CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
SUITE 900 – 1340 POYDRAS ST.
NEW ORLEANS LA 70112
(504) 658-3500 FAX NO. (504) 658-3598

Tuesday, August 19, 2014

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

Re: **Shawn Madison VS.**
Department of Police
Docket Number: 8183

Dear Mr. Hessler:

Attached is the action of the Civil Service Commission at the Commission's meeting on Friday, 8/15/2014.

Yours very truly,

Germaine Bartholomew
Chief, Management Services Division

cc: Ronal Serpas
Isaka Williams
Shawn Madison

CIVIL SERVICE COMMISSION FOR THE CITY OF NEW ORLEANS

DOCKET NO. 8183

SHAWN MADISON

V

NEW ORLEANS POLICE DEPARTMENT

This matter came before the Commission at its regular monthly meeting of June 16, 2014, on a Motion for Summary Disposition filed by the Appointing Authority, the New Orleans Police Department, after which meeting the matter was taken under advisement.

The Appellant, Shawn Madison, is a former employee of the New Orleans Police Department, who, prior to his resignation therefrom, was a permanent classified employee holding the position of Police Officer II.

In a disciplinary letter dated August 5, 2013, Superintendent of Police Ronal Serpas suspended Officer Madison for four (4) working days for violations of the rules of the New Orleans Police Department relating to damage to a police vehicle.

On August 27, 2013, Officer Madison filed an appeal of the suspension with the Department of City Civil Service and the matter was given a docket number and scheduled for hearing.

On November 11, 2013, Officer Madison authored an Interoffice Memorandum to the Superintendent of Police the subject of which was "Letter of Resignation" in which he voluntarily resigned from the New Orleans Police Department effective November 16, 2013.

Neither the "Letter of Resignation", which appears to be a pre-printed form prepared by the Department of Police, nor the Department's request thereon that the resigning officer provide a forwarding address, make any reference to the pending civil service appeal.

The New Orleans Police Department (the Appointing Authority) now moves for summary dismissal of the appeal on grounds that "(a) [T]he Commission lacks jurisdiction over the subject matter and/or persons seeking this appeal; (b) [T]he appellant, a former employee, has no right of appeal; and (c) [T]he appeal has become moot."

For the reasons that follow, we deny the Appointing Authority's motion.

As noted above, at the time he filed his appeal Officer Madison was a classified civil servant with permanent status in the classification of Police Officer II.

Permanent appointment as a classified civil servant is recognized as a property right under the Louisiana Constitution.

> Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause) ... [A] classified permanent employee enjoys a property right in maintaining his status ...(and) it is axiomatic that his position may not be changed or abolished without due process of law"

Bell v. Department of Health and Human Resources, 483 So.2d 945, 949, 950 (La. 1986), citing Cleveland Bd. of Educ. v. Loudermill. See also, Banks v. New Orleans Aviation Bd., 989 So.2d 819 (La. App. 4th Cir. 2008).

The property interest in employment extended to Officer Madison as a "permanent" classified employee by Louisiana law includes the right to appeal the disciplinary action taken against him. Article 10, Section 8, Louisiana Constitution of 1974. This property right and

the concomitant right to due process for its deprivation inhere both in the employee's "continued" employment and in the employee's temporary loss of pay or benefits resulting from a "disciplinary action", such as a suspension. Louisiana Constitution of 1974, Article 10 Section 8. Harris v. Dep't of Police, 125 So.3d 1124 (La. App. 4th Cir. 2012), Henderson v. Sewerage and Water Bd., 752 So.2d 252 (La. App. 4th Cir. 1999).

Louisiana law also imposes upon the Commission the corresponding duty to hear and decide the appeal so taken. Article 10, Section 12, Louisiana Constitution of 1974.

The Appointing Authority asserts that "[I]t is well-established jurisprudence that a classified employee who voluntarily resigns, has no right of appeal before the Civil Service Commission because they are not seeking continued employment. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985),[1]"

The Appointing Authority's citation to Loudermill for the proposition that it defines appeal rights in the municipal civil service is a misapprehension of the law.

