NOT DESIGNATED FOR PUBLICATION

TRACY FULTON	*	**NO. 2000-CA-2144**
VERSUS	*	**COURT OF APPEAL**
NEW ORLEANS POLICE DEPARTMENT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 5977

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Judge Miriam G. Waltzer

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(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray and Judge Max N. Tobias, Jr.)

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AFFIRMED.

STATEMENT OF THE CASE

Officer Tracy Fulton appeals a Civil Service Commission ruling upholding his thirty-day suspension from the New Orleans Police Department (NOPD).

STATEMENT OF FACTS

Fulton is a Police Officer III with permanent status in the Civil Service System. On 2 June 1998, at 9:00 a.m., he failed to appear in Juvenile Court after being served and acknowledging receipt of a subpoena. By letter dated 30 December 1998 from Superintendent Richard Pennington, Fulton was suspended for thirty days, effective 17 January 1999, for violations of departmental regulations specific to instructions from an authoritative source and mandatory court attendance. Fulton appealed the disciplinary action taken against him to the Civil Service Commission, and the matter was assigned to a hearing examiner. A hearing was held on 15 April 1999. The Commission reviewed the hearing officer's report, as well as the transcript and the documentary evidence presented at the hearing, and

denied Fulton's appeal without modification on 4 August 2000. Fulton now appeals to this Court.

APPLICABLE LAW

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action by his employer except for cause expressed in writing. The employee may appeal from such disciplinary action to the City Civil Service Commission. The burden of proof on appeal, as to the facts, shall be on the appointing authority. La. Const. art. X, § 8 (1974); Walters v. Department of Police of New Orleans, 454 So.2d 106, 112-113 (La. 1984). The Commission's decision is subject to review on any question of law or fact upon appeal to the appropriate court of appeal. La. Const. art. X § 12(B).

The Commission has a duty to independently decide, from the facts presented, whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction. Walters, 454 So.2d at 113. Legal cause for disciplinary action exists whenever an employee's conduct impairs the efficiency of the public service in which that employee is engaged. Cittadino v. Department of Police, 558 So.2d 1311 (La. App. 4 Cir. 1990). The appointing authority has the burden of proving, by a preponderance of the evidence, that the complained of activity occurred, and that such activity

bore a real and substantial relationship to the efficient operation of the public service. Id., at 1315.

In reviewing the Commission's exercise of its discretion in determining whether the disciplinary action is based on legal cause and the punishment is commensurate with the infraction, this Court should not modify the Commission's order unless it is arbitrary, capricious or characterized by an abuse of discretion. Walters, 454 So.2d at 114. "Arbitrary or capricious" means that there is no rational basis for the action taken by the Commission. Bannister v. Department of Streets, 95-0404, p.8 (La. 1/16/96), 666 So.2d 641, 647.

The Commission has the authority to "hear and decide" disciplinary cases, which includes the authority to modify (reduce) as well as to reverse or affirm a penalty. La. Const. art. X, § 12; Branighan v. Department of Police, 362 So.2d 1221, 1223 (La. App. 4 Cir. 1978). 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. The protection of civil service employees is only against firing (or other discipline) without cause. Id. at p. 1222.

The appointing authority is charged with the operation of his or her department and it is within his or her discretion to discipline an employee for

sufficient cause. Joseph v. Department of Health, 389 So. 2d 739, 741 (La. App. 4 Cir. 1980); Branighan, 362 So.2d at 1223. The Commission is not charged with such operation or such disciplining. Id.

In James v. Sewerage and Water Board of New Orleans, 505 So.2d 119 (La. App. 4 Cir. 1987), we considered a decision of the Commission which reversed a five day suspension of an employee and suggested a reprimand instead. In reversing the Commission and reinstating the suspension, we reaffirmed and reiterated the holdings in Joseph and Branighan, stating:

> It is not the job of the Commission to decide who should be disciplined how. The appointing authority is charged with the operation of his department. He is the one who must run the department, an obviously necessary part of which is dismissing or disciplining employees. While he may not do so without cause, he may, and indeed must, within the exercise of sound discretion, dismiss or discipline an employee for sufficient cause. The Commission is not charged with such operation or such disciplining.

Id. at 121.

