NOT DESIGNATED FOR PUBLICATION

ANTHONY LUBRANO	*	**NO. 2003-CA-2136**
VERSUS	*	**COURT OF APPEAL**
NEW ORLEANS POLICE DEPARTMENT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 4378, “”

* * * * * *

Judge David S. Gorbaty

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(Court composed of Judge David S. Gorbaty, Judge Edwin A. Lombard, Judge Leon A. Cannizzaro Jr.)

Anthony Lubrano
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In Proper Person, PLAINTIFF/APPELLANT

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AFFIRMED

On August 19, 2003, the appellant filed a motion to reopen his case with the New Orleans Civil Service Commission ("Commission") based on alleged newly discovered evidence or, in the alternative, to set aside its ruling on the basis of fraud and ill practices. On September 15, 2003, the Commission denied the motion. Subsequently, the appellant filed a motion for appeal of the Commission's decision. The appellant asks this court to reinstate him to his position with the New Orleans Police Department ("NOPD"). In the alternative, he asks this court to remand his case to the Commission for a new hearing. For the following reasons, we affirm the Commission's ruling.

Procedural History of *Lubrano I*

This court has previously reviewed the Commission's decision upholding the termination of the appellant from the NOPD, and the procedural history of the prior litigation is as follows. On June 14, 1993, the Commission affirmed the termination of the appellant from the NOPD after he tested positive for cocaine in a non-random drug test he was required to

take based on several complaints and tips regarding drug use by the appellant.

On March 23, 1994, the appellant filed an appeal with this court, seeking a reversal of the Commission's decision based in part on a lack of reasonable suspicion for the non-random drug test. On September 9, 1994, the appellant filed a motion to remand his case to the Commission for a new hearing based on newly discovered evidence of perjury, witness interference, and possible fraud. In support of his motion, the appellant pointed out that on August 29, 1994, then Sergeant Jacklean Davis, a witness at his Commission hearing, had been suspended for perjury in connection with the investigation of his case.

On October 3, 1994, this court issued its opinion in the appellant's case: the motion to remand was denied and the Commission's decision to uphold the appellant's termination from the NOPD was affirmed. *Lubrano v. Dept. of Police*, unpub., 94-0257 (La. App. 4 Cir. 10/3/94). (hereinafter referred to as *Lubrano I*). This court specifically addressed the issue of whether the drug test was based on reasonable suspicion. *Lubrano I*, 94-0257, p. 1. This court pointed out that a citizen's complaint was presumptively reliable and carried high indicia of credibility and reliability in the determination of probable cause as well as reasonable suspicion.

Lubrano I, 94-0257, p. 4. Therefore, this court concluded, the citizen's complaint against the appellant lodged by Harrison provided reasonable suspicion for the non-random drug testing of the appellant. Harrison's statement, this court further pointed out, was admitted into evidence without objection; and it was offered not for the truth of the matter asserted but to determine the issue of reasonable suspicion for the drug testing of the appellant. *Lubrano I*, 94-0257, p. 5.

STATEMENT OF THE FACTS

In *Lubrano I*, this Court summarized the evidence against the appellant as follows:

> Testimony during the Civil Service hearing established that Lubrano is a veteran officer who was hired in 1977. On December 6, 1991, **Cynthia Harrison appeared at the office of Internal Affairs Division (IAD) to lodge a complaint against Lubrano that he was using crack cocaine. She said her brother was a cocaine dealer who was a friend of Lubrano, and she believed Lubrano was protecting him. She has known Lubrano for six years, and she said that in late October 1991, she observed Lubrano at her brother's house at 627 Alvar, Apartment 4, laying [sic] on the floor naked, under the influence of cocaine. On other occasions she has also seen him obviously intoxicated standing outside the house.**
>
> **Sgt. Jacklean Davis of the IAD testified that she set up a surveillance of 627 Alvar Street in response to Harrison's complaint, but Lubrano was not seen. Sgt. Melvin Howard testified** that on January 6, 1992, he assisted in the execution of a search warrant of Apartment 4 of 627 Alvar Street during which police arrested four suspects and seized fifteen plastic

bags of a rock cocaine. He also stated **that a confidential informant with a history of reliability told him that Lubrano frequented 627 Alvar Street and the informant said he saw Lubrano smoke what appeared to be crack cocaine. The informant gave no other details and Sgt. Howard did not state the date of the tip.**

On January 9, police arrested Cynthia Harrison's brother, and at the time of his arrest he was in possession of 40 pieces of rock cocaine.

