

PEGGY POCHE

*

NO. 2018-CA-0431

VERSUS

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COURT OF APPEAL

OFFICE OF POLICE

*

FOURTH CIRCUIT

SECONDARY EMPLOYMENT

*

STATE OF LOUISIANA

APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 8596

Judge Joy Cossich Lobrano

(Court composed of Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)

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AFFIRMED

NOVEMBER 14, 2018

This is a civil service case. Plaintiff/appellant, Peggy Poche (“Poche”), appeals the February 28, 2018 decision of the Civil Service Commission (“CSC” or “Commission”) upholding the termination of her employment by the appointing authority, the Office of Police Secondary Employment (“OPSE”). For the reasons that follow, we affirm the decision of the CSC.

Poche was employed by the OPSE as an analyst and had permanent status as a classified employee. She was not a commissioned police officer. Poche was disciplined for violating the City of New Orleans (the “City”) domicile ordinance,¹ after she failed to provide documentation of an Orleans Parish domicile between April 30, 2016 and October 1, 2016.

On November 5, 2016, Poche was placed on emergency suspension.

Following a pre-discipline hearing on November 11, 2016, OPSE Director John L.

¹ The domicile ordinance is found in Chapter 2, Article X of the City of New Orleans Code of Ordinances, which is entitled “Domicile Employees” and is comprised of Sections 2-971 to 2-978. Section 2-973 provides that, “[e]xcept as otherwise expressly provided in this article, it shall be the policy of the city to provide employment, promotions, reemployment or reinstatement, and retention of employment opportunities with the city to persons who do or will have an actual domicile in Orleans Parish within 180 days of their employment commencing and who thereafter maintain their actual domicile in Orleans Parish.”

Salomone, Jr. (“Director Salomone”) issued a discipline letter to Poche, dated November 16, 2016, stating that Poche violated the City’s internal policy requiring compliance with the domicile ordinance. For violation of the domicile ordinance, Poche’s employment with the OPSE was terminated effective November 11, 2016.

On December 12, 2016, Poche appealed her termination to the CSC. The CSC hearing went forward on August 15, 2017. On January 25, 2018, the hearing examiner issued his report in which he recommended that the appointing authority met its burden of proof and established by a preponderance of the evidence that (1) the complained-of infraction occurred; (2) Poche’s conduct impaired the efficiency of the public service; and (3) the discipline imposed was commensurate with the offense. On February 28, 2018, the CSC denied Poche’s appeal, upholding her termination. This appeal followed.

This Court explained the applicable burden of proof and standard of review in civil service discipline cases as follows:

The CSC 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.*, 04-1888, 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 CSC is not charged with such discipline. The authority to modify a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. *Pope*, pp. 5-6, 903 So.2d at 4.

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 v. Dept. of Police*, 07-0166, p. 2 (La. App. 4 Cir. 8/1/07), 964 So.2d 1093, 1094, citing *Marziale v. Dept. of Police*, 06-0459, 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*, 07-1257, p. 7 (La. App. 4 Cir. 3/19/08), 981 So.2d 720, 724, citing *Fihlman v. New Orleans Police Dept.*, 00-2360, p. 5 (La. App. 4 Cir. 10/31/01), 797 So.2d 783, 787.

The decision of the CSC 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*, p. 2, 964 So.2d at 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 CSC order unless it was arbitrary, capricious, or characterized by an abuse of discretion. *Id.* A decision of the CSC is “arbitrary and capricious” if there is no rational basis for the action taken by the CSC. *Id.*, p. 2, 964 So.2d at 1095.

Clark v. Dep’t of Police, 2012-1274, pp. 4-5 (La. App. 4 Cir. 2/20/13), 155 So.3d 531, 534-35.

On appeal, Poche does not argue that the CSC erred in finding that she violated the domicile ordinance. Rather, her only assignments of error are that the CSC erred in finding that (1) OPSE suffered any impairment in the efficiency of its operations, and (2) the punishment was commensurate with the offense.

In her first assignment of error, Poche contends that OPSE provided no objective evidence of actual impairment to the efficiency of its operations. She also points to Director Salomone’s testimony in which he explained that, before becoming aware of Poche’s ordinance violation, Director Salomone would not have attributed any job performance concerns to Poche’s residency. Poche further claims she has never been accused of being untruthful. We find no merit in these arguments.

