

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1583

DAVID BLANCHARD

VERSUS

DEPARTMENT OF HEALTH AND HOSPITALS

Judgment Rendered: March 23, 2012

APPEALED FROM THE STATE CIVIL SERVICE COMMISSION
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 17059

LAURA D. HOLMES, CIVIL SERVICE COMMISSIONER
HONORABLE DAVID DUPLANTIER, CHAIRMAN,
JOHN MCCLURE, VICE-CHAIRMAN,
WILFRED PIERRE, G. LEE GRIFFIN, D. SCOTT HUGHES, KENNETH
POLITE, JR. AND CURTIS (PETE) FREMIN

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs with reasons.

McDONALD, J.

This appeal challenges a termination action by the Department of Health and Hospitals (DHH) that was reviewed and affirmed by the Civil Service Commission referee. For the following reasons, the decision dismissing David Blanchard from his employment effective November 18, 2010 is reversed DHH is ordered to reinstate Mr. Blanchard; and this matter is remanded to the Commission for further proceedings.

FACTS

David Blanchard was an Engineering Technician 5 with the Department of Health and Hospitals, whose duties included reviewing healthcare facility plans. On October 19, 2010, a letter was directed to Mr. Blanchard from a Louisiana state senator that enclosed a copy of a letter he had received from one of his constituents. The constituent letter advised of three major hurdles to be cleared before his facility could receive Medicaid certification and why it was important that his facility receive the necessary approvals in order to begin operations on January 1, 2011. The letter noted that the plan for review had been received at DHH, but the constituent had been advised that there were 39 plans ahead of his, and asked that the senator assist in expediting the plan review. Mr. Blanchard replied to the senator's letter on October 22, 2010, a Friday.

On Monday, Mr. Blanchard was discussing a different situation with his supervisor on the telephone when he indicated there was something else she should know. Upon arriving at her office, he showed her the letter from the senator and his e-mail reply.¹ The e-mail reply was forwarded later that afternoon to her supervisor, who in turn forwarded it to her supervisor, the Medicaid Director. All

¹ The testimony of the supervisor indicated that the meeting was on Monday, November 1, 2010, following the Friday the e-mail was sent. However, Mr. Blanchard's reply was mailed Friday, October 22, 2010, and the following Monday was October 25, 2010. November 1, 2010 was the following Monday.

three supervisors were very concerned about the contents of the e-mail. The Medicaid Director also received a communication from DHH's legislative liaison, who had also notified the Chief of Staff and the Undersecretary of the Department, that the senator had received an e-mail that was very rude. Upon reviewing the e-mail, the Medicaid Director found it not responsive to the senator's letter, sarcastic in some parts, and extremely rude. After consulting with several persons, including those in Human Resources and in the Legal Department, the Director concluded that the rude behavior was not to be tolerated and a *Loudermill*² letter was sent to Mr. Blanchard proposing his termination.

Subsequently, a letter terminating Mr. Blanchard's employment effective November 18, 2010 was sent to Mr. Blanchard, who appealed to the State Civil Service Commission. The Commission appointed a civil service referee to hear the appeal, and it was subsequently scheduled for March 3, 2011. The matter was heard on April 15, 2011 and taken under advisement. On Friday, May 19, 2011, a decision was rendered in Mr. Blanchard's appeal that included a statement of the appeal, findings of fact, discussion and conclusions of law, and denying Mr. Blanchard's appeal. This appeal followed.

DISCUSSION

In civil service disciplinary cases, an appellate court is presented with a multifaceted review function. *Bannister v. Department of Streets*, 95-0404 (La. 1/16/96), 666 So.2d 641, 647. First, as in other civil matters, deference will be given to the factual conclusions of the Commission. Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error standard of review. Second, in evaluating the Commission's determination as to whether the disciplinary action is both based on

² A "Loudermill letter" is required to be sent to all state employees who are subject to the State Civil Service Rules prior to their termination, by Civil Service Rule 12.7. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). See also La. Const. art. 10, §§1, 2, and 10.

legal cause and commensurate with the infraction, the court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by an abuse of discretion. *Id.* Generally, decisions of Civil Service Commission referees are subject to the same standard of review as decisions of the Commission itself. *Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans*, 02-0295, 02-0296 (La. App. 1st Cir. 2/14/03), 845 So.2d 491, 494.

