

NOT DESIGNATED FOR PUBLICATION

**COURT OF APPEAL
STATE OF LOUISIANA
FIRST CIRCUIT**

2008 CA 2142

DEREK M. LANDRY

VERSUS

**DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,
OFFICE OF STATE POLICE**

Judgment rendered: MAY - 8 2009

**State Police Commission
East Baton Rouge Parish
Docket No. 07-169-T**

**Brooke Duncan, III, Chairman;
Marshall Stevenson, Vice-Chairman; Bridgett Brown;
Joseph S. Cage, Jr.; & Robert M. Mills;
and Stephen H. Myers, Members**

**Floyd J. Falcon, Jr.
Baton Rouge, LA**

**Counsel for Appellant
Derek M. Landry**

**L. Clayton Burgess
Lafayette, LA**

**Michael C. Barron
Baton Rouge, LA**

**Counsel for Appellee
Dept. of Public Safety and
Corrections, Office of State Police**

**William A. Norfolk
Baton Rouge, LA**

**State Police Appellee Referee
State Police Commission**

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

Handwritten signatures and initials on the left side of the page, including what appears to be 'TSP', 'BPK', and 'WASH'.

DOWNING, J.

This appeal, filed by plaintiff/appellant Derek Landry, arises out of his termination as a trooper with the state police. The Louisiana State Police Commission (Commission) upheld the termination. For the following reasons, we affirm the Commission's decision.

PERTINENT FACTS AND PROCEDURAL BACKGROUND

Mr. Landry was a trooper with the Department of Public Safety and Corrections, Office of State Police. He was given written notice of his employment termination pursuant to Commission Rules 12.1 and 12.2, in a letter dated July 16, 2007. The letter explained that he was being terminated because of a collection of events spanning over five years.¹

-
- (1) ¹ The letter stated the following:

On October 14, 2006, while on duty, you arrested Ms. Kristie N. Briscoe for driving while intoxicated. She submitted to the Intoxilyzer 5000 breath test for blood alcohol content and registered a very high reading of .303g%. You released Ms. Briscoe to a Mr. Kevin Cross rather than transporting her to the nearest medical facility, as required by Louisiana State Police policy and procedure. Specifically, your actions violated the following policy and procedural orders ...

- (2) On October 23, 2006, you were assigned to assist with a serious injury crash which occurred on LA 97 in Acadia Parish. Tpr. Leon Defelice was the investigating trooper. Because of the reported serious injuries, Lt. James D. Fail went to the crash scene. Lt. Fail instructed you to proceed to American Legion Hospital in Jennings, Louisiana to get an assessment of injury and have biological specimens drawn on the driver transported to that hospital. The driver at said hospital was identified as Thomas Browning.

In your written incident report of November 10, 2006, you admitted that you knowingly used a post-mortem kit on a live subject (Mr. Browning) because you "...seen no reason to waste the evidence kit." You noted that Mr. Browning (the driver of the vehicle number 2) complained about the discomfort of having been stuck with a needle in an attempt to draw blood which lasted over one hour.

Upon returning to the scene of the crash you tendered the post-mortem kit with an open and unsealed blood specimen kit to Tpr. Defelice in the presence of Tfc. Stacy Prados. Tfc. Prados asked you if you had completed the Voluntary Submission to a Chemical Test form (DPSSP 4617) relative to Mr. Browning. You told Tfc. Prados that you had not completed the form; neither did you produce the Rights Relating to Chemical Test form (DPSSP 6621).

On October 24, 2006, Lt. Fail met with you concerning the improper use of post-mortem blood kit and the failure to advise the driver of his rights relating to a chemical test. You told Lt. Fail that since you had no other BAC kits in your unit, you thought it would be okay to use the post-mortem kit since the driver was not "in the wrong." You stated that you did not think it necessary to read the Rights Relating to a Chemical Test form to Mr. Browning since the driver was not suspected of being impaired or in the wrong in the traffic crash.

The statement to Lt. Fail on October 24, 2006, that you did not think it necessary to read the Rights Relating to a Chemical Test form to Mr. Browning, since the driver was not suspected of being impaired or in the wrong in the traffic crash, contradicts your written statement of November 10, 2006, wherein you stated "I explained to Tfc. Prados (sic Prados) I got side track (sic) and did not get a signature on the rights form."

Also, your statement to Lt. Fail, since you had no other BAC kits in your unit, you thought it would be okay to use the post-mortem kit since the driver was not "in the wrong", conflicts with your written statement wherein you state that you used a post-mortem kit on a live subject (Mr. Browning) because you "...seen no reason to waste the evidence kit."

