

**NOT DESIGNATED FOR PUBLICATION**

**KRISTER VILLEN** \* **NO. 2001-CA-0205**  
**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. 6058**

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**Judge Dennis R. Bagneris, Sr.**

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(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer, Judge Dennis R. Bagneris, Sr.)

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**REVERSED**

The New Orleans Police Department, appeals the Civil Service Commission's decision reversing a 5-day suspension that had been imposed by the Superintendent on Officer Krister Vilen. The Superintendent imposed the suspension on Officer Vilen for his alleged untruthfulness he gave in an administrative statement. Officer Vilen appealed to the Civil Service Commission.

### **FACTS**

The Public Integrity Division conducts internal integrity checks that are videotaped and recorded to determine whether police officers are following internal regulations when dealing with the general public. The Public Integrity Division created a scenario using two undercover police recruits who posed as private citizens. Police Office Ryan Maher responded to a call to investigate an alleged automobile theft and to question suspicious individuals. Also, Police Office Krister Vilen responded to the same call as a back up to Officer Maher.

During the course of the investigation Officer Maher questioned the undercover police recruits. A confrontation occurred between officer Maher and the two undercover police recruits who were posing as private citizens.

The confrontation was videotaped as it was happening and later reviewed. The videotape established that Officer Maher cursed and threatened the two undercover police recruits. Further, the videotape showed that Officer Vilen was approximately four to six feet away from Officer Maher during the confrontation and could have easily heard Officer Maher's curse and threaten the two undercover police recruits. However, Officer Vilen in an administrative statement to the Public Integrity Division denied hearing Officer's Maher's curse and threaten the two undercover police recruits.

Sergeant Bernell Neville, of the Public Integrity Division conducted an investigation, which was followed by a disciplinary hearing of Officer Vilen. The Police Superintendent determined that Officer Vilen was untruthful when he denied hearing Officer Maher's curse or threaten the two undercover police recruits. Officer Vilen was suspended for five days for violating the appointing authority's rule concerning truthfulness. Officer Vilen appealed to the Civil Service Commission.

On December 7, 1999 the Civil Service Commission conducted a hearing on the matter and took the matter under advisement. The Civil Service Commission rendered judgment overturning Officer Vilen's five-day suspension. The Civil Service Commission opined, "While Officer Vilen could easily have heard the remarks, the appointing authority cannot

determine what he did or did not hear from observing a videotape”. The New Orleans Police Department appeals.

### **DISCUSSION**

On appeal, the New Orleans Police Department contends that the Civil Service Commission acted arbitrarily and capriciously and committed clear error in overturning the suspension imposed by the Superintendent of Police. Secondly, the Civil Service Commission exceeded its constitutional authority by substituting its judgment for that of the appointing authority.

The New Orleans Police Department argues that if the Civil Service Commission reverses a disciplinary action, it must have an articulated basis for taking such action, i.e. stated rules or guidelines. Otherwise, the appointing authority cannot adequately impose its own regulations and standard of service.

The Civil Service Commission has the exclusive power and authority to hear and decide all removal and disciplinary cases, with subpoena power

and power to administer oaths. It may appoint a referee to take testimony, with subpoena power and power to administer oaths to witnesses. The Commission's decision is subject to review on any question of law or fact upon appeal to the Court of Appeal. La. Const. art. X, Sec. 12(B).

The Louisiana Supreme Court has formulated jurisprudential precepts to guide the Commission and the courts of appeal in applying these constitutional principles. "Cause" for the dismissal of a person who has gained permanent status in the classified civil service has been interpreted to include conduct prejudicial to the public service in which the employee in question is engaged or detrimental to its efficient operation. *Leggett v. Northwestern State College*, 242 La. 927, 140 So.2d 5 (1962); *Brickman v. New Orleans Aviation Board*, 236 La. 143, 107 So.2d 422 (1958); *Jais v. Department of Finance*, 228 La. 399, 82 So.2d 689 (1955); *Gervais v. New Orleans Department of Police*, 226 La. 782, 77 So.2d 393 (1955).

