

NOT DESIGNATED FOR PUBLICATION

MALCOLM ROSS * **NO. 2007-CA-0169**
VERSUS * **COURT OF APPEAL**
DEPARTMENT OF POLICE * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 7105

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Judge Patricia Rivet Murray

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr.)

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AFFIRMED

Officer Malcolm Ross of the New Orleans Police Department
[“NOPD”] appeals the decision of the Civil Service Commission [“the
Commission”] that upheld his thirty-five day suspension by the NOPD. For
the reasons that follow, we affirm.

FACTS AND PROCEEDINGS BELOW

Officer Ross, a twenty-eight year veteran of the NOPD, was
suspended without pay for thirty-five days for neglect of duty on account of
his unexplained failure to report to his job from September 19, 2005 until
October 3, 2005. It is undisputed that Officer Ross was on approved
furlough from Monday, August 29, 2005, until Monday, September 19,
2005. Hurricane Katrina struck the New Orleans area on August 29, the day
Officer Ross’s furlough officially began.

At the hearing on March 8, 2006, Anthony Canatella, Deputy Chief of
the NOPD, testified that despite a standing order that all furloughs are

cancelled when an emergency situation, such as Hurricane Katrina, occurs, the NOPD was disciplining Ross only for his failure to return on September 19 at the end of his scheduled furlough. Deputy Chief Canatella was the Commander of the Sixth District, to which Officer Ross was assigned at the time. Deputy Chief Canatella testified that he never spoke with Officer Ross until he showed up in early October, although the Deputy Chief admitted that the Sixth District station and the entire NOPD were experiencing major telephone / communication problems in the aftermath of Hurricane Katrina. He further testified he believed Officer Ross had made contact with a sergeant who had answered the phone at the Sixth District on September 28. At that time Officer Ross had asked if he could be carried on sick leave until his return; during that conversation the sergeant informed Officer Ross that he had already been placed on suspension for his failure to return. Deputy Chief Canatella stated that at the time of the hearing, he still had no information indicating that Officer Ross had a valid reason for being absent from September 19 through October 3. He explained that a minimum thirty-day suspension had been imposed upon all officers who had failed to return to the city after Hurricane Katrina, and that in the particular case of

Officer Ross, five days had been added.

At the conclusion of Deputy Chief Canatella's testimony, it was stipulated that Sergeant Waguespack would testify that Officer Ross had been absent from work without permission from September 19, 2005, until October 3, 2005; and that Sergeant Johnson would testify that he had personally listened to all the messages, numbering approximately nine hundred, that had been left on the Sixth District telephone answering machine during the month after Hurricane Katrina when the station was unmanned, and that there had been no message from Officer Ross.

Officer Ross testified that when he left New Orleans to drive to Houston for his vacation on Saturday, August 27, he was not aware that Hurricane Katrina was headed for the New Orleans area. He learned that the hurricane had hit the city and that the city was flooded from the television news reports on August 29 and 30. He testified that he tried to call the Sixth District three times on August 31, but could not get through. He then attempted to drive to New Orleans on September 2, but he was stopped by Army Reserve personnel on Interstate 10 near LaPlace and was told he could not go any further. Officer Ross stated he did not know of any other route

into the city besides Interstate 10, so he turned around and returned to Houston. He testified that he tried to call the Sixth District station numerous times after he got back to Houston, that he left messages, that his daughter sent an email on his behalf and that his son-in-law sent a text message. He introduced cell phone records showing multiple calls, some of which were long enough to indicate a message being left, made between August 31 and September 4, and an attempted text message to Deputy Chief Canatella's cell phone on September 3. In addition, the evidence showed an email was sent on September 4 identifying Officer Ross, giving his contact numbers and asking for a contact person and directions to get back into New Orleans. Also in evidence was an email response sent on September 4 stating that the NOPD was unable to appropriately respond to Officer Ross's inquiry at that time, but he was instructed to continue to check back with them as conditions improved, and listing three specific web sites he could use for that purpose. Although Officer Ross's cell phone records did not show any calls made to the NOPD between September 4 and September 25, they did reflect that he checked his voice mail periodically. He also testified that he called a civilian named Lisa Martin whom he believed could contact the

NOPD for him, and the cell phone records reflect several calls to her during this period of time.

Officer Ross further testified that he again left Houston at midnight on September 18, intending to drive to New Orleans to report to work on September 19. However, his car broke down on Interstate 10, and it had to be towed to Houma, Louisiana. Officer Ross stated that he purchased a new vehicle in Houma on the evening of September 19, but he did not attempt to continue on to New Orleans because he heard from news reports that the city was being evacuated due to the threat of Hurricane Rita approaching.

Officer Ross also stated that he had a female friend accompanying him who had intended to go to New Orleans to check on her apartment. He stated that he was unable to get her a bus ticket back to La Porte, Texas (near Houston), because there were no bus services operating, so after spending the night in a hotel near Houma, he drove her back to the Houston area. After arriving in Houston, he evacuated to the Dallas area with his daughter and son-in-law, who were leaving their residence in Houston to escape Hurricane Rita, which made landfall near the Texas-Louisiana border on September 21. Officer Ross testified that because of that evacuation, he was unable to

return to New Orleans until early October.

