NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0264

CHRISTOPHER GURBA

VERSUS

DEPARTMENT OF TRANSPORTATION & DEVELOPMENT - CRESCENT CITY CONNECTION

Judgment Rendered: OCT 1 4 2008

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On Appeal from the Civil Service Commission
Number 16,142

Honorable James A. Smith, Chairman

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a ruling of the Louisiana Civil Service Commission denying the plaintiff relief from an adverse decision by his state employer on an application for promotion. For the reasons that follow, we affirm in part, vacate in part, and dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are thoroughly detailed in the written reasons assigned by the Civil Service Commission referee, Elliott B. Vega, stating:

> Christopher J. Gurba is employed by the Department of Transportation and Development (DOTD)-Crescent City Connection Police Department (CCCPD) as a Police Office 2. He serves with permanent status.
>
> In March of 2007, Mr. Gurba was notified that he was not selected for a promotion to sergeant. By letter postmarked March 16, 2007, Mr. Gurba filed an appeal. Mr. Gurba's appeal is based on an allegation that his score in the "attendance" factor on the promotional matrix, had been changed from "5" (the best score possible) to "2." Mr. Gurba asserts that this change was done in violation of Civil Service Rule 11.26(d) and in violation of the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) [38 U.S.C. §4301 et seq.]. As relief, Mr. Gurba seeks to have his score raised back to "5." Mr. Gurba also requests attorney's fees.
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> **Findings of Fact**
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> 1. Christopher J. Gurba is employed by DOTD as a Police Officer 2. He serves with permanent status.
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> 2. In October of 2004, Mr. Gurba went out on military leave. Although Mr. Gurba has not returned to his regular duties, he has occasionally returned to duty to attend training and/or to make court appearances.
>
> 3. In January of 2007, DOTD/CCCPD created a promotional list for sergeant positions. Mr. Gurba applied for a promotion and was ranked on this list along with a number of other candidates.

4. Candidates for DOTD/CCCPD Sergeant were ranked based on an interview and their score in five categories. These categories were "job related experience," "PPR average for the last two years," "attendance," "qualifications" and "years of continuous service with the department." Candidates were given rankings between 1 and 5, with a ranking of 5 being the highest score possible. The attendance ranking was based on the number of times the candidate was out on unscheduled leave during the preceding year.

5. Because Mr. Gurba was out on military leave for more than a year prior to the ranking of the candidates for Sergeant, CCCPD Captain Peter Majorie, and CCCPD Chief Michael A. Helmsteader did not know how to score Mr. Gurba in "attendance." Mark Falcon, a contract attorney for DOTD, was asked to research the issue. Prior to Mr. Falcon's response, Mr. Gurba was given a default ranking of "5" in the category attendance for the January 2007 promotional list.

6. In March of 2007, DOTD revisited Mr. Gurba's ranking. Based on consultations with Mr. Falcon, DOTD decided to base Mr. Gurba's ranking on the year preceding his extended military service. As a result, Mr. Gurba's ranking was lowered from a "5" to a "2." Mr. Gurba was not selected for a promotion.

Conclusions of Law

The question ... is the following: did DOTD/CCCPD violate Civil Service Rule 11.26(d) when it based Mr. Gurba's "attendance" score on his attendance record for the year prior to his extended military service? ... Rule 11.26(d) ... provides:

> (d) Rights Upon Return.
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> Provisional, probational and permanent employees and employees serving on job appointment returning to their classified positions under the provisions of this Rule or Rule 8.19, which governs time frame requirements for restoration to state employment, shall return with such seniority, status, pay, and annual and sick leave accrual rates as they would have had if they had not been absent for military training or military active duty; however, both provisional and probational status shall be governed by the provisions of Rule 9.3. [Footnote omitted.]

At issue in this rule is the provision that Mr. Gurba be restored to the same "status" he held prior to his military service. And, what is encompassed by the term "status" is not explicitly defined by the Civil Service rules. Mr. Gurba urges an expansive reading of the term, asserting that he must be treated exactly the same as other employees in all aspects of his employment. In particular, Mr. Gurba asserts that his dependability score must be based on the same 365 days of

service that were used when ranking other candidates for promotion. However, in Rule 11.26(d), the term "status" refers to the permanent/probational/provisionary status of an employee under Civil Service Rules. This narrow use of the term "status" is also repeated in 11.26(a)(1), 11.26(b)(1), 11.26(c) and 11.26(g). As such, ... the correct reading of the rule requires only that Mr. Gurba come back to DOTD as a permanent status employee as that was his "status" prior to his absence.

The gist of Mr. Gurba's argument is that, despite his absence on military leave, DOTD should have based his dependability score on his attendance in the year prior to the scoring of the attendance matrix. Although the record is short on specifics, it indicates that Mr. Gurba attended training and made a few duty-related appearances for DOTD during this period and did not miss any of these scheduled intermittent appearances. Thus, Mr. Gurba argues that, during the approximately fifteen days he was actually on-the-clock for DOTD during the year preceding the scoring of the matrix, his attendance was perfect and deserving of the highest rating possible.

