

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0779

JODY P. USÉ

VERSUS

CITY OF THIBODAUX, CITY OF THIBODAUX
MUNICIPAL CIVIL SERVICE COMMISSION

Judgment Rendered: MAY 28 2015

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On Appeal from the
17th Judicial District Court
In and for Parish of Lafourche
State of Louisiana
Trial Court No. 122829
The Honorable John E. LeBlanc, Judge Presiding

* * * * *

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

Crain, J. concurs in the result and assigns reasons

HOLDRIDGE, J.

Jody Usé appeals the district court's judgment affirming the decision of the City of Thibodaux Municipal Civil Service Board (the Board) to uphold his termination by the City of Thibodaux. We affirm.

FACTS

In May 2011, Usé was notified that his employment as a Utility Service Repairman 1 with the City of Thibodaux had been terminated due to conduct of a discourteous and offensive nature toward the public. Usé appealed to the Board and a hearing was conducted on July 12, 2011.

At the hearing, the City presented evidence that a woman had complained about an encounter with Usé at a Burger King restaurant on April 29, 2011. Usé and the woman were waiting in line for their lunch orders and the woman approached Usé, who was wearing a City uniform shirt, to ask him if he knew her friend who also worked for the City. The woman complained that Usé brushed his hand on her shoulders and asked what she liked to do for fun. She further complained that Usé commented on her necklace and, as he was leaving, winked, and said he would see her later. The woman reportedly described Usé as "creepy."

The City additionally presented evidence of a 2008 sexual harassment complaint made against Usé by a female meter reader who performed contract work for the City. Usé allegedly approached the meter reader on the job, then made a comment with sexual overtones about the work she was performing. Lastly, the City presented testimony that at a presentation on its direct deposit program, Usé asked the presenter, who was also a city employee, if she was married and about her plans for that night.

Following a hearing on July 12, 2011, the Board voted to uphold the termination and, in accordance with the civil service rules, Usé appealed to the

district court. The district court found that the Board violated its procedural rules when it heard testimony outside the presence of the public and the parties, and remanded the matter to the Board for further proceedings.¹ On remand, over Usé's objection, the Board voted not to allow the presentation of new evidence. Instead, the Board heard the argument of counsel, reviewed the transcript of the July 2011 hearing absent the testimony adduced outside the presence of the public and the parties, and voted to uphold Usé's termination.²

Usé appealed the Board's decision to the district court for a second time, and the appeal was lodged as a new suit and allotted to a new judge of the district court. Usé argued that the Board's decision was rendered without a proper hearing on remand; that his termination was not reasonable; that the notice of termination he received did not contain the complete reasons and details for his termination; that the Board considered evidence pertaining to sexual harassment when he was not notified that was a basis for his termination; that he was denied due process; and, that the City failed to meet its burden of establishing a real and substantial relationship between the alleged improper conduct and the efficient operation of the City's Department of Public Works. The district court ruled that the procedural complaints had been addressed by the ruling rendered in the first appeal, and that its review in the second appeal was limited to the substantive issue of whether the City sustained its burden of proof to support Usé's termination. The district court then affirmed the Board's decision. Usé now appeals.

ASSIGNMENTS OF ERROR

Usé alleges five assignments of error:

1. The district court erred in affirming Jody's dismissal as a civil service employee because Jody was not furnished a proper written

¹ That decision was not appealed to this court.

² The single Board member who served at the time of both hearings did not participate in rendering the decision on remand.

notification which provided the complete reasons for his termination and because evidence was considered by the Civil Service Board relating to alleged sexual harassment that was completely outside of the scope of the reasons for termination given to Jody.

2. The district court erred in affirming Jody's dismissal as a civil service employee because the City of Thibodaux did not prove that [Jody] was terminated for "just cause" due to conduct that did in fact impair the efficiency and orderly operation of the City department for which he worked.
3. The district court erred in affirming Jody's dismissal as a civil service employee because Jody was not granted a "hearing" by the members of the Board that considered his second appeal and voted to uphold his termination.
4. The district court erred in applying the manifest error standard to its review of the facts that served as the basis of the decision of the Civil Service Board.
5. Alternatively, the district court erred by failing to remand Jody's appeal to the Civil Service Board for an entirely new hearing.

