

**NOT DESIGNATED FOR PUBLICATION**

**MARINA KAHN** \* **NO. 2003-CA-1178**  
**VERSUS** \* **COURT OF APPEAL**  
**NEW ORLEANS CHIEF** \* **FOURTH CIRCUIT**  
**ADMINISTRATIVE OFFICE** \* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CITY CIVIL SERVICE COMMISSION ORLEANS**  
**NO. 6498**

\* \* \* \* \*  
**Judge Edwin A. Lombard**  
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(Court composed of Chief Judge William H. Byrnes III, Judge Terri F. Love,  
Judge Edwin A. Lombard)

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**AFFIRMED**

This appeal is from City Civil Service Commission's decision upholding the termination of Marina Kahn, plaintiff-appellant, from her employment with the City of New Orleans. We affirm the decision of the City Civil Service Commission.

***Relevant Facts and Procedural History***

The appellant was employed by the City of New Orleans from November 2, 1976 through her termination on May 17, 2002. During her twenty-six years of civil service employment, the appellant attained permanent status and had no other disciplinary history. As of the date of her termination, the appellant was employed as an Assistant Chief Administrative Officer, and her duties included human resource and budgetary matters.

On March 7, 2002, the appellant was videotaped removing an audio recording device from a flower arrangement in her subordinate's cubicle.

On March 8, 2002, the appellant was videotaped replacing an audio recording device in the same flower arrangement in her subordinate's cubicle. The Chief Administrative Officer, Cedric Grant ("Grant" or the "appointing authority") reviewed the videotapes, which were the product of surveillance equipment installed by the New Orleans Police Department for investigative purposes, and identified the appellant. Two other employees of the Chief Administrative Office viewed the videotapes and identified the appellant.

The appellant was arrested on March 11, 2002, and charged with illegal wiretapping, a felony offense. The appellant was placed on leave with pay after the incident but was recalled to work in April and May to testify in an unrelated suit against the City. The record shows that on May 15, 2002, at approximately 3:50 p.m., the appellant received notification of a pre-termination hearing scheduled for 10 a.m. on May 17, 2002. Shortly before the hearing, at 9:35 a.m. on May 17, 2002, the appellant notified Grant by facsimile transmission that she would not be able to attend the pre-termination hearing due to a medical condition. Accordingly, the pre-termination hearing was held as scheduled without the appellant in attendance.

In his May 17, 2002, disciplinary letter to the appellant, Grant

justified termination of the appellant's employment by describing her actions as "gross misconduct . . . to the prejudice of the service and . . . clear violations of the spirit and intent of Rule IX of the Civil Service Rules".

On May 20, 2002, the appellant appealed her termination to the Commission. The matter was assigned to a hearing examiner, and a hearing was held on November 21, 2002. The appellant stipulated to the facts outlined in Grant's disciplinary letter, accepted responsibility for her actions, and argued that the penalty of termination was not commensurate with the violation. Grant testified that the planting of a recording device near an employee to record her conversations was so serious an offense that termination was the only option, especially considering the appellant's level of responsibility in the Chief Administrative Office. Grant clarified that there is no civil service policy or rule mandating termination upon arrest; rather, it was Grant's decision that termination was the appropriate discipline.

The appellant proffered evidence regarding the arrests of over 600 City employees since May 17, 2003, to illustrate that none of those employees had been fired and that termination in the appellant's case was excessive. The hearing officer disallowed the proffer, stating that the individual facts of each of those arrests were not relevant to the facts of the

appellant's arrest and termination. The hearing officer concluded that the Commission must decide whether termination was the appropriate punishment, as weighed against the appellant's many years of unblemished service to the City.

On June 10, 2003, the appellant was informed of the Commission's decision. A majority of the Commission upheld the termination of the appellant's employment, finding that planting a recording device to record conversations of a subordinate constitutes sufficient legal cause for termination. One member of the Commission dissented, stating that the appellant should have been disciplined but not terminated. This appeal follows.

### ***Discussion***

The appellant contends that the disciplinary action of termination from her civil service position was not commensurate with the offense of illegally wiretapping a subordinate, a crime she admits to committing. The appellant urges this Court to find that the Civil Service Commission ("Commission") erred in upholding her termination and to reinstate her to her position with a penalty commensurate with her admitted offense. The appellant argues that

the Commission erred in upholding Grant's decision to terminate her because Grant acted without legal cause: that is, Grant's motivation was his personal dislike of her and that termination was not commensurate with the offense. Furthermore, the appellant argues that the hearing officer erred in disallowing the proffer of evidence regarding the arrests of over 600 city employees since May 17, 2003. The appellant, it should be noted, makes no allegations of retaliatory firing or discrimination by Grant. The appellant urges this court to adopt the analysis and reasoning of the dissenting Commissioner.

On appellate review, findings of fact of the Commission are not to be overturned in the absence of manifest error, and the Commission's conclusion as to the existence or absence of cause for dismissal should not be disturbed unless the decision is capricious or an abuse of the Commission's discretion. *Williams v. Department of Property Management*, 2002-1407, p. 2 (La.App. 4 Cir. 4/16/03), 846 So.2d 102, 103. In *Newman v. Department of Fire*, 425 So.2d 753 (La. 1983), the Louisiana Supreme Court stated:

Disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the public service. The appointing authority . . . must demonstrate, by a preponderance of the evidence, that the conduct did in fact impair the efficiency and orderly operation of the public service.

*Newman*, 425 So.2d 753, 754. That is, “cause” for the dismissal of a civil service permanent employee has been interpreted to include conduct prejudicial to the public service the employee is engaged in or detrimental to its efficient operation.

In the instant case, the appellant admitted to the criminal behavior of illegally wiretapping her subordinate’s workstation. The hearing officer did not err in finding the arrest records of other City employees to be irrelevant to the discipline of the appellant. The appointing authority determined that the appellant’s actions were detrimental to the efficient operation of the Chief Administrative Office and prejudicial to the public service. Grant specifically noted that termination was the commensurate disciplinary action given the appellant’s position of authority and her access to sensitive personnel and budgetary information. We are of the opinion that the appointing authority demonstrated by a preponderance of the evidence that the appellant’s conduct did in fact impair the efficient and orderly operation of the Chief Administrative Office. Although the disciplinary action imposed may appear harsh given the appellant’s twenty-six years of otherwise unblemished service, wiretapping a subordinate amounts to a breach of trust. Accordingly, under the circumstances of this case, the action of the Commission in finding that the appointing authority had legal

authority to terminate appellant's employment cannot be characterized as arbitrary or capricious.

***Conclusion***

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

**AFFIRMED.**