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The Supreme Court of the United States of Louisiana

SEAN DUCKETT SR.

VS.

No. 3021-C-01794

**JEFFERSON PARISH DEPARTMENT OF
PUBLIC WORKS – STREETS**

IN RE: Sean Duckett, Sr. – Applicant Plaintiff;
Applying For Writ Of Certiorari, Jefferson Parish
Personnel Board, Number(s) 19-11, Court of Appeal,
Fifth Circuit, Number (s) 20-CA-452;

January 26, 2022

Writ application denied.

JDH

JLW

SJC

JTG

WJC

JBM

PDG

Supreme Court of Louisiana
January 26, 2022

s/ Katie Marjanouc
Chief Deputy Clerk of Court
For the Court

SEAN DAVID DUCKETT, SR.

No. 20-CA-452

VERSUS

FIFTH CIRCUIT

JEFFERSON PARISH DEPARTMENT
OF PUBLIC WORKS – STREETS

COURT OF
APPEAL

STATE OF
LOUISIANA

ON APPEAL DROM THE JEFFERSON PARISH
PERSONNEL BOARD
PARISH OF JEFFERSON, STATE OF LOUISIANA
.NO. 19-11

RUFUS C. HARRIS, III, CHAIRMAN, MICHAEL L.
FANTACI, AND DANIEL R. MARTINY, BOARD MEMBERS
PRESIDING

November 03, 2021

JOHN J. MOLAISON, JR.
JUDGE

Panel composed of Judges Jude G. Gravois,
Stephen J. Windhorst, and John J. Molaison, Jr.

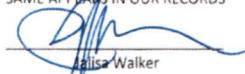
AFFIRMED

JJM

JGG

SJW

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS



Alisa Walker
Deputy, Clerk of Court

COUNSEL DOR PLAINTIFF/APPELLANT,
SEAN DAVID DUCKETT, SR.

Dale E. Williams

COUNSEL FOR DEFENDANT/APPELLEE,
JEFFERSON PARISH DEPARTMENT OF PUBLIC WORKS –
STREETS

Crystal M. Heine

MOLAISON, J.

Appellant, Sean Duckett, appeals the decision of the Jefferson Parish Personnel Board affirming his termination as Superintendent One (a classified permanent position) by the Jefferson Parish Public Works Department of Streets (“the Department”), for providing a fraudulent doctor’s note for sick leave. The appellant was terminated from his position on March 18, 2019 after he was officially notified of the reasons by a letter from the Director of the Department, Brook Burmaster. The appellant appealed his termination to the Personnel Board (the Board”) on April 11, 2019. A hearing was held before a hearing examiner (or referee). On March 2, 2020, the referee made a factual finding that the appellant used a fraudulent doctor’s excuse and lied in his pre-disciplinary hearing when he was confronted about the discrepancy. His conclusion was that punishment was warranted but the punishment given was excessive.

Counsel for both parties filed for post-hearing review.

After an August 18, 2020 board meeting in which both parties were permitted ten minutes to present argument, the Board ordered the reversal of the referee's decision. In its September 11, 2020 order, the Board ruled that the punishment given was not excessive, upholding the appellant's termination from employment. Thereafter, the appellant perfected his appeal to this Court. Because we find no merit to the appellant's assignments of error, we affirm the decision of the Personnel Board.

FACTUAL AND PROCEDURAL HISTORY

A termination letter of March 15, 2019 charged the appellant "with providing a fraudulent doctor's note on February 19, 2019 for your{r} sick leave that was taken February 12, 2019." The doctor's note, on letterhead from the office of Dr. Eric Lonseth, stated that the appellant accompanied a patient to a doctor's appointment on February 12, 2019. Director Burmaster, after investigation and a pre-disciplinary meeting

on March 6, 2019, found that the doctor did not have a record of the visit pr recognize the note; the appellant failed in his obligation to be truthful and accurate; the appellant requested sick leave under false pretenses and attempted to perpetrate deception of illness; and the appellant engaged in unprofessional and prohibited conduct that can reasonably be expected to damage the public's respect, confidence, or trust of parish government. In consideration of the determination to terminate the appellant's employment, Director Burmaster considered his recent annual evaluation rating of Below Expectations,¹ as well as a prior verbal warning by previous Director Neil Schneider in August of 2018 for providing a fraudulent doctor's note, and the

¹ There was a February 28, 2019 evaluation that was not introduced into evidence at the appeal hearing due to an agreement between counsel to limit the scope to the fraudulent letters as the reason for the action. Jefferson Parish Department of Personnel, Personnel Rules of the Classified Service, Rule XII Performance Evaluations, Section 1, Administration, 1.6 states "Performance evaluations are management judgments by appropriate supervisory authority and subject to section 1.8, below, are not appealable to the Personnel Board, until and unless they result in some form of appealable action specified elsewhere in these Rules."

use of sick leave in lieu of annual leave during a vacation in January of 2015. Director Burmaster stated that the acts of misconduct eroded his trust in the appellant and any expectation of his credibility and dependability.

After the appellant filed for an appeal of the decision, a hearing was held, on February 19, 2020, before the hearing examiner, Referee Theodore Nass.² The Department called witnesses, including Chantell Prestenbach, a streets department administrative assistant and former payroll clerk; Jonas Perriott, Human Resources manager³; Durell Jones, Sr., Superindant II, the appellant's supervisor⁴; and James Thompson, oil manager of the Department.⁵ Director

² Rule 12(a) of the Rules of Appeal Procedure, allows the Board to appoint a referee to hear and decide any appeal pending before the Board.

³ Mr. Perriott was tasked by the Appointing Authority into inquiring into the validity of the appellant's doctors' notes.

⁴ Mr. Jones testified that while he needed work orders and daily work schedules from the appellant, he never requested the doctors' notes.

