

NOT DESIGNATED FOR PUBLICATION

DOUGLAS BUTLER * **NO. 2000-CA-1358**
VERSUS * **COURT OF APPEAL**
NEW ORLEANS POLICE * **FOURTH CIRCUIT**
DEPARTMENT * **STATE OF LOUISIANA**

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 5971

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Chief Judge William H. Byrnes, III

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(Court composed of Chief Judge William H. Byrnes, III, Judge Miriam G. Waltzer, and Judge Michael E. Kirby)

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AFFIRMED

Police Officer Douglas Butler appeals the May 2, 2000 disciplinary action of the Civil Service Commission of the City of New Orleans to suspend him for 30 days. We affirm.

On August 15, 1998, around 1:25 a.m., Officer Douglas Butler responded to a call and drove his vehicle in the wrong direction one block down a one-way street, Bartholomew Street. He slowed down but did not see a stop sign because he was going the wrong way at the intersection of Dauphine and Bartholomew Streets, and he was broad-sided by a pickup truck driven by a private citizen. The police vehicle was totaled. The property damage to the vehicles was approximately \$13,000. The physical injuries were insignificant.

The New Orleans Police Department's accident review board concluded that the accident was preventable and had occurred during a line-of-duty emergency response. After a hearing, the Civil Service Commission upheld Superintendent Richard Pennington's 30-day suspension of Officer Butler. On May 2, 2000, The Civil Service Commission found that Officer Butler bore the sole responsibility for the accident and the penalty followed

the established departmental guidelines.

On appeal, Officer Butler contends that the penalty should be reduced based on mitigating factors.

An employee with permanent status in the classified civil service, may be disciplined only for cause expressed in writing. La. Const. Art. X, § 8; *Walters v. Department of Police of the City of New Orleans*, 454 So.2d 106 (La.1984); *Cittadino v. Department of Police*, 558 So.2d 1311 (La.App. 4 Cir. 1990). Legal cause for disciplinary action exists if the facts found by the Commission show that the conduct of the employee impairs the efficiency of the public service. *Fisher v. Department of Health and Human Resources, Office of Human Development*, 517 So.2d 318 (La.App. 1 Cir.1987); *Leggett v. Northwestern State College*, 242 La. 927, 140 So.2d 5 (La. 1962). 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. *Newman v. Department of Fire*, 425 So.2d 753, 754 (La. 1983). The appointing authority (the New Orleans Police Department) must prove to the appropriate Civil Service Board, by a preponderance of the evidence, that this correlation exists. *Cittadino, supra*. The legal basis for any change in a disciplinary action can only be that sufficient cause for the

action was not shown by the appointing authority. *Chapman v. Department of Police*, 97-1384 (La. App. 4 Cir. 1/28/98), 706 So.2d 656, writ denied, 98-0828 (La. 5/8/98), 719 So.2d 55. A supervisor is given much latitude in exercising control of the employees under his jurisdiction. *Marinovic v. New Orleans Police Dept.*, 422 So.2d 226, 228 (La. App. 4 Cir. 1982).

Appellate review encompasses both questions of fact and questions of law. La. Const. Art. X, § 12(B). Deference will be given to the factual conclusions of the Commission. *Bannister v. Department of Streets*, 95-0404 (La. 1/16/96), 666 So.2d 641, 647. In reviewing the findings of the Civil Service Commission, the court should apply the clearly wrong or manifest error rule generally appropriate for appellate review. *Walters, supra*, 454 So.2d at 113. The punishment should be commensurate with the infraction; the reviewing court should not modify the Commission's order unless it is arbitrary, capricious or characterized by abuse of discretion. *Cittadino, supra*.

In the present case, when Officer Butler testified, he was asked if the other driver caused the accident. Officer Butler stated that: "No, sir, I accepted full responsibility for this accident at the accident review board." He does not contest liability, but he contests the severity of the disciplinary penalty. Officer Butler referred to the August 30, 1999 report of the hearing

examiner. Officer Butler submits that the examiner found that the sole issue to be whether the amount of property damage could be a legitimate sole determiner of the number of days that the appointing authority may suspend an employee. Officer Butler asserts that the mitigating factors should have been considered as well as other viable punishments that would achieve the same results without placing such a financial hardship on the officer.

Officer Butler avers that a mitigating factor was that he was not familiar with the streets because he is from New York and was only on the job for a few months. He responded to a call in unfamiliar territory. In his brief Officer Butler stated that perhaps he was not ready to be put in a capacity to drive on unfamiliar one-way streets in response to emergency situations. Officer Butler asserts that the Department dispatcher pulled his unit out of his normal area around the 600 block of Bartholomew Street. He stated that Bartholomew Street runs both ways in the area with which he was familiar by the Florida Projects, and he mistakenly drove the wrong way for one block on Bartholomew, when the accident occurred at the intersection.

Officer Butler responded to a medical emergency call. The record shows that he had been assigned to the Fifth District on December 5, 1997. The accident occurred on August 15, 1998. This time period was adequate for a driver to be aware of the one-way street sign and apparent danger in

driving the wrong way. The officer is expected to be aware of the traffic hazard he creates.

Officer Butler maintains that La. R.S. 32:24 under certain circumstances allows a driver of an emergency vehicle to exceed the maximum speed limits and disregard traffic regulations.

