TRACY FULTON	*	**NO. 2017-CA-0523**
VERSUS	*	**COURT OF APPEAL**
DEPARTMENT OF POLICE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 8230 C\W 8402

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Judge Marion F. Edwards, Pro Tempore

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(Court composed of Judge Paula A. Brown, Judge Tiffany G. Chase, Judge Marion F. Edwards, Pro Tempore)

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AFFIRMED

DECEMBER 6, 2017

Officer Tracy Fulton appeals a decision of the New Orleans Civil Service Commission (the Commission) that affirmed the decision of the New Orleans Police Department (NOPD) to terminate his employment as a result of an altercation between him and a citizen prompted by an automobile accident. Officer Fulton, a twenty-year veteran of the NOPD with permanent status as a classified employee, appealed his termination to the Commission pursuant to Art. X § 8(A) of the Louisiana Constitution and Civil Service Commission Rule II § 4.1. After a three day hearing, the Commission deemed the dismissal appropriate. We affirm that decision for reasons that follow.

FACTS

On September 4, 2013, while off-duty and driving his personal vehicle, Officer Fulton was involved in an automobile accident with E.C. at the intersection of Earhart Boulevard and Monroe Street. Officer Fulton was stopped at a red light when E.C., who was driving a pickup truck, attempted to enter the turning lane. E.C.'s vehicle jumped the curb, and struck the rear fender of the Fulton vehicle. Fulton got out of his car to inspect the damage and went over to the other vehicle. Officer Fulton began yelling at E.C. and his passengers, and attempted to open the

driver door which was locked. Fulton then opened the rear door. A twelve-year-old child in the back seat of E.C's vehicle and two other passengers were frightened and screamed at E.C. to drive off. Officer Fulton slammed the car door and E.C. drove to his home about five blocks away. Fulton got into his car and followed E.C. while calling police to report a hit and run accident.

When E.C. parked in front of his home, Officer Fulton parked behind the vehicle and angrily confronted E.C. Fulton was still on the telephone with police at this point, and some of Officer Fulton's angry confrontation was overheard by the officer taking the report.

The argument escalated into a physical fight. According to the evidence presented at the hearing, E.C. kicked at Officer Fulton and Fulton punched E.C., who stumbled to his truck and got a machete. Fulton went to his vehicle and retrieved his service weapon. As a result of the fight, E.C. was injured and was taken by paramedics to the hospital. The hospital report shows that E.C. was diagnosed with a fractured nose, dislocated jaw, headache and concussion syndrome.

The matter was investigated by Sergeant Omar Diaz, a twenty-one year veteran of NOPD in the Police Integrity Bureau Criminal Section. Sergeant Diaz testified at the hearing. He stated that he was called to the scene of the altercation in the 8500 block of Forchey Street and interviewed several witnesses including E.C. and his two passengers. Sergeant Diaz concluded that E.C.'s pickup truck hit the rear of Fulton's auto by paint markings and scratches to the vehicles. The sergeant also listened to an audio recording of a call between Officer Fulton and the Second District Police Station. In that recording, Officer Fulton is heard saying "I wish you f------g would" in what appeared to be a threat. Although it appeared

both Officer Fulton and E.C. had weapons, it was not apparent which individual was the first to retrieve that weapon.

As a result of the incident, Officer Fulton was arrested and charged with second degree battery while off-duty. NOPD issued an emergency suspension and ultimately terminated Officer Fulton's employment. Fulton appealed the termination to the Civil Service Commission. Prior to the Commission hearing, the parties stipulated that Officer Fulton was tried on the second degree battery charge and found not guilty by a jury.

DISCUSSION

Initially we note that Fulton's brief does contain a statement of jurisdiction, an assignment of errors, or a list of issues presented for our review as required by Louisiana Uniform Rules of Courts of Appeal, Rule 2-12.4. NOPD has noted these deficiencies in its brief and urged dismissal of the appeal. Fulton has filed a reply brief acknowledging these defects and attempted to correct them. Despite Rule 2-12.4, assignments of error are not necessary in an appeal.[1] Appellate courts have the authority to consider an issue even in the absence of an assignment of error.[2] Accordingly, we will consider the merits of this appeal.

The appointing authority, which is the employer of an employee in the classified civil service, is charged with the operation of its department, and it is within its discretion to discipline an employee for sufficient cause.[3] New Orleans police officers are included in the protection guaranteed by this provision.[4]

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[1] La. C.C.P. art. 2129.
[2] *Merrill v. Greyhound Lines, Inc.,* 2010–2827 (La. 4/29/11), 60 So.3d 600, 601.
[3] *See* La. Const. art. X, § 8(A).
[4] *See Walters v. Dep't of Police of New Orleans,* 454 So.2d 106, 112 (La.1984).

However, the protection of civil service employees is only against firing or other discipline without cause.[5]

"Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged."[6] "The appointing authority must prove by a preponderance of the evidence the occurrence of the complained of activity and that the conduct impaired the efficient operation of the public service."[7] In the instant case we are concerned with the actions of a police officer. "(S)ince the public puts its trust in the police department as a guardian of its safety, it is essential the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust."[8]

"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."[9] 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."[10]

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[5] La. Const. Art. X, § 12; *Fihlman v. New Orleans Police Dept.,* 00–2360 (La.App. 4 Cir. 10/31/01), 797 So.2d 783, 787.
[6] *Cittadino v. Dep't of Police,* 558 So.2d 1311, 1315 (La.App. 4th Cir.1990), (citing, *Fisher v. Department of Health and Human Resources, Office of Human Development,* 517 So.2d 318 (La.App. 1st Cir.1987).
[7] *Narcisse v. Department of Police,* 12–1267 (La.App. 4 Cir. 3/6/13), 110 So.3d 692, 697 citing *Barquet v. Dep't of Welfare,* 620 So.2d 501, 505 (La.App. 4th Cir.1993).
[8] *Regis v. Dep't of Police*, 2013-1124 (La. 6/28/13), 121 So.3d 665, 666.
[9] *Pope v. New Orleans Police Dept.,* 2004–1888 (La.App. 4 Cir. 4/20/05), 903 So.2d 1, 5 (citing La. Const. art. X, § 12).
[10] *Id.* (citing, *Branighan v. Department of Police*, 362 So.2d 1221, 1222, (La.App. 4 Cir. 1978)).