While the intent of Rule 11.26 is to place Mr. Gurba back into the same position he would have been in but for his military service, there are practical limits on what can be done to achieve this goal. The rule does not contemplate penalizing employees who were not absent because of military service. However, ... under the interpretation of the rule advanced by Mr. Gurba, employees whose ranking would be based on their absences over a 365 day period would be measured against Mr. Gurba's absences over several (non-regular duty) days of service. It is readily apparent that a person stands a far greater chance of being absent during 365 days of regular duty than they do over a period of approximately 15 days. Rule 11.26(d) does not contemplate DOTD manipulating the promotional criteria to give Mr. Gurba the highest possible scores on his application. I therefore find that DOTD did not violate Civil Service Rule 11.26(d) when it based Mr. Gurba's dependability score on the last 365 days of service before he went out on military leave.

Mr. Gurba also raised the issue of discrimination based on his military service. However, a claim of discrimination based on military service does not give rise to a right of appeal to the Commission and I have no jurisdiction over this claim. See: **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 (La. 3/2/99)[,] 728 So.2d 1254. In addition, while Mr. Gurba also referenced the Louisiana Military Services Relief Act [LSA-R.S. 29:401 et seq.] whether DOTD violated this law is beyond the scope of my jurisdiction. See La. Const. Art. X, Sections 8, 10, and 12; **Agriculture**, *supra.* Likewise, Mr. Gurba's claim that DOTD's actions violate federal USERRA regulations lies outside the scope of my

> jurisdiction. And, while Mr. Gurba argues that Civil Service Rule 11.26(d) was passed as a result of, and should be read in concert with, the language of USERRA, I cannot read into Rule 11.26(d) more than is actually there. I therefore find that Mr. Gurba has not demonstrated that DOTD/CCCPD violated Rule 11.26(d) when it [rated] him based on his attendance over the year preceding his absence. Accordingly, Mr. Gurba's appeal is denied.[FN]
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> [FN]Civil Service Rule 13.19(u) places the burden of proof on the appellant in rule violation cases.

Mr. Gurba's subsequent appeal to the Civil Service Commission was denied.

Mr. Gurba now appeals to this court, assigning as error the Civil Service Commission's denial of his appeal and failure to construe Civil Service Rule 11.26(d) liberally in his favor to allow his work attendance to be computed based on the twelve calendar months immediately prior to the promotion evaluation.

LAW AND ANALYSIS

It is the duty of a court to examine subject matter jurisdiction *sua sponte*, even when the issue is not raised by the litigants. **McGehee v. City/Parish of East Baton Rouge**, 2000-1058, p. 3 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 260.

The Louisiana Constitution explicitly states that original jurisdiction over all civil and criminal matters is to be in the district courts "unless otherwise authorized by the constitution." LSA-Const. Art. V, §16; **Moore v. Roemer**, 567 So.2d 75, 79-80 (La. 1990). See also LSA-Const. Art. IV, §21; Art. V, §§15, 18, and 20; and Art. X, §§12, 46, and 50 (expressly providing for original jurisdiction of certain claims in the Public Service Commission, the Civil Service Commission, the State Police Commission, the juvenile and family courts, the limited jurisdiction courts, and the justice of the peace courts). Matters under the original jurisdiction of

administrative bodies are civil matters that would otherwise come under the original jurisdiction of the district court. **Id.**

The Civil Service Commission is given the right to hear appeals as stated in LSA-Const. Art. X, §§8 and 12, which provide:

> **§ 8. Appeals**
>
> **(A) Disciplinary Actions.** No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. ***A classified employee subjected to such disciplinary action shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part***. The burden of proof on appeal, as to the facts, shall be on the appointing authority.
>
> **(B) Discrimination.** ***No classified employee shall be discriminated against because of his political or religious beliefs, sex, or race. A classified employee so discriminated against shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part***. The burden of proof on appeal, as to the facts, shall be on the employee.
>
> **§ 12. Appeal**
>
> **(A) State.** ***The State Civil Service Commission shall have the exclusive power and authority to hear and decide all removal and disciplinary cases***, with subpoena power and power to administer oaths. It may appoint a referee, with subpoena power and power to administer oaths, to take testimony, hear, and decide removal and disciplinary cases. The decision of a referee is subject to review by the commission on any question of law or fact upon the filing of an application for review with the commission within fifteen calendar days after the decision of the referee is rendered. If an application for review is not timely filed with the commission, the decision of the referee becomes the final decision of the commission as of the date the decision was rendered. If an application for review is timely filed with the commission and, after a review of the application by the commission, the application is denied, the decision of the referee becomes the final decision of the commission as of the date the application is denied. The final decision of the commission shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located, upon application filed with the commission within thirty calendar days after its decision becomes final. Any referee appointed by the commission shall have been admitted to the practice of law in this state for at least three years prior to his appointment.

