

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0942

ROBERT S. LAWRENCE

VERSUS

STATE CIVIL SERVICE COMMISSION

Judgment Rendered: DEC 23 2014

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On Appeal from the
Decisions of the State Civil Service Commission
Number 17,837



The Honorable David Duplantier, Chairman
John McLure, Vice-Chairman¹
G. Lee Griffin, D. Scott Hughes, C. Pete Freman,
Sidney Tobias, and Robert Carrere; Member

Shannon S. Templet, Director
Department of State Civil Service

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BEFORE: GUIDRY, THERIOT AND DRAKE, JJ.

*Guidry, J. Dissents and would have recused
the Commission.*

¹ John McLure and Robert Carrere were absent and did not participate in the decision.

DRAKE, J.

This is an appeal from a ruling of the Louisiana Civil Service Commission (Commission) dismissing the administrative appeal of Robert S. Lawrence, who made a claim for back pay after being provisionally promoted, based on the timeliness of the administrative appeal. For the reasons that follow, we affirm the Commission ruling.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are thoroughly detailed in the decision rendered by the Civil Service Referee (Referee), which states:

Robert S. Lawrence is the State Examiner of Municipal Fire and Police Civil Service and he serves with permanent status. On February 18, 2013, Mr. Lawrence accepted the State Civil Service Commission's (SCS Commission) offer to provisionally appoint him to the position of Provisional State Examiner of Municipal Fire and Police Civil Service. Prior to his provisional appointment, Mr. Lawrence was serving as the Deputy State Examiner of Municipal Fire and Police Civil Service, with permanent status.

In Mr. Lawrence's written acceptance of his provisional appointment to the Provisional State Examiner position, he agreed to the SCS Commission's condition that his salary would be the same during the provisional appointment as he had been earning as the Deputy State Examiner. On June 5, 2013, Mr. Lawrence accepted a probationary appointment to the State Examiner position without an increase in pay. After Mr. Lawrence completed a six-month probationary period as the State Examiner, the SCS Commission granted him permanent status in that position effective December 5, 2013, along with a 10½ percent pay increase.

On December 20, 2013, the Department of State Civil Service received an appeal from Mr. Lawrence postmarked December 19, 2013. In his appeal, Mr. Lawrence contends that the SCS Commission violated Civil Service Rule (CSR) 6.11 by not increasing his pay upon his appointment as Provisional State Examiner. He further contends that his acceptance of the provisional appointment with the condition regarding his pay was an illegal "waiver" of his rights under the Civil Service Rules, and that his appeal is timely because he filed it within thirty calendar days of his learning of the alleged rule violation. As relief, Mr. Lawrence requests that his pay be increased by 10½ percent. [Footnotes omitted.]

Prior to February, 2013, Mr. Lawrence was the Deputy State Examiner. On February 1, 2013, Melinda Livingston retired as State Examiner. Another

individual was appointed Provisional State Examiner on February 1, 2013, but had to resign shortly thereafter. On February 18, 2013, Mr. Lawrence was offered the position of Provisional State Examiner subject to four conditions, including accepting the appointment without an increase in pay. One of the conditions of the position was the following: "Your salary as Provisional State Examiner will be \$100,900.80/per annum (or \$48.51/hr[.])." Mr. Lawrence was earning the same amount as the Deputy State Examiner, prior to the provisional appointment. On May 7, 2013, after interviewing other candidates, Mr. Lawrence was selected as the new State Examiner. Mr. Lawrence claims that he was promised a 10½ percent pay increase after a six-month test period. The six-month working period ended on December 5, 2013, and Mr. Lawrence was sworn in on January 10, 2014. Through the workings of his office, Mr. Lawrence learned that it violated Civil Service rules to offer a higher position to an employee without increasing the compensation, as had been done with regard to his own promotion. Mr. Lawrence sought back-pay from February 18, 2013, due to his detail to special duty, claiming a violation of Louisiana Constitution Article X, Section 10.

On December 20, 2013, Mr. Lawrence filed a claim with the Commission claiming that he was improperly paid beginning with the date of his detail to special duty. The Referee noticed that the appeal was not filed within thirty days of the action complained of and permitted Mr. Lawrence to amend his appeal. Mr. Lawrence responded to the Referee and filed a supplement to the appeal. The Referee issued an opinion dismissing the appeal for not being filed within thirty days of February 18, 2013. The Referee determined that the claim for provisional pay from February 18, 2013, until June 5, 2013, when Mr. Lawrence began a probationary period, the claim for probationary pay from June 5, 2013, until he obtained permanent status on December 5, 2013, and his amended claim for disparate/discretionary treatment were all untimely.

