

CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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CITY CIVIL SERVICE COMMISSION

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Monday, August 17, 2015

Mr. Eric Hessler
PANO 2802 Tulane Avenue #101
New Orleans, LA 70119

Re: **Chad Perez VS.
Department of Police
Docket Number: 8058**

Dear Mr. Hessler:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 8/17/2015 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,



Doddie K. Smith
Chief, Management Services Division

cc: Michael S. Harrison
Gregory Brumfield
Jay Ginsberg
Chad Perez

file

CHAD PEREZ

CIVIL SERVICE COMMISSION

VS.

CITY OF NEW ORLEANS

DEPARTMENT OF POLICE

NO. 8058

The Department of Police (“Appointing Authority”) employed Chad Perez (“Appellant”) as a police officer with permanent status. The Appointing Authority suspended the Appellant for one day, for ceasing to perform before the end of his period of duty. The Appellant admitted that he left work one hour early without permission from his supervisor. The Appellant claimed, however, that he was disciplined for a de minimus breach of the rules not based on merit. Instead he claimed the decision was motivated by retaliation for a complaint he had filed against NOPD and his supervisors under the Fair Labor Standards Act about a week earlier.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on May 16, 2013. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have reviewed a copy of the transcript and the submitted documentary evidence.

A legal argument was raised by the Appellant’s counsel alleging a violation of the time limits set forth in La. R.S. 40:2531, the “Law Enforcement Officer’s Bill of Rights”. Counsel contends that the time limit to conduct the investigation was exceeded, rendering the disciplinary action a nullity. It is noted that the initiation date of the investigation was on August 18, 2011, and a request to the Civil Service Commission for an additional

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sixty days to complete the internal investigation was granted on October 13, 2011. On that same date the Appellant received notice of no sustained violations from the case investigator.

The completed investigation was reviewed by the Chain of Command resulting in the reversal of the non-sustained finding and a Commander's Hearing was ordered. The date that the Appellant was notified of the reversal was not put on the record, so there is no way to determine whether the time limit had been exceeded. Based on the lack of evidence that the applicable time limit was violated, the argument is without merit.

Analysis

On August 9, 2011, Ofc. Perez filed a complaint with the Department of Labor and PIB alleging violations of the Fair Labor Standards Act for failure to pay overtime. That complaint specifically named his immediate supervisors.

A little more than a week later, Ofc. Perez admits that he left work an hour early without asking for his supervisor's permission. On August 18, 2011, officers in the First District were ordered to move their cars from a covered parking area. Officer Perez testified that his personal vehicle had a window stuck open, and because of impending rain, he sought to drive it home to safe cover. He left an hour before his shift ended to do so.

It is uncontested that the Appellant's supervisor, Sgt. Williams, called Ofc. Perez shortly thereafter to ask him a question about work, and that Perez responded that he had left towards home and why. Officer Perez also testified that he said he was only a minute away and offered to come back. Sgt. Williams stated that he did not remember whether

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this exchange occurred, but he admitted that he did not instruct Ofc. Perez to return, nor did he reprimand him for leaving without permission.

Thereafter, Sgt. Williams filed a complaint against Ofc. Perez. PIB investigated and found the allegations unsubstantiated. At a Commander's Hearing, Captain Goodly sustained the violation and recommended a Letter of Reprimand. Deputy Superintendent Albert then reviewed the Commander's Hearing and recommended instead that a one day suspension be imposed. Albert maintained that a message should be sent to other officers that leaving the job early would not be tolerated. Albert noted that if the Appellant had requested permission to leave early, his supervisor would most likely have granted permission, but that a supervisor must know where his subordinates are at all time. The Appellant was in a very important position and he was the only one in that position in his district.

Superintendent Ronal Serpas reviewed the matter and confirmed the recommendations of Deputy Superintendent Albert. The Superintendent issued a one day suspension for the violation.

LEGAL PRECEPTS

An employer cannot discipline an employee who has gained permanent status in the classified city civil service except for cause expressed in writing. LSA Const. Art. X, sect. 8(A); *Walters v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). The employee may appeal from such a disciplinary action to the city Civil Service Commission. The burden of proof on appeal, as to the factual basis for the disciplinary action, is on the appointing authority. *Id.*; *Goins v. Department of Police*, 570 So. 2d 93 (La. App. 4th Cir. 1990).

The Civil Service Commission has a duty to decide independently, based on the facts presented, whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters v. Department of Police of New Orleans, supra*. 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 (La. App. 4th Cir. 1990). The appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Id.* The appointing authority must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. *Id.* While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

The Appellant argues that he was disciplined not for the stated reasons but based on retaliation for his Fair Labor Standards Act complaint against NOPD. Under the current Civil Service Rules, there is no rule concerning retaliation, but courts have found that retaliation against an employee for having asked for an investigation can be a form of non-merit factor discrimination. *Department of Transportation and Development v. Gabour*, 468 So.2d 1301 (La.App. 1 Cir. 1985).

CONCLUSION

The fact that the Appellant left an hour early is uncontested. It is also clear that the Appointing Authority has the ability to discipline the Appellant based on this fact. What is at issue in this case, however, is whether the Appointing Authority's motive in

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disciplining the Appellant was merit-based, or made in retaliation for his FLSA complaint filed shortly before.

We believe that the Appellant proved by a preponderance of the evidence that the disciplinary action against him was motivated by retaliation. The event occurred a mere nine days after the Appellant filed his complaint about the overtime practices of NOPD, a complaint naming his immediate supervisors. There was no evidence from the Appointing Authority to rebut the timing of this disciplinary action with evidence that a one day suspension, sufficient to deny the Appellant an opportunity for promotion, was a typical response to this type of offense.

Nor did the Appointing Authority present evidence that the infraction was part of a pattern predating the FLSA complaint. Indeed, his supervisor testified that he had never had a problem with the Appellant leaving early and Chief Albert described Officer Perez as “one of the best policemen I have ever worked with.”

The Appointing Authority agreed that detectives, unlike patrol officers, work in the field, often with unpredictable hours. As Chief Darryl Albert testified, Project Safe Neighborhood detectives in particular to be available at any moment because they have to be accessible at all hours. What matters less than that detectives be in a particular place at a particular moment is that they be accessible and available to work when needed.

In this case, the evidence is uncontested that the Appellant’s supervisor was able to reach him by telephone and to know where he was and what he was doing. It is uncontested that, after being truthfully informed of the Appellant’s whereabouts and intentions, the supervisor did not ask the detective to return or to do any particular task. If this had indeed been the kind of offense usually deemed worthy of disciplinary action

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in the absence of retaliatory motive, it seems likely that the supervisor would have scolded the Appellant at the time and asked that he come back to complete his work. It is uncontested that the supervisor did not do so.

Based upon the foregoing, the Appellant's appeal is GRANTED.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 1st DAY OF
August, 2015.

CITY OF NEW ORLEANS
CIVIL SERVICE COMMISSION



TANIA TETLOW, COMMISSIONER

CONCUR:



MICHELLE D. CRAIG, CHAIRMAN



JOSEPH S. CLARK, COMMISSIONER