NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1423

ERROLL LAZARD

VERSUS

ORLEANS LEVEE DISTRICT

Judgment Rendered: APR 2 4 2015

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On Appeal from the
Decision of the State Civil Service Commission
Number S-17861

The Honorable David Duplantier, Chairman
John McLure, Vice-Chairman
G. Lee Griffin, D. Scott Hughes, C. Pete Fremin,
Sidney Tobias, and Robert Carrere, Members[1]

Shannon S. Templet, Director
Department of State Civil Service

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BEFORE: GUIDRY, THERIOT AND DRAKE, JJ.

J. Theriot, dissents with reasons.

[1] G. Lee Griffin, C. Pete Fremin, and Sidney Tobias were absent and did not participate in the decision.

DRAKE, J.

This is an appeal by the Orleans Levee District (OLD) from a ruling of the Louisiana Civil Service Commission (Commission) denying the application for review and rendering the decision of the Civil Service referee (referee) the final decision of the Commission. The decision reversed the dismissal of Erroll Lazard, ordered the payment of back wages with interest, and awarded attorney's fees. For the reasons that follow, we affirm the Commission ruling.

FACTS AND PROCEDURAL HISTORY

Mr. Lazard was employed by the OLD as a Trades Apprentice with permanent status. The OLD claims that on January 7, 2014, Mr. Lazard reported to work intoxicated. On January 8, 2014, the OLD provided Mr. Lazard with a pre-disciplinary notice. The January 8, 2014 letter gave Mr. Lazard an opportunity to respond, in writing, to the proposed action. On January 21, 2014, the OLD sent Mr. Lazard a termination letter.

Both the pre-disciplinary letter and the termination letter provided the following information with regard to the conduct of Mr. Lazard:

> On Tuesday, January 7, 2014[,] you reported to work in violation of the [OLD] Substance and Alcohol Abuse Policy and the [OLD] Rules and Regulations. You were observed and questioned by the supervisors at which time you notified them that you had been drinking alcohol the night before while watching the football game.

Mr. Lazard appealed his dismissal to the Commission. The referee sent the OLD a notice of possible defects and requested further information. The OLD responded by relying on the language in the pre-disciplinary letter and the termination letter, but also attached the results of Mr. Lazard's January 7, 2014 blood alcohol test, a previous blood alcohol test taken by Mr. Lazard in 2010, unsworn written statements from three co-workers of Mr. Lazard regarding the incident on January 7, 2014, and the OLD's Substance and Alcohol Abuse Policy.

Mr. Lazard filed objections to the information provided by the OLD to the referee, alleging that only the pre-disciplinary letter and termination letter were provided to him prior to his termination, and that the letters were facially deficient under Civil Service Rule 12.7 and Civil Service Rule 12.8. The rest of the information provided by the OLD was given to the referee after the termination and not to Mr. Lazard.

On May 21, 2014, the referee summarily granted Mr. Lazard's appeal and noted that the "employee statements, alcohol test results, and agency policy" were not attached to the pre-disciplinary and termination letters. Therefore, the referee did not consider these exhibits in her decision. The OLD filed an Application for Review of the referee decision with the Commission. On July 16, 2014, the Commission denied the Application for Review.[1] It is from this judgment that the OLD appeals.

ERRORS

The OLD assigns three assignments of error, all claiming that the Commission erred in upholding the decision of the referee with regard to whether the OLD provided Mr. Lazard procedural due process and its failure to comply with Rules 12.7 and 12.8.

DISCUSSION

Decisions of the Commission are subject to the same standard of review as a decision of a district court. *Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans,* 02-0295 (La. App. 1 Cir. 2/14/03), 845 So. 2d 491, 494. In civil service disciplinary cases, the factual conclusions of the referee and Commission are subject to the manifest error standard of review. *Paulin v. Dep't*

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[1] As a result of the Commission's denial of the OLD's application for review, the decision of the referee became the final decision of the Commission as of the date the Commission's decision to deny the application for review was filed with the director of the Department of State Civil Service. *See* La. Const. Art. X, § 12(A) and Louisiana Civil Service Rule 13.36(g).

