

NOT DESIGNATED FOR PUBLICATION

WRC (by Jmm)
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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0472

ALTON DAILEY

VERSUS

DEPARTMENT OF PUBLIC SAFETY & CORECTIONS, RAYMOND
LABORDE CORRECTIONAL CENTER

DATE OF JUDGMENT: NOV 01 2017

ON APPEAL FROM THE LOUISIANA CIVIL SERVICE COMMISSION
NUMBER 18052

DAVID DUPLANTIER, CHAIRMAN

Alton Dailey
Cottonport, Louisiana

Plaintiff-Appellant
Pro Se

Susan Wall Griffin
Baton Rouge, Louisiana

Counsel for Defendant-Appellee
Department of Public Safety &
Corrections, Raymond Laborde
Correctional Center

BEFORE: WHIPPLE, C.J., McDONALD AND CHUTZ, JJ.

Disposition: AFFIRMED.

CHUTZ, J.

This is an appeal by appellant, Alton Dailey, from a ruling of the Louisiana Civil Service Commission (Commission) denying his application for review, thereby rendering the decision of the Civil Service Referee (Referee) the final decision of the Commission.¹ The Referee's decision upheld the termination of appellant's employment with appellee, the Louisiana Department of Public Safety and Corrections (DPSC). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 9, 2014, appellant was employed by DPSC as a Corrections Sergeant with permanent status at Raymond Laborde Correctional Center, f/k/a the Avoyelles Correctional Center.² An altercation occurred on that date between several correctional officers and inmates while appellant was on duty as a "gun guard," as a result of which appellant was accused of failing to come to the aid of fellow officers by firing a warning shot. Appellant gave a written statement that day stating that even though he saw the disturbance, he did not fire his shotgun "because he was not close enough to see what was going on." On December 11, appellant was informed that he was being placed on administrative leave pending an investigation of the incident. Appellant prepared a written response to DPSC's charges, which is dated December 18. On December 19, the review officer recommended termination of appellant's employment.³ On December 22, appellant indicated he believed the proposed termination was excessive.

DPSC issued a letter dated January 7, 2015, terminating appellant's employment effective January 14. Appellant appealed that disciplinary action to the Commission. An issue was raised therein concerning whether the termination letter described the conduct forming the basis for his termination with the

¹ See La. Const. art. 10, § 12(A); Civil Service Rule 13.36(g).

² See 2016 La. Acts, No. 49, § 1.

³ According to DPSC, appellant was the subject of three prior disciplinary actions in 2014.

specificity required by Civil Service Rule 12.8.⁴ In response, DPSC requested permission, pursuant to Civil Service Rule 15.10, to rescind the January 2015 disciplinary action/termination letter due to the alleged lack of specificity. In its request, DPSC indicated that if approval was granted, a new termination letter would be issued correcting the alleged defect. The Referee granted approval of the rescission on April 10, which had the effect of rescinding appellant's termination, and further indicated the approval constituted "a final disposition" of the appeal.

On April 15, 2015, DPSC issued a second termination letter to appellant based on the December 2014 incident, with an effective termination date of April 25, and appellant filed a new appeal to the Commission. Thereafter, the Referee issued a notice to DPSC of a possible defect in the disciplinary action due to appellant's allegation that he did not receive pre-deprivation notice of the conduct for which the disciplinary action was taken or an opportunity to respond prior to the disciplinary action, as required by Civil Service Rule 12.7. The Referee requested that DPSC provide copies of the pre-disciplinary notice and any response filed by appellant. Additionally, appellant filed a motion for summary disposition on the grounds of the alleged lack of pre-deprivation notice. Upon reviewing the documents provided by DPSC, the Referee determined that appellant "received adequate pre-deprivation notice of the charges" against him. She further

⁴ Civil Service Rule 12.8 provides:

When an appointing authority decides to discipline or remove a permanent employee, the employee must be given written notice of the action being taken before the time the action becomes effective. The written notice must:

(a) state what action (suspension, reduction in pay, demotion, dismissal, or removal) is being taken and the date and time the action will become effective; and

(b) describe in detail the conduct supporting the action (who, what, when, where, why, and how) and

(c) contain the following notice: "You have the right to appeal this action to the State Civil Service Commission within 30 calendar days following the date you receive this notice. The appeal procedure is contained in Chapter 13 of the Civil Service Rules, which is available from the Department of State Civil Service or your Human Resource office."

concluded that summary disposition of the appeal was inappropriate and recalled the notice of possible defect.

