

ISIDRO MAGANA

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NO. 2001-CA-0326

VERSUS

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COURT OF APPEAL

**NEW ORLEANS POLICE
DEPARTMENT**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 6045

JUDGE JOAN BERNARD ARMSTRONG

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard
Armstrong and Judge Terri F. Love)

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RENDERED **REVERSED AND**

STATEMENT OF THE CASE

The New Orleans Police Department (“NOPD”) appeals a decision of the Civil Service Commission of the City of New Orleans (“the Commission”) reducing by two days a three-day suspension for neglect of duty imposed by the NOPD Superintendent on Officer Isidro Magana for his failure to inspect and secure his assigned police vehicle at the end of his tour of duty on December 8, 1998. Because we find that the Commission acted arbitrarily and capriciously, we reverse the Commission’s decision and reinstate the original three-day suspension.

STATEMENT OF THE FACTS

Testimony at the Civil Service Hearing revealed the following.

Officer Magana is a Police Officer IV assigned to the Second District. He is a Field Training Officer (FTO) responsible for instructing recruits on the proper way to perform the duties of police officers. On December 8, 1998, he was training recruit Hilal Rohli. Together, he and Rohli had performed the required inspections of their vehicle on each of the four

previous days of training. He had instructed her that assigned vehicles needed to be inspected at the beginning and end of each tour of duty. That morning, Rohli had inspected their vehicle under his supervision. During their tour that day, they made no arrests and had no passengers. The vehicle had remained locked at all times when they were not in it. They had returned to the station to finish up paperwork. At the end of their shift, Rohli returned to their vehicle, which had been locked in the station's lot, to retrieve their belongings. Officer Magana assumed Recruit Rohli was going to perform the end of shift inspection. He does not dispute that he personally did not inspect the vehicle that evening. He learned later that night that something had been found in the vehicle, but he never actually saw the substance. Someone from Central Evidence and Property told him that the substance was never tested. Likewise, someone from the Public Integrity Division told him that if the substance was listed as found property, it was probably not tested.

Officer Magana received a letter of reprimand dated July 21, 1999 from NOPD Superintendent Richard Pennington. The letter noted the following factual finding:

[O]n December 8, 1998, at 7:00 PM, while at 4317 Magazine, you failed to properly check and secure your assigned police vehicle at the end of your tour-of-duty. As a result the oncoming officers discovered a substance believed to be cocaine. Your failure to properly check the vehicle also led to

the owner of the substance not being charged with the violation.

The letter referred to a May 13, 1999 hearing before Captain Louis Dabdoub. Following that hearing, Captain Dabdoub recommended that a violation of neglect of duty be sustained and that Officer Magana receive a letter of reprimand.

NOPD Rule 4.4 defines neglect of duty as failure to perform the duties or assume the responsibilities of an officer's grade and assignment. Civil Service Rule IX provides, in pertinent part, that when a classified employee is unable or unwilling to perform his duties in a satisfactory manner or has omitted to perform any act it was his duty to perform, the appointing authority shall take action warranted by the circumstances. This action may include, *inter alia*, suspension without pay not exceeding one hundred twenty calendar days.

The letter went on to state that Bureau Chief Ronald Serpas had reviewed the investigation and recommended that a three-day suspension would be a more appropriate penalty in light of a prior sustained case for neglect of duty. The Superintendent approved the three-day suspension recommended by Bureau Chief Serpas.

On cross-examination, Officer Magana admitted having the ultimate responsibility for inspecting his vehicle, even though a recruit was assisting

him with his duties at the time. Under questioning by the hearing examiner, he stated that his appreciation of the purpose of checking the vehicle was to make sure that they found any contraband.

Officer Mark Stich testified that he was assigned the vehicle in question on the evening of December 8, 1998. During his inspection of the vehicle at the beginning of his tour, he discovered what appeared to be a piece of crack cocaine on the rear floor. The rock was about the size of a penny and was wrapped in plastic. He took the substance to the Central Evidence and Property room and filed a Found Property report. He identified a photograph of the substance he found in the back of the vehicle. He also identified the police report he prepared in conjunction with the found property. He verified that the photograph and the police report contain the same item number. Officer Stich stated that during his training, he had been told to search his police vehicle before and after his shift.

Officer Hilal Rohli testified that the day in question was her fourth day on the street as a new recruit. She admitted giving a statement shortly after the incident to the effect that she did not check the interior of the vehicle prior to getting off on 12/8/98. However, she remembered searching the back of the vehicle because she had dropped her pen. She further stated that, at the time, she had never seen crack cocaine before, and probably

could have passed it up even if she had seen it that evening.