of Health & Hospitals, Office of Behavioral Health, 13-1916 (La. App. 1 Cir. 6/6/14), 146 So. 3d 264, 268; *see also Lowery v. Department of Health and Hospitals,* 13-0811 (La. App. 1 Cir, 3/12/14), 142 So. 3d 1016, 1021. Thus, the factual determinations will be reversed only if the appellate court finds that a reasonable basis does not exist for the Commission's finding and further that the record establishes the finding is clearly wrong. *Paulin,* 146 So. 3d at 268. The Commission's conclusion regarding sufficiency of notice of dismissal is a factual conclusion that may not be disturbed on appeal in the absence of manifest error. *See Adikema v. Dep't of Pub. Safety & Corr.--Office of Youth Dev.*, 06-1854 (La. App. 1 Cir. 9/14/07), 971 So. 2d 1071, 1075.

An employee who has a property right in continued employment may not be deprived by the state of this property right without due process of law. *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). Therefore, before an employee is deprived of any protected property interest in his employment, he must be made aware of the facts and evidence against him before discipline is taken. *Loudermill,* 470 U.S. at 542, 105 S.Ct. at 1493.

An employee with permanent status may be disciplined only for cause expressed in writing. La. Const. art. X, § 8(A). Cause for dismissal includes conduct prejudicial to the public service involved or detrimental to its efficient operation. *Paulin,* 146 So. 3d at 267. The appointing authority bears the burden of proving such conduct by a preponderance of the evidence, meaning that the evidence as a whole must show the fact sought to be proven as more probable than not. *Paulin,* 146 So. 3d at 268.

The issue before this court is whether Mr. Lazard was afforded due process prior to his termination. *See Loudermill,* 470 U.S. at 538, 105 S.Ct. at 1491. Due process is by nature an imprecise ideal, the contours of which are often difficult to

ascertain. This is so because its requirements vary according to circumstance. Due process encompasses the differing rules of fair play which through the years have become associated with different types of proceedings. *Lange v. Orleans Levee Dist.*, 10-0140 (La. 11/30/10), 56 So. 3d 925, 930 (citation omitted).

Mr. Lazard, as a permanent employee, enjoys a property right in, and is entitled to, his position. Further, applicable law guarantees him continued employment, which may not be changed without due process of law. However, in addressing the question of procedural due process, we find that "[The] central meaning of procedural due process is well settled. Persons whose rights may be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified." *See Harris* v. *Dep't of Police*, 12-0701 (La. App. 4 Cir. 9/14/12), 125 So. 3d 1124, 1129 (*quoting Moore v. Ware,* 01-3341 (La. 2/25/03), 839 So. 2d 940, 949). Furthermore, "this right to notice and opportunity must be extended at a meaningful time and in a meaningful manner." *Harris,* 125 So. 3d at 1129 (*quoting Moore,* 839 So. 2d at 949).

The OLD contends that the Commission manifestly erred in ignoring many of the facts before it, namely, the pre-disciplinary letter, Mr. Lazard's own acknowledgment letter, previous notification of a positive test result for alcohol use, and the facts of the termination letter. The OLD claims that it complied with the due process rules set forth in Rules 12.7 and 12.8. According to Rule 12.7, a permanent employee who is disciplined must be given "oral or written notice of the proposed action, the factual basis for and a description of the evidence supporting the proposed action, and a reasonable opportunity to respond." Rule 12.8 requires that a permanent employee who is to be removed must be given written notice of the action before the action becomes effective, and the notice must "describe in detail the conduct for which the action is being taken." This rule "plainly comprehends a fair and clear statement of the misconduct of the employee

including, whenever pertinent, times, dates, places and amounts." *Univ. of New Orleans v. Pepitune*, 460 So. 2d 1191, 1193 (La. App. 1 Cir. 1984), *writ denied,* 464 So. 2d 315 (La. 1985) (citations omitted).[2] "The purpose of this rule is to apprise the employee in detail of the charges and to limit any subsequent proceedings to the stated reasons. *Pepitune,* 460 So. 2d at 1193 (citation omitted).

