NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1526

LISA GUILLMETTE

VERSUS

CAPITAL AREA HUMAN SERVICES DISTRICT

Judgment Rendered: JUN 02 2017

* * * * *

On Appeal from the
State Civil Service Commission
Docket No. S-18102
Honorable David Duplantier, Chairman;
John McLure, Vice-Chairman;
G. Lee Griffin, Ronald M. Carrere, Jr.,
D. Scott Hughes, C. Pete Fremin,
and Kimberly Dellafosse, Members

Byron P. Decoteau, Jr., Director
Department of State Civil Service

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BEFORE: PETTIGREW, McDONALD, AND PENZATO, JJ.

PENZATO, J.

Lisa Guillmette appeals the decision of the State Civil Service Commission (Commission) sustaining the decision of the Capital Area Human Services District (CAHSD) to terminate her employment. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Ms. Guillmette was employed by CAHSD as a Medical Certification Specialist 2 and served with permanent status. By letter dated October 5, 2015, CAHSD terminated Ms. Guillmette's employment effective October 12, 2015. The termination letter detailed that Ms. Guillmette made threats against a supervisor and left a vulgar and profane voicemail on CAHSD's answering machine, violating CAHSD policy No. 420-05 "Employee Conduct," Section III, Rule Violations, which states:

> While the following list is not all inclusive, some of the violations which can result in disciplinary action, including dismissal, are as follows:
> a. Abusive behavior
> (1) Verbal threats towards persons or property, the use of vulgar or profane language towards others, making disparaging or derogatory comments or slurs, offensive sexual flirtations and propositions, verbal intimidation, exaggerated criticism, practical jokes and name calling.

The termination letter also indicated that Ms. Guillmette violated CAHSD Employee Handbook, Section III (A) Code of Conduct regarding a safe and non-hostile working environment for all employees and incorporated the policy on "Employee Conduct."

Ms. Guillmette appealed her termination to the Commission, claiming that in the days leading up to the threats and vulgar language, she was suffering from acute viral encephalopathy and other maladies causing her to have an altered mental state. Therefore, she claims that she had no control of her actions and was not at fault for her behavior.

A Civil Service Referee (Referee) heard testimony regarding the appeal and made certain factual findings, to which the parties generally do not dispute. Ms. Guillmette's duties at CAHSD included determining eligibility for clients in need of developmental disability services. Dr. Scott Meche was her third line supervisor, and Dr. Jan Kasofsky was the executive director of CAHSD. Prior to leaving the voicemail at issue in this matter, Ms. Guillmette had been unhappy with her work conditions, primarily due to her poor working relationship with Dr. Meche. The message that Ms. Guillmette left included threats to Dr. Meche and other negative comments about her work situation, including her request to begin a Weight Watchers program that was denied.

On Monday, August 10, 2015, Ms. Guillmette suffered an illness that required a visit to a medical clinic, and she did not go to work that day. She returned to work on August 11 and 12, 2015. On the evening of August 12, 2015, Ms. Guillmette suffered shortness of breath and a disjointed thought process. As a result, she went to the emergency room where she was treated and released. The nurse's notes from the emergency room visit noted that she was "very anxious" and "having problems with anxiety lately." She was diagnosed with Dyspnea (difficult or labored breathing) and Anxiety Disorder. Ms. Guillmette did not go to work on August 13 and 14, 2015. During the evening of Friday, August 14, 2015, and morning of Saturday, August 15, 2015, Ms. Guillmette was in an agitated state and her thoughts were disjointed. Her behavior was erratic and uncharacteristic of her normal behavior.

At 9:03 a.m. on Saturday, August 15, 2015, Ms. Guillmette left a voicemail on the CAHSD answering machine threatening Dr. Meche and using vulgar and profane language. At 9:46 a.m. on the same day, Ms. Guillmette's sister called 911, and Ms. Guillmette was taken to the hospital, where it was noted that she was combative, agitated, exhibited unmanageable behavior, was a danger to self and

others, paranoid, homicidal and suicidal. She was discharged on Monday, August 17, 2015, after being diagnosed with acute encephalopathy and sepsis. The hospital staff considered whether to refer Ms. Guillmette to a psychiatrist, psychologist, or to call the coroner for a Physician's Emergency Certificate. However, none of these things were done.