The appellate standard of review of a factual decision of the Commission is the manifestly erroneous/clearly wrong standard.[11] In determining whether the disciplinary action was based on good cause and whether the punishment is commensurate with the infraction, the appellate court should not modify the Commission's order unless it was arbitrary, capricious, or characterized by an abuse of discretion.[12] A decision of the Commission is "arbitrary and capricious" if there is no rational basis for the action taken by the Commission.[13]

The Commission conducted a three-day hearing in which it considered the allegations against Fulton, that he committed a second degree battery while off-duty, and failed to conduct himself in a professional manner. The Commission handed down a judgment with extensive reasons, in which it affirmed NOPD's decision to terminate Officer Fulton's employment as a result of the incident. In the judgment, the Commission examined both the initial contact at the time of the automobile accident and the second interaction at E.C's home. The Commission also considered the calls made by Fulton to the command desk in which he initially reported following a vehicle that had just struck his car and refused to stop, and the second call in which he updated his location.

After consideration of all of the evidence presented, the Commission concluded that the appointing authority had sufficient cause to terminate the employment and that Fulton's actions adversely impacted NOPD"s efficient operations. The Commission found that "NOPD has a duty and responsibility to deter aggressive interactions between officers and residents whether on or off-duty.

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[11] *Cure v. Dep't of Police*, 2007-0166 (La.App. 4 Cir. 8/1/07), 964 So.2d 1093, 1094, see also La. Const. Art. X, § 12.
[12] *Id*. 964 So.2d at 1094-1095.
[13] *Id.* 964 So.2d at 1095.

Furthermore, NOPD must ensure that all personnel represent themselves and NOPD in a professional and lawful manner, even when off-duty."

The Commission's basis for the finding of sufficient cause rests on an analysis of the elements of the crime of second degree battery and the law of self-defense as it relates to this matter. Additionally, the Commission discussed the proper standard of proof. The Commission determined that the "beyond a reasonable doubt" standard required for a criminal conviction does not apply in this instance, and determined that the standard of proof herein is "preponderance of the evidence." We agree.

An acquittal on a criminal charge does not preclude a civil service disciplinary action based on the same set of facts.[14] The state's burden of proving every element of a crime beyond a reasonable doubt in a criminal proceeding does not apply in administrative proceedings.[15] The appointing authority in an administrative proceeding need only prove by a preponderance of the evidence that the complained of action occurred and that it impaired the efficient operation of the public service.[16]

Second degree battery is defined by La. R.S. 14:34.1 as a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury**.** That statute further provides that:

> For purposes of this article, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

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[14] *Bailey v. Dep't of Pub. Safety & Corr.*, 2005-2474 (La. App. 1 Cir. 12/6/06), 951 So. 2d 234, 240,(citing, *Department of Public Safety and Corrections v. Hooker,* 558 So.2d 676, 678 (La.App. 1st Cir.1990)).

[15] See*, Walters v. Department of Police of New Orleans*, 454 So.2d 106 (La. 1984).

[16] *Cittadino v. Dep't of Police*, supra.

Fulton does not dispute the fact that he hit E.C. and severely injured him; rather, Fulton argues that his actions were justified as self-defense. The Commission considered the facts of this matter and concluded that Fulton could not claim self-defense because he was the aggressor in the interaction between the two parties.

La. R.S. 14:21 provides:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

The Commission observed that E.C. did not speed away from the accident; but instead stopped for a red light, giving Fulton the opportunity to get the license plate number, make, model and color of E.C.'s vehicle and to communicate that information to the command desk. The Commission noted that Fulton approached E.C.'s vehicle after the accident and hit, then opened the rear door, followed E.C. to his home and confronted E.C. for the second time. Further, Fulton did not withdraw from the confrontation before striking E.C. in the face. The Commission found it was not necessary for Fulton to angrily confront E.C. at the scene of the accident or to aggressively open the rear door of E.C.'s vehicle. Nor was it necessary for Fulton to follow E.C. to his home and continue the confrontation after E.C. drove off in fear.

The Commission also found that E.C.'s response in assuming a "fighting stance" and kicking at Fulton was a reasonable response to Fulton's aggression. The Commission noted that Fulton could have reported the accident and withdrawn from the conflict at several points before punching E.C. in the face and abdomen. However, he chose not to. Considering the facts presented to the Commission, we

do not find the Commission was manifestly erroneous in its finding that Fulton was the aggressor and not entitled to claim self-defense.

The Commission found Fulton's decision to aggressively confront E.C. at the scene of the accident and opening the vehicle door was "inappropriate and needlessly escalated an already difficult situation." Furthermore, while Fulton could have chosen to simply write down the license plate number and other information on E.C.'s vehicle and report the accident to police, he chose a "far more aggressive approach." Such action, in the Commission's view, adversely impacted NOPD's efficient operations. We find that there is a rational basis for that finding and; accordingly, the Commission's ruling is not "arbitrary and capricious."

For the foregoing reasons, we affirm the ruling of the Civil Service Commission upholding the termination of employment of Officer Fulton by the New Orleans Police Department.

AFFIRMED