The Commission has a duty to decide independently from the facts presented whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *See Brickman v. New Orleans Aviation Board*, *supra* 107 So.2d at 434 (1958) (*McCaleb, J., dissenting*). A reviewing court should not reverse a commission conclusion as to the

existence or absence of cause for dismissal unless the decision is arbitrary, capricious or an abuse of the commission's discretion. *Jones v. Louisiana Department of Highways*, 259 La. 329, 250 So.2d 356 (1971); *Konen v. New Orleans Police Department*, 226 La. 739, 77 So.2d 24 (1954). On the other hand, the judicial review function is not so limited with respect to the commission's decisions as to jurisdiction, procedure, and interpretation of laws and regulations. *Konen v. NOPD, supra*.

The standard to be applied by a court in reviewing the commission's factual findings has changed over the years. Under the previous constitution, which provided that the commission's findings of fact were final, La. Const. art. XIV Sec. 15(O)(1) (1921), this court held in a variety of decisions that the agency's factual findings would not be disturbed if there is of record "any evidence," *Leggett v. Northwestern State College, supra*; "substantial evidence," *Konen v. New Orleans Police Department, supra*; "some evidence," *Gervais v. New Orleans Police Department, supra* or "probative evidence," *Mayerhafer v. New Orleans Police Department*, 235 La. 437, 104 So.2d 163 (1958), to support them. See *H.F. Sockrider, Dismissal of Louisiana State Civil Service Employees*, 23 La.L.Rev.121 (1962). These standards of review of factual determinations, however, have been superseded by the new constitutional rule that the commission's

decision is subject to review on any question of law or fact. La. Const. art. 10 Sec. 12.

Accordingly, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review in deciding whether to affirm the commission's factual findings. *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978); *Canter v. Koehring Co.*, 283 So.2d 716 (La.1973). See, *Sanders v. Department of Health and Human Resources*, 394 So.2d 629 (La.App. 1st Cir.1980); *writ denied*, 399 So.2d 602 (La.1981); *Herbert v. Department of Police*, 362 So.2d 1190 (La.App. 4th Cir.1978); *Michel v. Department of Public Safety, Alcoholic Beverage Control Board*, 341 So.2d 1161 (La.App. 1st Cir.1976); *writ denied*, 343 So.2d 1078 (La.1977).

Thus a multifaceted review function is committed to the court in civil service disciplinary cases. In reviewing the commission's procedural decisions and interpretations of law the court performs its traditional plenary functions of insuring procedural rectitude and reviewing questions of law. Due concern both for the intention of the constitution and for the boundaries between the functions of the commission and of the court, however, demands that a reviewing court exercise other aspects of its review function with more circumspection. In reviewing the commission's findings of fact,

the court should not reverse or modify such a finding unless it is clearly wrong or manifestly erroneous. In judging 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, the court should not modify the commission's order unless it is arbitrary, capricious or characterized by abuse of discretion. Cf. La.R.S. 49:964; *Save Ourselves, Inc. v. The Louisiana Environmental Control Commission*, 452 So.2d 1152 (La.1984); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C.Cir.1978); *K. Davis, Administrative Law* (1982 Supp.) at 536 et seq., *Walters v. Department of Police of City of New Orleans* 454 So.2d 106 (La.1984).

### **APPLICATION OF LEGAL PRECEPTS**

Applying these precepts to the evidence of record, we conclude that the commission did commit manifest error in its factual findings:

- (a) The commission was clearly wrong in finding that the appointing authority could not determine what Officer Vilen did not hear from observing videotape;
- (b) The commission was clearly wrong in finding that the appointing authority failed to establish a preponderance of the evidence that Officer Vilen was untruthful.



Further, after reviewing the video tape in the record, we find that the Officer Villen was untruthful in his statement to the Superintendent. The video clearly establishes that Officer Villen was no more than two to three feet away during the confrontation. Officer Maher's words were loud and clearly audible.

The appointing authority proved by a preponderance of the evidence, that the complained of activity occurred, and that the activity bore a real and a substantial relationship to the efficient operation of the police department. *Cittadino v. Department of Police*, 558 So. 2d 1311 (La. App. 4 Cir. 1990). There is a rational basis and sufficient cause for Officer Villen's five-day suspension imposed by the Superintendent.

Therefore, the action of the Commission in overturning the Superintendent's ruling was arbitrary and capricious. Accordingly, we find the commission erred in its judgment. We reverse and reinstate the five-day suspension imposed by the Superintendent.

**REVERSED**