

NOT DESIGNATED FOR PUBLICATION

ERIC BERGER * **NO. 2001-CA-1731**
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. 6153
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Judge Patricia Rivet Murray
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(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

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**RULING ON REHEARING STRICKEN; ORIGINAL RULING
OF THE CIVIL SERVICE COMMISSION AFFIRMED**

Plaintiff/Appellant Eric Berger appeals a decision of the Civil Service Commission (“the Commission”) upholding a ten (10) day suspension levied against him by his employer, the New Orleans Police Department (“the NOPD”), for his having reported late to his assigned place of work on five occasions.

FACTS AND PROCEDURAL HISTORY

Berger is a Police Officer who has attained permanent status in the classified city service. During the time at question, Berger worked as the First District’s A-case officer in the District Investigation Unit (“the DIU”). His primary responsibility was to deliver each day’s case reports to the District Attorney’s Office for the processing of State arrests. By letter dated 15 March 2000, the NOPD, through Superintendent Richard Pennington, informed him that an administrative investigation revealed that he had been observed reporting late to his assigned place of work on five separate occasions between July of 1998 and February of 1999, in violation of departmental rules concerning Reporting for Duty. The letter stated that

following a hearing held before Bureau Chief Ronald Serpas on 26 January 2000, at which Berger offered nothing which would tend to mitigate, justify, or explain his behavior, Chief Serpas had recommended that the violation be sustained and that Berger receive a ten (10) day suspension. The letter stated that Superintendent Pennington was imposing the recommended penalty and that his suspension would commence on Sunday, 26 March 2000.

Berger timely appealed the suspension to the Commission. Testimony was taken before a Hearing Officer on 3 August 2000, 7 September 2000, and 19 October 2000. In an opinion rendered on 29 May 2001, the Commission made the following findings:

The facts are not in dispute. The Appellant admits that he did not report to his place of assignment at the beginning of his shift on the five days during which he was under surveillance. He also admits that he did not obtain permission to work at home. The Appointing Authority acknowledges that the Appellant always put in a full day and that he performed all of the requirements of the job. From these facts, it is clear that the Appellant violated the internal rule requiring that he report for duty at the time and place required by the assignment. The Appellant erred in not asking his supervisors for permission to work at home. However, it is also clear that the Appellant did not realize that he was violating internal rules. His supervisors did not admonish him. In fact, they had no complaints.

Based on those findings, the Commission ruled that the Appointing Authority had met its burden of proving that Berger had violated departmental rules concerning reporting for duty. However, the

Commission found that the penalty was not commensurate with the violation, considering that Berger was not informed of his error up front and given the opportunity to correct his behavior. Accordingly, the Commission treated the five incidents as a single violation and reduced the suspension to two (2) days, ordering the NOPD to return to Berger the remaining eight (8) days with all emoluments. From our review of the record, it appears that the Commission's 29 May 2000 ruling was not mailed to the parties.

Oddly, on 25 July 2001, the Commission issued another opinion stating therein the following:

After hearing argument, the Commission grants the Motion for Rehearing and approves the original ten-day suspension imposed by the appointing authority. Accordingly, the appellant's appeal is **DENIED**.

Apparently, both the May 2001 and the July 2001 decisions of the Commission were sent to the parties under a cover letter dated 27 July 2001.

Berger timely appealed the Commission's decision to this Court.

STANDARD OF REVIEW

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. (Emphasis in original).

The superintendent of police is charged with the operation of his department and it is within his discretion to discipline an officer for sufficient cause. The Civil Service Commission is not charged with such operation or such disciplining. Id. at p. 1223.

DISCUSSION

The NOPD rule that Berger is alleged to have violated was laid out in the 15 March 2000 disciplinary letter suspending Berger and reads as follows:

RULE 4 PERFORMANCE OF DUTY

1. REPORTING FOR DUTY

A member shall promptly report for duty at the time and place required by assignment or orders, but in the event of inability to perform or begin punctually, he shall notify his commanding officer or a member of his unit authorized to receive such information before the designated time for commencement.

