

ROBINSON DEL CASTILLO

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NO. 2003-CA-0684

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. 6405

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge David S. Gorbaty
and Judge Edwin A. Lombard)

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AFFIRMED.

Plaintiff-appellant, Robinson Del Castillo, seeks review of the Civil Service Commission's decision dismissing his appeal of his termination of employment with the New Orleans Police Department. The appellant was terminated for violations of departmental rules concerning truthfulness and the use of an unauthorized weapon while working an authorized private detail. These violations were discovered during an investigation concerning an allegedly accidental shooting which occurred at appellant's home while appellant was working a private detail on July 30, 2000. After an administrative investigation was conducted, the appellant was notified on September 20, 2001, that he was terminated from his employment as a result of these violations. The appellant sought review of the administrative decision by the Civil Service Commission. Hearings were conducted on October 9, and December 4, 2002. The Civil Service Commission dismissed appellant's appeal on March 7, 2003. The Commission found that the New Orleans Police Department had met its burden of proving the violations of the rules by the appellant. The Commission stated in its report:

On July 30, 2000 an unusual incident occurred.
Appellant was working a paid detail at Walgreens Drug Store

from 11:00 p.m. to 6:00 a.m. Appellant was wearing his Baby Glock 27 weapon which is a private weapon not authorized for detail duty.

According to Appellant, his wife called him at Walgreens from their residence about 2:35 a.m. to advise him that she had accidentally shot herself in the leg when Appellant's service (duty) weapon had fallen from a dresser in the bedroom and gone off in mid-air. Appellant changed his story at the hearing about whether the distress call from his wife came to his cell phone or to a pay phone at Walgreens.

An investigation of the bedroom showed that a sliding glass door had been shattered caused by the passage of an incoming bullet.

Appellant stated that upon receiving the call from his wife he told the cashier at Walgreens that he had an emergency and had to go home. He immediately reported the incident on a 911 call but did not give his name nor did he call an ambulance.

The police investigated the shooting and became suspicious of Appellant's story. The investigation revealed that contrary to Appellant's account, no one at Walgreen's knew that Appellant had ever left on the night of July 30, 2000. Furthermore a check of phone records of the phone at Appellant's residence and his own cell phone did not show that a call had been made by Appellant's wife to Appellant on the night in question. The only thing the phone records showed was that a few minutes before the shooting Appellant's wife had concluded a 159-minute phone call to Sgt. James Steward who worked with her at Jackson Barracks. Appellant's wife refused to cooperate with the police and would not testify at the hearing based on the husband-wife privilege.

The absence of any record showing a phone call from the wife to Appellant at Walgreens raised a very serious question. How could Appellant have learned of the shooting and called 911 to report the incident while he was at Walgreens if his wife had never made a phone call to him? Putting suspicion aside as to the circumstances surrounding the actual shooting, Appellant was terminated solely for conducting a detail at Walgreens without an authorized weapon and for being untruthful with police investigators in stating that he left Walgreens in response to a phone call from his wife.

We share with the police department and the Hearing

Examiner a disbelief of Appellant's claim that he was called at Walgreens by his wife. The phone records clearly show that no such phone call was made to Appellant. Appellant complains on this appeal that there is nothing more than circumstantial evidence and that he should not be terminated. But untruthfulness in connection with this incident involving the discharge of Appellant's weapon and a wound to his wife is no small matter and justifies his termination. We note also that Appellant has admitted to the charge that he was carrying an unauthorized weapon on his detail at Walgreens while leaving his duty weapon at home on his dresser.

Appellant now seeks review of the Civil Service Commission's dismissal of his appeal. He contends that the Commission's decision was clearly wrong and based upon uncharged conduct, i.e. the shooting incident involving his wife.