* * *

(Emphasis added.)

In **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 (La. 3/2/99), 728 So.2d 1254, the Louisiana Supreme Court concluded that Article X of the Louisiana Constitution serves as a limit on the State Civil Service Commission's quasi-judicial power to hear the appeals of state civil service employees to two categories of claims: (1) discrimination claims provided for in § 8(B); and (2) removal or disciplinary claims provided for in § 12(A) and § 8(A).[1] The supreme court noted the Commission's authority to enact rules, though broad and general, is nonetheless limited by the terms expressed in the constitution. Therefore, the court found that any Commission rules expanding its power beyond constitutional limits were unconstitutional. Specifically, the supreme court held unconstitutional particular civil service rules to the extent they purported to authorize appeals to the Commission on discrimination claims outside the scope of the Commission's limited jurisdiction as defined under Article X, §§ 8 and 12. See **Berry v. Department of Public Safety and Corrections**, 2001-2186, p. 15 (La. App. 1 Cir. 9/27/02), 835 So.2d 606, 616-17 (citing **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at pp. 6-15, 728 So.2d at 1259-64). See also **Flanagan v. Department of Environmental Quality**, 99-1332, p. 4 (La. App. 1 Cir. 12/28/99), 747 So.2d 763, 765.

In **Sumrall**, the Louisiana Department of Agriculture and Forestry filed suit in the district court seeking a judicial declaration that the Commission's rules, purporting to extend its jurisdiction relative to

[1] Although Section 12 establishes that the Commission has exclusive original jurisdiction over all removal and disciplinary cases, the section is silent on discrimination cases. Thus, Sections 8 and 12 must be read together in order to assess the Commission's quasi-judicial authority. **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at pp. 6-7, 728 So.2d at 1259.

discrimination claims beyond the four instances set forth in LSA-Const. Art. X, §8 (political beliefs, religious beliefs, sex, or race), were unconstitutional. Following denial by the lower courts of the relief sought, the supreme court reviewed the matter and held that the Commission may constitutionally exercise its appellate jurisdiction only when a classified employee brings a discrimination claim based upon one of the four enumerated categories set forth in Section 8(B). In so ruling the supreme court reasoned that it is clear from a straightforward reading of Section 8(B) that the provision prohibits only four categories of discrimination: those based on political or religious beliefs, sex or race. Thus the court held that the section limits the Commission's appellate jurisdiction to only those cases by classified employees asserting that they have been so discriminated against, stating that no other meaning can be ascertained from the plain text of the article. **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at p. 5, 728 So.2d at 1258-59. The supreme court ruled that the constitutional provisions relative to the Civil Service Commission do not include the authority to enact rules to expand the Commission's own jurisdiction to hear appeals, and that noticeably absent from the rulemaking provisions are the words "other matters pertaining to appeals." **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at pp. 10-11, 728 So.2d at 1262.

In **Berry**, a state trooper appealed a demotion resulting from a disciplinary action and further sought review of an annual "Performance Planning and Review" rating of "poor" (later upgraded to "needs improvement"). The State Police Commission upheld the trooper's demotion, but held that it did not have jurisdiction to hear the appeal of the unfavorable performance rating, citing **Louisiana Department of**

Agriculture and Forestry v. Sumrall.[2] On appeal of the matter, this court stated that the State Police Commission had no authority to entertain the appeal of the trooper's performance rating unless it constituted a discrimination, removal, or disciplinary action, and that no such allegation was made in the case. This court concluded that the trooper's "needs improvement" rating was not discriminatory, nor was it a removal or disciplinary claim; therefore, as a matter of law, the State Police Commission lacked jurisdiction over the issue. **Berry v. Department of Public Safety and Corrections**, 2001-2186 at pp. 16-17, 835 So.2d at 617-18.

In **Flanagan**, a classified employee serving with permanent status as an Environmental Specialist III with the Louisiana Department of Environmental Quality (DEQ) appealed the denial of a promotion, alleging that he was denied promotion in retaliation for his having previously filed an appeal of a disciplinary matter in which he prevailed, and because he had previously filed a lawsuit against DEQ based on age discrimination. Mr. Flanagan contended that the denial of promotion in retaliation for his prior disciplinary appeal and lawsuit constituted "discrimination" based upon "non-merit factors." The Civil Service Commission denied relief. On appeal, this court, citing **Louisiana Department of Agriculture and Forestry v. Sumrall**, held that DEQ was without jurisdiction to hear Flanagan's claim of discrimination through DEQ's consideration of "non-merit factors" since LSA-Const. Art. X, §§8 and 12 provide appellate

