

**NOT DESIGNATED FOR PUBLICATION**

**JERARD BRUMFIELD** \* **NO. 2008-CA-1502**  
**VERSUS** \*  
**DEPARTMENT OF POLICE** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CITY CIVIL SERVICE COMMISSION ORLEANS**  
**NO. 7281**  
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**Judge Dennis R. Bagneris, Sr.**  
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(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

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**JUNE 10, 2009**

**AFFIRMED**

In this appeal, the plaintiff/appellant, Officer Jerard Brumfield (“Appellant”), seeks review of a decision of the Civil Service Commission (“Commission”) of the City of New Orleans upholding a decision by the New Orleans Police Department (“NOPD”) to terminate him, effective October 29, 2005, for alleged job abandonment. For the following reasons, we hereby affirm.

## **FACTS**

The Appellant was a police officer with the NOPD and a classified employee in the civil service system. According to Appellant, he was on annual leave in Houston, Texas when he received notice that the Superintendent had placed the police department on “Activation Status” in order to mobilize essential personnel and first responders in preparation for Hurricane Katrina. Although Appellant was contacted on August 28, 2005, and told to immediately report for duty in New Orleans, he testified that he was unable to return to New Orleans because of traffic congestion related to Hurricane Katrina. Thereafter, Appellant testified that because he was told that he would be suspended for not reporting on either August 28 or 29, 2005, he did not attempt to return to New Orleans to seek reinstatement; rather, he waited for a hearing.

Thereafter, on October 24, 2005, the NOPD sent a letter to Appellant’s address notifying him that he was being “dropped from the rolls of the New Orleans Police Department for abandonment of position.” Appellant appealed this disciplinary action on May 10, 2006.

Following a hearing, the Commission issued a decision on September 10, 2008, denying the appeal. Appellant now appeals the Commission’s decision.

## **STANDARD OF REVIEW**

The Commission has authority to “hear and decide” disciplinary cases, which includes the authority to modify (reduce) as well as to reverse or affirm a penalty. La. Const. art. X, § 12; *Pope v. New Orleans Police Dept.*, 2004-1888, p. 5 (La. App. 4 Cir. 4/20/05), 903 So. 2d 1, 4. The appointing authority is charged with the operation of its department and it is within its discretion to discipline an employee for sufficient cause. The Commission is not charged with such discipline. The authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. *Pope*, 2004-1888, pp. 5-6, 903 So. 2d at 4.

The decision of the Commission is subject to review on any question of law or fact upon appeal to this Court, and this Court may only review findings of fact using the manifestly erroneous/clearly wrong standard of review. La. Const. art. X, § 12; *Cure v. Department of Police*, 2007-0166, p. 2 (La. App. 4 Cir. 8/1/07), 964 So. 2d at 1093, 1094. In determining whether the disciplinary action was based on good cause and whether the punishment is commensurate with the infraction, this Court should not modify the Commission order unless it was arbitrary, capricious, or characterized by an abuse of discretion. *Id.* A decision of the Commission is “arbitrary and capricious” if there is no rational basis for the action taken by the Commission. *Cure*, 2007-0166, p. 2, 964 So. 2d at 1095.

## **DISCUSSION**

On appeal, Appellant asserts the following assignments of error: (1) whether the Commission’s decision should be reversed because NOPD failed to meet its burden of proving legal cause for the termination by a preponderance of the evidence; (2) whether the Commission’s decision should be reversed because

the termination was arbitrary, capricious, and an abuse of discretion; (3) whether the Commission's decision should be reversed because no pre-termination investigation was conducted, as required by La. R.S. 40:2531, rendering the termination null; and (4) whether the Commission's decision should be reversed because there was no pre-termination notice and the post-hearing procedure violated his due process rights.