STANDARD OF REVIEW

A civil service commission or board must decide not only if a disciplinary action has been made in good faith for cause, but additionally must make an independent assessment of whether the particular punishment imposed is warranted. *Moore v. City of Baton Rouge*, 13-1026 (La. App. 1 Cir. 5/2/14) 146 So. 3d 584, 588. In reviewing the Board's decision, the reviewing court has a multifaceted review function. *See Walters v. Dep't of Police of City of New Orleans*, 454 So. 2d 106, 113-114 (La. 1984). First, deference will be given to the factual conclusions of the Board. Accordingly, in deciding whether to affirm the Board's factual findings, the reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review. *See Bannister v. Dep't of Streets*, 95-0404 (La. 1/16/96), 666 So. 2d 641, 647. Second, in evaluating the Board'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 Board's order unless it is arbitrary, capricious, or characterized by an abuse of discretion. *See Lange v. Orleans Levee Dist.*, 10-0140 (La. 11/30/10), 56

So. 3d 925, 934. “Arbitrary or capricious” means the absence of a rational basis for the action taken. *Bannister*, 666 So. 2d at 647.

DISCUSSION

First Assignment of Error

In his first assignment of error, Usé has alleged that he was not furnished with proper written notification providing the complete reasons for his termination and that the Board erred in considering evidence outside the scope of the reasons for termination given to him. However, there is no evidence in the record before us that addresses the notification issue. Apparently, Usé failed to introduce into evidence the portion of the first appeal which contained evidence of the notification received by Usé. As Judge LeBlanc stated in Usé’s second appeal hearing, which is the basis for this appeal,

“Now, what makes this case different is that this is the second appeal of the Civil Service Board findings. And for clarification, there was an original appeal which I am not—I have not taken judicial notice of. I don’t think it’s anything other than a fact that needs to be talked about because the original hearings were challenged on appeal to the district court in front of Judge Larose in a separate proceeding. On the procedural aspects ... the notice aspects ... Judge Larose ruled on the procedural issues and remanded the case back to the board.”

As Judge LeBlanc pointed out, there was a separate appeal proceeding before Judge Larose, which decided the notice issue. Based on our review of the record before us, which does not contain the record of the district court’s first appeal hearing or the evidence introduced by Usé on the notice issue at that hearing, this court cannot determine if Usé was afforded proper notification. Accordingly, we find this assignment of error to be without merit since there is nothing in the record before us to allow this court to address that issue.

Second Assignment of Error

It is undisputed that Usé held a permanent civil service position with the City. A permanent civil servant employee cannot be disciplined without cause.

La. Const. art. 10, §8. “Cause” sufficient for the imposition of discipline means “conduct that impairs the efficiency of the public service in which the employee is engaged.” *Marsellus v. Dep’t of Public Safety and Corr.*, 04-0860 (La. App. 1 Cir. 9/23/05), 923 So. 2d 656, 660 citing *Wopara v. State Employees’ Grp. Benefits Program*, 02-2641 (La. App. 1 Cir. 7/2/03), 859 So. 2d 67, 69.

In his second assignment of error, Usé contends that the district court erred in affirming his dismissal because the City did not prove that he was terminated for “just cause.” Usé argues that his termination was both arbitrary and capricious because there was no evidence to prove “just cause” for his termination; however, based on our review of the record, we are compelled to disagree.

The record demonstrates that the Board had an opportunity to determine whether reasonable grounds for a finding of just cause and that the penalty of termination was commensurate with the offense. Thus, the cause for which Usé was disciplined is clear and factually based on his discourteous and offensive conduct toward the public. The record reflects that Usé acted discourteously and in an offensive manner towards two women, which is in direct violation of Civil Service Rule IX, §I, 1.2(e).