On appeal, the OLD refers to alcohol testing performed on Mr. Lazard on March 23, 2010, and claims this gave Mr. Lazard knowledge of the rules and policies of the OLD regarding alcohol use. The OLD also sets forth in its argument what occurred on January 7, 2014, observations by Mr. Lazard's supervisor, an admission by Mr. Lazard, and the results of alcohol testing of Mr. Lazard. The OLD refers to an alcohol test that was performed on January 7, 2014. The OLD also relies on a statement in both letters regarding what Mr. Lazard had been informed in the past regarding the rules and policies of the OLD. However, none of this information was included in either the pre-disciplinary or termination letters, but was all provided in response to the referee's notice of possible defects. Neither of the letters provided to Mr. Lazard actually alleged that he reported to work intoxicated.

In both the pre-disciplinary letter and the termination letter, the OLD notified Mr. Lazard that he was "observed and questioned by the supervisors at which time [he] notified them that [he] had been drinking alcohol the night before while watching the football game." As noted by the referee, neither of the letters contained any factual allegation that Mr. Lazard "appeared intoxicated, smelled of alcohol, was unsteady on his feet, slurred his words, or failed an alcohol test." Furthermore, as noted by the referee, the OLD did not include any explanation as to how "Mr. Lazard's drinking alcohol the night before violated its policy and

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2 This case was referring to Civil Service Rule 12.3, the contents of which are now found in Rule 12.8. *Rollins v. Hous. Auth. of New Orleans*, 93-1810 (La. App. 1 Cir. 10/7/94), 644 So. 2d 837, 838.

employee rules." The referee made a factual determination that the pre-disciplinary letter and termination letter did not contain the "factual detail and specificity required" by Rules 12.7 and 12.8.

Both letters given to Mr. Lazard concluded that he had violated the OLD rules and substance abuse policy. However, we agree with the referee's finding that neither letter contained sufficient factual detail regarding the accusations against Mr. Lazard to enable Mr. Lazard to respond to those accusations. The letters contain no facts as to how his drinking at home the night before while watching a football game constituted a violation of any policy or rule adopted by the OLD. Although the OLD did send the referee alcohol test results and co-employee statements, none of these were included in either the pre-disciplinary or termination letters sent to Mr. Lazard. The two letters did not give Mr. Lazard notice in a meaningful manner. In particular, the plain language of Rule 12.7, as well as the due process principle pronounced in *Loudermill* (upon which Rule 12.7 is based), clearly provide that in addition to notice of the charges, notice of the evidence supporting the charges must also be given to the employee. *See Dep't Pub. Safety and Corr. v. Savoie,* 569 So. 2d 139, 142 (La. App. 1 Cir. 1990) (wherein this court, citing *Loudermill,* held "notice is sufficient if it apprises the employee of the nature of the charges and **general substance of the evidence** against him" (emphasis added)). Thus, the law clearly mandates that the employer must provide the employee with some notice of the evidence of the charges. *See Cannon v. City of Hammond,* 97-2660 (La. App. 1 Cir. 12/28/98), 727 So. 2d 570, 572-73; *Henderson v, Sewerage and Water Board,* 99-1508 (La. App. 4 Cir. 12/22/99), 752 So. 2d 252, 255. Therefore, the OLD did not carry its burden of proving by a preponderance of the evidence that it had afforded Mr. Lazard the due process required by Rules 12.7 and 12.8.

CONCLUSION

For the foregoing reasons, we agree with the judgment of the Commission denying the application for review of the referee decision. Accordingly, the judgment of the Civil Service Commission is affirmed. Costs of the appeal are assessed to appellant, the Orleans Levee District.

AFFIRMED.

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VERSUS

ORLEANS LEVEE DISTRICT

THERIOT, J. dissenting with reasons.

I respectfully dissent from the majority opinion and find that the referee erred in her finding that OLD's pre-disciplinary and termination letters do not comply with Civil Service Rule 12.7 and Civil Service Rule 12.8(b).