Rather, we are persuaded by Director Salomone’s testimony about the purpose and mission of OPSE. OPSE is a City department, which was created as a

result of a federal consent decree and is responsible for coordinating and tracking when and where New Orleans Police Department officers work paid details as secondary employment. *See generally U.S. v. City of New Orleans*, 731 F.3d 434 (5th Cir. 2013), *remanded to* 32 F.Supp.3d 740 (E.D. La. 2014). Director Salomone testified that OPSE is charged with bringing a sense of credibility and integrity to the police paid detail process, in the face of allegations that police officers were acting illegally or inappropriately with respect to these paid details. According to Director Salomone, when OPSE employees misrepresent facts or are untruthful, it undercuts the integrity of OPSE's mission. Director Salomone determined that Poche misrepresented that she continued to live in Orleans Parish during the disputed period in 2016.

While Poche was not a police officer, she worked for a department that monitors and keeps track of paid details worked by police officers. Director Salomone's testimony is consistent with the Louisiana Supreme Court's reasoning in *Regis v. Dep't of Police*, 2013-1124, p. 2 (La. 6/28/13), 121 So.3d 665, 665-66, in which the Court held that, because police officers are responsible for law enforcement, "a police officer's failure to comply with the laws thus gravely impairs the efficiency of the department"; "[w]hen an officer violates the law, 'it casts doubt upon the credibility of the [police department] to ably conduct one of its principal functions.'"

This Court has likewise acknowledged that violations of internal rules relative to paid details impair the efficiency of police operations. In *Tregre v. Dep't*

of Police, 2013-1365, pp. 7-8 (La. App. 4 Cir. 4/30/14), 139 So.3d 1034, 1038, this Court employed similar reasoning in upholding the discipline of a police officer for violating internal rules prohibiting accepting cash payments, including checks made payable to cash, for paid details. This Court explained as follows:

...Assistant Superintendent Albert testified that cash payments are more difficult to track and link to the officer who performed the detail. Thus, the policy prohibiting cash payments including checks made payable to cash was established to avoid the “look of impropriety” and “to keep a better record of payment that officers receive while working paid details.” The Commission found the Appointing Authority “is justified in enforcing a legitimate rule that protects the integrity of its detail policy. Checks made payable to cash can be cashed by anyone, while a check issued to a specific individual is more restrictive.” The Department of Police establishes certain policies and regulations to assure the efficient operation of the public service. Failing to uphold and discipline those in violation of the rules impairs the integrity and operation of the department.

Id. See also *Abbott v. New Orleans Police Dep’t*, 2014-0993, pp. 12-14 (La. App. 4 Cir. 2/11/15), 165 So.3d 191, 199-201.

Moreover, citing the preamble to a prior version of the domicile ordinance, this Court stated in *Aldor v. New Orleans Fire Dep’t*, 2001-0439, p. 9 (La. App. 4 Cir. 11/21/01), 803 So.2d 112, 118:

The Domicile Ordinance requires all City employees to have an actual domicile in New Orleans. Among the purposes of the Domicile Ordinance are enhancement of morale and efficiency of City civil service; economic stimulation resulting from maximizing the portion of the City’s personnel expenditures that is re-spent by City employees within the City; protection of the City’s tax base by encouraging the utilization, maintenance, improvement and redevelopment of the City’s residential properties; and promoting establishment of domiciles in New Orleans by as many employed persons as possible.

This Court noted, in light of these purposes, that violation of the domicile ordinance adversely impacts City employee morale. *Id.*, 2001-0439, p. 12, 803

So.2d at 119.² Director Salomone likewise expressed concerns about OPSE staff morale where an employee violates the domicile ordinance. In particular, he testified that, if all other staff members are required to live in the City and one employee disregards this requirement, this can create an environment where the employees who follow the domicile ordinance perceive that they are being treated unfairly. We thus find that the record supports the CSC's finding that Poche's violation of the domicile ordinance impaired the efficiency of OPSE operations.

We next turn to Poche's argument that termination was not commensurate with violation of the domicile ordinance. Section 2-977 of the domicile ordinance unambiguously provides that "[k]nowing failure to comply with any of the provisions of this article by officers and employees of the city shall be cause for dismissal or other disciplinary actions." Termination of employment is also set forth in Rule IX, Section 1.1 of the Rules of the Civil Service Commission for the City of New Orleans, which provides, 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:

(a) termination from the service...