The first issue we will address is whether the NOPD had legal cause to terminate Appellant and whether the punishment imposed is arbitrary, capricious, or an abuse of discretion. Appellant argues on appeal that the appointing authority failed to meet its burden of proving "legal cause" for termination because he was the only witness called and because he testified that he tried to get to New Orleans during the contra flow/mandatory evacuation, but was unsuccessful. Further, Appellant argues that because his Supervisor advised him that he was under immediate, indefinite suspension at that time, he waited for the NOPD to give him any other directive or order. Therefore, Appellant argues that the NOPD failed to present any evidence that the alleged dereliction bore a real and substantial relationship to the efficient operation of the appointing authority. For the following reasons, we find no merit in Appellant's argument.

The appointing authority has the burden of proving, by a preponderance of the evidence, that the complained of activity or dereliction occurred, and that such dereliction bore a real and substantial relationship to the efficient operation of the appointing authority. *Cure*, 2007-0166, p. 2, 964 So. 2d at 1094, citing *Marziale v. Dept. of Police*, 2006-0459, p. 10 (La.App. 4 Cir. 11/8/06), 944 So. 2d 760, 767. The protection of civil service employees is only against firing (or other discipline) without cause. La. Const. art. X, § 12; *Cornelius v. Dept. of Police*, 2007-1257, p.

8 (La.App. 4 Cir. 3/19/08), 981 So. 2d 720, 724, citing *Fihlman v. New Orleans Police Dept.*, 2000-2360, p. 5 (La. App. 4 Cir. 10/31/01), 797 So. 2d 783, 787.

After a review of the record, we find the appointing authority established legal cause to terminate Appellant. It is clear from Appellant's testimony that he failed to report for duty following a notice of activation to report for Hurricane Katrina. Appellant testified that he was a first-responder and essential personnel, which warranted his presence during and immediately following Hurricane Katrina. Therefore, there is a real and substantial relationship between the Appellant's absence from the city of New Orleans, and the NOPD's ability to efficiently secure the safety of the general population. Although Appellant's reason for his absence was the difficulty he faced in navigating contraflow traffic between Houston and New Orleans, he offered no legal justification for failing to return to work on August 28, 2005, and thereafter. Thus, we find the NOPD met its burden of proving legal cause for the termination by a preponderance of the evidence.

Further, we find no merit in Appellant's argument that termination for failure to drive to New Orleans on August 28 or 29, 2005, against government-ordered contra-flow, is so grossly excessive as to be arbitrary, capricious, and an abuse of discretion. As stated above, not only did Appellant fail to report to New Orleans on August 28, or 29, but he failed to report to duty and/or seek reinstatement following the storm. Under these facts, we find the Commission's decision was clearly rational and is therefore neither arbitrary, capricious, nor an abuse of discretion.

The second issue we will address is whether the Commission's decision should be reversed because there was no pre-termination investigation and because

there was a delay between a post-termination hearing and the appeal to the Commission.

This Court, in *Reed v. Department of Police*, 06-1498 (La.App. 4 Cir. 10/10/07), 967 So. 2d 606, held that under the circumstances presented by Hurricane Katrina and its aftermath, affording the officers a post-termination hearing was sufficient to satisfy the due process requirements of both the United States and Louisiana Constitutions. In this case, Appellant was given an opportunity to be heard in a post-termination hearing; accordingly, we find that due process requirements were met. Further, we find no merit in Appellant's argument that the post-termination proceedings were constitutionally inadequate due to lengthy delays. Given the emergency circumstances and the post storm recovery conditions, and because there is no bright line rule for prejudicial delay, we find the Commission's delay of almost 26 months in deciding the appeal does not result in a deprivation of due process.

In conclusion, we find the Commission properly found that legal cause existed for Officer's Brumfield's termination and properly upheld the appointing authority's discipline. There is no showing that the Commission committed manifest error in its findings of fact or that its decision was arbitrary, capricious, or characterized by an abuse of discretion. We also find the delays in the post-termination hearing and appeal do not rise to a deprivation of due process considering the post storm recovery conditions present in the city of New Orleans during that time.

**AFFIRMED**