⁵ Mr. Thompson testified that employees get five "occurrences" per year before being required to document sick leave.

Burmaster testified that although he looked back into other incidents after the doctor's note, he would fire an employee for a first offense of this kind. The appellant also testified that he changed the date of the doctor's note because he was not at the doctor's office on that date, but was assisting his father who had an incident while driving. He stated that he provided the note because his supervisor told him it was necessary when he left work that day.

The Department submitted evidence (in Appointing Authority exhibits) showing a January 2015 “write up” ⁶, the doctor's note at issue, as well as doctor's notes from February 13 and 27 from The Urgent Care; the tape of the pre-disciplinary hearing; an email from Dr. Lonseth's office stating they neither had a record of, nor recognized the note; and Employee Investigative Report (“EIR”) of February 20, 2019; and EIR of

⁶ The incident in January 2015 related to the appellant attempting to change annual leave, requested for his honeymoon, to sick leave after being in a car accident.

February 19., 2019; and a letter from the appellant's previous supervisor, Neil Schneider.

The February 20, 2019 EIR by Supervisor Jones was investigation of the appellant for failing to comply with the process for submitting his daily work schedule and submitting two additional doctor's notes on February 13 and 14, 2019 without the required physician's signature.⁷ The investigation notes that “{Mr. Jones} was informed that you have submitted notes of this nature in the past and was given a verbal Warning by Mr. Neil Schneider asking you to never do this again.” The EIR states that the appellant had been given the department policy on timely submission of his daily work schedule.

⁷ Attached to the EIR were statements regarding prior “Coaching/Counseling Sessions” given to the appellant, including: one for not submitting his daily work schedule on time on September 18, 2018 by Supervisor Jones regarding reliability for not carrying out a directed order; one on June 6, 2018 by Supervisor Thompson regarding decision making for not sending out the daily schedule on time; and one on March 26, 2018, by Supervisor Arthur Moran regarding communication for not sending out the daily work schedule.

The February 19, 2019 EIR by Supervisor Jones was for the appellant's failure to turn in 10 work order/jobs on Friday, February 15, 2019. An email of February 6, 2019 from manager James Thompson was attached to show his directive that "from this day forward I need you to ride, check and take pictures of 101 jobs per week and make copies. This will help eliminate the work order reduction in concrete."

Neil Schneider's affidavit⁸ stated that he is the Parish Capital Projects Director. He was the former Director of the Jefferson parish Department of Streets, and during his tenure the appellant submitted a "questionable doctor's note" and was given a verbal warning.

After finding that the appellant used a fraudulent doctor's excuse and lied about it in his pre-disciplinary hearing, Referee Nass concluded that punishment was warranted, but

⁸ The affidavit states that the affiant was "unable to attend the hearing" without further reasons. Rule 10(g) of the Rules of Appeal Procedure, states that affidavits and other ex parte statements shall not be received in evidence without the consent of all parties, except to refresh memory or to discredit a witness.

the punishment given was excessive. He ordered that the appellant be demoted to foreman, and not be awarded back pay as the loss of pay is part of the punishment (and many of the continuances were caused by his pleadings). He further ordered that the appellant's time off should be considered leave without pay. The appellant should serve a working test period of six months not for pay, his pay should remain as it was when he was last employed, and he should report for work on March 9, 2020.⁹

The Department filed a motion for expedited decision by the Personnel Board for a stay of execution of the referee's decision due to the judgement taking effect prior to the appeal delay of fifteen calendar days from the date of the decision. On March 19, 2020, the appellant filed an application for post-hearing review in which he claimed that the referee's judgement

⁹ Referee Nass further ordered that the appellant would not be eligible for a raise until March 2021, but the appellant would be eligible for tenure award in 2020. He also ordered the dismissal of the appellant's appeal of his March 2019 evaluation, "as it has become moot."

was erroneous as it found the appointing authority was justified in demoting him and discipline was improper “because the situation leading to the altered doctor’s note was entirely the making of the HR representative Jonas Perrioti who interfered with appellant’s protected right to FMLA to care for his father.”¹⁰ The Department filed an application for review of the referee’s decision on July 15, 2020, asserting that the referee erred in finding that the termination was excessive and allowing the appellant to be reinstated at the same salary.”¹¹

The parties presented argument before the Board on August 8, 2020.¹² The Board found that the punishment was not

¹⁰ In the alternative, he claimed that the judgment was erroneous in finding that the appointing authority was justified in denying him back pay, stating the same grounds as his Fourth Assignment of Error in this appeal.

¹¹ The appellant filed a reply on August 3, 2020, where he stated the Department improperly argued about similar situations and his annual evaluation. On August 7, 2020, the Department submitted a response to his reply stating that misrepresentation and deception is worthy of termination and allowing him to return to employment would set an unfavorable precedent.

¹² Rule of Appeal Procedure 27 allows for any party to file with the Board an application requesting the Board to review a decision of a referee on any question of law or fact, which may be accompanied by written argument.

excessive because the appellant used a fraudulent doctor's excuse and lied about it in his pre-disciplinary hearing when he was confronted about the discrepancy. In accordance with Article X, §12 of the Louisiana Constitution and Rule of Appeal Procedure 31, the appellant filed a timely appeal to this Court.

DISCUSSION

In his assignments of error, the appellant alleges that the Board committed reversible error; by illegally depriving him of a timely pre-deprivation notice and a meaningful opportunity to be heard, by determining that his actions impaired the efficient operation of the Department, by reversing the hearing officer's finding that the termination was not commensurate with the offense, and by failing to restore him to his previous job with back pay, attorney fees, and costs.

Rule of Appeal Procedure 27(f) states that the Board may reverse or modify the Referee's decision on an issue of law after consideration of the application for review. The Board may also listen to pertinent portions of the sound recordings of the proceedings conducted before the Referee or read and review the transcript of the proceedings before the Referee, and, thereafter, reverse or modify the Referee's decision on an issue of fact.