FACTS

At the Civil Service Commission hearing, the appellant testified that on July 30, 2000, he was working an authorized paid detail at a Walgreens Drug Store in New Orleans East when he allegedly received a phone call from his wife stating that she had been shot and to come home. He told the Walgreens manager that he had a family emergency and had to leave. On the way home, appellant called 911 to report the shooting but did identify himself as a police officer. When the appellant arrived at home, he found his wife in the bathroom with a gunshot wound to her leg. According to the appellant, his wife told him that she had put his service revolver on the

dresser and that it misfired when it fell from the dresser. He then took his wife to the hospital where she remained for four days. The appellant spoke with Sergeant Melborn, who handled the initial call about the shooting. The appellant admitted at the hearing that he was wearing an unauthorized weapon while working the paid detail at Walgreens. The appellant denied making any intentionally false statements.

An administrative investigation subsequently took place. Sergeant Paul Moretti, of the Public Integrity Bureau, and Sergeant Gerard Dugue, of the Homicide Division, handled the investigation. Sgt. Moretti testified at the Civil Service Commission hearing that he interviewed the appellant and searched the scene of the shooting. The appellant told Sgt. Moretti that he was working at Walgreens when he received a phone call from his wife to come home because she had accidentally shot herself. The appellant stated that his wife told him she had placed his service weapon on the dresser in their bedroom and that as she was walking to the bathroom, the weapon fell off the dresser and fired in mid-air, striking the appellant's wife in the leg. Sgt. Moretti stated that a preliminary examination of the appellant's service weapon revealed no malfunction that would cause the weapon to discharge in mid-air. The preliminary findings were confirmed by an examination of the weapon by the manufacturer.

Sgt. Moretti further testified that he and Sgt. Dugue searched the appellant's residence for further evidence about the shooting several days after the incident occurred. When the officers arrived at the appellant's house, the appellant was willing to consent to the search, but appellant's wife was uncooperative and irate. She would not allow them into the house without a search warrant. After obtaining a search warrant, the officers were allowed into the house. The officers retrieved the sliding glass door which had been shattered when the appellant's service weapon discharged (the bullet from the weapon went through the glass door before striking the appellant's wife), and they measured the height of the dresser from which the weapon had allegedly fallen. Sgt. Moretti also subpoenaed the records of appellant's land based telephone at his residence and his cellular telephone. The records of appellant's land based residence telephone indicated that a 159-minute phone call was concluded at 2:39 a.m. The records reveal that no calls were made to appellant's cellular telephone from the land based residence telephone. Sgt. Moretti stated that he traced the 159-minute phone call to a Sgt. James Stewart, appellant's wife's co-worker. The officer further testified that the records from appellant's cellular telephone showed no incoming calls from the residence telephone at the time of the shooting. The 911 records indicate that the appellant called in the

shooting at 2:41 a.m. but did not identify himself.

Sgt. Moretti interviewed Sgt. James Stewart who acknowledged that he was on the telephone with the appellant's wife on the night in question. Stewart stated that they were discussing repairs to be done on rental property owned by the appellant and his wife. Stewart's wife indicated that she was present while Stewart was on the telephone with the appellant's wife. Stewart also told Sgt. Moretti that he had gone out of town for the weekend; and when he returned, he found a note on the front door of his residence accusing him of having a sexual relationship with the appellant's wife. Stewart informed Sgt. Moretti that he had been receiving harassing phone calls on his cell phone from someone who identified himself as the appellant. The phone calls came from the appellant's wife cell phone. Sgt. Moretti obtained the appellant's wife's cell phone number from Stewart. The officer then subpoenaed the records for the appellant's wife's cell phone. These records reflect that no calls were made to Walgreens or the appellant's cell phone around the time of the shooting.

Sgt. Moretti interviewed Stewart on a second occasion. Stewart told Sgt. Moretti that he did not know anything about the shooting. Stewart stated that he learned about the shooting a few days later when he returned to work. He and another co-worker visited the appellant's wife in the

hospital. Stewart stated that the appellant's wife told him the story about the weapon falling off of the dresser. Stewart told the appellant's wife that he did not believe the story. The appellant's wife then told Stewart that as soon as she got off the phone with him that night, she turned around and the appellant was standing behind her. She would not tell Stewart anything else.