Mr. Lawrence filed an Application for Review of the Referee's decision on March 14, 2014. The Commission affirmed the decision of the Referee on May 7, 2014. It is from this judgment that Mr. Lawrence appeals.

ERRORS

Mr. Lawrence assigns a multitude of errors all stemming from the procedure utilized by or the authority of the Commission and the dismissal of his appeal for untimeliness.

DISCUSSION

Timeliness of Appeal

Mr. Lawrence argues that the Commission erred in summarily dismissing his appeal, which was filed more than thirty days after the action of his accepting a provisional appointment without an increase in pay, because he was unaware that he was entitled to receive such an increase with his provisional appointment on February 18, 2013. He claims he did not learn of the rule violation until December 6, 2013, when he attempted to appoint an employee to a different position without an increase in pay.

Civil Service Rule 13.10 permits an employee to appeal to the Commission when he has been subjected to a disciplinary action, a civil service rules violation, or discrimination. The delay for making such an appeal is provided for in Civil Service Rule 13.12, which provides:

(a) No appeal shall be effective unless a written notice complying with the requirements of Rule 13.11 is either (i) received in the office of the Director of the Department of State Civil Service at Baton Rouge, Louisiana, or (ii) is addressed to the Director of the Department of State Civil Service at Baton Rouge, Louisiana, with proper postage affixed, and is dated by the United States Post Office.

1. Within thirty (30) calendar days after the date on which appellant received written notice of the action on which the appeal is based when written notice before or after the action is required by these Rules; or
2. Within thirty (30) calendar days after the date when appellant learned or was aware that the action complained of had occurred

when no written notice is required by these Rules or, if required, was given tardily or not at all.

Mr. Lawrence argues that he “learned or was aware that the action complained of had occurred” on December 6, 2013. The Commission contends that Mr. Lawrence “learned or was aware that the action complained of had occurred” on February 18, 2013, when he accepted the provisional appointment at his same rate of pay.

The timely filing of a request for appeal in administrative determinations is jurisdictional. *Acosta v. Department of Health and Human Resources*, 423 So. 2d 104, 105 (La. App. 1 Cir. 1982). An employee’s failure to file an appeal timely is a jurisdictional defect, in that neither the Commission nor any other court has the jurisdictional power or authority to reverse, revise, or modify an action after the time for filing an appeal has elapsed. *See Lay v. Stalder*, 99-0402 (La. App. 1 Cir. 3/31/00), 757 So. 2d 916, 919.

Mr. Lawrence argues that the appeal delays did not begin to run until he was aware of his right to appeal. This court rejected this same argument in *Pugh v. Department of Culture, Recreation and Tourism*, 597 So. 2d 38 (La. App. 1 Cir. 1992). The plaintiff in *Pugh* argued that the appeal delays pursuant to Civil Service Rule 13.12(a)(2) did not begin to run until the employee was aware of his right to appeal. This court disagreed with the plaintiff in *Pugh* and determined that the thirty days began to run from the date of the adverse action. *Pugh*, 597 So. 2d at 42-43.

Mr. Lawrence relies upon *Allen v. City of Alexandria*, 08-747 (La. App. 3 Cir. 12/10/08), 1 So. 3d 680, 681, which held it to be “unfair and unrealistic to require an employee to file a complaint before he or she knows of the existence of unfair treatment” when the plaintiff was told she would be given a pay increase retroactively, but was not done so. The Third Circuit held that the plaintiff could

not have known she would not be paid the pay increase until she completed the temporary assignment and was not paid.

Allen is distinguishable from the present case. Although in the supplement to his appeal, Mr. Lawrence claims that he was told he would be paid the 10.5% pay increase when he completed the six-month test period, this matter involves an action where Mr. Lawrence signed a document agreeing to a provisional appointment without a pay increase. A condition of the provisional employment was that he would not be given an increase in pay. Mr. Lawrence was aware from the date he accepted the provisional employment on February 18, 2013, there would be no increase in pay. In *Allen*, the employee was unaware there was no increase in pay until she actually completed the temporary appointment. Therefore, the date the action complained of occurred, February 18, 2013, controls the timeliness of the appeal, not when Mr. Lawrence claims he became aware he had a right to appeal.