A classified employee's right to appeal disciplinary action is not grounded in federal law or jurisprudence. The right is a creation of, and defined by, state law. It is the existence of a property right under state law, specifically, the "tenure" right, that determines whether federal due process requirements must be met for deprivation of the right.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings

[1] The Appointing Authority's italicization of the word "continued" ("a classified employees' right of appeal is based on their property right in *continued* employment") is a linguistic contortion. Memorandum in Support of Summary Disposition, page 3. The phrase "property right in continued employment", occurring at pages 533, 536, 538 and 539 of the Loudermill decision, and which does not employ italics, is used to denote *tenured* employment. cf. pgs. 546, 550. "Continued employment" as used in Loudermill does not mean that the employee must "continue *in* employment".

> that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)

> Employment at will stands in stark contrast to those relationships which bestow upon certain employees a property interest and thereby fall within the purview of the due process clauses found in the United States and Louisiana Constitutions. Such an interest "exists only where the employee has an express or implied right to continued employment." White v. Mississippi State Oil and Gas Board. 650 F.2d 540, 541 (5th Cir.1981). These clauses provide "no person shall be deprived of life, liberty, or property without due process of law." Article 1, §§ 2, 4 and 22 of the Louisiana Constitution of 1974 also declares that property cannot be taken except by due process of the law, and that the courts are open to ensure such protection. Employees, who are not at-will employees, and thus can only be dismissed for just cause, have a sufficient property interest in continued employment to warrant Fifth and Fourteenth Amendment protection. Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). This property interest, however, is not spawn from the Constitution; rather, the United States Supreme Court in Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) made clear that the right's existence is entirely dependent on state statute, local ordinance or an express or implied contract. See also Bishop v. Wood. 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). It is this property interest that entitles the employee to due process of the law and typically requires that they are afforded a pre-termination hearing.

Tolliver v. Concordia Waterworks Dist. No. 1, 735 So.2d 680, 682, 683, 98-00449 La. App. 3 Cir. 2/10/99, (La. App. 3 Cir. 1999)

Furthermore, the Loudermill decision was concerned only with the *predeprivation* due process rights of tenured public employees fired for cause: "In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause." Cleveland Board of Education v. Loudermill Parma Board of Education v. Donnelly Loudermill v. Cleveland Board of Education, 470 U.S. 532, 535. 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The Loudermill decision was not concerned with, and has nothing to say about, civil service jurisdiction over appeals filed by an employee prior to resignation.

It is state law that controls the disposition of this matter, and there is no provision of the Louisiana Constitution and no Rule of this Commission supporting the proposition that the Commission's Article 10, Section 12, jurisdiction over a properly filed and pending Article 10, Section 8, appeal is lost by a subsequent resignation or other separation from the classified civil service.

The Appointing Authority cites a number of state court decisions in support of its contention that jurisdiction over an existing appeal is lost by an employee's subsequent resignation. None of the cases cited by the Appointing Authority support its contention.

The appellant in Russell v. Mosquito Control Bd., 941 So.2d 634 (La. App. 4th Cir., 2006) submitted a letter of resignation on April 27, 2004. On May 12, 2004, 15 days later, he filed a civil service appeal challenging the "voluntary" nature of his retirement and a suspension imposed on April 13, 2004, 14 days before he resigned. Unlike the instant matter, there was no civil service appeal pending at the time of Russell's retirement. The Louisiana Fourth Circuit Court of Appeal stated: "The narrow issue before us is thus whether Mr. Russell's retirement decision was voluntary." Id at 640. Testing the nature of Russell's retirement decision by the four factors announced in Parker v. Board of Regents of Tulsa Jr. College, 981 F.2d 1159, 1162 (10th Cir.1992), the Court found that Russell had not acted under any undue compunction to retire and that his voluntary separation from the service terminated all of his rights under the civil service system at the time of separation. Russell was, therefore, without the legal right to appeal *anything* subsequent to his retirement.

