NOT DESIGNATED FOR PUBLICATION

PAULETTE OWENS	*	**NO. 2004-CA-0231**
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. 5893

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Judge Dennis R. Bagneris, Sr.

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

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AFFIRMED

Officer Paulette Owens was found to have violated the New Orleans Police Department Rules and Procedures of moral conduct and performance of duty for alleged payroll irregularities during the period of time from March 17, 1996 through August 31, 1996. Consequently, Officer Owens was terminated on August 28, 1998. Officer Owens is presently before this court seeking review of the decision of the Civil Service Commission denying her appeal. We affirm for the reasons below.

FACTUAL AND PROCEDURAL HISTORY

On May 8, 1988, Officer Owens joined the New Orleans Police Department ("NOPD"). In January 1995, she was assigned to the Homicide Division as a detective. On August 28, 1998, Officer Owens was terminated from the NOPD for violations of Adherence to Law, Truthfulness, and Devoting Entire Time to Duty. Specifically, the termination letter stated in part:

> This investigation determined that between January 1, 1996 and September 1, 1996, you worked a paid detail, as a New Orleans Police Officer, in the Louisiana Superdome, while being carried working in the Homicide Unit of the New Orleans Police Department, on thirteen (13) different occasions. In

> statements to Sgt. Robert Harrison you were untruthful when you said that on March 17, 1996, the hours listed on the payroll sheets at the Superdome were incorrect. Lieutenant Horace Giroir stated that on March 17, 1996, you were at the Superdome at approximately the hours listed on the payroll sheets.
>
> You were also untruthful when you stated that your hours listed at the Homicide Unit were wrong on one (1) occasion because you had a four (4) day weekend, starting Friday, May 3, 1996 when you worked the detail. However, payroll records reflected that you did not have a four (4) day weekend and that you were AWP OFF on Wednesday and Thursday of the week in question.
>
> You were untruthful on another occasion when you stated that the hours you worked at the Superdome were correct and the hours you worked in the Homicide Unit were wrong. Your Homicide Unit supervisors, Sgt. Miller and Sgt. Patterson stated that your Homicide hours were correct.
>
> Additionally, you were untruthful on five (5) other occasions concerning payroll discrepancies. You were charged with Devoting Entire Time to Duty due to the fact that you worked a paid detail when you should have been working for the New Orleans Police Department in the Homicide Unit.

Thereafter, Officer Owens appealed her termination from NOPD to the Civil Service Commission ("Commission"). The matter was assigned to a Civil Service Hearing Examiner, who conducted hearings on December 4, 1998, March 17, 1999, April 20, 1999, June 14, 1999, July 30, 1999, August 26, 1999, and October 12, 1999, with the examiner submitting his report to the Commission on January 17, 2000.

On October 24, 2003, the Commission rendered its unanimous

opinion finding that "the penalty of termination is within reason under the circumstances as being commensurate with the violations" and dismissed Officer Owens's appeal. In its opinion, the Commission first noted that although the termination letter alleged "on 13 different occasions between January 1, 1996 and September 1, 1996," Owens had worked a paid detail at the Louisiana Superdome while also working on the payroll of the NOPD Homicide division, only two specific dates were given: March 17, 1996 and May 3, 1996. Therefore, the Commission determined that because no other specific dates were enumerated in the termination letter, it would only consider March 17, 1996 and May 3, 1996. The Commission further determined that the appointing authority met its burden of proof for the March 17, 1996 complaint, but not for the May 3, 1996 complaint. The Commission explained its decision regarding the March 17, 1996 date as follows:

> Throughout the hearing the Appellant contended that the Superdome records were wrong. We find to the contrary. Based upon the March 17, 1996, Dome record contained in City 2, Sgt. Weilbelt's testimony, the Appellant's failure to call any witnesses to challenge the authenticity or accuracy of the March 17, 1996 Dome record and the Appellant's own contradictory statements regarding the hours worked at the Superdome on March 17, 1996, the Commission finds as fact that the Appellant worked a paid detail at the Superdome on March 17, 1996, during the same workday hours on which she admits she was carried on the payroll of the NOPD.