After a public hearing on the merits, the Referee issued a decision finding DSPC proved both legal cause for discipline against appellant and that the penalty imposed was commensurate with the offense. The Commission denied appellant's application for review of the Referee's decision, which had the effect of rendering the Referee's decision the final decision of the Commission. Appellant now appeals the Commission's decision, raising five assignments of error.

DISCUSSION

In his first three assignments of error, appellant argues he was not afforded a pre-deprivation *Loudermill* hearing, written or oral notice of the proposed disciplinary action, the factual basis for the action, and a description of the evidence supporting it, nor the due process protections provided by Rule 12.7. He complains that the Referee held a hearing in his appeal when he was not accorded the due process protections afforded by Rule 12.7.

Appellant's contentions are based on the fact that the original disciplinary action against him of which he was informed in the letter issued by DPSC in January 2015 was rescinded in April 2015. Contending that the Commission ignored this rescission, appellant argues DPSC "was lawfully supposed to start the entire disciplinary procedure over after [he] had been reinstated," but it failed to do so. Appellant does not allege the pre-deprivation notice, opportunity to respond, and *Loudermill* hearing afforded to him in December 2014 were inadequate in any manner. It is his contention that once the January 2015 disciplinary action/termination letter was rescinded, DPSC was required to once again give him pre-deprivation notice, an opportunity to respond, and a hearing before issuing a second termination letter. We disagree.

Both the United States Constitution and the Louisiana Constitution provide that an individual cannot be deprived of property without due process of law. U.S. Const. amend. 14; La. Const. art. I, § 2. It is well established that a permanent, classified civil service employee has a property interest in retaining his job. *Lange v. Orleans Levee District*, 10-0140 (La. 11/30/10), 56 So.3d 925, 930; *Hudson v. Department of Public Safety & Corrections, Louisiana State Penitentiary*, 96-0499 (La. App. 1st Cir. 11/8/96), 682 So.2d 1314, 1318, writ denied, 96-2942 (La. 1/31/97), 687 So.2d 408. Thus, such an employee cannot be terminated without due process of law. *Cleveland Board of Education. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed.2d 494 (1985); *Lange*, 56 So.3d at 930.

The essential requirements of procedural due process are notice and the opportunity to be heard. *Loudermill*, 470 U.S. at 542, 105 S. Ct. at 1495. In *Lange*, the Louisiana Supreme Court recognized that the principles delineated in *Loudermill* regarding the due process rights owed to permanent, civil service employees threatened with termination were codified in Civil Service Rule 12.7. *Lange*, 56 So.3d at 930. Specifically, Rule 12.7 provides that when an appointing authority proposes to terminate a permanent employee “the employee 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.”

In the instant case, after reviewing the documentation provided by DPSC concerning the pre-deprivation process accorded to appellant, the Referee concluded that the requirements of due process were met. In civil service disciplinary cases, decisions of the Commission and its referees are subject to the same standard of review as a decision of a district court. *Harrell v. Dept. of Health and Hospitals, Office for Citizens with Developmental Disabilities, Pinecrest Supports and Services Center*, 10-0281 (La. App. 1st Cir. 9/10/10), 48

So.3d 297, 301, writ not considered, 10-2310 (La. 12/10/10), 51 So.3d 715. A reviewing court should not disturb the factual findings made by a referee in the absence of manifest error. *Wiley v. Department of Health & Hospitals*, 15-1984 (La. App. 1st Cir. 9/16/16), 203 So.3d 1085, 1087. We find no error in the Referee's determination that appellant received sufficient due process.