² We acknowledge that, after this Court's opinion in *Aldor*, *supra*, the domicile ordinance was amended to exempt certain employees, including police officers and firefighters. *See* Chapter 2, Article X, Section 2-975, City of New Orleans Code of Ordinances (M.C.S., Ord. No. 25242, § 1, eff. 3-7-13; M.C.S., Ord. No. 25793, § 1, eff. 4-10-14; M.C.S., Ord. No. 26035, §§ 2, 3, eff. 9-4-14). There is nothing in the ordinance or the record, however, to indicate that an exemption applies to Poche or OPSE employees in general. Also, the *Aldor* case has not been overturned.

While termination of employment is not the only available penalty for violation of the domicile ordinance, the CSC noted that the domicile ordinance puts the employee on notice that termination is an available discipline for violation of the ordinance. The record reflects that, upon Poche's hiring, she was required to complete and sign forms in which she (1) acknowledged that compliance with the domicile ordinance was a condition of her employment; and (2) agreed to acquire and maintain an Orleans Parish domicile within 180 days of her hire.

Further, Director Salomone testified regarding his decision to terminate Poche, rather than impose less severe discipline. He explained that the OPSE is monitored by the federal court and Department of Justice, such that "we've got to be the folks who are above the dirty business." According to Director Salomone, Poche made "an effort to deceive about the truth of [her] domicile and we cannot operate without integrity intact and have our staff be known not to have integrity."

As this Court stated in *Pope v. New Orleans Police Dep't*, 2004-1888, pp. 7-8 (La. App. 4 Cir. 4/20/05), 903 So.2d 1, 5 (quoting *James v. Sewerage & Water Bd. of New Orleans*, 505 So.2d 119, 121 (La. App. 4th Cir.1987):

It is not the job of the Commission to decide who should be disciplined how. The appointing authority is charged with the operation of his department. He is the one who must run the department, an obviously necessary part of which is dismissing or disciplining employees. While he may not do so without cause, he may, and indeed must, within the exercise of sound discretion, dismiss or discipline an employee for sufficient cause. The Commission is not charged with such operation or such disciplining.

In reviewing an appointing authority's disciplinary decisions, the CSC's "authority to reduce a penalty can only be exercised if there is insufficient cause

for imposing the greater penalty.” *Pope*, 2004-1888, p. 5, 903 So.2d at 5 (citing *Branighan*, 362 So.2d at 1222).

While Poche asserts that a “lesser punishment would be more appropriate,” we have no authority to reduce her discipline under the facts of this case. It is well-settled that this Court should not modify the discipline imposed by the CSC unless it was “arbitrary, capricious, or characterized by an abuse of discretion.” *Cure v. Dep’t of Police*, 2007-0166, p. 2 (La. App. 4 Cir. 8/1/07), 964 So.2d 1093, 1094-95 (citation omitted). A decision by the CSC is “arbitrary or capricious” only if there is no rational basis for the action taken by the CSC. *Id.*, 2007-0166, p. 2, 964 So.2d at 1095 (quotation omitted). This Court has explained:

In practice, we afford great deference to the CSC’s ruling supporting the decision of the appointing authority. *See Serignet v. Dept. of Health*, 08-0469, p. 10 (La. App. 4 Cir. 5/20/09), 15 So.3d 1019, 1025. Neither the CSC nor a reviewing court should “second-guess” an appointing authority’s decisions. *See Lange v. Orleans Levee District*, 10-0140, p. 17 (La. 11/30/10), 56 So.3d 925, 936.... Moreover, neither the CSC nor the reviewing court may serve as a *de facto* pardon board. *Id.* “[S]ympathy is not a legal standard.” *Id.*

Byrd v. Dep’t of Police, 2012-1040, p. 10 (La. App. 4 Cir. 2/6/13), 109 So.3d 973, 980.

We find no law or evidence in the record that would permit us to reach the conclusion that Poche seeks. While termination seems harsh, this penalty is specifically provided for in the domicile ordinance and Rules of the Civil Service Commission. OPSE acted within its authority in determining that it cannot employ a worker who fails to follow an ordinance, which is a condition of her employment. Considering OPSE’s role monitoring paid details by a police

department subject to a federal consent decree, we cannot say that the CSC acted arbitrarily or capriciously in upholding the OPSE's decision.

Accordingly, for these reasons, we affirm the decision of the CSC to deny Poche's appeal.

AFFIRMED