In his sole assignment of error, Berger asserts that the Commission's decision upholding his ten (10) day suspension is arbitrary, capricious, and clearly erroneous, and/or that the penalty assessed against him is excessive. In support of its arguments, however, Berger raises another unique issue concerning the Commission's 25 July 2001 decision. That decision was allegedly rendered upon rehearing. It approved the original ten (10) day suspension imposed by the NOPD and denied his appeal. Although the Commission stated that it reached its new decision after "hearing argument", Berger correctly points out that nothing in the record indicates that another hearing took place after the Commission's 29 May 2001 decision reducing his ten (10) day suspension to two (2) days. He also correctly points out that although the Commission stated that it was granting "the Motion for Rehearing", no such Motion for Rehearing is contained in the record which the Director of the City Civil Service certified as constituting a complete and correct transcript of the record as requested by the Appellant in his designation of the record. In his designation of the record, after requesting certain specific documents, Berger asked that the record on appeal be

comprised of “[e]ach and every other document that may be contained in the full and complete file and record of the Civil Service Commission regarding this matter that may not have been previously designated above.” Finally, Berger correctly points out that the Commission failed to give any reasons for reversing its original 29 May 2001 decision. As a result of the foregoing, Berger submits that the Commission’s decision on rehearing exceeded the time allowed for rehearings. For that reason, Berger argues that the original decision of the Commission was final and res judicata prior to the issuance of the decision on rehearing, and that, therefore, this Court should reinstate the Commission’s original decision shortening his ten (10) day suspension to a two (2) day suspension.

The NOPD makes no comment on the alleged impropriety of the Commission’s decision on rehearing. It simply argues that the NOPD proved that it had legal cause to discipline Berger and that the NOPD had a rational basis for imposing a ten (10) day suspension for Berger’s violation of its reporting for duty rule on five (5) separate occasions. In addition, citing Palmer v. Department of Police, 97-1593 (La. App. 4 Cir. 1/28/98), 706 So. 2d 658, the NOPD asserts that “this court has noted that mitigating circumstances cannot be used to reduce a penalty once legal cause has been established.”

Our review of the record indicates that the actions of the Commission in this matter were indeed highly irregular. The cover letter informing the parties of the Commission's decision is dated 27 July 2001 and states that "[a]ttached is the action of the City Civil Service Commission at the Commission's meeting on Wednesday, July 25, 2001." According to the Table of Contents of the Commission's record in this matter, the Commission's decision is located at pages five (5) through ten (10) of the record and consists of the Commission's original five (5) page decision dated 29 May 2001, as well as the one (1) page decision on rehearing dated 25 July 2001. It therefore appears that the parties were not informed of the Commission's original decision until fifty-nine (59) days after it had been rendered.

Rule II, Section 4.18 of the Commission Rules for the City of New Orleans provides that all decisions of the Commission will be considered final on the day of issuance except as provided in Section 4. 19. That Section, in turn, provides that the Commission shall receive and consider any application for re-hearing filed within ten (10) calendar days of the issuance of the decision by the Commission. It further provides that in such cases, the decision will be considered final on the date of notification of the disposition of the request for re-hearing.

There is no authority for the Commission to decide *sua sponte* to grant “rehearing” and reverse a decision that it had rendered a full fifty-nine (59) days prior, especially when it appears that no motion for rehearing was ever filed nor did any additional hearing ever take place. Accordingly, we strike the 25 July 2001 decision of the Commission and turn our focus to the Commission’s original decision dated 29 May 2001.

In that decision, the Commission found that the NOPD met its burden of proving that it had cause for disciplining Berger for violating departmental rules relative to reporting for duty. Nonetheless, it found that the NOPD had failed to show that the penalty imposed was commensurate with the infraction. We agree. While there is no question that Berger technically violated the departmental rules by not reporting to his assigned place of duty at the prescribed time, his supervisors all testified that he was putting in all of his required hours and that he was doing a great job in his position as A-case officer for District One. In fact, there was testimony that before he was assigned that position, prisoners were being released because police reports were not being turned in, but that he had cleared all those up when he took over the task. They also testified that most district’s had two (2) A-case officers, whereas the First District only had one (1) during the relevant time period, that being Officer Berger. In addition, Berger’s

supervisors testified that there was no formal roll call for officers in the DIU and that they had never admonished him for being late. The NOPD did prove, however, that an officer is required to report to his assigned place of work at the appointed time unless he had permission to do otherwise. All things being said, we agree with the Commission's original assessment that the NOPD failed to prove that Berger's actions bore a real and substantial relationship to the efficient operation of the public service. *See Cittadino and Walters*. (Compare the situation in Palmer, where we stated that **Officer Palmer's action** of allowing a prisoner in his custody to escape because he had not followed police procedure **either did, or did not, impair the efficiency of the public service, despite mitigating circumstances**.) While his being tardy need not be tolerated by the NOPD without any punishment, we agree that a two (2) day suspension is commensurate with his infractions, especially because he was never previously admonished for his actions or given the opportunity to change his ways.

CONCLUSION

For the reasons stated herein, the 25 July 2001 decision of the Commission is stricken. We affirm the 29 May 2001 decision of the Commission reducing the suspension imposed on Berger by the NOPD from ten (10) to two (2) days.

The NOPD is hereby ordered to return to Berger the remaining eight (8) days with all the emoluments of employment.

**RULING ON REHEARING STRICKEN; ORIGINAL
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