While one or two particulars of the encounters might be contested, the essence of the encounters is not. The record in this matter establishes that both women felt violated or offended by Usé’s vulgar behavior toward them. There is nothing in the record before us to suggest that these women had any connection to Usé prior to these encounters, nor does the record reflect any motive these women may have to fabricate their statements that they were offended by Usé’s behavior. Usé’s behavior was so discourteous and unprofessional that such discipline is warranted as it impaired the efficiency of the public service and bears a real substantial relation to the efficient and orderly operation of the public service in

which he was engaged. *See Marsellus*, 923 So. 2d at 660, citing *Wopara*, 859 So. 2d at 69. Such rules and regulations are designed to insure the orderly and efficient administration of the service being rendered by the employing authority. Clearly, the department as well as its public image in the community, is affected whenever a public service worker does not comply with department rules and regulations.

Thus, the Board independently reviewed and assessed the city's discipline of Usé and the district court affirmed the Board's decision in finding "cause" for his termination. The record supports the district court's finding that the Board's decision was made in good faith for cause and that the district court's findings are not clearly wrong or manifestly erroneous and that the Commission's decision to terminate his employment was not arbitrary, capricious, or characterized by an abuse of discretion. Therefore, we find this assignment of error to be without merit.

Third and Fifth Assignments of Error

A classified permanent civil service employee enjoys a property right in maintaining his status, and therefore may not be terminated from that position without due process of law. *See Bell v. Dep't of Health & Human Res.*, 483 So. 2d 945, 949-50 (La. 1986). Usé contends that his due process rights were violated when the Board refused to hold a new evidentiary hearing after this matter was remanded by the district court. He further contends that the district court erred by failing to remand for a new hearing in his second appeal.

The applicable civil service rules afford employees the right to appeal to the Board to test the reasonableness of their dismissal. *City of Thibodaux*, Civil Service Rule II, §4.1. The Board is required to hold a hearing, which shall be open to the public, and make its decision on the facts presented. *City of Thibodaux*,

Civil Service Rule II, §§4.5, 4.8, 4.10. In making its decision, the Board acts as the fact finder. *Cf. Moore v. Ware*, 01-3341 (La. 2/25/03), 839 So. 2d 940, 946. The Board's factual conclusions are accorded deference by reviewing courts and may not be overturned unless they are found to be manifestly erroneous. *Id.* If made in good faith and for statutory cause, a Board's decision should not be disturbed on judicial review. *Moore*, 839 So. 2d at 945.

In the instant matter, Usé assigns as error the fact that he did not receive a new evidentiary hearing following his initial appeal. However, we disagree that a new evidentiary hearing was required. The supreme court held that "Some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1494 (1985). The court further stated that:

The foregoing considerations indicate that the pretermination "hearing," though necessary, need **not** be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S., at 378, 91 S.Ct., at 786. See *Cafeteria v. McElroy*, 367 U.S. 886, 894-895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In general, "something less" than a **full evidentiary hearing** is sufficient prior to adverse administrative action. *Matthews v. Eldridge*, 424 U.S., at 343, 96 S.Ct., at 907, *Cleveland Bd. Of Edu.*, 470 U.S. at 546, 105 S.Ct. at 1495 (Emphasis added).

Usé was afforded a previous evidentiary hearing. However, the Board admits that this hearing included testimony by an unsworn witness that was not taken before the Board itself. On that basis, the district court remanded the Board's decision for further proceedings. **That decision was not appealed.** At the second hearing, the Board reviewed the transcript of the July 2011 hearing, which was held before a prior Board comprised of different members. Thus, the members of the Board who rendered the decision were not present at the first

hearing to “hear” testimony. Even so, we do not find that Usé’s due process rights were violated.