Further, the Commission overruled the following three objections made by Officer Owens: (1) hearsay as to the Superdome records, (2) lack of authentication of the Superdome records, and (3) incompleteness of the Superdome records. The Commission explained its ruling as to the hearsay objection:

> With respect to the Appellant's hearsay objection we note that Article 803(6) of the Louisiana Code of Evidence provides, in pertinent part, for the following exception to the hearsay rule:
>
> > (6)Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness…
> > La. C.E. Art. 803(6)
>
> Sgt. Harrison testified at the December 4, 1999, hearing and Sgt. Italiano at the June 14, 1999, hearing, as to how the records came into their possession. Both men were cross-examined by the Appellant's counsel. In short, Lt. Italiano requested of Public Integrity Division Commander Major Loicano that he request the records through Deputy Chief Doucet, the overall supervisor of Superdome details. Deputy Chief Doucet provided the documents to Major Loicano who

provided them to Sgt. Italiano who provided them to Sgt. Harrison. Lt. Italiano identified City 2 [Superdome records] as copies of the documents that were provided to him.

We find Sgt.s Harrison and Italiano to be the type of "other qualified witnesses" intended by La. C.E. Art. 803(6) and overrule the Appellant's objection to hearsay.

The Commission explained its ruling as to the objection of lack of authentication of the Superdome records:

With regard to the Appellant's objection as to lack of authentication we note that Louisiana Code of Evidence provides that '[T]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' La. C.E. Art. 901.

The document purports to be a record of NOPD employees' dates and times of attendance at paid details in the Louisiana Superdome.

The only person whose name appears on the March 17, 1996 Dome record and who was called as a witness in this proceeding, other than the Appellant, was Sgt. G.A. Weibelt, Jr. who worked at the Superdome on the date in question and who testified as follows with regard to how the Dome records were completed:

BY SGT.WEIBELT

A. If I was working at that time, every time I ever attended the Superdome on those days, the procedures that I specified were implicit. We always make sure that we have roll call. We make sure that everyone – complies with the regulations of the Police Department pertaining to uniforms and everyone is in attendance.

Q. So, if it's indicated that either Owens or Taylor were working on that day, would they have

been present at these roll calls?
A. Yes, they would have.

The Appellant's attorney asked no questions of Sgt. Weibelt.

Sgt. Weibelt's testimony satisfies us that the document is what it purports to be, namely a record of the Appellant's presence at the Louisiana Superdome for the hours 7:00 a.m. to 4:00 p.m. on March 17, 1996, and the Appellant's objection as to lack of authentication is overruled.

The Commission also gave detailed reasons why it overruled Officer Owens's objection as to the incompleteness of the records. Specifically, the Commission stated as follows:

The Appellant requested that the Hearing Officer defer ruling on the admissibility of City 2 (the Superdome records) 'until such time as we've had the opportunity to present the entire Superdome record regarding hours worked by these employees.' As we have noted above, this objection is directed to the weight to be accorded the evidence, not its admissibility.

The Appellant did not present any witness or evidence to challenge the authenticity of the 'Dome record' for March 17, 1996, which is the first document in City 2.

Although the Appellant's attorney alluded to a change in Superdome payroll records by one Susan Pollet, Superdome "Accounting Manager", Pollet was not called to testify.

The one witness that the Appellant called to challenge City 2 could say nothing about the record for March 17, 1996. Despite any formal acceptance of City 2 into evidence, the Appellant's attorney used City 2 to examine Sgt. Donald Paisant, who was called by the Appellant in her case-in-chief on August 26, 1999. Although Appellant's counsel interrogated Paisant about many aspects of City 2 in an effort to undercut reliance on the document as an accurate

> representation of the hours worked, no questions were asked by Paisant about the Dome record for March 17, 1996. On cross-examination by the Appointing Authority Paisant explained that he had no involvement with the preparation of the Dome record for March 17, 1996 and could not make any representation about it.