In Smith v. New Orleans Police Department, 00-1486 (La. App. 4 Cir. 4/11/01), __ So.2d __, we reversed the Commission's reduction of a suspension from five days to two days for an officer's failure to complete an investigation of a shoplifting incident by writing a police report and

confiscating surveillance tapes that showed the alleged perpetrator fleeing the scene. At the Civil Service hearing, the NOPD called the officer who investigated the charges against Officer Smith, as well as the Captain who had conducted a Commander's hearing on those charges. Both testified that Officer Smith should have prepared a police report. In addition, Officer Smith testified to having two sustained, and one pending, suspensions for neglect of duty. Thus, we found ample evidence to show that the Superintendent acted reasonably and with sufficient legal cause in imposing a five-day suspension under the circumstances of the case.

Recently, in Stevens v. Department of Police, 2000-1682 (La. App. 4 Cir. 5/9/01), __ So.2d __, we reversed the Commission's reduction of a suspension from fifteen days to ten days for an officer's running of a stop sign and causing an accident with another vehicle. The Commission concluded that the appointing authority had suspended Officer Stevens for just cause; nevertheless, it found that the fifteen day suspension was not commensurate with the dereliction and reduced it to ten days in view of Officer Stevens' exemplary record and the appointing authority's previously imposed disciplinary action in similar cases. We held that the Commission's reduction of the suspension was an arbitrary and capricious interference with the Superintendent's authority to manage the police department.

DISCUSSION

In his sole assignment of error, Officer Fulton asserts that the Commission acted arbitrarily, capriciously and contrary to the law and to the facts in upholding the NOPD's thirty-day suspension against him. Specifically, Officer Fulton asserts that he had no intent to violate departmental rules. He claims that he merely overslept on the day he was subpoenaed to Juvenile Court, after having worked the night before. When he awoke, he called the Assistant District Attorney in charge of the case and was told that he need not appear because the defendant had already pled guilty that morning. Thus, he claims that no harm occurred as a result of his missed court appearance. Further, Officer Fulton argues that Superintendent Pennington improperly relied on three prior sustained violations of "instructions from authoritative source" in making his decision to suspend him for thirty days, because those violations were under appeal at the time. As a result, Officer Fulton claims that the thirty-day suspension was too severe for the infraction committed.

In response, the City argues that the Commission made the right decision based upon competent evidence presented by the NOPD. The City points out that Officer Fulton was the arresting officer and his presence was therefore crucial to the prosecution of the juvenile case. In addition, Officer

Fulton admitted that he had not called the Assistant District Attorney until after 2:00 p.m. on the day in question, even though the subpoena had required him to be in court at 9:00 a.m. In support of its arguments, the City offers the following excerpt from the Commission's decision: "Testimony by police officers in open court is one of the more fundamental duties of officers, and the Appellant, by taking such a cavalier attitude to a legally issued subpoena, had a detrimental impact on the efficient operation of the Police Department."

In addition to the above quote, this Court also notes the following language from the Commission's decision: "For Appellant to have argued that he called the Assistant District Attorney five hours *after* (emphasis added) he was scheduled to be in court is so flimsy as to be almost laughable. Had a guilty plea not been entered, the defendant in that juvenile case could have been set free by Appellant's negligent actions."

The City did not address Officer Fulton's allegation that Superintendent Pennington, in levying the thirty-day suspension, improperly relied upon three prior sustained violations because those violations were the subject of outstanding appeals. This Court observes that the Commission recognized in its decision that Officer Fulton's argument in this regard had legal merit. The Commission went on to note, however, that since the time

that testimony had been taken in this case, it had ruled on Officer Fulton's other appeals, denying them in each instance.

We agree with the Commission's unstated conclusion that Officer Fulton's argument in this regard had become moot by the time the Commission rendered its decision in this matter.

Based on the record before this Court, we find that Commission's decision to uphold the thirty-day suspension levied against Officer Fulton was not manifestly erroneous. As correctly noted by the Commission, one of the most fundamental duties of an arresting officer is testifying in open court to the facts surrounding a particular suspect's arrest. As admitted by Officer Fulton, a case can be dismissed for the failure of the arresting officer to show up and testify. The fact that Officer Fulton's neglect of duty did not result in the juvenile defendant being set free is irrelevant. The NOPD has a right to insist that its officers properly perform their duties. It follows that the NOPD has a right to discipline its officers for breach of those duties. The NOPD should not have to dispense discipline based on the harm, or in this case, the lack of harm, caused by an officer's breach of duty. It was not error for the Civil Service Commission to sustain the penalty imposed by the appointing authority.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Civil Service Commission.

AFFIRMED