The human resources director of CAHSD, Shaketha Brown, informed Ms. Guillmette on the afternoon of August 17, 2015, that she had heard the voicemail, which Ms. Guillmette did not deny leaving. Approximately a week later, Ms. Guillmette saw her family physician, Dr. Kodi Crisp-Coleman, who opined that the hospital discharge diagnosis of viral encephalitis was correct and that the delirium associated therewith caused Ms. Guillmette's erratic behavior, including the voicemail.

On August 24, 2015, Ms. Guillmette met with Dr. Kasofsky, admitted remembering the content of the voicemail, and apologized for leaving it. Prior to issuing the termination letter dated October 5, 2015, Dr. Kasofsky consulted with Dr. Aniedi Udofa, a psychiatrist and deputy coroner in East Baton Rouge Parish, who was also CAHSD's medical director. Dr. Udofa was accepted at the hearing by the Referee as an expert witness in the field of psychiatry. She testified that she advised Dr. Kasofsky that due to the specific detailed facts referenced by Ms. Guillmette in her voicemail, and considering her response to both Ms. Brown and Dr. Kasofsky, Dr. Udofa believed that the illness that Ms. Guillmette suffered from on August 15, 2015, was more likely psychological than physical. Dr. Udofa did not believe that Ms. Guillmette could have provided the specific detail in her voicemail had the cause been viral encephalitis, which causes much more confusion. Furthermore, between August 10, 2015, and May 18, 2016, Ms. Guillmette did not see a psychologist or a psychiatrist to determine if she suffered from a mental illness.

The Referee issued a decision on July 15, 2016, concluding that CAHSD proved legal cause for discipline and that the penalty imposed, dismissal, was commensurate with the offenses. The Referee's decision became the final decision of the Commission, and Ms. Guillmette appeals from this decision.

ERRORS

Ms. Guillmette assigns nine errors to the Referee's decision. However, the first four errors can be consolidated to assert that the Referee erred in not concluding that the voicemail was the involuntary result of acute encephalitis, for which Ms. Guillmette was not at fault. In her fifth assignment of error, Ms. Guillmette asserts that the Referee erred in giving inappropriate weight to Dr. Udofa's testimony, who neither examined nor treated Ms. Guillmette. Assignments of error six through eight claim that the Referee erred in failing to determine that Ms. Guillmette must undergo a mental fitness for duty examination and in finding that she violated CAHSD policy regardless if she suffered from acute encephalitis or from a mental illness. Ms. Guillmette claims in her ninth assignment of error that the Referee erred in failing to award attorney fees and reverse the decision of CAHSD.

STANDARD OF REVIEW

This court summarized the standard of review applicable to a decision of the Commission in *Brown v. Dep't of Health & Hosps. E. Louisiana Mental Health Sys.*, 2004-2348 (La. App. 1 Cir. 11/4/05), 917 So. 2d 522, 527, *writ denied*, 2006-0178 (La. 4/24/06), 926 So. 2d 545, as follows:

> Generally, decisions of Commission referees are subject to the same standard of review as decisions of the Commission itself. Decisions of the Commission are subject to the same standard of review as a decision of a district court. When reviewing the Commission's findings of fact, the appellate court is required to apply the manifestly erroneous or clearly wrong standard of review. However, in evaluating the Commission's determination as to whether the disciplinary action taken by the appointing authority is based on legal cause and commensurate with the infraction, the reviewing court

> should not modify or reverse the Commission's order unless it is arbitrary, capricious, or characterized by an abuse of discretion. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof. A conclusion is "capricious" when there is no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. (Citations omitted).