Due process entitles an employee threatened with termination to notice of the charges lodged against him, and an opportunity to tell his side of the story before termination. *Lange v. Orleans Levee Dist.*, 2010-0140 (La. 11/30/10), 56 So.3d 925, 930. However, only the *barest* of a pre-termination procedure is required when an elaborate post-termination procedure is provided. *Dep't of Pub. Safety & Corr., Office of Youth Servs. v. Savoie*, 569 So. 2d 139, 141-42 (La. App. 1st Cir. 10/16/90) (emphasis added); *Lange v. Orleans Levee Dist.*, 2010-0140 (La. 11/30/10), 56 So.3d 925, 931. Prior to discharge a public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present reasons why the proposed action should not be taken; notice is sufficient if it apprises the employee of the nature of the charges and the general substance of the evidence against him. *Savoie*, 569 So.2d at 141-42. To require more would intrude on the substantial governmental interest in quickly removing an unsatisfactory employee and create an unwarranted administrative burden. *Savoie*, 569 So.2d at 142. In this instance, an elaborate post-

termination procedure is set forth in the Louisiana Civil Service Rules, Chapter 13, "Civil Service Appeals," entitling Mr. Lazard to a post-termination appeal and thereby eliminating the need for more than the barest of pre-termination procedure. Further, Neither Rule 12.7 nor Rule 12.8 require an employer to prove its case at this stage; the rules simply require that the employer place the employee on notice.

In *Univ. of New Orleans v. Pepitune*, 460 So.2d 1191, 1193 (La. App. 1st Cir. 11/20/84) *writ denied,* 464 So.2d 315 (La. 1985), this Court upheld a decision of the Civil Service Commission finding that the employer had failed to bear its burden proving legal cause for the employee's dismissal. Specifically, this Court wrote:

> Civil Service Rule 12.3 requires the appointing authority to furnish the employee with detailed written reasons for removal or other disciplinary action. This rule "plainly comprehends a fair and clear statement of the misconduct of the employee including, whenever pertinent, times, dates, places and amounts." *Hays v. Louisiana Wildlife and Fisheries Commission,* 243 La. 278, 143 So.2d 71, 74 (1962); *Department of Public Safety v. Rigby,* 401 So.2d 1017, 1021 (La.App. 1st Cir.), *cert. denied,* 406 So.2d 626 (La.1981). "The purpose of this rule is to apprise the employee in detail of the charges and to limit any subsequent proceedings to the stated reasons. "*Rigby,* 401 So.2d at 1021 (citations omitted).

Pepitune, 460 So.2d at, 1193. Though the requirement that an employee be provided detailed notice of the basis for disciplinary action is now encompassed within Rule 12.7 and Rule 12.8(b), *Pepitune* remains pertinent and persuasive. The relevant portion of the pre-disciplinary letter and the termination letter, identical in each, provides:

> On Tuesday, January 7, 2014 you reported to work in violation of the Orleans Levee District Substance and Alcohol Abuse Policy and the Orleans Levee District Rules and Regulations. You were observed and questioned by the supervisors at which time you notified them that you had been drinking alcohol the night before while watching the football game.

From this, it is evident that Mr. Lazard was accused of violating an Alcohol Abuse Policy, and that this violation followed a night of drinking. The inference

that Mr. Lazard was being disciplined for appearing at work intoxicated was patently obvious. Further, the date, time and place of the violation – when Mr. Lazard reported to work on January 7, 2014 – were apparent in the letters. The purpose of the Civil Service Rules as stated in *Pepitune* is to apprise the employee in detail of the charges and to limit any subsequent proceedings to the stated reasons; as the pre-disciplinary letter and the termination letter plainly made Mr. Lazard aware that he had to defend against being charged with arriving at work on the morning of January 7, 2014, under the influence of alcohol in violation of the Orleans Levee District Rules and Regulations, "Alcohol and Drugs" section, the purpose of the Civil Service Rules was accomplished.

Thus, the letters were sufficient to put Mr. Lazard on notice of what he was accused of and of what he had to defend against, and, therefore, met the requirements of due process and Civil Service Rules 12.7 and 12.8(b).

OLD provided Mr. Lazard with notice of the charges against him, reasons for those charges, and a reasonable opportunity to respond to those charges; thus, the Referee's finding that OLD violated Civil Service Rule 12.7 and 12.8 and by extension, Mr. Lazard's due process rights, was erroneous. Thus, the Referee's decision to summarily dismiss the case was an abuse of discretion.