Palmisano v. Department of Fleet Management, Parish of Jefferson, 97-745 La. App. 5

Cir. 12/10/97, 704 So.2d 862 (La. App. 5 Cir. 1997), involved an appeal by Salvador Palmisano to the Personnel Board of the Parish of Jefferson in which he sought to rescind his resignation. There was no civil service appeal pending at the time of Palmisano's resignation and the issue before us was not present in Palmisano's case. The Louisiana Fifth Circuit Court of Appeal held that although there is no appeal from a voluntary resignation, a discharged employee is entitled to have an evidentiary hearing to determine whether his discharge was voluntary. It held that Palmisano's resignation was voluntary and that he had no right to appeal from a voluntary resignation.

In Foucha v. Department of Police, 947 So.2d 805 (La. App. 4th Cir. 2006) the "sole issue presented" was "whether Ms. Foucha has a right of appeal to the Commission" from the October 1, 2005 resignation that she appealed on December 19, 2005. Id at 807. Again, unlike this case, there was no civil service appeal pending at the time of Foucha's resignation. Consistent with prior jurisprudence the Louisiana Fourth Circuit found that

> [W]hen... an employee voluntarily resigns, the employee has no right to appeal. ...On the other hand, when as in *Simon,* it is alleged that an employee involuntarily resigned, the employee has a right to appeal. *Russell, supra.* The reason an employee who involuntarily resigns has a right to appeal is "to preclude the characterization of disciplinary action as a 'resignation' to subvert an employee's right to appeal provided for by La. Const. Art 10, § 8.

Id at 809. (citations omitted)

Jerome v. Department of Police, 4 So.3d 896 (La. App. 4th Cir. 2009) presents essentially the same fact situation found in Foucha, supra, viz., a post-Katrina resignation from the New Orleans Police Department resulting in the filing of a post-resignation appeal seeking to change the NOPD's personnel file notation that the employee had "resigned under

investigation". The Fourth Circuit panel noted that it had considered similar appeals:

> In *Moore v. Department of Police,* 06-1217 (La. App. 4 Cir. 1/17/07), 950 So.2d 96, this court addressed an issue analogous to the one at hand. After Moore, a police officer, resigned, he learned that the police department had commenced an investigation and had designated in his personnel file that he had "resigned under investigation." He appealed the matter to the CSC. The CSC denied his appeal, finding that because he had voluntarily resigned, he had no right to appeal the RUI notation in his record. Moore appealed the matter to this court, and this court affirmed the CSC's decision.
>
> ...
>
> We find no evidence in the record to indicate that Jerome's resignation was anything but voluntary.

Id at 898.

Again, the appeal in Jerome case, as in all of the others cited by the Appointing Authority, was filed *after* resignation and concerned the question of whether the resignation was voluntary. Neither the Jerome decision nor the Moore decision involved a civil service appeal filed *before* the resignation and pending at the time of resignation.

While the cases cited by the Appointing Authority, and many others not cited[2], define the parameters of the Commission's jurisdiction over appeals filed *subsequent* to a resignation or retirement, all of these cases concern appeals having as their subject the resignation or retirement itself. None of the cases considered the question of whether the Commission's jurisdiction over a pending appeal survives a resignation or retirement.

Although pre-dating the current Louisiana Constitution and involving a municipal fire

---

[2] Krasnoff v. City of New Orleans, 209 So.2d 149 (La. App. 4 Cir., 1968), Peterson v. Department of Streets, 369 So.2d 235 (La. App. 4 Cir., 1979); Mejia v. Dep't of Police, 43 So.3d 286 (La. App. 4th Cir. 2010); Adikema v. Dept. of Public Saf. and Correc., 971 So.2d 1071 (La. App. 1st Cir. 2007).

and police civil service board and not a constitutional civil service commission, Gibson v. Municipal Fire and Police Civil Service Bd. of City of Baton Rouge, 289 So.2d 362 (La. App. 1 Cir., 1973), is instructive. In Gibson, a police officer tendered a resignation on October 6, 1969, in order to take a position with another police department. The resignation was to be effective on October 25, 1969. However, Gibson was suspended "until further notice" effective October 17, 1969, on the basis of criminal charges filed on October 14, 1969. Gibson appealed the suspension on November 3, 1969. The civil service board took no action on the appeal other than to write to Gibson that it would hold his appeal letter "on file ... until such time as the criminal charges resulting from your arrest are disposed of by District Court." Id at 363.