Lt. Robert Italiano of the IAD testified that on February 9, 1992, he received an anonymous tip that Lubrano used crack cocaine on February 2, 1992. Lt. Italiano said the tip was brief and not detailed. Lt. Italiano did not consult Lubrano's superiors or co-workers to determine whether Lubrano exhibited unusual behavior or poor performance and there is no evidence that the tip was corroborated.

Based on the above Lt. Italiano completed a written request for a non-random drug test, and on February 10, 1992, the Department ordered Lubrano to submit to a urinalysis. The urine sample tested positive for cocaine metabolite and the Department terminated Lubrano.

At the hearing, Lubrano denied that he used cocaine and testified that he believed a drink was laced with cocaine the weekend before the test. Lubrano alleged as a possible motive retaliation for his public criticism of IAD (in 1983) and because of an arrest he recently made. The hearing officer admitted into evidence a police department interoffice memo that reported an anonymous telephone call that Lubrano was set up.

Three officers who knew and worked with Lubrano testified that they had not seen Lubrano drink while on duty, nor use narcotics or exhibit unusual behavior.

Lubrano I, 94-0257, p. 1-2 (emphasis added).

DISCUSSION

The appellant, pro se, argues that the Commission erred in denying his most recent motion to reopen his case. The appellant claims that on June 23,

2003, he received a letter from retired officer Eddie Clavier, which was dated June 19, 2003 and had attached to it a copy of an investigative report dated April 7, 1998. The appellant claims that the letter and report contained material evidence of further criminal conduct, fraud and perjury by Sergeants Davis and Howard.

The appellant claims the newly discovered evidence shows that (1) Sergeant Davis committed perjury in her statements and testimony regarding the appellant's presence at a "crack house"; (2) other officers, not Sergeant Howard, personally received the confidential informant's tip that the appellant had frequented the "crack house" and was seen smoking crack; (3) Sergeant Howard and Ms. Harrison were likely in a relationship at the time the appellant was investigated for drug use; and (4) Sergeant Howard had been disciplined for fraud in 1984. The appellant also argues that the Commission's original decision should be reversed and he should be reinstated on the grounds that the newly discovered evidence amounts to fraud and ill practices.

The NOPD argues that the Commission did not err in denying the appellant's motion to reopen his case or set aside its 1993 decision. First, the NOPD argues, the appellant's claims are barred by *res judicata*. Alternatively, they argue that the appellant is not entitled to a new hearing,

as the appellant failed to carry his burden to prove the evidence qualifies as newly discovered evidence or that the evidence was material to the outcome of the original proceeding. The NOPD also argues that the appellant is not entitled to a judgment of nullity because such an action is prescribed. Alternatively, the NOPD argues that the appellant is not entitled to a judgment of nullity because he had an opportunity to appear, to discover all pertinent facts, and to assert a defense. Lastly, the NOPD argues that the appellant is not entitled to a judgment of nullity because perjury does not amount to a fraud on the court.

Standard of Review

A reviewing court should not reverse a Commission's conclusion on whether the disciplinary action is based on legal cause, unless the conclusion is arbitrary, capricious, or an abuse of discretion. *Walters v. Department of Police of City of New Orleans*, 454 So.2d 106, 114 (La.1984). When reviewing the Commission's findings of fact, however, a reviewing court should not reverse or modify a finding unless it is manifestly erroneous. *Walters* 454 So.2d 106, 113.

Res Judicata

In *Burguieres v. Pollingue,* 2002-1385 (La.2/25/03), 843 So.2d 1049, the Supreme Court set forth five criteria that must be met for a matter to be

considered res judicata. They are as follows:

> (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

Burguieres 2002-1385, p. 8; 843 So.2d at 1053.

In the instant appeal, the appellant again argues that the drug test was not based on reasonable suspicion and points to allegedly newly discovered evidence of perjury by the investigating officers. In applying the criteria set forth by the Supreme Court for a matter to be considered *res judicata*, there is no question that the earlier judgment is valid and final, that the parties are the same, and that the cause of action arose out of the same transaction or occurrence that was the subject of the first litigation. The only arguable issue is whether the evidence that the appellant relies on existed at the time of the final judgment in *Lubrano I*.

Newly Discovered Evidence

The appellant's motion for new trial on the basis of newly-discovered evidence should be granted only if: (1) the new evidence was discovered after trial, (2) the new evidence is not cumulative, (3) the new evidence would tend to change the result of the case, and (4) the new evidence could not have been discovered, with due diligence, before the trial was completed.

Harris v. Orleans Parish School Bd., 1997-0724, p. 4, 706 So.2d 223, 225 (La.App. 4 Cir. 1/28/98), citing *Barker v. Rust Engineering Co.*, 428 So.2d 391, 394 (La.1983).