The Jefferson Parish Department of Public Works – Streets is a classified civil service system governed by a statutory system established by Title 33, Chapter 5, Part I of the Louisiana Revised Statutes. A classified civil servant is afforded protection in disciplinary actions taken without cause. La. Const. art. 10 § 8(A); *Becker v. Jefferson Parish Dept. of Parks & Recreation*, 09-662 (La. App. 5 Cir. 1/12/10), 30 So.3d 1007; *Adams v. Jefferson Parish Department of Community Action Programs*, 02-1090 (La. App. 5 Cir. 4/29/2003), 845 So.2d 1147. A dismissal of a civil servant “for cause” is synonymous with legal cause; legal cause for disciplinary action exists if the facts found by the commission disclose that the conduct of the employee impairs the efficiency of the public service. *Robinson v Jefferson Parish Dept. of Pub. Works-Drainage*, 13-474 (La. App. 5 Cir. 12/19/13). 131 So. 3d 433, 437. The appointing authority is charged with the operation of its department, and it is within its discretion to discipline an employee for sufficient cause. *Becker*, 30 So.3d at 1013.

La R.S. 33:2561 allows a public employee to apply to the Board for a review of discharge or disciplinary action. The statute states that the Board is “confined to the question of whether the action taken against the employee was made in good faith for cause{.”} The burden of proving legal cause before the Board is on the appointing authority. *Ruddock v. Jefferson Par. Fire Civil Serv. Bd.*, 96-831 (La. App. 5 Cir. 1/28/97), 688 So.2d 112, 114. The Board’s findings must be based on competent evidence; incompetent evidence will not be considered by the appellate court on review. *George v. Department of Fire*, 93-2421 (La. App. 4 Cir. 5/17/94), 637 So.2d 1097. When reviewing the Board’s findings of fact, the appellate court must apply the manifest error standard, however, in reviewing the Board’s exercise of its discretion to determine whether the disciplinary action is based on legal cause, and the punishment is commensurate with the infraction, this Court should not modify the Board’s order unless it is arbitrary, capricious, or characterized by abuse of discretion. *Bolar v.*

Department of Public Works – Water, 95-346 (La. App. Cir. 10/31/95), 663 So. 2d 876; *Ruddock v. Jefferson Par. Fire Civil Serv. Bd.*, 96-831 (La. App. 5 Cir. 1/28/97), 688 So. 2d 112, 114.

First Assignment of Error

In his first assignment of error, the appellant claims that the Board erred in violating principles of due process by illegally depriving him of a timely pre-deprivation notice and meaningful opportunity to be heard.

In *Cleveland Board of Education v Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the Supreme Court defined the minimum procedures due prior to the discharge of a tenured public employee. According to the Court, a pre-termination hearing should be held, but it need not be elaborate, and it may be “something less: than a full evidentiary hearing. *Id* at 545. In essence, this pre-termination hearing should be an initial inquiry to determine whether reasonable grounds existed to believe that the charges against the employee are true in order to support the purposed action. *Id.* At 545-546.

“An appointing authority is required to afford an employee notice of the ‘reasons’ for disciplinary action.” *Ellins v. Dept. of Health*, 505 So.2d 74, 76 (La. App. Cir. 1987) (*citing* La. R.S. 33:2423). The purpose of the pre-termination hearing is not to definitely resolve the propriety of the discharge, but to guard against mistaken decisions. *George v. Dept. of Fire*, 637 So.2d 1097, 1104 (La. App. Cir. 1994). Depending on the circumstances of the case, the employee must be informed of the time, place and nature of the alleged misconduct in sufficient detail to enable the employee to adequately prepare his defense. *Department of Safety v. Rigby*, 401 So.2d 1017 (La. App. 1 Cir. 1981), *writ denied*, 406 So.2d 626 (La. 1981).

The appellant states he was given no written, or other, notification of a pre-disciplinary hearing. Neither party introduced a copy of a written notice for that meeting, or claimed that it was oral notice. The appellant gave conflicting testimony at the appeal hearing on this issue. When asked how he was notified about the pre-disciplinary hearing, he stated “A letter

came afterward for the hearing.....we was {sic} in a meeting on the Westbank already and I was told to stay after the meeting.” But he refers to “the notice” that the hearing was supposed to be about his evaluation. However, at the pre-disciplinary hearing, he stated “I wasn’t informed that I was going over the evaluation today...I was not informed of that we was {sic} having this evaluation meeting.”

In his conclusion, the appellant states that Jefferson Parish Personnel Rules put no requirement for advance notice of disciplinary actions. However, Jefferson Parish Administrative Management Policies (JPAMP) 502, section 5 delineates the requirements for a Pre-Disciplinary Hearing between the appointing authority and a subordinate employee who is alleged to have violated a policy, regulation, rule, performance standard or has otherwise acted or failed to act in a manner to the prejudice of the parish employment. The purpose of the hearing is to provide notice to an employee of

allegations of violations before disciplinary action is taken.

JPAMP Rule 5.2.

As far as notice, an employee shall be given notice of the pre-disciplinary hearing reasonable in advance of the scheduled hearing; either (1) by hand in writing, except in exigent circumstances notice may be oral; or (2) by mail, U.S. mail, postmarked five (5) calendar days in advance of scheduled hearing. PJAMP Rule 5.6.1. JPAMP Rule 5.6.2 states:

the notice shall (1) state the date, time and place of pre-disciplinary hearing; (2) describe the conduct, action or inaction, which gives rise to the pre-disciplinary hearing; (3) description of information of facts which is the basis for the hearing; (4) refer to the policy, law, regulation, rule or performance standard which has been violated; (5) inform the employee that the employee will have an opportunity to respond to the information and facts presented and to present information and facts; (6) inform the employee that formal disciplinary action may be taken based upon information provided and findings reached following the pre-disciplinary hearing.