Twenty nine months later all criminal charges against Gibson were finally dismissed and he asked for a hearing to reverse the suspension, rescind the resignation, reinstate him and pay all back pay. In a 2-1 decision, the Louisiana First Circuit Court of Appeal denied the requested relief holding that "[T]he record is completely devoid of any credible evidence that the appellant either endeavored or effectuated the withdrawal of his resignation". Id at 365. However, the Court did, without citing any legal authority, restore Gibson's pay from the date of his suspension to the date of his resignation.

In a written dissent, Judge Watson objected to both Appointing Authority's and the civil service board's failure to act.

> The issue here is whether an employee, who has previously tendered his resignation, which was accepted, and then is suspended prior to the date the resignation takes effect, and while he is still an employee in good standing, is entitled to insist upon a disposition of the charges brought against him by his

suspension. I believe that he is.

...

> Appellant was entitled, under the circumstances, to have a determination of his rights; and by failing to do so, the appointing authority and the Board have placed themselves in a position where he can now reclaim the rights which have been denied to him.
>
> The purpose of civil service is to protect certain interests of the government and certain rights of the individual. By being suspended and having no determination of the situation, it is obvious that appellant not only was precluded from performing the duties of his position as a police officer in Baton Rouge, but was severely handicapped in any attempt to work in law enforcement (or other occupation) in any other area.

In the instant matter, neither positive law nor jurisprudence command dismissal of the pending appeal. Implicated in this appeal are the appellant's constitutional right to his property, i.e., his four days of pay (if wrongfully withheld) and his constitutional right of appeal. The Commission will not assume that the appellant voluntarily extinguished these rights by choosing to resign or retire. Nothing in our law requires that an appellant remain in involuntary servitude to the City of New Orleans in order to vindicate his employment rights.

The Commission's Rules recognize that dismissal of an appeal will not be presumed and that an appellant must manifest an intent to dismiss an appeal by affirmative act.

Rule II, Section 6.7 provides:

> An appellant may withdraw or abandon an appeal at any time prior to the hearing thereof by filing with the Director a written notice of intention to do so, or upon oral motion before the Commission or the Hearing Examiner. After an appeal has been heard, it may be withdrawn or abandoned only with the approval of the Commission. Where the Commission gives its approval of such withdrawal or abandonment, the Director shall provide written notification of the Commission's decision to all parties.

The clear import of this Rule is, in part, to prevent any misconstruing of the appellant's intent with regard to his appeal. An appellant must evidence withdrawal or abandonment of his appeal by unequivocal act. We know of no authority that holds that a resignation "moots" an existing appeal and the Appointing Authority cites us to none.

There is no evidence in this record of a "written notice of intention" to dismiss this appeal nor is there before the Commission an oral motion by the appellant to do so.

Accordingly, we find that Officer Madison's resignation, tendered after the timely filing, during his employment, of an appeal of his suspension, does not extinguish the Commission's jurisdiction over the appeal nor render it moot.

The Appointing Authority's Motion for Summary Disposition is DENIED.

NEW ORLEANS, LOUISIANA, this August 15, 2014.

REV. KEVIN W. WILDES S.J., CHAIRMAN

JOSEPH S. CLARK, COMMISSIONER

MICHELLE D. CRAIG, COMMISSIONER

EDWARD PAUL COHN, COMMISSIONER

RONALD P. MCCLAIN, COMMISSIONER