

**NOT DESIGNATED FOR PUBLICATION**

**ROGER HERBERT**

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**NO. 2003-CA-2181**

**VERSUS**

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**COURT OF APPEAL**

**NEW ORLEANS FIRE  
DEPARTMENT**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM THE  
CITY CIVIL SERVICE COMMISSION, CITY OF NEW ORLEANS  
NO. 6557

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**Judge David S. Gorbaty**

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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**AFFIRMED**

Roger Herbert appeals a decision of the New Orleans Civil Service Commission affirming his dismissal from the New Orleans Fire Department. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY:**

On September 8, 1992, Roger Herbert was hired by the City of New Orleans; and on January 24, 1993, he was appointed as a firefighter with the New Orleans Fire Department (“NOFD” or the Appointing Authority). On August 16, 2002, he was terminated by the Appointing Authority, which concluded that Herbert had been untruthful by concealing his history of a seizure disorder. In addition, the Appointing Authority concluded that Herbert failed to obtain “intensive treatment” recommended by a psychiatrist to whom he had been sent by the Appointing Authority.

Herbert appealed to the Civil Service Commission. The parties explained to the hearing examiner that Herbert’s history of a seizure disorder and his admission that he concealed this condition from the Appointing

Authority were revealed when Herbert released his medical records to the Appointing Authority after he was treated at the DePaul – Tulane Behavioral Health Center (DTBH) for depression. The parties stipulated to the admission of the medical reports from his treatment in lieu of the treating physician testifying.

The DTBH discharge report dated October 19, 2001 was written by Dr. James W. Lowe, a board certified psychiatrist, and was admitted into evidence. Dr. Lowe treated Herbert at the DTBH from October 1, 2001 to October 19, 2001. Dr. Lowe stated in the DTBH discharge report that Herbert admitted a long history of epilepsy and stated that his struggle to overcome it had left him feeling depressed. In the DTBH report, Dr. Lowe stated:

[The Appellant] has done things such as getting a job with the Fire Department and lying about his seizure disorder. He hints at some possible episodes of seizure behavior years ago with the Fire Department but has had no seizures over the last several years. He does not understand that his behavior has placed himself and other people in jeopardy. He is angry at his supervisors because he feels that he could have been passed for a class, even though he missed the last class which was an oral exam final for the class. This prevents him from applying for a promotion at the Fire Department.

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[The Appellant's] clinical course of treatment in the hospital was a rocky one. Initially, he became angry and upset when discussing his seizure disorder. He felt that he could not mention his seizure disorder to the Fire Department and threatened to sue us if we disclosed this to them. I informed him that he had the right to complete confidentiality, however,

he would rescind his statements that he had made to the Fire Department EAP. He became somewhat threatening and threats [sic] to homicide towards me and seemed to calm down when he realized that his confidentiality would be maintained. After we were able to reassure him that we were not going to tell the Fire Department about his seizure disorder, he was able to work the program fairly well.

The medical report of Dr. Lowe dated December 6, 2001 was admitted into evidence. In this report, Dr. Lowe stated that he had treated Herbert for a psychiatric condition since September 2001 and that Herbert was psychiatrically disabled and unable to function in a fire department setting. Lastly, the medical report of Dr. Lowe dated April 4, 2002 was admitted into evidence. In this report, Dr. Lowe stated that Herbert had been under his care for depression and that his prognosis was “good with intensive treatment.” Dr. Lowe cleared Herbert to return to work in terms of his psychological health.

Gary Carbo, the Personnel Officer for the NOFD, testified that he examined Herbert’s initial employment application and that Herbert did not disclose any medical condition relating to seizures. Carbo admitted that he could not recall if the employment application specifically asked about seizure disorders. Carbo testified, however, that such a condition should have been disclosed; and, had such been disclosed, he would have recommended that Herbert not be hired. Herbert’s employment application

was not admitted into evidence.

Fritz Conrad, the Interim Superintendent of the NOFD, testified that he conducted Herbert's pre-termination hearing and recommended termination. Based on Dr. Lowe's medical reports, Superintendent Conrad determined that Herbert concealed his medical condition in his original employment application and that his condition would have, in all likelihood, disqualified him from employment. In addition, Superintendent Conrad testified that he recommended termination because Herbert failed to submit to "intensive treatment" as recommended by Dr. Lowe as a condition of returning to employment.

Herbert testified that he did not conceal his medical condition in his application for employment and that he could not recall any specific questions regarding seizures. He further testified that his condition has never affected his performance as a firefighter and that he has not had a seizure in years because his condition is medically controlled.

In support of Herbert's testimony, the medical reports of Dr. Morteza Shamsnia, a neurologist, were admitted. Dr. Shamsnia stated in his report dated October 12, 2001 that Herbert was compliant with his treatment and medications and that he should be allowed back to work as a fireman. Dr. Shamsnia further informed Dr. Lowe in a letter dated December 9, 2002 that

Herbert was compliant with his treatment and medication for his seizure disorder and that he had been seizure-free for the past ten years.

Lastly, Reverend Dwight Webster testified that Herbert sought pastoral counseling from him for his psychological issues; and he opined that Herbert had successfully worked through his issues. Reverend Webster admitted that he was not medically trained and could not render an opinion on whether his pastoral counseling constituted the “intensive treatment” recommended by Dr. Lowe for Herbert’s psychological health.