The decision of the Commission reduced the three-day suspension to a one-day suspension.

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 City 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. (emphasis in original)

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 Bd. 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 Palmer v. Department of Police, 97-1593 (La. App. 4 Cir. 1/28/98), 706 So.2d 658, we reversed the Commission's reversal of the NOPD's imposition of a two-day suspension where a prisoner in an officer's custody

had escaped because the officer had not followed police procedure. In its decision, the Commission noted that it had found mitigating circumstances which needed to be taken into account in determining whether Officer Palmer's actions had impaired the efficient operation of the public service. We stated that Officer Palmer's actions either did, or did not impair the efficient operation of the public service, *despite mitigating circumstances*. Finding that Officer Palmer's actions clearly impaired the efficiency of the public service, we held that the Commission's opinion that the two-day suspension was inappropriate was simply a substitution of its judgment for that of the appointing authority.

Similarly, in Chapman v. Department of Police, 97-1384 (La. App. 4 Cir. 1/28/98), 706 So.2d 656, we rejected the Commission's reduction of a suspension from thirty to ten days, holding that the Commission is not charged with the operation of the NOPD or disciplining its employees. Importantly, we noted that the Commission had concluded that Chapman violated departmental regulations, but it believed that the thirty-day suspension was "too harsh" under the circumstances. We concluded that the Commission's action was simply a substitution of its judgment for the Superintendent's judgment. We found that the Superintendent had sufficient cause to impose the penalty and that the NOPD carried its burden of proof.

The Commission's action was an arbitrary and capricious interference with the authority of the Superintendent to manage his department.

In Smith v. New Orleans Police Department, 2000-1486 (La. App. 4 Cir. 4/11/01), 784 So.2d 806, 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), 789 So.2d 622, 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 its sole assignment of error, the NOPD asserts that the Commission acted arbitrarily and capriciously and committed clear error in reducing the suspension imposed by the Superintendent of the NOPD and exceeded its constitutional authority by substituting its judgment for that of the appointing authority.

In its decision, the Commission noted: "It being clear that there was an infraction, there remains the question of whether the discipline imposed was commensurate with the offense." The Commission went on to state that: "It is clear from the disciplinary letter that the severity of the discipline imposed on Officer Magana was predicated on the *presumed* nature of the "found property"." The Commission then opined at length regarding the sufficiency of the proof that the substance was actually crack cocaine, and the applicability of a disciplinary chart allegedly used by the NOPD

Superintendent when determining the appropriate discipline to impose in a particular case.

The Commission's focus on whether the substance found in Officer Magana's car was actually cocaine was misplaced. Officer Magana is a Field Training Officer whose duty it is to ensure that new recruits are trained in using proper police procedure. He admitted that he failed to personally perform, or to specifically ensure that Recruit Rohli perform, the required end of shift inspection. While it is unfortunate that the substance found in his car was never tested, this fact does not make the discipline imposed upon him by the appointing authority improper. The efficiency of the public service was affected by the failure of Officer Magana to see that proper police procedure was followed. At this early stage of her field training, Recruit Rohli should not have been allowed to skip the required end of shift inspection simply because they had made no arrests nor carried any passengers during their tour of duty. Officer Magana testified that the purpose of the end of shift vehicle inspection was to make sure that any contraband was found. As demonstrated by Officer Stich, a thorough inspection resulted in the discovery of a substance that had apparently been overlooked in the initial search of Officer Magana's vehicle earlier that day. Here, the Commission merely reduced the suspension imposed upon Officer

Magana; it did not eliminate it altogether. Such action belies its argument that the appointing authority failed to prove that Officer Magana's conduct had any adverse effect on the efficient operation of the public service. We find that the appointing authority proved by a preponderance of the evidence that Officer Magana's dereliction impaired the efficient and orderly operation of the police department.

We must now determine whether the discipline imposed by the NOPD was commensurate with Officer Magana's dereliction. Officer Magana admitted receiving a letter of reprimand for an earlier violation of neglect of duty. Civil Service Rule IX provides that when an employee has committed any act to the prejudice of the service, the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service. This action may include suspension without pay not to exceed one hundred twenty calendar days. Officer Magana was responsible for training new recruits in proper police procedure. When we consider the nature of Officer Magana's infraction and his prior violation for neglect of duty in that context, we cannot say that imposition of a three-day suspension was excessive. The Commission's reduction of the Officer Magana' suspension from three days to one day was an arbitrary and capricious interference with the authority of the Superintendent to manage his department.

For the foregoing reasons, the decision of the Civil Service Commission is reversed and the three-day suspension originally imposed on Officer Magana by the appointing authority is reinstated.

REVERSED AND

RENDERED