La. R.S. 32:24 provides:

A. The driver of an authorized emergency vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to, but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

B. The driver of an authorized emergency vehicle may:

(1) Park or stand, irrespective of the provisions of this Chapter;

(2) Proceed past a red or stop signal or stop sign, but only after slowing down or stopping as may be necessary for safe operation;

(3) Exceed the maximum speed limits so long as he does not endanger life or property;

(4) Disregard regulations governing the direction of movement or turning in specified directions.

C. The exceptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of audible or visual signals sufficient to warn motorists of their approach, except that a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

D. The foregoing provisions shall not relieve the driver of an authorized vehicle from the duty to drive with due regard for the safety of all persons,

nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Although the above statute permits drivers to disregard the traffic signs in some situations, § D states that the statute does not protect the driver of an authorized vehicle from the consequences of his reckless disregard for the safety of others.

Officer Butler referred to the accident report prepared by Lieutenant Thomas R. O'Shaugnessey. Although Lieutenant O'Shaugnessey did not testify at the Civil Service hearing, and the record does not show that the accident report was introduced into evidence, Deputy Chief Duane Johnson testified about the accident report. Although the accident report is not in the record, we will review the testimony concerning that report.

Officer Butler claims that the accident report demonstrates the mitigating factor that he actually stopped at the intersection before proceeding into the intersection where the accident occurred. Officer Butler also asserts that the report shows that the civilian vehicle was speeding and Officer Butler was not. Officer Butler testified that he was going the normal speed limit of 25 miles per hour. Officer Butler stated that he did not put on the siren but had put on the blue lights just as he was hit by the civilian vehicle.

During the hearing, Officer Butler's counsel read from the accident report:

It said, "From observed damage to vehicle number two and no visible skid marks, owner of vehicle number two may have been in violation of Title 32, Section 64, which is the general speed law, which may have contributed to a compliant failure of Revised Statute 32, 125, which says that the vehicle, even though it has the right of way, shall yield to the emergency vehicle." . . .

Deputy Chief Johnson testified that the accident review board "reviewed the circumstances of the accident by looking at the police report, examining photographs from the scene, listening to the officer's testimony, as well as reviewing [the] supervisor's report." He compared Lieutenant O'Shaughnessy's comments in the accident report with the assessment by the accident investigator. Deputy Chief Johnson stated:

The accident investigator did not indicate any skid mark data on the other vehicle, in fact, he did not check off any violations, he put no violations on the part of the citizen vehicle. He checked off violations on [the] part of the officer's vehicle. So, despite the comments that Lieutenant O'Shaughnessy made, I would have to defer to the totality of the accident scene and based on what we've seen from our recognized expert that we dispatch off to handle it.

* * *

. . . But, I would also like you to note that Lieutenant O'Shaughnessy says that the[--], under that same narrative, under the guidelines of 32, 24, Emergency Vehicles Exception, that the officer approached the intersection at a rate of about five

miles per hour to ten miles per hour, which is also inconsistent with the accident investigation and inconsistent with the damages. I believe that an officer at five miles per hour could certainly stop his car if he would have yielded to the other intersection which had the right of way.

Deputy Chief Johnson remarked that the amount of damage from the pictures showed that the accident did not take place at five miles per hour. It was a significant amount of speed where the other driver could not avoid a collision.

Deputy Chief Johnson gave an explanation of the factors that were evaluated by the accident review board. He explained that on a case-by-case basis, the accident review board took into consideration the grossness of the violation, the significance of what the officer did wrong, whether he violated department procedures and whether he violated traffic laws. The accident review board also looked at the results of the accident to determine what injuries and damage were involved, and whether there was more than one party in respect to the emergency response. Deputy Chief Johnson noted that the accident report said that the officer was responding to a Code 2, but the disciplinary letter states that it was a Code 3 emergency response. Code 2 allows an officer to proceed at the speed limit whereas a Code 3 allows the officer to travel ten miles per hour above the speed limit. Both Codes allow the officer to use the blue lights and siren on the police vehicle. Deputy

Chief Johnson stated that whether the Code was 2 or 3 did not mitigate the circumstances of the accident at all.

When asked how the accident adversely affected the efficient running of the police department, Deputy Chief Johnson stated that the police vehicle was significant and critical to the fleet where the police had a limited number of resources. The loss of a car might make officers pair up rather than having individual cars.

As a mitigating circumstance, Officer Butler asserts that he went the wrong way unintentionally by mistake. Deputy Chief Johnson agreed that it would have been a lot more serious offense if Officer Butler disregarded the stop sign rather than if he drove the wrong way unintentionally. Deputy Chief Johnson considered that 30 days was consistent with similar types of accidents. He remarked that the amount of damages involved suggested some speed although there was no definite evidence or skid mark data that would prove the amount of speed involved.

The record shows that the Civil Service Commission reviewed the mitigating circumstances in affirming Officer Butler's 30-day suspension. We cannot find that the punishment was not commensurate with the infraction, and that the Superintendent of Police and the Civil Service Commission were clearly wrong, acted arbitrarily and capriciously, or

abused their discretion in assessing Officer Butler's penalty.

Accordingly, the disciplinary action of the Civil Service Commission is affirmed.

AFFIRMED