JPAMP Rule 5.7 provides for the documentation of pre-disciplinary hearing, including the date, time, place and duration of the hearing; copy of notice of pre-disciplinary hearing; description of facts and/or copy of evidence presented

during the hearing that tend to establish the conduct, action or inaction, on the part of the employee which is a violation of a policy, law, relation, rule or performance standard which has been violated.

It is not clear from the record before us that the meeting March 6, 2019 was a pre-disciplinary hearing in accordance with the Parish's policies. However, it meets the requirement of an initial inquiry to determine whether reasonable grounds existed to believe that the charges against the employee are true in order to support further action. In the case, it appears the Department attempted to have one hearing to meet the requirements of a below standards evaluation and to review the EIRs.¹³

The dual purposes of the meeting are established from the transcript. Human Resources manager, Jonas Perioti, stated

¹³ Jefferson Parish Personnel Rule 1.5 provides that discussion of an evaluation with the employee is mandatory if the evaluation is Below Expectations or Needs Improvement in any category.

“there’s a couple of things we want to talk to you about today.

First, we are going to start off with your actual evaluation.”

Over forty minutes later, Mr. Perioti states “we’re going to move onto the second part of the meeting, we going to talk about the recent EIR.” The EIR for February 20, 2019 discusses the doctors’ notes, as well as failing to turn in his daily reports on time.

However, the appellant did not raise this issue in his appeal. It was not adjudicated before Referee Nass during the hearing. It was raised for the first time in his post-hearing application for review, where he stated he was not given sufficient due process noticer and no meaningful opportunity to be heard prior to the deprivation of his Civil Service position. Rules of Appeal Procedure, Rule 1(A) (d) states that the petition must have “clear and concise statement of actions complained against and a clear concise statement of the basis of the appeal.” When examining the similar Civil Service Rule 13.11, the First Circuit has held “{t}he function of this rule is two-fold: (1) it

apprises the appellee and the Commission of the material facts in dispute and therefore establishes the scope of the evidentiary hearing; and (2) it enables the Commission to gauge the amount of time needed for the evidentiary hearing by narrowing the issues. “*Wheeler v. Dept. of Pub. Safety & Corr., Washington Corr. Inst.*,” 500 So.2d 786, 788 (La. App. 1 Cir. 1986). Requiring applications for appeals to set forth the basis of the appeal “is similar in concept to La. C.Cr.P. arts 844 and 920 and Rules 1-3 and 3-1.1 of the Courts of Appeal which limit and/or designate issues in appeals to those set forth in assignments or specifications of error; errors which are not so designated are deemed abandoned and may not be considered on appeal.” *Shelton v. Se. Louisiana Univ.*, 431 So.2d 437, 440 (La. App 1 Cir. 1983).

By failing to raise this argument before the appeal hearing, the Department was not put on notice to prove this basis and the opportunity to provide a copy of the notice or documentation of a pre-disciplinary hearing. It is also unclear

whether it was addressed by the Board, as we have no transcript from the August 18, 2020 board hearing. Thus, we cannot consider for the first time on appeal, whether the Department complied with its Administrative Policies.

Loudermill entitles a civil service employee to oral or written notice of the charges, and explanation of the employer's evidence, and an opportunity to present his side of the story. *Cannon v. City of Hammond*, 97-2660 (La. App.1 Cir 12/28/98), 727 So.2d 570, 572. The appellant admitted to some type of notice before the hearing, two EIRs detailing the employer's evidence were presented to him, and he was offered an opportunity to respond at the pre-termination hearing in which he chose to deny the allegations. This is sufficient to meet the minimum due process requirement that "some type of pre-termination hearing" be held. *Cannon* 727 So.2d at 572. Furthermore, the appellant had a post-termination hearing to respond and present evidence. The *Loudermill* Court stated the existence of post-termination procedures is relevant to the

necessary scope of pre-termination procedures. 470 U.S. at 547 (FN 12). The written notice requirement has been found to pertain to the termination letter required after the employee has received a *Loudermill* pre-termination hearing. *Brown v. Housing Authority of New Orleans*, 590 So.2d 1258, 1260 (La. App. 1 Cir. 1991). Thus, we find the appellant was not deprived of his constitutional right of due process before his termination was final.

Second Assignment of Error

The appellant claims that the Board committed reversible error when it determined that his actions impaired the efficient operation of the Department.

In reviewing the Board's exercise of its discretion to determine whether the disciplinary action is based on legal cause, this Court should not modify the Board's order unless it is arbitrary, capricious, or characterized by abuse of discretion. *Bolar v. Department of Public Works – Water*, 95-346 (La. App. 5 Cir. 10/31/95), 663 So.2d 876, writ denied, 95-2809 (La.

1/26/96), 666 So.2d 680. “Cause for dismissal of an employee includes conduct prejudicial to the public service involved or detrimental to its efficient operation. *Bannister v. Dept of Streets*, 95-0404, (La. 1/15/96), 666 So.2d 641, 647. A disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the “efficient operation” of the public service. *Newman v. Dept. of Fire*. 425 So.2d 753, 754-55 (la. 1983). If the appointing authority demonstrated by a preponderance of the evidence that the conduct of the employee did in fact impair the efficient and orderly operation of the department, then the action of imposing such disciplinary measures may not be characterized as arbitrary and capricious. *Id.*

In the *Newman* case, the Louisiana Supreme Court overturned the appellate court’s reversal of the employee’s demotion for leaving his post. Finding “{t}he actions of Newman in leaving the station reduced dangerously the manpower level and

efficiency pf his ladder unit in violation of department policy and his duty as a fire captain and unit commander.” *Id.* The court found in view of the departmental rules and regulations governing such matters and the added responsibilities attendant the rank of captain, it was improper for the court of appeal to down-play the action of Newman as simply “absent without notification.” *Id.* At 756. The action of the Commission in demoting Newman to the rank of firefighter was not found to be arbitrary or capricious since it was proven by preponderance of the evidence that his dereliction substantially impaired the efficient and orderly operation of the fire department. *Id.*

In the present case, the charge in the termination letter was “providing a fraudulent doctor’s note on February 19, 2019 for your sick leave that was taken February 12, 2019.” This was proven by the appellant’s own testimony, as well as the Department’s investigation. The Director found the appellant’s actions to be in violation of Parish and departmental work rules. Jefferson Parish Administrative Management Policy 501 on

conformance to the law requires employees to be truthful and accurate in conduct, and Policy 503 describes unsatisfactory performance as absence without proper authorization and making false records or statements of any kind.