LAW AND DISCUSSION

Employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. La. Const. art. 10, § 8. "Cause" exists when the employee's conduct is detrimental to the efficient and orderly operation of the public service that employed him or her. Stated differently, disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the public service. The appointing authority has the burden of proving by a preponderance of the evidence that the conduct did in fact impair the efficiency and orderly operation of the public service. *Brown,* 917 So. 2d at 527.

A preponderance of the evidence means evidence which is of greater weight than that which is offered in opposition thereto. And, proof is sufficient to constitute a preponderance when, taken as a whole, it shows the fact of causation sought to be proved as more probable than not. *Brown,* 917 So. 2d at 527; *see generally,* La. Const. Art. 10, § 8(A); Civil Service Rule 13.19(c).

The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Stobart v. State, through Department of Transportation and Development,* 617 So. 2d 880, 882 (La. 1993). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Stobart,* 617 So. 2d at 882.

Where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Stobart,* 617 So. 2d at 883.

Assignments of Error One through Four

In her first four assignments of error, Ms. Guillmette contends that the Referee erred in failing to accept that, more likely than not, Ms. Guillmette suffered from acute involuntary viral encephalitis, which caused her erratic behavior.

Dr. Crisp-Coleman qualified as an expert in family medicine and admitted to having no specialty in psychiatry or psychology. Prior to the events of August 2015, she saw Ms. Guillmette only once for an annual exam. Dr. Crisp-Coleman did not see Ms. Guillmette during the days which led to her hospital stay or during her hospital stay, but treated her on August 24, 2015, for a hospital follow-up. She obtained the hospital records two days later, and based on a review of those records, opined that Ms. Guillmette's erratic behavior was the result of viral encephalitis and was due to "more of a delirium due to illness, not a mental illness."

Dr. Udofa was accepted as an expert in the field of psychiatry. She did not treat Ms. Guillmette, but was asked by Dr. Kasofsky to review the medical records of Ms. Guillmette. She concluded that Ms. Guillmette made a credible threat against Dr. Meche. Dr. Udofa also noted that Ms. Guillmette's voicemail referenced killing herself and cited specific past events at CAHSD. Dr. Udofa explained that viral encephalitis is a diagnosis of exclusion and that the hospital records were negative for viral encephalitis so the diagnosis was "encephalitis, likely viral." Dr. Udofa explained that because Ms. Guillmette had never been seen by a psychiatrist or psychologist during her hospital stay, as well as the fact that her voicemail contained specific threats and referenced real events, the doctor

could not exclude mental illness as the cause of Ms. Guillmette's behavior. Dr. Udofa did not recommend that Ms. Guillmette return to work with CAHSD.

Ms. Brown learned of the voicemail on Monday, August 17, 2015, and immediately notified Dr. Kasofsky, who was out of the country, and the Louisiana Department of Public Safety. Ms. Brown called Ms. Guillmette and informed her that she was being placed on leave with pay and criminal charges were filed for improper telephone communication. When Dr. Kasofsky returned, she and Ms. Brown held a meeting on August 27, 2015, with Ms. Guillmette, giving her a chance to explain what occurred. Ms. Guillmette explained that at the time of the voicemail she had viral encephalitis. After an investigation, Dr. Kasofsky issued a pre-termination notice and attached the policies that had been violated by Ms. Guillmette.

Dr. Kasofsky is the appointing authority for CAHSD and makes disciplinary decisions. She testified that at the August 27, 2015 meeting, Ms. Guillmette explained some of the references in her voicemail, including the one to the Weight Watchers program she had wanted to begin and her understanding that state money could not be used for the program. Dr. Kasofsky testified that Ms. Guillmette seemed to recall the voicemail and had apologized for its occurrence. Dr. Kasofsky was concerned that the voicemail named actual people and real incidents and contained threats against Dr. Meche and to Ms. Guillmette. She asked Dr. Udofa to listen to the voicemail, and Dr. Udofa agreed that Ms. Guillmette's threat was credible and there was a legitimate concern for staff safety.