-
- (3) On October 24, 2006, you initiated a traffic stop on the driver of a blue GMC Yukon on I-10 east bound near the Duson/Mire exit. You exited your unit and met with the driver, later identified as Kevin Mudd. You failed to activate the microphone on your mobile video recorder (MVR) system for the first four minutes of the stop, in violation of State Police policy. Four minutes into the stop you reached into your belt and activated the microphone. The video tape is available for your review at Internal Affairs.

The driver, Kevin Mudd, had no identification on him and gave his brother's name (Damien Mudd) to you. You learned from the passenger that the true identity of the driver was Kevin Mudd and that he was driving under revocation. However, you took no immediate action on the traffic violations; neither did you take the driver into custody for providing false information. Instead, you advised him of your suspicion that narcotics were involved and requested a consent to search. The driver agreed to the search. Only at this time did you request assistance. You called Troop I and advised you were "Code 4" (everything is okay but send assistance) and requested Duson P.D. to meet you. You did not inform the Troop of the status of your stop or request assistance from the troopers, who could have assisted in the matter of 5-10 minutes.

Kevin Mudd and his passenger became visibly nervous knowing that you intended to search and that assistance was probably on the way. You appeared relaxed and not on guard. The passenger, a man of approximately six feet five inches and three hundred-fifty (350) pounds came close to you and positioned himself between you and the driver, Kevin Mudd. Using the passenger as interference, the driver ran to his vehicle and drove off. As you gave foot chase, the passenger, now unsupervised and unsecured, twice reached into his pants and discarded contraband. After reviewing the tape, Sgt. Lanny Bergeron returned to the scene on October 25, 2006, and located a bag of marijuana and rolling papers.

At this point, apparently oblivious to the fact that the passenger had thrown contraband into the weeds, you handcuffed and secured the passenger. You attempted to place him in your unit, but could not because of his size.

You then notified Troop I of your situation that you were "Code 4" and you had a "10-15" (subject in custody) who is "just in custody for now."

At this time a Duson Police officer by the name of Gerald Credeur arrived on the scene. He observed the passenger sitting on the ground cuffed and asked you what happened? You did not answer. According to Officer Credeur you started saying "F_____, f _____ ..." On the tape at 21:33:57, having been told that the Duson Police Office had just gotten the call, you responded irately with: "Some f_____ing, useless motherf_____s if ever I did see." You told Officer Credeur that he could get "10-8" (back on the road). After helping you get the suspect into your vehicle Officer Credeur left the scene and wrote a voluntary statement attached as Exhibit 4.

Acadia Parish Sheriff's Deputy Ricky Monceaux then arrived at the scene to offer assistance. In his offense report of December 11, 2006, he indicated that in the past you had never been polite to him. On the date in question he walked up to your unit, in which you were seated with the window down. He asked what was going on. You ignored him and made a face as if to indicate that he should not have asked. You then exited your unit and walked past Deputy Monceaux without saying a word. You removed the handcuffs from your 350 pound suspect and returned to your unit, passing the Deputy again without saying a word. Deputy Monceaux then told you that he had a van coming for the suspect. You responded "cancel it, I don't need it." Deputy Monceaux then cancelled the order for the van and left the scene. The Deputy asserts in the attached report (Exhibit 5) that you were unprofessional and treated him with disrespect. This was particularly wrong since he was there solely to assist you.

- (4) On May 11, 2007, you met with Sgt. Paul Vankerkhove at Troop I and received the pre-termination (Laudermill) letter dated May 7, 2007, ... At this time you turned in some Louisiana State Police equipment including a portable radio, magazines and uniforms. You did not turn in your commission card, wallet badge or wallet.

Louisiana State Police Internal Affairs opened an investigation of the circumstances surrounding your lost commission card and wallet. On May 17, 2007, when questioned about the LSP commission card, you stated that while at the Troop you told Sgt. Vankerkhove that you had left the commission card out by the pond at your residence. You said it was very dark in your backyard and that was the reason you did not retrieve it before going to the Troop on May 11, 2007. You also said that you told Sgt. Vankerkhove that you would retrieve the wallet the following morning and would bring your LSP commission card and some paperwork to the Troop the following week. You denied that the commission card was ever lost and surrendered the commission card, wallet badge and wallet to TFC, Kevin Ducote on May 17, 2007...