The parties stipulated that if called as a witness, Dr. Lowe would testify that Herbert was not compliant with his recommendation of “intensive treatment” for his psychological problems. That is, Dr. Lowe would testify that pastoral counseling sessions did not constitute “intensive treatment” for Herbert’s psychological problems.

The hearing examiner found that the Appointing Authority met its burden in justifying Herbert’s termination. The Civil Service Commission also found that the Appointing Authority provided sufficient evidence that it terminated Herbert for cause and denied the appeal. The Commission adopted the findings of the hearing examiner and stated:

The Appellant failed to disclose vital medical information in his application for employment. While he may have feared rejection because of his medical condition, this fear did not justify his failure to disclose. A review of an applicant’s medical history is part of the employment process. It does not

matter that the Applicant has had no episodes during his employment. By initially concealing his medical condition, the Appellant undermined the efficient operation of the Department of Civil Service that oversees the hiring process, and the Appointing Authority that has an interest in knowing whether its applicants can perform firefighting duties in a safe and efficient manner. Further, the Appointing Authority has established that the Appellant failed to submit to psychological treatment ordered by his treating physician. While spiritual counseling may offer comfort and help restore psychological balance, the Appointing Authority is justified in having medical assurance before returning an employee back to firefighting duties.

This appeal follows.

#### **DISCUSSION:**

Herbert argues that the Commission erred in dismissing his appeal and finding that the Appointing Authority met its burden in proving he was terminated for cause for concealing a history of a seizure disorder and for failing to follow his doctor's orders to engage in "intensive treatment" for his psychological issues. First, he points out, the Appointing Authority did not produce his employment application, in which he allegedly concealed his history of a seizure disorder, or any evidence of the types of questions he was asked during the employment process. Second, the Appointing Authority failed to prove that the "intensive treatment" recommended by Dr. Lowe was a specified course of treatment. Herbert contends he concluded his treatment with Dr. Lowe and that the "intensive treatment" recommended

was left to his own discretion.

The Department argues that the Commission did not err in finding the Appointing Authority met its burden and dismissing Herbert's appeal. The medical records prove that Herbert concealed his history of a seizure disorder and failed to abide by Dr. Lowe's orders for "intensive treatment" for his psychological issues. Therefore, Herbert was subject to dismissal under Civil Service Commission Rule IX, § 1, paragraph 1.1, which states in relevant part:

When an employee in the classified service is unable or unwilling to perform the duties of his/her position in a satisfactory manner, or has committed any act to the prejudice of the service, or has omitted to perform any act it was his/her duty to perform, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service. The action may include one or more of the following: (1) removal from the service.

An employee who has gained permanent status in the classified city civil service cannot be subjected to disciplinary action except for cause expressed in writing, and he may appeal disciplinary action taken against him to the Civil Service Commission. La. Const. art. X, § 8(A). On appeal, the Civil Service Commission has a duty to decide if the Appointing Authority had good or lawful cause for taking the disciplinary action; and, if so, whether the punishment is commensurate with the offense. *Walters v.*



*Department of Police of City of New Orleans*, 454 So.2d 106, 113 (La.1984).

The Appointing Authority has the burden of proving by a preponderance of the evidence not only that the complained-of conduct occurred, but that it impaired the efficient operation of the governmental entity. *Newman v.*

*Department of Fire*, 425 So.2d 753, 754 (La. 1983).

The Commission's decision is subject to review by the court of appeal on questions of law or fact. *Walters*, 454 So.2d 106, 113. Therefore, to modify the disciplinary action of the Appointing Authority, the Commission must find that there was insufficient legal cause for the disciplinary action taken. *Palmer v. Department of Police*, 97-1593, p. 3 (La.App. 4 Cir. 1/28/98), 706 So.2d 658, 659. Legal cause exists if the facts found by the Commission disclose that the conduct of the employee impaired the efficiency of the public service. *Palmer*, 97-1593, p. 3, 706 So.2d 658, 659. 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*, 454 So.2d 106, 114. 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.

We are of the opinion that the Commission did not err in finding that

the Appointing Authority met its burden in showing that Herbert's termination was based on legal cause. The medical records prove that Herbert has a seizure disorder and reflect his admission that he concealed his seizure disorder from the Appointing Authority. Carbo and Conrad testified that Herbert did not disclose his seizure disorder during the employment process and that such information was relevant to the decision to employ him. The parties stipulated that Dr. Lowe would testify that the pastoral counseling of the Appellant did not qualify as "intensive treatment."

As this Court pointed out in *Newman*, 425 So.2d 753, 756, "[t]he public puts its trust in the fire department as a guardian of its safety, and it is important that the department be allowed to set appropriate standards of conduct for its employees sworn to uphold that trust." Herbert's termination was not arbitrary or capricious. By a preponderance of the evidence, the Appointing Authority proved that Herbert was untruthful and that such untruthfulness substantially impaired the efficient and orderly operation of the fire department. Whether Herbert's failure to disclose his history of a seizure disorder was an intentional act or an act of omission, his actions were untruthful and subjected him to dismissal.

**AFFIRMED**