We find the Department met its burden of establishing legal cause for termination by showing the appellant's dishonesty. The charge that the appellant failed in his obligation to be truthful and accurate was proven. Director Burmaster stated in the termination letter that he acts of misconduct eroded his trust in the appellant and any expectation of his credibility and dependability. Deference should be given to the Director's assessment that lack of trust in his employees will impair the efficient operation of a department in which employees must provide truthful information of their daily location as their work requires them to be in different locations without the regular supervision of their superiors. In *Narcisse v. Dept. of Police*, 12/1267 (la. App. 4 Cir. 3/6/13), 110 So.3d 692, 702, the court found that the Department established

that an officer's dishonesty and failure to follow orders resulted in violations of core departmental values which “{w}e cannot say that these violations did not bear a real and substantial relationship to the efficient operation pf the appointing authority.”

The appellant argues that it is improper for the Agency to refer to similar situations and his recent annual evaluation because the Agency agreed to abandon all allegations against him except that he submitted a manufactured doctor's note. However, evidence of prior suspensions, reprimands or poor service ratings may be included in a letter of dismissal because they are relevant to the ultimate question of whether or not the employee was dismissed for cause, or they may be considered in determining an appropriate punishment. *Stiles v. Department of Public Safety, Drivers' License Division.* 361 So.2d 267 (La. App. 1 Cir. 1978). *Howard v. Hous. Auth. of New Orleans.* 457 So.2d 834, 845 (La. App. 1 Cir. 1984), *overruled by Ward v. Dept.*

of *Pub. Safety & Corr.*, 97-1109 (La. App. 1 Cir. 9/18/98), 718 So.2d 1042.

Third Assignment of Error

The appellant claimed that the Board erred when it reversed the hearing officer's finding that his termination was not commensurate punishment for the offense committed.

Courts of Appeal are not free to alter the Board's choice of punishment unless it is shown that the Board abused its discretion or acted arbitrarily and capriciously. *Shields v. City of Shreveport*, 565 So.2d 473 (La. App. 2 Cir. 1990). Where there is no rational basis for the Board's action, its decision is arbitrary and capricious. *Bannister*, 666 So.2d at 647. The decision of the Board should not be overturned on appeal, even as to the severity of the discipline, unless the record reveals an abuse of discretion, or an insufficiency of supporting evidence. *McIntosh v. Monroe Municipal Fire and Police Civil Service Board*, 389 So.2d 410 (La. App. 2 Cir. 1980), *writ denied*, 395 So.2d 1363 (La. 1981); *Petrus v. Guin*, 378 So.2d 1016 (La. App.

2 Cir. 1979). A court cannot overrule a decision of the Board merely because it disagrees with the penalty imposed, substituting its judgement for that of the board. *Dumez v. Houma Municipal Fire and Civil Service Board*, 408 So.2d 403 (La. App. 1 Cir. 1981); *Shields v. City of Shreveport*, 565 So.2d 473, 478 (La. App. 2 Cir. 1990) (on rehearing), aff'd, 579 So.2d 961 (La. 1991). While the Court will not disturb findings of fact when they are based upon the Board's assessment of witness credibility and conflicting testimony, when testimony is taken by a hearing officer, the Board has no advantage over the reviewing court in evaluating the credibility of the witnesses. *Grant v. Department of Police*, 99-1351 (La. App. 4 Cir. 1/5/00), 750 So.2d 382, 384, *writ denied*, 760 So.2d 1161 (La. 4/20/00) (citing *Tobias v. Department of Streets*, 454 So.2d 853 (La. App. 4 Cir. 1984); *Bolar*, 663 So.2d at 880.

The referee determined that the punishment was not commensurate after evaluating the testimony from the Appointing Authority, Human Resources, the appellant's

supervisor, and the appellant. However, the Board overturned this finding. We cannot say that the Board abused its discretion in upholding the Department's punishment. Supervisors are granted much latitude when exercising control over employees within their jurisdiction; an employee's conduct in a particular department is a vital part in maintaining that department so that it can properly provide service to the public. *City of Kenner v. Pritchett*, 432 So.2d 971, 974 (La. App. 5 Cir. 1983). Jefferson Parish Administrative Management Policy 502 allows for corrective disciplinary action, including termination, to be imposed for unacceptable or prohibited conduct.

In *Serignet v. Department of Health*, the appellate court found that termination was justified for the deliberate falsification of sick slips which shows a lack of truthfulness and reliability. (La. App. 4 Cir. 5/20/09), 15 So.3d 1019, 1024. As discussed in the previous assignment of error, the appellant's acts of misconduct eroded the Department's trust in the appellant and any expectation of his credibility and

dependability. Lack of truthfulness is a rational basis for termination of a public employee.

