

NOT DESIGNATED FOR PUBLICATION

KEVIN GORRELL * **NO. 2003-CA-1440**
VERSUS * **COURT OF APPEAL**
DEPARTMENT OF SAFETY * **FOURTH CIRCUIT**
AND PERMITS * **STATE OF LOUISIANA**
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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 6467

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Judge Patricia Rivet Murray

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,
Judge Max N.Tobias, Jr.)

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AFFIRMED

Mr. Kevin Gorrell, a Senior Taxicab Investigator, appeals the judgment of the New Orleans Civil Service Commission [“the Commission”] suspending him for one hundred twenty days without pay. For the reasons that follow, we affirm.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Gorrell is a Senior Taxicab Investigator with the Department of Utilities [“Appointing Authority”] with permanent status. He was first hired by the City on October 27, 1980, and he was appointed to Senior Taxicab Investigator on April 25, 1993. On February 12, 2002, he was terminated for leaving his job without permission and for untruthfulness. The Appointing Authority charged that Gorrell, after reporting to work on Mardi Gras Day, February 12, 2002, left his assigned area to go home, and then lied about his location when he responded to a radio check made by his supervisor.

This matter was assigned by the Commission to a Hearing Examiner,

and was heard on December 2, 2002 and February 5, 2003, with Gorrell and his counsel present. On Mardi Gras Day 2002, Gorrell and his co-worker, Ms. Evelle Thomas, were assigned as partners to perform taxicab investigative work in a certain zone in New Orleans; Gorrell, the senior member of the team, was the driver of their assigned vehicle, unit 5026. Pursuant to a memo from the Appointing Authority, taxicab investigators were mandated not to leave their assigned areas without the permission of their supervisors.

On the morning of Mardi Gras Day 2002, at approximately 11:00 a.m., one of Gorrell's supervisors, Mr. Jose Rodriguez, noticed that Thomas was driving unit 5026 by herself. Rodriguez stopped Thomas and questioned her about the whereabouts of Gorrell; Rodriguez mentioned it was the second time that day he had seen Thomas by herself, having observed her earlier about 9:30 a.m. Thomas responded that Gorrell was at home, where he resided with his mother, attending a barbecue. Thomas testified that her partner had taken the vehicle home just after reporting for work and had invited her to stay for the barbecue, but she had declined. She testified that she didn't want to leave her assigned post because she was already on probation, so she told Gorrell she was taking unit 5026 on an errand, and to "beep" her when he was ready to return to work. She then

drove to her assigned area. She said she returned to Gorrell's home once to see if he was ready, but was told by his relatives that he had gone to the parade. She drove back to her assigned area and made a cell phone call to another senior officer intending to ask what she should do about her partner's actions, as she had only been on the job five months. Before she could talk to the senior officer, she was stopped by Rodriguez.

Rodriguez first contacted Freddie Sims, Gorrell's immediate supervisor. Sims testified that at roll call that morning, Gorrell had told him that he might drive by to see his sick mother, but Sims had not interpreted that comment to mean Gorrell would take off a significant part of the day. Gorrell's mother's house was not within the district to which unit 5026 was assigned. While Thomas was still with him, Rodriguez initiated a radio check as to Gorrell's location; Gorrell called in and said he was at the intersection of Martin Luther King Boulevard and Claiborne Avenue with Thomas, which was obviously a lie. Gorrell was ordered to go to the dispatch center for the remainder of the day, but apparently before he was given that order, he called Sims to say he was going home sick. Gorrell did not return to work that day.

The Commission found that the record showed that Thomas and Gorrell had a strained relationship. At the hearing, Gorrell argued that

Thomas had a vendetta against him. A former co-employee of Gorrell's, Verna Dunn, testified that Thomas called her after the incident and said that she (Thomas) finally got him (Gorrell).

Lillian Regan, the former Director of the Appointing Authority who had made the decision to terminate Gorrell, was not available to testify, as she no longer worked for the City. Based on the facts of the case, the Hearing Officer recommended a long suspension rather than termination, which he did not believe was justified.

The Commission reviewed the record, including the transcript and all documentary evidence. The Commission noted that Gorrell had two prior sustained violations, including a forty-five day suspension in February, 2000, for unauthorized use of a City vehicle and a three day suspension in November, 2000, for inappropriate behavior to a supervisor. The Commission therefore believed there was some justification for progressive discipline to support a severe penalty. The Commission also noted, however, that Gorrell had worked for the City for twenty years and had been a good employee.

On April 22, 2003, the Commission signed a judgment finding that, in the absence of testimony from the former Director of the Appointing Authority, Ms. Regan, there was insufficient evidence to support termination

of Mr. Gorrell. Balancing the seriousness of the charges against Gorrell's twenty years of service, the Commission imposed a one hundred twenty day suspension, which it found to be the maximum reasonable discipline that could be imposed in this case.

DISCUSSION

Recently, in *Delpit v. New Orleans Dept. of Utilities*, 2002-2008 (La.App. 4 Cir. 2/19/03), 841 So.2d 30, this court reiterated the standard of review for an appeal of a Commission decision:

The Louisiana Supreme Court discussed in *Walters v. Department of Police*, 454 So.2d 106 (La.1984), the standard of review for an appeal of a city civil service commission decision. The Supreme Court stated:

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. He may appeal from such disciplinary action to the City Civil Service Commission, and the burden of proof on appeal, as to the facts, is on the appointing authority. La. Const. art. X, § 8.

... 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).

This 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. 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 was commensurate with the dereliction....

* * * * *

...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.
Id. at 112-14. (emphasis added) (citations omitted).

Delpit, supra, pp. 4-5, 841 So.2d at 32 (citations omitted).

In *Newman v. Department of Fire*, 425 So.2d 753, 754 (La.1983), the Louisiana Supreme Court discussed the meaning of the term "arbitrary and capricious," stating that disciplinary action against a civil service employee will be deemed arbitrary and capricious unless the Appointing Authority can demonstrate, by a preponderance of the evidence, that the employee's conduct did in fact impair the efficiency and orderly operation of the public service. In another civil service case, *Bannister v. Department of Streets*,

95-0404 (La.1/6/96), 666 So.2d 641, the Supreme Court determined that "arbitrary and capricious" means that there is no rational basis for the action taken.

In the instant case, Gorrell argues that there was no cause to discipline him because there was insufficient evidence to show he violated any departmental rules. As a result, Gorrell argues, the decision of the Commission was arbitrary, capricious and an abuse of discretion. The undisputed evidence shows that, at a minimum, Gorrell was not performing his assigned work duties on Mardi Gras Day 2002 and that he misled his supervisors about his location. The Commission correctly noted that there was insufficient evidence to warrant termination but that there was sufficient evidence to warrant suspension. An employee not at his work station or performing his assigned duties without the permission of his supervisor clearly impedes the efficient operation of public service. Moreover, in light of Gorrell's prior disciplinary record, we find there was a rational basis for the length of the suspension imposed. Therefore, we hold that the commission's decision to impose a one hundred and twenty day suspension was not arbitrary or capricious.

CONCLUSION

Accordingly, the decision of the Civil Service Commission is

affirmed.

AFFIRMED