In *Lott v. Dep’t of Pub. Safety and Corr., Office of Louisiana State Police*, 98-1920 734 So. 2d 617, 621 (La. 5/18/99), our supreme court reiterated that no one has a vested right in any given mode of procedure and that due process only requires that a party be provided notice and the opportunity to be heard. In *Lott*, the court noted that due process does not require that the fact finder in an administrative hearing actually hear witnesses to assess their credibility. *Id.* Likewise, in *Hamilton v. Louisiana Health and Human Resources Admin.*, 341 So. 2d 1190, 1193-1194 (La. App. 1 Cir. 1976), this court held:

The opportunity for the determiner of fact to assess witness credibility is not an indispensable prerequisite to due process, at least in an administrative hearing. So long as the party involved is afforded ample opportunity to confront and cross examine the witnesses against him and to present his own case in full, due process may be satisfied.

In the instant matter, Usé’ was afforded an opportunity to submit evidence, cross examine witnesses, and present his case in full at the previous evidentiary hearing. Accordingly, we find no violation of his due process rights by the Board when, on remand, it heard oral argument and reviewed the transcript of the prior evidentiary hearing before rendering its decision. *Id.* See also *Bryan v. Dep’t of Corr.*, 374 So. 2d 155, 157 (La. App. 1 Cir. 1979) (where court failed to discern any deprivation of due process rights where, in cases of a tie vote, an absent commissioner is allowed to cast the deciding vote after reference only to a transcript of the record); *Carter v. Blache*, 476 So. 2d 873, 877 (La. App. 2 Cir., 1985) (where court determined that the Board was within its authority making determination based solely from a reading of sworn testimony that the employer had proven its case by a preponderance of the evidence). Therefore, we find Usé’s third and fifth assignments of error to be without merit.

Fourth Assignment of Error

Usé lastly alleges that the district court erred in applying the manifest error standard and instead should have applied the *de novo* standard. He cites no authority to support this assertion. The Board argues that the standard should be manifest error because it made a factual determination based upon its findings and deference should be given to the factual conclusions of the Board. In this instance,³ the Board took evidence, considered that evidence, and made a ruling based upon its findings. Subsequently, the district court's standard of review is manifest error. This assignment of error also lacks merit. This court finds that the Board made a factual determination and applying the manifest error standard finds that the Board's decision to take disciplinary action against Usé should not be overturned.

CONCLUSION

For the foregoing reasons, we affirm the decision of the City of Thibodaux Municipal Civil Service Board, in accordance with the views expressed herein. Costs of this appeal are assessed to the appellant, Jody Usé.

AFFIRMED.

³ We find this case to be akin to those cases in which a civil service referee takes evidence in cases to be decided by the Civil Service Commission. In such cases, the factual conclusions of the referee and the Commission alike are subject to the manifest error standard of review. *Paulin v. Dep't of Health & Hospitals, Office of Behavioral Health*, 13-1916 (La. App. 1 Cir. 6/6/14), 146 So. 3d 264, 268.

JODY P. USÉ

STATE OF LOUISIANA

VERSUS

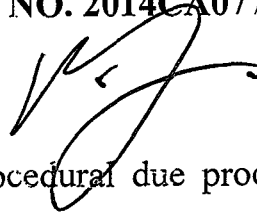
COURT OF APPEAL

**CITY OF THIBODAUX, CITY
OF THIBODAUX MUNICIPAL
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CRAIN, J., concurring in the result.



The fundamental requirement of procedural due process is notice and an opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Cannon v. City of Hammond*, 97-2660 (La. App. 1 Cir. 12/28/98), 727 So. 2d 570, 572. City of Thibodaux Civil Service Rule IX, Section 1.3 allows the appointing authority to take action for reasons beyond those stated in the written notice provided to the employee, so long as the employee is given an opportunity for an informal hearing to discuss the new allegation. The record establishes that Usé was provided at least one informal hearing at which details of the allegations against him were discussed. Further, Usé was provided an opportunity to be heard through the first hearing. As applied in the field of administrative law, procedural due process is more flexible than in a judicial tribunal. *Landry v. Department of Public Safety and Corrections*, 08-2142 (La. App. 1 Cir. 5/8/09), 2009WL1270290, p.3. Accordingly, I concur in the result reached by the majority.