Evidence of prior infractions coupled with the instant offense may evidence either an employee's unreliability or his indifference to the requirements of his job. Repeated infractions by an employee may justify dismissal. *McGee v. Sewerage and Water Board of New Orleans*, 396 So.2d 430 (La. App. 4 Cir. 1981); *Albert v. Louisiana State Penitentiary*, 396 So.2d 340 (La. App. 1 Cir. 1981). In *Bolar*, the employee contended that the termination was inappropriate as it was not justified by the grounds for his dismissal. 663 So.2d at 879. This Court found that although there had only been one or two instances where the employee had misused his Parish assigned vehicle, his actions established a pattern of conduct over an extended period of time. *Bolar v. Dept. of Pub. Works- Water*, 95-346 (La. App. 5 Cir. 10/31/95), 663 So.2d 876, 879.

Director Burmaster testified that he would fire for a first offense of a false note. While there was perhaps inadequate

evidence presented of other incidents in the past, those were under the tenure of previous directors. Director Burmaster should be given the discretion to make rational personnel decisions for his department. Although the Department decided not to proceed on other grounds, the appellant argues that his termination was excessive due to his twenty years of service without “written disciplinary issues.” The EIRs submitted into evidence at the hearing showed that the appellant required frequent coaching and counseling regarding different policies in the year preceding the fraudulent note. The dishonesty shown by the appellant in submitting a falsified note, also calls into question the veracity of all documentation submitted by the appellant in the past twenty years, and would lead the Department to not trusting any future documents from the appellant. Thus, we find no merit to this assignment of error as the Board’s decision to terminate the appellant was not arbitrary or capricious.

Fourth Assignment of Error

The appellant contends that the Personnel Board committed reversible error in failing to restore him to his previous job with back pay, attorney fees and costs.

The appellant claims that a Commission may order back pay, depending on the circumstances of the case. *Thomas v. Dept. of Welfare*, 454 So.2d 839, 840 (La. App. 4 Cir. 1986). After hearing the circumstances of this case, the referee and Board declined to order back pay. As this determination was made by referee who was the finder of fact and arbiter of the pre-hearing process in this case, we will defer to his judgement. His order states that he felt it would be appropriate as part of the punishment. As we find that termination was justified, we find no merit to the claim that a restoration without pay and fees was erroneous.

CONCLUSION

For the above-mentioned reasons, we affirm the decision of the Personnel Board to terminate the appellant's employment with the Jefferson Parish Department of Public Works – Streets.

AFFIRMED

**JEFFERSON PARISH, LOUISIANA
PERSONNEL BOARD**

SEAN DUCKETT SR.

VERSUS

**DEPARTMENT OF PUBLIC WORKS –
STREETS**

DOCKET NO. 2019-11

ORDER

IT IS ORDERED that the appellant file any supplemental filings he may wish to file by July 1, 2020 to perfect his appeal of the Referee's decision.

IT IS FURTHER ORDERED that the appointing authority file their reply briefs by July 15, 2020 and if they file an appeal of the Referee's decision they must do so at the same time.

IT IS FURTHER ORDERED that if the appointing authority files an appeal of the Referee's decision that Sean Duckett is granted until July 29, 2020 to reply.

IT IS FURTHER ORDERED that each party is granted ten minutes of argument at the August 18, 2020 Board Meeting to argue their cause.

Rendered and signed this 15 day of June, 2020,
Jefferson, Louisiana

/s/ THEODORE NASS,
REFEREE

Certified true copy

By: /s/ JOHN G. DUMAS
PERSONNEL DIRECTOR
17 June, 2020

Dale Williams via dale@daleslaw.com
Crystal Heine via CHeine@jeffparish.net

Before the Jefferson Parish Department of Personnel

In the Matter of Sean Duckett, Sr. vs. Department of

Public Works-Streets

Docket No. 2019-011

**SEAN DUCKETT SR.'S POST HEARING
APPLICATION FOR REVIEW**

THIS APPLICATION for post-hearing review is made by Sean Duckett, Sr. through his counsel, in accordance with Rule 28 of the Jefferson Parish Personnel Board Rules of Appeal Procedure.

INTRODUCTION

Sean Duckett, Sr. (Duckett) began working for Jefferson parish almost twenty-five years ago¹ as a laborer and rose through the ranks to the position of Road Maintenance Superintendent I. During this time Duckett received exemplary performance reviews, regular pay

¹ Duckett was hired October 26, 1996.

raises, managing to do this with almost no disciplinary action taken against him.

This suddenly changed when Durrell Jones, an individual Duckett used to supervise when he worked on the West Bank of Jefferson Parish, became his supervisor in June of 2018. In the space of just a few weeks Duckett was written up by Jones five times: August 15, 23, 29, 31 and September 18, 2018.

On March 6, 2019, Durrell Jones directed Duckett to attend a meeting for an unspecified purpose.² Duckett soon discovered that at the meeting was his direct supervisor Durrell Jones, his second level supervisor

² Exhibit 1, Recorded disciplinary conference of Sean Duckett conducted on March 6, 2019, stipulated by the parties and accepted by the hearing officer as evidence. For the convenience of the Board, a commercially obtained and unaltered time-stamped transcription, linked to the recording of the recorded disciplinary conference is available using the following link: https://www.rev.corr./transcript-editor/shared/MICKRHGw5z7mLjcprZGTGox9mWoXrNOxUwZsjwC2319iLOft-ixoNp_GefcgpbCriLplXmmBJa4bCYCBjWeV7qZODmw?loadFrom=SharedLink

James Thompson, Director of Department of Streets Brooks Burmaster and human resources manager Jonas Perrioti. In what turned out to be a pre-deprivation hearing, which lasted almost an hour, he found himself accused of an array of misconduct and was required to respond, factually, on the spot. He was repeatedly asked for documents to support his defenses. At several times during this hearing Duckett can be heard protesting that he needed time to collect documents and his logs to answer the specific allegations of misconduct which was brought against him. This was denied to him. During the final five minutes of the meeting.....