On appeal, Officer Owens briefed two assignments of error, arguing: (1) that the Commission committed manifest error in finding that she worked from 7:00 a.m. until 7:30 p.m. at a Superdome paid detail on March 17, 1996, while being paid by the NOPD for working her homicide duties from 7:25 a.m. until 4:00 p.m., and (2) that the Commission's delay in rendering its decision in her case warrants reversal.

DISCUSSION

A permanent classified City Civil Service employee cannot be subjected to disciplinary action except for cause expressed in writing. La. Const. of 1974 art. X, § 8(A). "Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged." *Cittadino v. Department of Police*, 558 So.2d 1311, 1315 (La.App. 4 Cir. 3/14/90). The employee's appointing authority bears the burden of proving by a preponderance of the evidence that the conduct at issue "impaired the efficiency of the public service and that it bears a real and substantial relationship to the efficient operation of the public service." *Id.*

The Civil Service Commission reviews all removal and disciplinary cases, and an appeal from the Commission is heard before the court of appeal. *Walters v. Department of Police of the City of New Orleans*, 454 So.2d 106, 113 (La.1984). In *Walters*, the Louisiana Supreme Court stated the appellate court's standard of review:

> 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 114. Further, "[w]hen there is a conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review. When there are two permissible views of evidence, the fact finder's choice cannot be manifestly erroneous." *Saacks v. City of New Orleans*, 95-2074, p. 13 (La.App. 4 Cir. 11/27/96), 687 So.2d 432, 440.

Issue One: Whether the Commission committed manifest error in finding that Officer Owens worked from 7:00 a.m. until 7:30 p.m. at a Superdome paid detail on March 17, 1996 while being paid by the NOPD for working her homicide duties on tbe same date from 7:25 a.m. until 4:00 p.m.

The thrust of Officer Owens's argument is that the Commission erred in admitting the Superdome records because the records are excluded by the hearsay rule and because Sgt. Harrison and Lt. Italiano were not qualified to

testify as to the manner by which the March 17, 1996 records were prepared.

Hearsay may be admitted in administrative hearings, and this practice does not violate the constitution. *Taylor v. New Orleans Police Dept.*, 2000-1992, pp. 4,6 (La.App. 4 Cir. 12/12/01), 804 So.2d 769, 772, 773. However, the findings of the Commission must be based upon competent evidence. *Id.* at 5 citing *Cittadino v. Dep't of Police*, 558 So.2d 1311, 1315 (La.App. 4 Cir. 3/14/90). The appellate court will disregard incompetent evidence. Therefore, the question becomes whether the hearsay evidence was "competent evidence." *Taylor*, p. 5, 804 So.2d at 773.

In the instant case, the Commission found that two of the witnesses, Sgt. Harrison and Lt. Italiano, were "other qualified witnesses" as contemplated by Article 803(6) of the Louisiana Code of Evidence. Accordingly, the Commission found that the business records about which the witnesses testified were competent evidence that should be admitted into evidence. Based on the record before this court, we find that the Commission's decision to overrule the hearsay objection was not manifestly erroneous. Accordingly, we find no merit to this assignment of error.

Issue Two: Whether the Commission's three year and none month delay in deciding her appeal amounts to justice denied under the law.

Officer Owens argues that *Patterson v. New Orleans Fire Dep't*, 98-1168 (La. App. 4 Cir. 12/23/98), 727 So.2d 551, applies to the instant case

and requires a reversal of the Commission's decision due to the lengthy delay in rendering its decision on her appeal of the August 1998 termination. On the other hand, NOPD argues that the Louisiana Supreme Court decision, *Bannister v. Department of Streets*, 95,0404 (La. 1/16/96), 666 So.2d 641, applies to this case and that the case should be affirmed.