We find no merit in appellant's contention that DPSC was required to repeat the pre-deprivation process, including another *Loudermill* hearing, a second time after DPSC's original disciplinary action/termination letter was rescinded in April 2015. The rescission did not nullify the pre-deprivation process required by *Loudermill* and Rule 12.7 that was provided to appellant in December 2014. The rescission was requested by DPSC because the original termination letter failed to comply with Rule 12.8, which deals specifically with the written notice required after an appointing authority decides to discipline or remove a permanent employee, and not due to any failure to comply with Rule 12.7, which deals with an employee's right to pre-deprivation notice and an opportunity to respond. Although it was necessary for DPSC to reissue the termination letter with a new effective date after the rescission, we are unaware of any authority requiring DPSC to repeat the preliminary steps in the disciplinary action, such as pre-deprivation notice and opportunity to respond. See *Brown v. Housing Authority of New Orleans*, 590 So.2d 1258, 1260 (La. App. 1st Cir. 1991) (the holding of a pre-termination hearing is a preliminary step in a disciplinary action).

Appellant has not alleged any way in which he was prejudiced by the lack of a second pre-deprivation notice and opportunity to respond after the rescission of the original disciplinary action/termination letter. The due process requirements delineated in *Loudermill* and codified in Rule 12.7 serve as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employees are true and

support the proposed action.” *Loudermill*, 470 U.S. at 545-46, 105 S.Ct. at 1495; *Lange*, 56 So.3d at 930-31. This objective was accomplished through the pre-deprivation process afforded to appellant by DPSC in December 2014. At that time, appellant received both notice and an opportunity to respond to the charges against him. The central issue presented herein is whether appellant was afforded due process prior to his termination. We agree with the Referee’s determination that appellant was afforded adequate, pre-deprivation due process in this case.

In assignment of error number four, appellant contends he was never reinstated to his position, as he should have been, after the April 2015 rescission of DPSC’s original disciplinary action/termination letter. In response, DPSC asserts in its appellate brief that although appellant was not required to return to work after the rescission, his status was changed from a former to a current employee and he was paid back wage and received service credit for the period from the effective date of the original termination letter, January 14, 2015, until the effective date of the second termination letter.

The record before us does not contain a transcript of the hearing held before the Referee nor any other evidence related to this issue raised by appellant. In his motion for appeal, appellant specifically stated he was not requesting a transcript.

It is the burden of the appellant, or the party answering the appeal, to provide the court with an adequate basis for their complaint in the form of a transcript, narrative, or evidence. *Deshautelles v. South Central Bell Telephone Company*, 96-0716 (La. App. 1st Cir. 12/20/96), 694 So.2d 381, 385, writ denied, 97-0893 (La. 5/9/97), 693 So.2d 761; *Brousseau v. Tucker*, 479 So.2d 446, 452 (La. App. 1st Cir. 1985), writ not considered, 481 So.2d 1329 (La. 1986). The absence of any evidence, transcript, or narrative is imputable to the one assigning error. Under such circumstances, the judgment on appeal is presumed to be correct. See *Deshautelles*, 694 So.2d at 385; *Brousseau*, 479 So.2d at 452.

Therefore, on the record before us, no basis exists to support this assignment of error.

In his final assignment of error, appellant assigns error to the Commission's failure to assign written reasons in denying his application for review of the Referee's decision. However, appellant has cited no authority to this Court that requires the Commission to do so. Civil Service Rule 13.36(f)(4) provides that after consideration of an application for review, the Commission may affirm the referee's decision by denying the application for review. Further, Rule 13.36(g) clearly envisions the Commission affirming a referee's decision without written reasons, because it provides that upon the filing of the Commission's order denying an application for review, the decision of the referee becomes the decision of the Commission. Under these provisions, the Commission is not required to assign written reasons when denying an application for review.

CONCLUSION

For the reasons assigned, the decision of the Civil Service Commission is affirmed. All costs of this appeal are to be paid by appellant, Alton Dailey.

AFFIRMED.