A permanent classified civil servant employee cannot be disciplined without cause. La. Const. art. 10, §8. "Cause" sufficient for the imposition of discipline means "conduct that impairs the efficiency of the public service and bears a real and substantial relation to efficient and orderly operation of the public service in which the employee is engaged." *Marsellus v. Department of Public Safety and Corrections*, 04-0860, p. 5 (La. App. 1st Cir. 9/23/05), 923 So.2d 656, 660, citing *Wopara v. State Employees' Group Benefits Program*, 02-2641, p. 3 (La. App. 1st Cir. 7/2/03), 859 So.2d 67, 69). The "appointing authority" must prove by a preponderance of the evidence that the employee's conduct did, in fact, impair the efficiency and operation of the public service. *Id.*, 923 So.2d at 660. In order to modify or reverse the Civil Service referee's determination in this matter, we must first find that the Civil Service referee's decision was arbitrary, capricious, or characterized by an abuse of discretion. *Usun*, 845 So.2d at 495.

We find no error in the findings of fact determined by the referee. However, our review requires us to also review and ensure that there was legal cause for the disciplinary action and that the punishment is commensurate with the infraction. Since the punishment in this case was so severe, termination, in addition to the jurisprudence, we reviewed all appeal decisions of the Commission for the last several years. In doing so, we noted information posted on the web site January 20, 2012, concerning corrective actions, particularly the following:

The corrective action taken must fit the offense. In deciding what action to take, the agency can consider prior action taken against the employee. Generally, the severity of the action depends on how seriously the employee's conduct impacted the public service. Therefore, if you do the opposite of what your agency was created to do (such as harming a patient in your care, or letting an inmate escape, or violating the laws you were hired to enforce, etc.), or engage in other serious misconduct (such as stealing from the State, engaging in workplace violence, etc.), you can expect to be dismissed for the first offense. Otherwise, we recommend that the agency use the least severe action needed to accomplish the desired result – correcting behavior.

The record does not contain any information regarding Mr. Blanchard's work product, nor any indication that he had received less than a satisfactory rating in the performance of his duties; so we assume, in addition to having permanent status, Mr. Blanchard's job performance was not substandard.

As noted previously, Mr. Blanchard was entitled to receive a *Loudermill* letter advising him of his employer's intention to terminate his employment and also to be notified in detail of the cause, so that he may respond and defend the unacceptable conduct. Mr. Blanchard received a hand-delivered letter dated November 17, 2010, advising him of the termination as follows:

Dear Mr. Blanchard:

Pursuant to Civil Service Rule 12.7 you were given written notice on November 8, 2010 of the Appointing Authority's proposed action. You responded on November 12, 2010. Having considered your response, the Appointing Authority has decided to proceed with the disciplinary action.

Accordingly you are hereby notified that pursuant to the authority contained in Chapter 12 of the Civil Service Rules, you will be dismissed from your position as an Engineering Technician 5 with the Department of Health and Hospitals, Medical Vendor Administration effective 4:30 p.m. on Thursday, November 18, 2010. The reason for this proposed disciplinary action is as follows:

On Friday, July 2, 2010, at 4:24 p.m., Erin Rabalais, your supervisor, issued you a directive, in which you were informed to "not place your personal opinions in emails ... and to leave such comments out of emails"

On Wednesday, October 20, 2010, you received a letter from State Senator John R. Smith, requesting your assistance in expediting a plan review for DeQuincy Memorial Hospital.

On Friday, October 22, 2010, at 4:15 p.m. you sent Senator Smith an email (attached hereto and marked as Exhibit "A") which states the following:

"Senator Smith,

Although I review healthcare facility plans, I am not authorized to displace clients who have patiently waited their turn in favor of other, more politically connected ones. Enclosed in your envelope was a signed statement from Mr. John A. [Matheson], Chairman of the Board for DeQuincy Memorial Hospital (see scanned attachment).