You apparently did not realize that the telephone conversation on May 11, 2007, between you and Sgt. Vankerkhove was recorded. It is clear that you did not tell Sgt. Vankerkhove anything other than that you lost your wallet fishing. ... Had you told Sgt. Vankerkhove that you would bring in the commission card in the future, there would have been no need for the telephone conversation, which was placed by Sgt. Vankerkhove to determine the status of the commission card, wallet and badges. Your untruthful statements of May 17, 2007, to troopers Adrian Brown and Kevin Ducote and your untruthful telephonic statement to Sgt. Vankerkhove on May 11, 2007, violate the following policy. ...

Mr. Landry appealed the termination on August 9, 2007. The Commission heard the appeal pursuant to Rule 13.11, on December 20, 2007 and February 12, 2008. On June 16, 2008, the Commission, with one member dissenting, rendered its opinion and upheld the termination.

In Mr. Landry's appeal to this court he asserts twelve assignments of error. In assignment of error 1, he alleges that the Commission's transcript is not complete, thereby depriving him of his right to appeal. In assignments of error 2, 3, 4, 5, and 6, Mr. Landry challenges various incidents of his alleged failure to follow police procedure, which he claims do not rise to the level meriting termination. In assignments of error 7, 8, 9, 10, and 11, he alleges that his due process rights were violated because of the Commission's invocation of Rule 13.11, wherein he claims: (1) he was forced to testify first and the entire Commission did not hear his testimony; (2) his due process rights were violated by the Commission's manner of utilizing Rule 13.11; (3) he was not allowed to cross-examine witnesses; (4) he was denied his right to have the Office of State Police bear the burden of proof; and (5) the expedited hearing made a mockery of the judicial process. The final assignment of error requests reversal of his termination and attorney fees.

DISCUSSION

-
- (5) ... On January 08, 2003, through January 14, 2003, you were suspended for thirty-six (36) hours for improperly issuing a green "temporary vehicle use authorization" sticker to your nephew for use on a 1988 Chevrolet Caprice station wagon operated by your nephew after a plate had been seized and your nephew and your nephew, Brian Mouton, cited for Failure to Register Plate, by Corporal Michael Brown of Lafayette Police. This wrongful conduct subjected the citizens of Louisiana to property risk by wrongfully authorizing operation of an uninsured and unregistered motor vehicle. ...
- (6) Again on June 12, 2003, you began a seventy-two (72) hour suspension which ended on June 23, 2003, (date incorrect) for disobeying a direct order of Sgt. Paul Brady in regard to a speeding ticket and obtaining the phone number of a female violator for personal reasons during a traffic stop. In the suspension letter of May 28, 2003, you were notified that "any future violations of this or any nature may result in more severe disciplinary action, including and up to termination." ...
- (7) On August 24, 2006, you were cautioned by Lt. Fail relative to traffic stops on July 31, 2006, through August 1, 2006. (CF attached Exhibit 9). Therein you were cautioned about positioning yourself in a compromising position while on traffic stops. On one stop you had allowed two subjects out of their vehicle while allowing a passenger to return to the vehicle without supervision and allowed the passenger to walk behind you more than once.

The first issue to be resolved is whether Mr. Landry has been deprived of his appellate rights because the proceedings transcription is not complete, since some of the spoken words were unclear and could not be typed. Mr. Landry cites Art. I § 19 of the Louisiana State Constitution which provides that no person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. He cites numerous instances where the testimony was not recorded and thus could not be transcribed. He also cites instances where ellipses were used to denote missing testimony. Citing a criminal case, **State v. Cheatteam**, 07-272 (La.App. 5 Cir. 5/27/08), 986 So.2d 738, 746, Mr. Landry claims that the transcript in this matter contains material omissions which prejudice his appeal because he cannot support his arguments with this incomplete record. He however, does not point to any specific omission that would make a difference.

At least in civil cases an appellate court can remand an action for proper consideration when the record is so incomplete that the court is unable to pronounce definitely on presented issues or where parties have failed, for whatever reason, to produce available evidence material to a proper decision. **Whetstone v. Dixon**, 92-0123, (La.App. 1 Cir. 3/5/93), 616 So.2d 764, 774.

While we agree that some particulars of the transcribed testimony are unclear, the meaning and context are quite clear. Furthermore, many of the cited incidences were fully documented on video or compact disc and introduced as exhibits. Moreover, Mr. Landry has not pointed to any specific testimony that may have made a difference in the outcome. After a thorough review of the record, we conclude that there is sufficient evidence in the record for this court to pronounce definitively on whether the Commission erred in the termination of Mr. Landry. Accordingly, the first assignment of error is without merit.