The documentary evidence submitted by Officer Ross showed that on September 19, a towing service picked up his car on Highway 90 eastbound by the Gray exit, not on Interstate 10 as he had testified. When questioned about this discrepancy, Officer Ross indicated that he did not really know what road he was on when his car broke down because the traffic had been rerouted because of Hurricane Rita, and he had merely followed the signs directing traffic to New Orleans. Documentary evidence also confirmed that Officer Ross purchased a vehicle on September 19 for \$10,230 from Terrebonne Ford in Houma, the place to which his car had been towed.

At the conclusion of the hearing, the parties stipulated that Officer Daughtry of the Sixth District would testify that he had called Officer Ross on September 27 or 28 in response to a phone message and had told Officer Ross that he had to call Deputy Chief Canatella. Officer Ross stated that he actually reached Deputy Chief Canatella on his cell phone on September 28, but Canatella told Ross he was sleeping and would call him back. Deputy Chief Canatella testified that although he did not remember such a call, it could have occurred because during that time he was still sleeping in his

police vehicle because of the emergency situation. Cell phone records confirmed that the call was made.

On December 6, 2006, the Commission rendered its decision upholding Officer Ross's thirty-five day suspension. The Commission found that Officer Ross was suspended for cause, reasoning that the appellant neglected his duty when he failed to return to New Orleans after purchasing a vehicle in Houma on September 19. The Commission stated that the Hurricane Rita storm warnings did not justify the appellant's decision to return to Texas rather than reporting for duty.

ISSUES

On appeal, Officer Ross asserts two assignments of error: that there was insufficient evidence to prove that he was suspended for cause; and alternatively, that the penalty imposed upon him was not commensurate with his infraction.

APPLICABLE LAW

An employer cannot subject an employee who has gained permanent status in the classified city civil service to disciplinary action except for cause expressed in writing. La. Const. Art. X, § 8(A); *Walters v.*

Department of Police, 454 So.2d 106, 112 (La. 1984). The employee may appeal from such a disciplinary action to the Commission. *Id.* The Commission has a duty to decide independently from the facts presented whether the appointing authority had good and lawful cause for taking the disciplinary action and, if so, whether the punishment imposed was commensurate with the dereliction. *Id.* at 113. Legal cause exists whenever the 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. 4th Cir. 1990). The appointing authority bears the burden of proving by a preponderance of the evidence that the conduct complained of occurred and that the conduct impaired the efficiency of the public service. *Id.* The appointing authority must also prove that the actions complained of bore a real and substantial relationship to the efficient operation of the public service. *Id.*

In civil service disciplinary cases, the appellate court has a multifaceted standard of review. First, as in other civil matters, deference must be given to the factual findings made by the Commission, which should not be disturbed unless manifestly erroneous or clearly wrong.

Second, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause and commensurate with the infraction, the appellate court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by an abuse of discretion.

Bannister v. Department of Streets, 95-404, p.8 (La. 1/16/96), 666 So.2d 641, 647 (citations omitted).

DISCUSSION

Applying these legal principles to the facts of the instant case, we conclude that the Commission did not err by upholding the thirty-five day suspension imposed upon Officer Ross. Officer Ross does not dispute that he was absent from work from September 19 until October 3, which is the conduct for which he was disciplined. Moreover, while the evidence indicated that Officer Ross did attempt, albeit unsuccessfully, to contact the NOPD in the immediate aftermath of Hurricane Katrina, this evidence is not relevant to the issue on appeal because Officer Ross was only disciplined for his failure to return to his job after his furlough ended on September 19, 2005, approximately three weeks after Katrina's landfall. Significantly, there was no evidence to suggest that Officer Ross had a legitimate excuse

for his failure to return to New Orleans after purchasing a vehicle in Houma on September 19, or that he attempted to contact the NOPD at that time.

According to his own testimony, Officer Ross never attempted to return to the city at that time, either because he believed the city was under an evacuation order and/or because he believed he had an obligation to drive his female passenger back to Texas.

Clearly, the unexcused absence of a police officer from his job for two weeks, even under ordinary circumstances, is conduct that impairs the efficiency of the operation of the police department. In the instant situation, which occurred during a time when the NOPD was operating under emergency conditions with limited personnel, the failure of an officer to report for duty clearly justifies disciplinary action. Finally, considering the testimony that all NOPD officers who were not on furlough and who failed to report for duty by September 14 after Katrina were placed on an automatic thirty-day suspension, we find that the thirty-five day suspension imposed upon Officer Ross was commensurate with his infraction.

Therefore, we conclude that the Commission did not err by upholding the action of the appointing authority.

CONCLUSION

Accordingly, the decision of the Civil Service Commission dismissing Officer Ross's appeal is affirmed.

AFFIRMED