Mr. [Matheson] observes the irony of one branch of government at odds with another in seeking favor for his project. Irony is also witnessed from this end with respect to observing you in lock step with petitioner after presiding over a legislative session that eliminated the department I formerly worked for (Div. of Engineering & Architectural Services). Within that environment, you sit silently as he alleges the lack of coordinated efforts by "...branches of government". Use your senatorial experience to explain that apparent contradiction to Mr. [Matheson] for me.

Finally, I want to provide some hope that the plan review scheduled for DeQuincy's Psychiatric Unit looks to be compatible with the overall time schedule described in your letter. You can also assure Mr. [Matheson] that I am not dedicated to forestall his efforts in creating jobs and I find his suggestion offensive. Instead he seems shortsighted in needlessly seeking to incite animosity with my office.

As an employee of the Department of Health and Hospitals, it is your responsibility to provide efficient and timely services to the citizens of the state of Louisiana, maintain a cordial and professional relationship with the elected members of the Louisiana Legislature, as well as assist the general public when required. Inappropriate communication with elected officials concerning matters of the Department of Health and Hospitals will not be tolerated. Insubordination to a directive from your supervisor will not be tolerated.

You have the right to appeal this action to the State Civil Service Commission within 30 calendar days following the date you receive this notice. The appeal procedure is contained in Chapter 13 of the Civil Service Rules which is available from the Department of Civil Service or your Human Resources Office.

The letter was signed by Don Gregory, the Medicaid Director.

The grounds for Mr. Blanchard's termination given by DHH were insubordination for failure to follow a supervisor's directive to keep his personal opinions out of e-mails and unprofessional and rude behavior based on his e-mail reply to Senator Smith's letter. The Civil Service referee found that DHH failed to prove cause for disciplinary action against Mr. Blanchard based on a charge of insubordination. Mr. Blanchard responded, and we agree, that the July 2, 2010 e-mail from his supervisor was specifically addressed to communications from Mr. Blanchard to his supervisor in response to requests for status reports on named projects. The supervisor directed Mr. Blanchard not to give his personal opinions, especially those that were critical of the person to whom the supervisor had to forward the status report, because she did not have time to act as a "filter." Therefore, a charge of insubordination based on a personal opinion being expressed in the response to the senator's letter could not be considered a failure to follow that directive.

The Civil Service referee found that Mr. Blanchard was guilty of rude and unprofessional conduct in his e-mail to the senator and this was legal cause for discipline against him, with which we agree. However, the referee also found that the discipline, termination, was commensurate with the offense, with which we do not agree.

Although we find that Mr. Blanchard's reply to the senator showed extraordinarily poor judgment and agree that it was rude and unprofessional, after careful review of the record and other disciplinary actions taken by the Commission, we conclude that the termination constituted excessive discipline, not commensurate with the offense, and that the referee's decision to uphold the action taken was an abuse of discretion. Accordingly, we reverse the Commission's decision insofar as it upholds DHH's termination of Mr. Blanchard, and remand this matter to the Commission for imposition of appropriate

discipline, short of termination. We further order Mr. Blanchard to be reinstated to employment, subject to the imposition of the modified discipline to be imposed.

DECREE

The decision of the Louisiana Civil Service Commission, denying the appeal of the appellant, David Blanchard, is affirmed in part as to the finding of legal cause for discipline, but reversed in part as to the finding that the penalty of termination was commensurate with the offense. It is ordered that the appellant be reinstated to his employment with the Department of Health and Hospitals, and that this matter be remanded to the Commission to determine the appropriate discipline to be imposed, if any. Costs of this appeal are assessed to the appellant, David Blanchard.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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DAVID BLANCHARD

VERSUS

DEPARTMENT OF HEALTH AND HOSPITALS

HUGHES, J., Concurring.

I respectfully concur. I conclude that Mr. Blanchard's actions, at issue in this case, did not warrant discipline.

Based on the record presented on appeal, there was no evidence that Mr. Blanchard failed to comply with and/or violated a DHH policy, which was in place *prior* to the actions of Mr. Blanchard at issue herein. At most, the evidence showed that, in July of 2010, Mr. Blanchard was instructed by his supervisor, Erin Rabalais, via a July 2, 2010 email communication, to discontinue including his unsolicited opinions about the "short-sighted actions' of the department's upper management" in emails submitted to her in response to her requests for "a facility's plan review status." In contrast, the written communication for which Mr. Blanchard was terminated from his employment was not directed to Ms. Rabalais, but rather, was included in a response to a request for information from a Louisiana senator.