[2] The State Police Commission has substantially the same jurisdictional basis as the Civil Service Commission, as provided in LSA-Const. Art. X, § 46: "A classified state police officer subjected to ... disciplinary action shall have the right of appeal to the [State Police] commission[;] ... [n]o classified state police officer shall be discriminated against because of his political or religious beliefs, sex or race ... [and a] classified state police officer so discriminated against shall have the right of appeal to the commission...." See also LSA-Const. Art. X, § 50 (which provides that the State Police Commission has the exclusive power and authority to hear and decide all removal and disciplinary cases).

jurisdiction to the DEQ upon only four bases of discrimination: political beliefs, religious beliefs, sex, or race. **Flanagan v. Department of Environmental Quality**, 99-1332 at pp.4-6, 747 So.2d at 765-66.

In the instant case, Mr. Gurba maintains, essentially, that he was discriminated against because he had been on leave for active military service, asserting violations of Louisiana Civil Service Rule 11.26(d), the Louisiana Military Service Relief Act (LSA-R.S. 29:401 et seq.), and the federal Uniformed Services Employment and Reemployment Rights Act (USERRA).

The USERRA provides in 38 U.S.C.A. § 4311(a):

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation

Protection under the USERRA extends to military personnel on active duty, training, and National Guard duty. **McLain v. City of Somerville**, 424 F.Supp.2d 329, 334 (D.Mass. 2006).

Louisiana Civil Service Rule 11.26(d) provides as follows:

> The provisions of this rule shall apply to members of a Reserve Component of the Armed Forces of the United States who are called to duty for military purposes, and to members of National Guard Units which are called to active duty as a result of a non-local or non-state emergency.
>
> * * *
>
> (d) Rights Upon Return.
>
> Provisional, probational and permanent employees and employees serving on job appointments returning to their classified positions under the provisions of this Rule or Rule 8.19, which governs time frame requirements for restoration to state employment, shall return with such seniority, status, pay, and annual and sick leave accrual rates as they would have had

> if they had not been absent for military training or military active duty; however, both provisional and probational status shall be governed by the provisions of Rule 9.3.
>
> The Louisiana Military Service Relief Act provides, in part:
>
> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

LSA-R.S. 29:404(A).

Mr. Gurba asserts that contrary to the mandates of these pronouncements of law, the Louisiana Department of Transportation and Development - Crescent City Connection Police Department failed to assign him a score on the "attendance" factor of the promotional matrix in a similar manner as other employees who were not subject to active military service during the pertinent time, resulting in an overall lower score accorded to him and the ensuing denial of a promotion. However, we are constrained by the supreme court's ruling in **Louisiana Department of Agriculture and Forestry v. Sumrall**, construing the constitutional provisions governing appeals to the Civil Service Commission on the basis of discrimination to restrict those appeals only to claims of discrimination on the basis of political beliefs, religious beliefs, sex, or race; discrimination on the basis of military service is not within the jurisdiction of the Civil Service Commission to adjudicate. Therefore, the Civil Service Commission had no jurisdiction in this matter and the appeal should have been dismissed.[3]

[3] Even so, the supreme court has recognized that, with respect to a cause of action based upon a form of discrimination not within the scope of the Commission's quasi-judicial power as expressed in Article X, §§ 8 and 12, recourse is available in the district courts, noting that other laws, statutes, and provisions of the constitution create assertable individual rights to be free from many forms of discrimination and plaintiffs seeking protection under any of these laws may take refuge in the district courts of this state. **Louisiana Department of Agriculture and Forestry v. Sumrall**, 98-1587 at p. 15, 728 So.2d at 1264.

Although the Civil Service Commission referee stated that "a claim of discrimination based on military service does not give rise to a right of appeal to the Commission and I have no jurisdiction over this claim," he nevertheless ruled on Mr. Gurba's Civil Service Rule 11.26(d) claim. A plain reading of Rule 11.26(d) as it pertains to the claims raised by Mr. Gurba compels the conclusion that discrimination based on military service is the basis of his Rule 11.26(d) claim as well as the other arguments presented. Nor is the failure to promote a matter over which the Commission has appellate jurisdiction. **Flanagan**, supra. Thus, the Civil Service Commission had no jurisdiction to adjudicate any of the issues presented by Mr. Gurba. To the extent the Civil Service Commission ruled that it had no jurisdiction as to a claim of discrimination on the basis of military service, we affirm in part, while we vacate the remainder of the Commission's ruling on the merits as being likewise outside its jurisdiction.

CONCLUSION

For the reasons assigned herein, the ruling of the Louisiana Civil Service Commission is affirmed in part and vacated in part, and the appeal is dismissed. All costs of this appeal are assessed to Christopher Gurba.

RULING AFFIRMED IN PART AND VACATED IN PART; APPEAL DISMISSED.