In assignments of error 7, 8, 9, 10, and 11, Mr. Landry alleges that his due process rights were violated because of the Commission's invocation of Rule 13.11.² He claims that the procedure of calling him as a witness first, prior to the State proving its case violated his due process rights.

In this regard this Court has previously considered a civil service rule almost identical to the rule at issue. In **Guillory v. State Department of Institutions, Louisiana State Penitentiary**, 219 So.2d 282, 286 (La.App. 1 Cir. 1969), this Court decided a determination of whether the rule was constitutional is essentially a conclusion of law rather than a finding of fact and therefore reviewable by the court in each instance. Because of this opportunity of judicial oversight, the Court found that the rule was not unconstitutional *per se*.

Under the due process clause, the state may determine the process by which legal rights are asserted and enforced so long as a party receives due notice and an opportunity to be heard. U.S.C.A. Const. Amend. XIV. Louisiana courts have considered the almost identical language to the State Police Commission Rule 13.11(d), in the Civil Service Commission Rules. In **Gainer v. Dept. of Health and Hospitals**, 610 So.2d 936, 938-939 (La.App. 1 Cir. 1992), this court held that the Commission has much discretion in the conduct of its hearings, and summary dispositions are provided for in certain instances. The courts will interpret statutes in light of their true intent and so as to avoid absurd results. **Id.** So long as the

² STATE POLICE COMMISSION RULES CHAPTER 13; APPEALS AND HEARINGS
13.11 PROCEDURE FOR HEARING APPEALS.

(d) Where appropriate and not inconsistent with these Rules, the rules of evidence applicable to civil trials in the district courts of the State shall be observed in all hearings before a referee or the Commission. The Commission or the referee may require the appellant to give his sworn testimony before hearing any other evidence and, if at the conclusion of the appellant's testimony, the Commission finds that the appeal is not supported by any just or legal ground, the Commission may decline to hear or consider any other evidence and thereafter take appropriate action with regard to the final disposition of such appeal.

(f) If after hearing appellant's testimony the Commission or the referee is of the opinion that he may have just or legal grounds for his appeal, it or he shall permit him to adduce such other evidence, testimonial or otherwise, as may be relevant.

Civil Service rules are reasonable, and not in violation of basic constitutional rights, they must be enforced by the courts. **Id.**

State Police Commission rule 13.11(d) allows the commission to require the appellant to give his sworn testimony before hearing any other evidence and, if at the conclusion of the appellant's testimony, the Commission finds that the appeal is not supported by any just or legal ground, the Commission may decline to hear or consider any other evidence. In this case the Commission required Mr. Landry to testify about the facts of his case. At the end of his testimony, it heard from two State Police witnesses. The Commission then decided that Mr. Landry could not overcome the evidence and exhibits introduced supporting his termination.

It is well settled that the Commission has the authority to promulgate rules, but no procedural rule may deprive an employee of the opportunity to present his defense in full. *See Guillory*, 219 So.2d at 286. This summary disposition permits the Commission to render judgment on an appeal after taking only the appellant's testimony and to decline to permit introduction of further evidence. **Id.** This rule permits the Commission, in a proper case, to stop the admission of redundant, cumulative testimony of little or doubtful relevancy. That the authority to adopt such rule is vested in the Commission cannot be denied. **Id.** Obviously, such a rule making authority may not be exercised arbitrarily or in any manner resulting in limitation or deprivation of the right of an employee to discharge the burden incumbent upon him of establishing an alleged illegal discharge. **Id.** Such an issue, however, must be resolved in the light of the facts particular to each individual case. **Id.**

Accordingly, we conclude there was no *per se* violation of due process.

Mr. Landry also claims that not all of the members were present during the two days of hearings, and therefore, the entire Commission did not "hear" his entire testimony. Although not specifically articulated, Mr. Landry seems to be

arguing that somehow his due process right to be heard was violated because all of the members were not present when he testified.