At the hearing, Ms. Guillmette denied that she remembered leaving the voicemail until after she heard the call and her sister, Robin Guillmette, filled her in on some of the facts.[1] However, Ms. Guillmette did testify that at the meeting with Dr. Kasofsky, she was able to explain the details of her reference to the Weight Watchers program. She also admitted on cross examination that she was unhappy with her work environment due to Dr. Meche. She also agreed that she did not deny leaving the voicemail when she initially spoke to Ms. Brown.

The Referee noted that at the hearing, Ms. Guillmette denied that she even remembered leaving the voicemail. However, he did not find her testimony credible based on the detail she was able to give Dr. Kasofsky during their meeting, that she did not deny the voicemail message when she spoke to Ms. Brown, and that she was unhappy with Dr. Meche at work. Ms. Guillmette argues that the Referee erred in relying on her failure to deny the voicemail message.

We find no manifest error in the Referee's credibility determinations in this regard. The trial court's decision to favor Dr. Kasofsky's and Ms. Brown's testimony over Ms. Guillmette's testimony, which was internally inconsistent, is a classic credibility call left to the discretion of the fact finder. A fact finder's ruling on a witness's credibility is entitled to "great deference" and will not be overturned unless there is no evidence to support those findings. An appellate court errs in substituting its own credibility judgment for that of the trial court, and we find no reason to do so considering the clear conflict in the testimony. *Burnett v. E. Baton Rouge Par. Sch. Bd.,* 2011-1851 (La. App. 1 Cir. 5/3/12), 99 So. 3d 54, 61-62, *writ denied,* 2012-1217 (La. 9/21/12), 98 So. 3d 342 (citing *Foshee v. Georgia Gulf Chemicals & Vinyls, L.L.C.,* 2009-2477 (La. 7/6/10), 42 So.3d 346, 349).

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[1] The tape recorder malfunctioned at the hearing and the testimony of Ms. Guillmette was not recorded. Therefore, the parties agreed to permit the Referee's notes to be used in lieu of Ms. Guillmette's testimony. Any reference made to her testimony is taken from these notes, which are included in the record.

Ms. Guillmette argues that she is not responsible for the threats she made due to the viral encephalitis. Following the hearing, the Referee greatly detailed his reasoning for the credibility decisions he made. Those details included believing the testimony of Dr. Udofa that the diagnosis of viral encephalitis by the hospital was a diagnosis of exclusion since other possible explanations were ruled out. He also believed Dr. Udofa's testimony that viral encephalitis would have caused Ms. Guillmette to have been so confused she could not have recalled the detailed facts that she referenced in her voicemail. As we find no manifest error in the Referee's factual findings, these assignments of error are without merit.

Assignment of Error Five

Ms. Guillmette's fifth assignment of error is that the Referee failed to give more weight to the opinion of Dr. Crisp-Coleman, her treating family physician, than Dr. Udofa, CAHSD's medial director and a psychiatrist. When faced with the question of whether to accept the opinion of a non-treating physician specialist over the opinion of a treating physician specialist, this circuit has previously held that the trial court ultimately retains the discretion to weigh and consider such competing testimony, despite any applicable presumptions. *Dawson v. Terrebonne Gen. Med. Ctr.,* 2010-2130 (La. App. 1 Cir. 5/19/11), 69 So. 3d 622, 627, recently quoted *Ponthier v. Vulcan Foundry, Inc.,* 1995-1343 (La. App. 1 Cir. 2/23/96), 668 So. 2d 1315, 1317 (footnotes omitted) (emphasis added), as follows:

> Experts' testimony may be given different weights depending on their qualifications and the facts upon which their opinions are based. For example, the general jurisprudential rules are that a treating physician's opinion is given more weight than a non-treating physician, and the testimony of a specialist is entitled to greater weight than a general practitioner. **The trial court, however, is not bound to accept the testimony of an expert whose testimony is presumptively given more weight if he finds the opinion is less credible than that of other experts.** As the supreme court explained in *Middle Tennessee Council v. Ford,* 274 So.2d 173, 177 (La. 1973):
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> > The weight to be given to the testimony of experts is largely dependent upon their qualifications and the facts

> upon which their opinions are based. However, the sincerity and honesty of the opinions expressed are matters which the trial judge is in a particularly advantageous position to determine. It is, in effect, in part, a question of credibility, and when the experts are widely disparate in their conclusions, the rule has special relevance.