Sgt. Moretti also spoke with the Walgreens' employees. They stated that they did not know if or when the appellant had left until they received a phone call from him stating that he had a family emergency and would not be back. None of the employees recall the appellant receiving a phone call from his wife on the Walgreens' telephone.

Sgt. Dugue testified that he interviewed the appellant's wife while she was hospitalized for the shooting injury. The appellant's wife told Sgt. Dugue that she had been on the telephone and got up from her bed after concluding her phone call. She placed the appellant's service weapon on top of the radio which was on the dresser. She was walking towards the bathroom when she heard something falling. The next thing she realized was that she had been shot. She tried to render first aid to herself and then called the appellant on his cell phone. She told him that she had accidentally shot herself and asked him to come home. The appellant's wife told Sgt. Dugue that the weapon went off before it hit the floor. She speculated that

the gun might have gotten caught on the dresser handle. Sgt. Dugue noted that appellant's wife was a sergeant in the Army National Guard. The officer subpoenaed the appellant's telephone and cell phone records. The records reveal no incoming calls on the appellant's cell phone from his residence phone at the time of the shooting. Sgt. Dugue further stated that the appellant's wife refused to cooperate when he sought to obtain a formal statement.

The Civil Service Commission has a duty to decide independently from the facts presented whether the appointing authority has a good or lawful cause for taking disciplinary action and, if so, whether punishment imposed is commensurate with the dereliction. Walters v. Department of Police of New Orleans, 454 So.2d 106 (La. 1984). The appointing authority has the burden of proving by the preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. Cittadino v. Department of Police, 558 So.2d 1311 (La. App. 4 Cir. 1990). In reviewing the decisions of a Civil Service Commission, 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 Dept. of Highways, 259 La. 329, 250 So.2d

356 (La. 1971); Konen v. New Orleans Police Dept., 226 La. 739, 77 So.2d 24 (1954).

In civil service disciplinary cases, an appellate court is presented with a multifaceted review function. First, as in other civil matters, deference will be given to the factual conclusion of the Commission. Hence, in deciding whether to affirm the Commission's factual finding, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review. Walters, 454 So.2d at 114.

Second, in evaluating the Commission's determination as to 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. Id. "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.

In the present case at bar, the evidence presented at the hearing substantiates the findings of the New Orleans Police Department and the Civil Service Commission that the appellant violated the rules concerning truthfulness and the use of an unauthorized weapon while working an authorized private detail. While appellant claimed at the hearing, and

continues to argue, that his wife called him and told him about the shooting, the documentary evidence directly controverts his testimony. The telephone and cell phone records indicate that no calls were made to Walgreens or appellant's cell phone from his residence phone or his wife's cell phone at the time of the shooting. Even when presented with this objective documentary evidence, the appellant refused to acknowledge that he might have been wrong about the phone call. Such evidence was sufficient to prove that appellant was not being truthful when questioned by Sgt. Moretti in connection with investigation of the shooting incident. In addition, the appellant admitted at the hearing that he had his private weapon with him on the private detail at Walgreens and had left his service weapon at home.

The appellant claims that he was terminated because the department was suspicious about his involvement with the shooting. The Civil Service Commission noted in its decision that the circumstances surrounding the shooting were suspicious, however, the shooting itself was not the basis for the termination. The appellant was terminated because the Commission found that he was untruthful and that he used an unauthorized weapon while on a private detail. The evidence adduced at the hearing supports the Commission's finding. The lack of truthfulness by a police officer when questioned by one of his peers in connection with an internal investigation

substantially affects the credibility and integrity of the police department.

The Civil Service Commission was not arbitrary and capricious when it dismissed the appellant's appeal.

For the foregoing reasons, the judgment of the Civil Service Commission is affirmed.

AFFIRMED.