2. In the alternative, the Referee's judgement dated March 2, 2020 is contrary to the law and evidence (manifestly erroneous) as it finds that the appointing authority was justified in denying Duckett back pay in that:

- a. The record reflects that there were no unnecessary delays brought about by Duckett;
- b. The record reflects that there were unnecessary delays brought about by the Appointing Authority;
- c. The decision finds legal cause for loss of back pay where none exists.

ARGUMENT

Duckett shows that he received no written, or other, notification of the March 6, 2019 meeting whatsoever. More specifically, he states that at no time prior to his termination did he receive any written, or other, notification of a pre-disciplinary hearing.³

Duckett submits that the sound recording of that March 6, 2019 hearing, which has been submitted into

³ This is disputed by respondent, Appointing Authority Department of Public Works-Streets (appointing Authority). See Exhibit 2, Memorandum in Response to Appellant's Post-hearing Memorandum Regarding Pre-Disciplinary/pre-deprivation notice at Roman numeral I.

evidence by both parties, bear out his assertion beyond any doubt.

Duckett initially states at 0:40 that he “didn’t see any evaluation”. At 2:04 he says,

“I wasn’t informed that I was going over the evaluation today. I was {inaudible 00:20:09} the meeting was upon. I was not informed of that we was having this evaluation meeting, so I don’t have any documentation stating or showing that I can prove or show for all of these low expectations that I have.”

By 42:15 the conversation had covered according to Jonas Perioti, communication, decision making and supervision and management. Duckett was unable to, throughout this dialogue, to reference documents because he had been surprised by the proceeding.

At 42:41 Duckett points out that all of what he was accused of doing had not yet been read off. Jonas Perioti, the HR manager, seems to be reluctant to spend any more time, saying that “we have other stuff to cover in this

meeting:”. Saying “he has presented enough evidence, just based upon the stuff that he read” [42:52]⁴ upon which Mr. Burmaster says, at 42:56 “No,

Regular employees in the classified service have the right to appeal to the Board from suspension and other disciplinary actions to test the reasonableness of such action. Jefferson parish Personnel Rules, Rule II, Section 4.1.

The burden of proof of an appeal as to the facts shall be on the appointing authority. *Id*; Jefferson Parish Personnel Rules, Rule II, Section 4.6: Jefferson Parish Personnel Board Rules of Appeal Procedure, Rule 9 (c).

[T]he charges expressed in writing by the appointing authority as cause for...suspension,...or other action, shall not be accepted as *prima facia* true. Evidence shall not be received from an appointing authority to supplement or enlarge the charges contained in such written document. The appellant

⁴ Also at [43:05]

may rebut any proof offered by the appointing authority in support of the charges.

Jefferson Parish Personnel Board Rules of Appeal Procedure, Rule 9 (m).

Upon a board's review of a discharge or disciplinary action against a public employee, the appointing authority bears the burden of proving legal cause. *Lewis v Jefferson Parish Dept. of Public Works*, 99-16 (La.App. Cir. 5/1999), 761 So.2d 558, *writ denied*, 99-2906 (La. 1/14/00), 753 So.2d 215. Legal cause for disciplinary action exists if the facts found by the civil service commission or personnel board disclose that the conduct of the employee actually impairs the efficiency of the public service. *Adams v. Jefferson Parish Dept. of Community Action Programs*, 02-1090 (La.App. 5 Cir. 4/29/03), 845 So.2d 1147, 1150.

The Personnel Board has a duty to decide, independently from the facts presented, whether the appointing authority has good and lawful cause for taking disciplinary action and, if so, whether the punishment

imposed is commensurate with the dereliction. *Wilson v. Jefferson Parish*, 95-470 (La.App. 5 Cir. 1/17/96), 668 So.2d 1167 *writ denied*, 96-0413 (La. 4/19/96), 671 So.2d 927.

Before being deprived of a property right in a public job, a civil service employee is entitled to notice and an opportunity to be heard which is appropriate to the nature of the case. In *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985), the United States Court stated:

An essential principle of due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). We have described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.”

This transcript was exported on Oct. 08, 2020 -

No, I did not.

Jonas Perioti (Human Resources) (01:58)

What issues do you have with the evaluation?

Sean Duckett (01:59)

A lot.

Jonas Perioti (Human Resources) (02:00)

Okay.

Sean Duckett (02:02):

Okay.

Jonas Perioti (Human Resources) (02:03)

Which [crosstalk 00:02:04]

Sean Duckett (02:04)

I wasn't informed that I was going over the evaluation today. I was [inaudible 00:02:09] the meeting was upon. I was not informed of that we was having this evaluation meeting, so I don't have any documentation stating or showing that I can prove or show for all these low expectations that I have.

Jonas Perioti (Human Resources) (02:24):

Right, but you could just generally tell us why you don't agree with the evaluation. What areas?

Sean Duckett (02:29):

Because in all these different areas...May I have a look at it again? I'll just go over the areas. I don't know, I'm exactly about one. The first one is in what?

Jonas Perioti (Human Resources) (02:43):

The first one is in knowledge and skill.

Sean Duckett (02:48):

Okay, knowledge and skill. I am knowledgeable in my job, and I don't feel to believe that I should be graded as a one, and I have documentation to prove it. To show it. And the next category is what?

Jonas Perioti (Human Resources) (03:02):

I just want to point out..... What was the issue that happened? Was that issue.... Did someone with a... What reason that you gave him a one?

Darrrell Jones (03:15):

Knowledge and skill, I gave him a one because of the fact he was instructed to bring some work orders, I gave him an email, to have a packet ready every Friday, he didn't have that ready. Also we gave him a

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1 together to drive.

2 Because I'm the only one that

3 really tend to my parents. I got two elderly

4 parents. And when I left, I was more upset.