In the present case, we note that the testifying doctors were not of the same specialty, and that neither doctor treated Ms. Guillmette during her hospital stay. Both doctors relied on their review of her hospital records. The Referee had the discretion to evaluate all of the testimony and to determine which expert's opinion was most credible. This determination cannot be disturbed unless found to be manifestly erroneous. On the record before us, after careful review of the medical records and testimony offered, we find the Referee's conclusions are amply supported. Therefore, we are unable to find manifest error in the determination of the Referee.

Assignments of Error Six through Nine

In her sixth through ninth assignments of error, Ms. Guillmette claims that because the Referee concluded that it was unclear "whether [Ms.] Guillmette suffered from viral encephalitis or from mental illness which was undiagnosed and untreated," he erred in failing to hold that CAHSD should have had her undergo a mental fitness for duty examination prior to the decision to terminate her. Ms. Guillmette opines that due to the viral encephalitis that was ravaging her brain, she did not know what she was doing at the time she left the voicemail.

The Referee made a finding of fact that because Ms. Guillmette's memory regarding the voicemail message was accurate, he did not believe that she was unaware of what she was doing at the time she left the voicemail message. We have previously discussed the Referee's credibility determinations with regard to Ms. Guillmette's testimony and have found no manifest error.

Ms. Guillmette argues that even if her actions were the result of a previously undiagnosed and untreated mental illness, CAHSD should have insisted on a proper mental examination rather than termination. She relies on *Department of Public Safety and Corrections, Office of State Police v. Mensman,* 1995-1950 (La. 4/8/96), 671 So. 2d 319 (per curiam), wherein the state police terminated Mensman for neglecting his basic duties. He appealed his termination and testified that during the time period of the offending conduct, he was suffering from depression, and therefore, termination was an excessive penalty. Mensman had actually sought professional help shortly before his termination. The Commission determined that termination was too severe a penalty and took into consideration that Mensman's major depression affected his ability to work and that the state police had not accommodated his schedule to attend group counseling, thereby contributing to his discontinuing therapy. Consequently, the Commission reinstated Mensman with the condition that a treating therapist certify he was fit to return to active duty. *Mensman,* 671 So. 2d at 322.

Mensman does not dictate, as argued by Ms. Guillmette, that the Commission must "insist upon [an employee] submitting to a mental health fit for duty assessment prior to making any decision to terminate." The depression suffered by Mensman was well documented and no threat of violence was involved in that case. We find nothing that places the obligation on an employer to conduct or demand that a mental health examination of an employee be conducted.

"Cause" for the dismissal of a person who has gained permanent status in the classified civil service has been interpreted to include conduct prejudicial to the public service in which the employee in question is engaged or detrimental to its efficient operation. *Mensman,* 671 So. 2d at 321. Threats of violence can constitute legal cause for dismissal of a permanent civil service employee. *Usun v. LSU Health Sci. Ctr. Med. Ctr. of Louisiana at New Orleans,* 2002-0295 (La. App.

1 Cir. 2/14/03), 845 So. 2d 491, 496. Based on the evidence in the record, the safety of CAHSD staff and clients was at issue, and we cannot say that the Referee's determination was arbitrary, capricious or an abuse of discretion. These assignments of error are without merit.

CONCLUSION

For the above and foregoing reasons, the State Civil Service Commission's decision of July 15, 2016 is affirmed. All costs of this appeal are assessed against appellant, Lisa Guillmette.

AFFIRMED.