to support a finding that Barbier made the sexual remark. But even with an adverse presumption and Blanchard's recantation, the referee was within his province, as the factfinder, to rely on the statement Blanchard gave to the Audit Section investigator since Blanchard admitted in her testimony that it was her statement. She also testified that she was not coerced by her supervisors to sign her statement. And we find it noteworthy that Blanchard's testimony revealed that she was not necessarily an unbiased witness since she clearly was unhappy with her departure from employment with AECE.

Despite the competing versions of the facts, the referee's fully articulated factual findings are not manifestly erroneous. *See Stobart v. State, Dep't of Transp. and Dev.*, 617 So.2d 880, 882 (La.1993).

Next, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause and commensurate with the

infraction, the court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by abuse of discretion. *Bannister*, 666 So.2d at 647.

Employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. La. Const. art. X, § 8(A). "Cause" for the dismissal of such a person includes conduct prejudicial to the public service involved or detrimental to its efficient operation. *Bannister*, 666 So.2d at 647.

Barbier first challenges the referee's conclusion that the reduction-in-pay disciplinary action against him was warranted. The gist of his complaint is that he was not apprised that his discipline was based on an alleged inappropriate "personal relationship" with Brown. He also complains that the referee permitted a "trial by ambush" when he allowed "a previously unreferenced and unproduced policy relating to the reporting of professional relationships" into evidence.

We find it unnecessary to address whether the contact between Brown and Barbier constituted a personal relationship that needed to be reported to DCFS because the record supports the conclusion that Barbier engaged in the sexual harassment of CWLC co-owner Jodi Loar.¹ As such, the imposition of a reduction in pay is warranted even without a charge of failure to report a personal relationship. Sexual harassment is among the expressly prohibited employee conduct violations, see DCFS Policy 2-03 and 4-07, and is clearly conduct that is detrimental to DCFS's efficient operation, particularly since Barbier inspected Loar's facility for regulation compliance and, thus, the referee correctly determined that cause existed for the reduction-in-pay disciplinary action against Barbier.

Barbier urges that because two of the charges levied in the September 16, 2011 disciplinary letter were summarily dismissed, the "totality of the circumstances" changed and, therefore, he is entitled to a similar reduction in the punishment

¹ Barbier has not appealed the referee's factual findings that he made inappropriate comments to Loar about the nursing of her baby. Summarily, we refer to this conduct as "sexual harassment."

imposed against him. Even if the appointing authority in initially imposing discipline chose to weigh heavily Barbier's long-standing meritorious employment in the State Civil Service, because cause existed for a reduction in pay based solely on the charges of sexual harassment and the penalty was commensurate with the offense, the referee's action upholding a reduction in pay was not arbitrary, capricious, or characterized by an abuse of discretion.

Turning to the disciplinary action that resulted in Barbier's termination from employment at DCFS, Barbier again asserts that because the referee summarily dismissed five of the charges levied in the June 13, 2012 disciplinary letter, the "totality of the circumstances" had changed. Therefore, Barbier asserts, he is entitled to a similar reduction in the punishment imposed against him.

When an employee knowingly and/or willingly violates published laws, rules, regulations, or operating procedures; when an employee's conduct has been such that his contribution to the department and the fulfillment of its mission does not meet department standards; or when previous counseling efforts and disciplinary actions taken to correct his improper conduct or behavior have proven ineffective, dismissals are appropriate. See DCFS Policy 4-07.

The record establishes that subsequent to the complaint of the sexual harassment of Loar, which was received on April 15, 2011, Barbier was suspended with pay. On May 27, 2011, DCFS sent a letter which lifted his suspension subject to certain directives including that he discontinue contact with specified providers and "conduct [himself] in a professional manner at all times." The derogatory comments at AECE were subsequently made by Barbier on August 3, 2011. Disciplinary action for the sexual harassment against Loar, which occurred on June 17, 2010 and again on August 31, 2010, resulting in a reduction in pay, was initiated against Barbier in a September 16, 2011 disciplinary letter. Disciplinary action resulting in termination for the derogatory comments at AECE was initiated against

Barbier in a June 13, 2012 disciplinary letter. Thus, after an initial suspension with pay was lifted and Barbier was counseled by letter dated May 27, 2011 to conduct himself in a professional manner at all times, he made the derogatory comments at AECE. One remark was sexual in nature and the other included vulgar or profane language that he sarcastically directed to himself.

Abusive behavior such as the use of vulgar or profane language or derogatory comments is an example of a violation of prohibited employee conduct that may result in disciplinary action. See DCFS Policy 4-07. All DCFS employees are expected to adhere to a standard of conduct that is respectful of all persons within a work environment. See DCFS Policy 2-03. Such abusive behavior and failure to adhere to respectful standards of conduct are prohibited conduct that is prejudicial to DCFS and detrimental to its efficient operation, particularly since Barbier inspected AECE for regulation compliance. Therefore, cause existed for the imposition of disciplinary action against Barbier. Because previous counseling efforts and the earlier disciplinary actions taken to correct his improper conduct or behavior proved ineffective, dismissal was appropriate, see DCFS Policy 4-07, and the penalty of dismissal was commensurate with the offense. Although five of the charges against Barbier levied in the June 13, 2012 letter were summarily dismissed, there is no error in the referee's implicit conclusion that the abusive behavior committed by Barbier on August 3, 2012, after he had been counseled on May 27, 2011 to "conduct [himself] in a professional manner at all times" and was required as a matter of promulgated policy to adhere to a standard of conduct that is respectful of all persons within his work environment alone were sufficient to support Barbier's termination. Therefore, the referee's action of upholding the appointing authority's termination is not arbitrary, capricious, or characterized by abuse of discretion.

DECREE

For these reasons, the referee's decision upholding the appointing authority's disciplinary actions of reduction in pay and termination is affirmed. Appeal costs are assessed against appellant, Loni Barbier.

AFFIRMED.