

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2018 CA 1183

NORRIS JOHNSON

VERSUS

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS - DIXON
CORRECTIONAL INSTITUTE

Judgment rendered JUN 17 2019

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On Appeal from the
State Civil Service Commission
State of Louisiana
No. S-18171

The Honorable David Duplantier, Chairman
D. Scott Hughes, Vice-Chairman
John McLure, G. Lee Griffin, Ronald M. Carrere, Jr.
C. Pete Fremin, and Jo Ann Nixon, Members
Byron P. Decoteau, Jr. Director, Department of State Civil Service

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

CA
WJC by JMM
JMM

HOLDRIDGE, J.

Norris Johnson appeals a final decision of the Louisiana State Civil Service Commission (“Commission”) upholding the termination of his employment. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Johnson was employed as a Corrections Sergeant at the Department of Public Safety and Corrections (DPSC) – Dixon Correctional Institute (DCI). By letter dated April 7, 2016, DPSC dismissed Johnson from his position effective April 15, 2016. DPSC alleged Johnson attempted to engage in sexual activity with an offender and failed to conduct a proper search of the offender, in violation of agency policy. Johnson appealed his dismissal, denying the allegations and, in the alternative, alleging that dismissal was too severe a penalty. A Commission referee held a public hearing, and based upon the evidence presented, denied Johnson’s appeal. Johnson filed an application for review of the referee’s decision, which the Commission denied. Johnson now seeks review in this court.

DISCUSSION

On appeal, Johnson claims that the factual findings and conclusions of the referee were manifestly erroneous and that termination as a penalty was too severe.

Decisions of referees are subject to the same standard of review as decisions of the Commission itself. **Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans**, 2002-0295 (La. App. 1 Cir. 2/14/03), 845 So.2d 491, 494. Decisions of the Commission are subject to the same standard of review as decisions of a district court. **Id.** Thus, as to the Commission referee’s factual findings, the reviewing court should apply the clearly wrong or manifest error standard of review. **Id.** The trier of fact is granted a great deal of discretion in matters of credibility of witnesses. See **Young v. Department of Health and**

Human Resources, 405 So.2d 1209, 1212 (La. App. 1 Cir.), writ denied, 407 So.2d 749 (La. 1981). This is so because the trier of fact is able to observe first-hand the demeanor and character of the witnesses, while this court is limited to a review of the cold record. **Id.** Therefore, unless the factual findings are clearly wrong or manifestly erroneous, we will not disturb credibility determinations of the referee.

A permanent classified employee may be disciplined only for cause. La. Const. art. 10, § 8(A); **Usun**, 845 So.2d at 495. “Cause” for disciplinary action is conduct of the employee that is detrimental to the efficient and orderly operation of the public service that employed him or her. **Id.** 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. **Foreman v. LSU Health Sciences Center**, 2004-0651 (La. App. 1 Cir. 3/24/05), 907 So.2d 103, 106, writ denied, 2005-1084 (La. 6/24/05), 904 So.2d 742. Furthermore, the error of law standard is applicable to questions of law presented in review of an administrative decision. **Id.**

In this case, the referee held an evidentiary hearing and issued factual findings, which we summarize herein. Jean Turner, Corrections Sergeant Master, testified that on March 1, 2016 at 1:40 p.m. at DCI, she went to find Johnson to have him sign a payroll document. Turner went into the kitchen office, where Johnson and an offender were. Turner testified she saw both of Johnson’s hands halfway down the front of the offender’s pants, with his palms facing the offender. She immediately turned and walked back to the outside of the kitchen office, facing the men. Johnson told the offender to go to the bathroom and straighten his

clothes, and he did. Johnson advised Turner that he was “shaking down” (searching) the offender to make sure that he was not stealing sugar packets from the kitchen area. Johnson then sat down at the desk and laid his head down. Turner reported the incident to Johnson’s supervisors.

According to Johnson, immediately prior to the incident, he saw the offender put sugar packets in his front pant pockets.¹ Johnson testified that the offender refused to remove the sugar packets from his pockets even after Johnson ordered him to do so. The offender’s refusal to follow Johnson’s order was a violation of Offender Rules, but Johnson did not write him up for this violation.

The Department policies that Johnson was alleged to have violated were those concerning searches and improper activities with offenders. More specifically, DCI Policy 3A-022 — Control of Contraband; Searches and Preservation of Evidence states:

II. PAT DOWN / FRISK SEARCH

A. Offender

A search of a fully clothed offender for the purpose of discovering contraband. The offender being searched may be required to empty his pockets or any other item in his control where contraband items may be stored or carried. ...

The offender being searched may also be required to remove all outerwear (coats, jackets, hats, caps, belts, gloves, shoes, socks, etc.) in order for these items to be searched. He may also be required to run his hands through his hair and to open his mouth for inspection. The offender will not be required to remove articles of clothing, which are the offender’s basic dress (shirt, pants, etc.)[.]

The person conducting the search shall use his hands to touch the offender being searched, through his clothes, in such a manner to determine if something is being concealed. If the person conducting the search discovers an unusual lump, bulge, etc., he may order the offender being searched to disclose the source.