Civil Service Rule II, § 4.16 provides:

> Appeals to the Commission shall be decided promptly, but in any event within ninety (90) calendar days after ... receipt by the Commission of the Hearing officer's report and official transcript of the testimony of said hearing.

In *Bannister v. Department of Streets*, this Court reversed a decision of the Commission because the Commission's decision was not rendered until 87 days after the 90-day period identified in Rule II had expired. 666 So.2d at 645. However, the Louisiana Supreme Court reversed, finding that the 90-day period identified in the Civil Service Rule is "directory" as opposed to "mandatory." *Bannister*, 666 So.2d at 646. Even though the rule was couched in mandatory terms the Supreme Court held that, considering the purpose and intent of the drafters of the rule, it was merely directory in nature, and its violation under the circumstances did not render the commission's decision erroneous. The Court recognized that, to conclude otherwise, would be an absurd result. The Supreme Court added:

> …we are also impressed by the fact that Rule II, § 4.16 relates solely to the Commission's own actions. Understandably, once

> litigants in a civil service proceeding present their case, its resolution is then placed beyond their control and into the hands of the administrative body. Yet, the mandatory application of the rule in question would cause the parties to win or lose simply as a result of unintended actions--even neglect--by that agency. Such an outcome, rather than fostering decisions based on the merits, would allow sheer technicalities to defeat actual justice.

Bannister, 666 So.2d 641, 646.

In *Patterson*, Chief Herbert Patterson was employed by the City of New Orleans as the Coordinating Deputy Chief/Senior Deputy Chief of the New Orleans Fire Department. 727 So.2d at 552. Chief Patterson was charged with violating New Orleans Fire Department Rules, Sections 13:18 and 14.01 when, upon entering credit union office in which four African-American females were present, he remarked that they must be "giving away free" food. *Id.* After an internal hearing, it was recommended that Chief Patterson be given a letter of reprimand and that he apologize to the complaining witnesses in writing; however, the Superintendent suspended Chief Patterson for 30 days at a cost to Chief Patterson of approximately $5,100.00 in lost pay and benefits. *Id.* Thereafter, Chief Patterson appealed his suspension to the Civil Service Commission. A hearing was held on September 22, 1995, and findings were issued on September 27, 1995. The hearing officer found that the City failed to prove its allegations of racial remarks. The Civil Service Commission failed to act on these finding until

April 6, 1998, at which time it rejected the findings of the hearing examiner and instead chose to sustain the 30-day suspension. On appeal, this court reversed the Commission's ruling, finding that under Civil Service Rule II, § 4.16, "justice delayed becomes justice denied." *Id.* at 553. This Court explained:

> We feel that the facts of this case distinguish it from *Bannister*. At some point justice delayed becomes justice denied. In light of *Bannister*, we cannot say exactly where that point is, or whether it is a bright line or a range. In this case it does not matter. The delay in this case is more than eight times as long as the eighty-seven-day delay found in the *Bannister* case. This is not a matter of continuing the employment of someone whose continued service has been found to be detrimental to the public as it was in *Bannister*. With the exception of the period of his suspension (February 20, 1995 through March 21, 1995), Chief Patterson has continued to work during the entire period he waited for his appeal to be decided, but he had to do so with this matter hanging over his head. We feel that this delay in itself and all that Chief Patterson has been through, along with his written apologies, is punishment enough for what at worst can only be characterized as one stupid and insensitive remark. The record will not support a finding that the remark was made with any racial or sexist intent.

Patterson, 727 So. 2d at 553.

In this case, we feel the facts are distinguishable from *Patterson* in that payroll fraud and dishonesty are much more detrimental to the public than making an "insensitive remark." Although we agree with Officer Owens that the Commission should have issued the opinion in a more timely fashion, we do not find the remedy is to reinstate a police officer who has

been untruthful and dishonest in her duties to the NOPD force. Accordingly, we find no merit to this assignment of error.

For the foregoing reasons, we affirm the decision of the Civil Service Commission.

AFFIRMED