On October 19, 2010 Mr. Blanchard received correspondence from the senator, directed to him personally, which asked him to check on a particular project under review in Mr. Blanchard's department and to inform the senator

whether the project's review could be expedited. Mr. Blanchard replied via an email on October 22, 2010. In that reply, Mr. Blanchard stated that he did not have the authority to "displace clients who have patiently waited their turn in favor of other, more politically connected one." Mr. Blanchard further commented on the "irony of one branch of government at odds with another in seeking favor for his project" and also the "irony" he witnessed in observing the senator "in lock step" with his constituent, who had requested the expedited review of the project, despite the senator having "presid[ed] over a legislative session that eliminated the department [Mr. Blanchard] formerly worked for." Further, Mr. Blanchard noted that the senator was "sit[ting] silently" as the constituent alleged a "lack of coordinated efforts by '...branches of government.'" Mr. Blanchard requested that the senator use his "senatorial experience" to explain to his constituent "that apparent contradiction." Nevertheless, Mr. Blanchard also advised the senator that the scheduled plan review for the project at issue appeared to be "compatible" with the "overall time schedule described in [the senator's] letter," and he asked the senator to advise his constituent that he was not attempting to "forestall his efforts" in forwarding the project.

After reviewing this communication, I would conclude that Mr. Blanchard was attempting to express his views to the senator as to the working of his department vis-à-vis legislative actions and encouraging the senator to take a more active roll in helping his constituents understand the demands and challenges faced by state workers. Moreover, I would find that Mr. Blanchard was expressing the viewpoint that all persons subject to the overview of his department should be treated equally and that political influence should not be used to bypass the established order of review within the department. Such views are in accord with LSA-R.S. 42:1101(B) of the Code of Governmental Ethics, which provides:

It is essential to the proper operation of democratic government that elected officials and public employees be independent and impartial; that governmental decisions and policy be made in the proper channel of the governmental structure; that public office and employment not be used for private gain other than the remuneration provided by law; and that there be public confidence in the integrity of government. The attainment of one or more of these ends is impaired when a conflict exists between the private interests of an elected official or a public employee and his duties as such. The public interest, therefore, requires that the law protect against such conflicts of interest and that it establish appropriate ethical standards with respect to the conduct of elected officials and public employees without creating unnecessary barriers to public service. It is the purpose of this Chapter to implement these policies and objectives.

DHH introduced no evidence that such communications had been prohibited, at the time of Mr. Blanchard's October 22, 2010 email to the senator, between one of its employees and a state senator. Interestingly, a *subsequent* policy statement was issued by Ms. Rabalais and disseminated to Mr. Blanchard. That policy, dated November 5, 2010, stated:

You are hereby directed that you shall not have any communications, either by email or regular mail or oral communications, to any State Senator, State Representative, or any elected governmental official or a member of their staff concerning the Department of Health and Hospitals [sic] matters. If you are contacted by a State Senator, State Representative, an elected official or a member of their staff, you shall immediately inform your supervisor and your supervisor shall communicate with such official.

You are hereby directed that you shall not communicate with the Executive Management Team of the Department of Health and Hospitals without prior written approval of your supervisor.

You are hereby directed that you shall cc Erin Rabalais, on any email correspondence that you send to someone outside the Department of Health and Hospitals the subject of which is the business of the Department of Health and Hospitals.

You are hereby directed that you are to submit to Erin Rabalais any written regular mail correspondence you send to anyone outside the Department of Health and Hospitals for approval prior to mailing.

Failure to comply with these directives may result in disciplinary action up to and including termination of employment.

Thereafter, Mr. Blanchard was sent notice three days later, on November 8, 2010, informing him that DHH intended to terminate his employment, and he was in fact terminated by a following letter dated November 17, 2010.

Putting aside the fact that there is no indication in the record that the November 5, 2010 policy implemented by Ms. Rabalais applied to any DHH employee other than Mr. Blanchard, I would find it patently unfair for Mr. Blanchard to be disciplined for actions taken *prior* to the promulgation of a rule prohibiting such behavior.