A similar issue regarding whether the Commission must hear the evidence together was fully discussed by the Louisiana Supreme Court in **Lott v. Dept. of Public Safety and Corrections, Office of La. State Police**, 98-1920, p. 5 (La. 5/18/99), 734 So.2d 617, 620. In **Lott**, the Court proclaimed that the presence of a quorum of the commission at appeal hearings was not required to satisfy the appellant's due process. **Id.** Louisiana may determine the process by which legal rights are asserted and enforced so long as a party receives due notice and an opportunity to be heard. **Id.**, 98-1920, p. 7, at 621. Due process does not require that a decider of fact in an administrative hearing actually hear the witnesses to assess their credibility. **Lott**, 98-1920, p. 6, 734 So.2d at 621. *Also see* **Hamilton v. Louisiana Health & Human Resources Admin.**, 341 So.2d 1190, 1193-1194 (La.App. 1 Cir. 1976).

We note that one Commissioner dissented because she felt that Mr. Landry was denied due process. Another concurred with the findings, but felt that each appellant should be entitled to the examination of witnesses and evidence at a public hearing. While we are also reluctant to advocate summary dispositions when it concerns an appeal of a terminated employee, we are constrained by the law that allows this disposition in administrative matters. Therefore since a quorum of the Commissioners attested that they heard Mr. Landry's testimony either live or by tape recording, we must conclude that this portion of the assignment of error is without merit. Under **Lott**, the Louisiana Supreme Court held procedural due process as applied in the field of administrative law is more flexible than its application in a judicial tribunal. **Lott**, 98-1920, p. 6, 734 So.2d at 621. Further, it stated that no one has a vested right in any given mode of procedure. **Id.** 98-1920, p. 6, 734 so.2d at 621.

In Mr. Landry's assignments of error 2, 3, 4, 5, 6, and 12, he claims that the listed offenses do not rise to the level that would merit dismissal.

The Commission's authority "to hear and decide" disciplinary cases includes a duty to independently decide from the facts presented whether the appointing authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction (cause). **Dept. of Public Safety and Corrections, Office of State Police v. Mensman**, 94-1073 (La.App. 1 Cir. 6/30/95), 671 So.2d 360, 363; *af'd*, 95-1950 (La. 4/8/96), 671 So.2d 319, 321. In reviewing the Commission's findings of facts, a court should not reverse or modify such a finding unless it is clearly wrong or manifestly erroneous. **Id.**, 94-1073, p. 6, 671 So.2d at 363. Moreover, in judging the Commission's exercise of its discretion in determining whether the disciplinary action is based on legal cause and the punishment is commensurate with the infraction, the reviewing court should not modify the Commission's order unless it is arbitrary, capricious or an abuse of discretion. **Id.**

The Commission specifically found that Mr. Landry failed to take a person who had a blood alcohol content of .303g% to the hospital because he was not familiar with the procedure mandating him to do so.

The Commission specifically found that Mr. Landry drew blood from a living person by using a kit designed to be used on a dead person. His excuse for using the post-mortem kit was that he saw no reason to waste the kit once he opened it. He also failed to seal the blood sample which rendered it useless.

The Commission specifically found that Mr. Landry failed to get the driver's signature on the "green rights form" when handling a crash in Acadia Parish.

The Commission found that Mr. Landry's handling of a traffic stop was replete with procedural and safety violations including allowing the driver with no identification, who was suspected of having drugs, to escape in the vehicle.

The Commission found that Mr. Landry used profanity during a stop and in the presence of other officers. He also failed to turn in his wallet and badges and gave a false statement as why he could not do so.

Mr. Landry has previously been given the benefit of doubt as evidenced in our unpublished opinion, **Landry v. Dept. of Public Safety and Corrections, Office of State Police**, 07-0559 (La.App. 1 Cir. 11/2/07), (unpublished) 966 So.2d 1249 (table). In that case the Commission decided, and we agreed, that deficiencies in an arrest report were due to confusion rather than deliberate falsification. Here, however, after reviewing the record in its entirety, it is apparent that Mr. Landry was given many chances for redemption, but he continued to disobey the rules and regulations. Collectively, the listed infractions clearly show no error committed in the decision by the State Police to terminate Mr. Landry, or in the Commission's decision to uphold the termination. One of the primary missions of the State Police is law enforcement. Since the public puts its trust in the police as a guardian of its safety, it is essential the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust. **Berry v. Dept. of Public Safety and Corrections**, 01-2186, p. 13 (La.App. 1 Cir. 9/27/02), 835 So.2d 606, 615. Accordingly, we find no error in the Commission's decision. These assignments of error are without merit.

DECREE

For the above reasons, the decision of the State Police Commission upholding the termination of Derek M. Landry by the Department of Public Safety and Corrections, Office of State Police is affirmed. The costs of this appeal are assessed to appellant, Derek M. Landry.

AFFIRMED