First, the appellant argues that newly discovered evidence shows that Sergeant Davis committed perjury in her statements and testimony regarding the appellant's presence at a "crack house." This Court, however, specifically addressed this perjury issue in *Lubrano I*, stating:

> On September 8, 1994, Lubrano filed a Motion to Remand based on newly discovered evidence that Sgt. Jacklean Davis was suspended for 30 days and demoted for perjury in connection with Officer Lubrano's case. Sgt. Davis testified before the hearing examiner in this case that her surveillance did not show Lubrano at the crack house. She testified at a subsequent hearing concerning Lubrano's unemployment compensation benefits that she did see Lubrano at the crack house. Lubrano argues that evidence impeaches Sgt. Davis and that this Court should remand for a new hearing.
> Sgt. Davis received Harrison's complaint. However, Sgt. Davis's testimony at the Civil Service hearing did not implicate Lubrano but established that the Department was unable to corroborate Harrison's complaint. Moreover, the additional information supplied to Officers Howard and Italiano, and all of the evidence discussed above are sufficient to support a finding of reasonable suspicion that would support a drug test, even if Davis is shown to have given inconsistent testimony.

Lubrano I, 94-0257, p. 5. This Court in *Lubrano I* specifically addressed the issue of Sergeant Davis' perjury in connection with her investigation and testimony regarding the appellant. The issue generally is barred by *res judicata*. Any newly discovered evidence of Sergeant Davis' perjury

regarding the appellant's presence at a "crack house" would be cumulative.

Next, the appellant claims that newly discovered evidence shows that other officers, not Sergeant Howard, personally received the confidential informant's tip that the appellant had frequented the "crack house" and was seen smoking crack. Sergeant Howard's testimony regarding an anonymous tip, however, was not the only evidence supporting the Commission's finding that there was reasonable suspicion to order a non-random drug test of the appellant. This Court specifically found that reasonable suspicion was provided by the citizen complaint against the appellant brought by Harrison. Therefore, any newly discovered evidence regarding Sergeant Howard's receipt of the anonymous tip would not change the outcome of the case.

Next, the appellant claims that newly discovered evidence shows that Sergeant Howard and Ms. Harrison were likely in a relationship at the time. The appellant fails to show how this information would be material or how it would have changed the outcome of the case.

Lastly, the appellant claims that newly discovered evidence shows that Sergeant Howard had been disciplined for fraud in 1984. Again, the appellant fails to show how this information is material or how it would have changed the outcome of the case.

Therefore, we find that the evidence presented by the appellant does

not qualify as newly discovered evidence sufficient to merit a new hearing before the Commission.

Action for Nullity

The appellant also asks this court to set aside the Commission's ruling and reinstate him to his position with the NOPD; or alternatively to remand his case to the Commission on the grounds that the perjury amounts to fraud and ill practices. This claim amounts to a request for a judgment of nullity under La. C.C.P. art. 2004.

Prescription

An action to annul a judgment on the grounds of fraud and ill practices must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices. La. C.C.P. art. 2004(B). Jurisprudence has established that a petition for nullity can be untimely because it was filed more than one year after the time that the plaintiff should have discovered the alleged fraud or ill practices. *Dauzat v. Louisiana Patients Compensation Fund*, 97-1318 (La.App. 4 Cir. 12/17/97), 710 So.2d 1088, 1090, citing *Kambitsis v. Schwegmann Giant Supermarkets*, 95-478 (La.App. 5 Cir. 11/15/95), 665 So.2d 500, 502. The court in *Kambitsis* stated:

> This state's courts have consistently held that Art. 2004, prescription starts running on the date the injured party discovers or should have discovered information on which a

> cause of action might be based. Whenever there is notice enough to excite attention and put a person on his or her guard and suggest further investigation, this is tantamount to knowledge or notice of everything to which an inquiry may lead. Information or knowledge suggesting an inquiry is sufficient to start the running of prescription.

Kambitsis, 665 So.2d 500, 502.

The appellant claims to have discovered the new evidence through a letter received on June 23, 2003 from a now-retired officer. The report, which was summarized in and attached to the letter, was dated April 7, 1998 and was filed with the Chief of Police at the time. The report was prepared by comparing Sergeant Davis' investigative report, Harrison's civilian complaint, the appellant's statement to Sergeant Davis, and the application for the search warrant. There is no indication in the record that these documents were not available for the appellant's review at the time of his Commission hearing. Therefore, the appellant's claim for a judgment of nullity based on his receipt of the letter with the attached report is prescribed.

CONCLUSION

Based on the foregoing, we affirm the Commission's ruling denying the appellant's motion to reopen the case or to set aside the ruling on the basis of fraud and ill practices.

AFFIRMED