5 And I love my job. I wouldn't had did

6 20-plus years just to say I didn't have my

7 Job.

8 Q. Tell us about getting the doctor's

9 Note. Did your dad go to the doctor that day?

10 A. He didn't go to the doctor that

11 Day. But he told me specifically, "When you

12 Come back to work, make sure you have a

13 Doctor's note."

14 Q. What did you do?

15 A. I got a doctor's note. I changed

16 The date.

17 Q. But it was legitimate ---

18 A. It was a legitimate doctor's note.

19 Q. --- doctor's note, but for the date?

20 A. Before that date.

21 Q. But for? In other words, you

22 Changed the date?

23 A. Yes, I changed the date. Because I

24 was --- I felt under pressure. And he was on

25 me so much for everything, even writing me up

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1 on my day off.

2 Q. Had anybody given you any

3 alternative? Did you feel at that point, you

4 Had any alternative but to get a doctor's

5 note?

6 A. I didn't know no other way. I

7 Wasn't instructed no other way to do anything.

8 I never was told any other way.

9 Q. All right. So what's the next

10 thing you heard about this? I mean, you gave

11 Who the doctor's note?

12 A. I'm sorry?

13 Q. Who did you give the doctor's note

14 to?

15 A. Durrell Jones.

16 Q. What did Durrell Jones say, if

17 Anything, when you gave it to him?

18 A. He didn't tell me anything at that

19 Time.

20 Q. How long was it before you heard

21 Anything about the doctor's note?

22 A. My evaluation. My disciplinary

23 hearing.

24 Q. About how many days or weeks was

25 that after the doctor's note incident?

1 A. From February 12th when the
2 doctor's note was submitted, I got terminated
3 March 18th.

4 Q. Okay.

5 A. And the pre-disciplinary hearing
6 for my evaluation, that when it was
7 discussed. I'm not sure if it was March 3rd.

8 Q. How were you notified about the
9 pre-disciplinary hearing?

10 A. A letter came afterward for the
11 hearing.

12 Because we was in a meeting on the
13 Westbank already and I was told to stay after
14 the meeting.

15 Q. So you got written up?

16 A. After the meeting.

17 Q. And when was the notification?

18 When did you get that notification?

19 A. The meeting was about my
20 evaluation, the disciplinary hearing. But
21 during that time, the doctor's note and
22 everything was submitted, talked about.

23 Q. Did you get --- were you aware that
24 the pre-disciplinary hearing would be about
26 the doctor's note?

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1 A. No.

2 Q. Why not? Was that not mentioned in
3 your notice ?

4 A. No. I don't recall that even being
5 in the notice about the doctor's note.

6 Q. What was in the notice?

7 A. Just the pre-disciplinary hearing.

8 Q. About what?

9 A. It was supposed to be about my
10 evaluation.

11 Q. About your evaluation?

12 A. Yes.

13 Q. Did you come prepared at that
14 meeting to talk about your doctor's notes?

15 A. No, sir.

16 Q. Did the doctor's note situation
17 come up at the pre-disciplinary hearing?

18 A. Then it came up. And it was
19 discussed that we had called the doctor up.

20 Q. Okay. Well, I'm not there.

21 Okay. So I want to make sure I
22 understand your testimony. Up to the actual
23 time of the pre-disciplinary hearing, you were
24 in the room and you learned after you had
25 closed the door, sat down, for the first time

1 that the disciplinary hearing was going to be
2 about the doctor's note. Was that a surprise
3 to you?

4 A. Yes.

5 Q. Were you prepared at all to deal
6 With that?

7 A. No.

8 Q. What do you remember, if anything,
9 about that colloquy? I understand we have it
10 recorded.

11 A. I was already disturbed with my
12 evaluation because I was being evaluated by
13 someone who have not even been in a position
14 but they can evaluate --- no more than a couple
15 of months.

16 Q. Who are you referring to?

17 A. Mr. Durrell Jones.

18 Q. Okay.

19 A. He did my evaluation, but he was
20 not my supervisor but two months or so. But
21 he did my yearly evaluation. And he was
22 still, as I would say, in probationary period
23 himself for the position he hold.

24 But I don't think it was fair for
25 even him to have done my evaluation. But when

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1 all of that came about, that's when everything
2 was talked about.

3 Q. And I know everybody's going to
4 listen to that. But what do you remember from
5 your perspective about how that meeting went?
6 How did the conversation begin?

7 A. When it was mentioned to me about
8 the letter of being sick and the date, the

9 the letter was --- the letter wasn't a specific
10 letter but I changed the date on it. And then
11 I was so afraid of my job to where I changed
12 It because I was trying to keep my job. I had
13 So much pressure with me.

14 I had time. I had leave. But it
15 Was not told,, like, okay, what I'm going to
16 do, I'm going to give you annual leave,
17 emergency leave, or an occurrence. Just use
18 an occurrence. My supervisor didn't instruct
19 me on nay of that. But I was sitting there,
20 even --- I wasn't focused on leave time. I was
21 more focused on my dad who's on the side of
22 the road.

23 Q. Now, you did tell the Appointing
24 Authority a falsehood, is that correct, in
25 that meeting?

1 A. Yes, I talked with them. And when
2 they was taking about the note, I kept to my
3 guns because I was scared.

4 Q. What did you think about that, if
5 anything?

6 A. I was -- if I would said anything,
7 I was thinking I was going to get fired. But
8 I was scared. I really was. But I wouldn't
9 do it again because I got too many years
10 invested to lose.

11 Q. Well, do you remember ever ---
12 that's a material --- you would agree that that
13 is a material misrepresentation of the truth
14 to your supervisor; is that correct?

15 A. Yes.

16 Q. Can you recall any other similar
17 misrepresentation that you have ever given to
18 anybody in a position of authority in

19 Jefferson Parish?

20 A. No.

21 Mr. Williams:

22 That's all the questions I

23 have for right now.

24 Mr. Nass:

25 Okay.