Authority of Commission

Mr. Lawrence also claims that the Commission had no authority to hear the present case since the Louisiana Constitution Article X, §12(A) permits the Commission to hear only cases involving removal and disciplinary cases. Relying on his interpretation of the constitutional grant of jurisdiction to the Commission, Mr. Lawrence argues that the Commission does not have jurisdiction. Mr. Lawrence correctly points out that the articles of the constitution give the Commission jurisdiction in certain cases, being exceptions to the general rule that district courts have original jurisdiction of all civil and criminal matters. *See* La. Const. art. V, § 16(A). There are other pertinent constitutional provisions.

The constitution gives the Commission exclusive jurisdiction in all removal and disciplinary cases. La. Const. art. X, § 12(A). Further, the constitution specifically gives classified employees the right of appeal to the Commission in

disciplinary actions and in cases alleging political, religious, sex, or race discrimination. La. Const. art. X, § 8. Civil Service Commission Rule 13.10(c) allows the Commission to hear appeals of those adversely affected by a violation of any provision in the Civil Service Article or any Civil Service Rule other than a rule in Chapter 10. In *Department of Health & Human Resources v. Payton*, 498 So.2d 181, 187 (La. App. 1 Cir. 1986)(on rehearing), DHHR contended that the plaintiff had no right to appeal because his allegation of discrimination based on his union activities did not charge one of the kinds of discrimination listed in article X, section 8. This court held, however, that the plaintiff had the right to appeal such discrimination by virtue of Civil Service Rule 13.10, which was adopted pursuant to the Commission's rule-making powers. *Department of Health & Human Resources*, 498 So. 2d at 188.

The constitution gives the Commission broad rulemaking powers for the administration and regulation of the classified service, and this power includes the power to adopt rules for regulating employment. La. Const. art. X, § 10(A)(1)(a). Civil Service Rule 13.10, which was adopted pursuant to the Commission's constitutional rule-making power, provides that an appeal may be made to the Commission by a state classified employee who has been removed, discriminated against because of political or religious beliefs, sex, or race, or has been adversely affected by the violation of any provision of the Civil Service Article or Civil Service Rule. See *Department of Labor, Office of Employment Security v. Leonards*, 498 So. 2d 178, 180 (La. App. 1 Cir. 1986). Therefore, the Commission had jurisdiction to hear the rule violation claim of Mr. Lawrence pursuant to Civil Service Rule 13.10(c).

Contra non valentem

Mr. Lawrence claims that the doctrine of *contra non valentem* applies to the present case to excuse his tardy filing of the appeal. The equitable doctrine of

contra non valentem “has been applied to cases wherein defendant has concealed the fact of the offense” *Sterne v. Dep’t of State Civil Service*, 98-0525 (La. App. 1 Cir. 4/1/99), 731 So. 2d 505, 507 (La. App. 1 Cir. 4/1/99) (quoting *Butler v. Charity Hospital of New Orleans*, 442 So. 2d 531, 535 (La. App. 1 Cir.1983), quoting from *Nathan v. Carter*, 372 So. 2d 560, 562 (La. 1979)). It also can apply when the defendant has committed acts that willfully or intentionally hindered, impeded, or prevented plaintiff from asserting a cause of action. *Sterne*, 731 So. 2d at 507.

The four general situations in which *contra non valentem* has been applied are: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff’s action; (2) where there was some condition coupled with a contract or connected with the proceeding which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; or (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Whitnell v. Menville*, 540 So. 2d 304, 308 (La. 1989). We agree with the Commission that none of these situations are applicable in the present case.

Recusal of Commission

Mr. Lawrence also claims that the Commission should have recused itself upon his motion since the Commission is his employer and the trier of fact in this case. Civil Service Rule 13.32 provides that recusal of a Commissioner or referee is governed by the grounds for recusal of a judge listed in La. C.C.P. art. 151. The constitution gives the Commission broad rulemaking powers for the administration and regulation of the classified service, and this power includes the power to make rules for regulating employment. La. Const. art. X, § 10(A)(1). As part of the rulemaking powers, the Commission has set up an appeal system to a referee and

the Commission. Civil Service Rule 13.10, *et seq.* Mr. Lawrence does not show that there is any bias in the Commission following the rules it enacted through its constitutional authority. Therefore, the Commission correctly denied the motion to recuse.

CONCLUSION

For the foregoing reasons, we agree that the appeal to the Referee was untimely, as it was not filed within the time prescribed by Civil Service Rule 13.12(a)(2). Accordingly, the judgment of the Civil Service Commission is affirmed. Costs of the appeal are assessed to appellant, Robert S. Lawrence.

AFFIRMED.