¹ Except for one occasion, the offender in his testimony always referred to a pocket, but Johnson in his testimony referred to both pockets and a pocket.

DPSC Corrections Services Employee Manual, Section II, Part I, Rules 13(g) and 14(h) state:

13. MALFEASANCE— AGGRAVATED:

...

g. Each employee must perform his duties so as to fulfill the purpose and responsibility of his assignment.

14. UNAUTHORIZED ACTIVITIES WITH OFFENDERS:

...

h. Staff Sexual Abuse-Includes any behavior or act of a sexual nature directed by an officer, employee or contract worker of the Department with an offender or resident who is under their supervision and who is assigned to a confinement facility such as a prison, correctional institution, jail, transitional work program or judicial agency referral residential facility. Examples of this behavior include, but are not limited to, the following:

- Intentional touching of the genitalia, anus, groin, breast, inner thigh or buttocks with the intent to abuse, arouse or gratify sexual desire;
- Completed, attempted, threatened or requested sexual acts;
- Occurrences of indecent exposure, invasion of privacy or staff voyeurism for sexual gratification[;]
- Sexual relationships of a romantic nature between staff and an offender with or without the consent of the offender are included in this definition.

The referee determined that Johnson violated DPSC sexual abuse policy, DCI search policy, and DPSC aggravated malfeasance policy. Of the different accounts by Turner, Johnson, and the offender as to what occurred between Johnson and the offender, the referee specifically stated that he found only Turner's testimony to be entirely credible and that he based his findings of fact on her testimony. The referee concluded that the only reasonable explanation for the incident of March 1, 2016, was that Johnson attempted to touch the offender's genitalia with the intent to arouse or gratify his sexual desire.

The referee also stated that Johnson's testimony was "completely unworthy of belief." The referee noted that Johnson's testimony that he reached his right hand into the offender's left-front pants pocket was contrary to both Turner's and

the offender's testimony. Moreover, on direct examination, Johnson testified that he had not been investigated as to any sexual allegations with offenders at DCI. However, on cross examination, he admitted that he had been investigated twice. The first investigation was based on an allegation by another inmate who alleged that Johnson grabbed his penis and tried to kiss him. The second investigation was based on a different inmate's allegation that on one occasion, Johnson looked at his crotch and said, "[L]ooks like something is happy today."

The referee found the offender's testimony credible except for his testimony as to how Johnson touched him. The offender testified that he got sugar for his coffee and also put some sugar packets in his pocket. According to the offender, Johnson said, "I ought to shake you down" and grabbed the front of his waistband and tugged on his pants. The offender said that Johnson's hands were inside the front waistband of his pants, but that Johnson's palms were not facing him. The referee determined that this part of the offender's testimony was an effort to minimize Johnson's actions so that if Johnson returned to work at DCI, the offender would not be subject to possible retaliation. The offender also testified that in February of 2016, Johnson had improperly given him a piece of chicken to eat. The offender stated that in February of 2016, Johnson told him, "You are getting big" and "You look like you work out."

The referee stated that Johnson conceded that reaching his hand into the pants pocket of the offender's pants was contrary to DCI search policy. Additionally, Jason Kent, Corrections Warden 4, testified that, regardless of which way Johnson's palms were facing (away from the offender as the offender had testified), Johnson's search was improper as Johnson should not have placed his hands inside the offender's waistband or inside his pant pockets.

In determining that DPSC proved cause for discipline against Johnson, the referee stated that DCI has a quasi-military environment. He then said that although there was no testimony that Johnson actually touched the offender's genitalia, the mere attempt was a violation of DPSC policy and a potential breach of security.² Warden Kent testified that if Turner had not witnessed the incident, the offender could have forced Johnson to break DCI rules in the future by threatening to report the incident.

In concluding that DPSC proved that the penalty imposed was commensurate with the offenses of attempting to engage in sexual activity with an offender and failing to conduct a proper search of an offender who was believed to have contraband on his person, the referee concluded that the impairment to state service was the potential security breach at DCI, which could have led to destruction of life or property, or both. The referee noted that actual impairment was not required, and that the increased potential for impairment was sufficient. See Ravencraft v. Department of Public Safety and Corrections, 608 So.2d 1051, 1057 (La. App. 1 Cir.), writ denied, 609 So.2d 829 (La. 1992). The referee found that Johnson's behavior was detrimental to state service and that it endangered the safety and security of the inmates and employees at DCI. The referee concluded that Johnson's dismissal was commensurate with the offenses.

We find no manifest error in the factual findings of the referee. His determination that Turner's testimony as to the incident was more credible was supported by the evidence submitted and a reasonable basis exists for that determination. We do not find that the referee's decision to uphold Johnson's termination was arbitrary, capricious, or characterized by an abuse of discretion.

² The referee erroneously referred to DCFS policy in his decision, but it is clear he meant DPSC policy.

We agree with the referee's conclusion that Johnson's termination was warranted and commensurate with his violations of DPSC rules. Accordingly, we find no merit in Johnson's contentions on appeal.

CONCLUSION

For the foregoing reasons, the decision of the referee and the Commission's denial of the application for review are affirmed. Costs of this appeal are assessed to Norris Johnson.

AFFIRMED.