

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 1511

DYLAN BERTRAND

VERSUS

DEPARTMENT OF WILDLIFE & FISHERIES

Judgment rendered March 26, 2008.

Appealed from the
Civil Service Commission
in and for the State of Louisiana
Docket No. S-15847
Honorable James A. Smith, Chairman

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ATTORNEY FOR
ANNE S. SOILEAU, DIRECTOR,
DEPARTMENT OF STATE CIVIL
SERVICE

BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.



PETTIGREW, J.

In this case, plaintiff, Dylan Bertrand, appealed to the Civil Service Commission for the State of Louisiana ("Commission") challenging the decision by his employer, the Louisiana Department of Wildlife and Fisheries ("LDWF"), to terminate his employment as a LDWF Enforcement Senior Officer following an incident wherein Mr. Bertrand allegedly provided false information to his supervisor in a report and failed to cooperate with an internal investigation regarding same. After considering the pleadings in the record and the applicable law, Commission Referee Roxie F. Goynes issued a decision on December 29, 2006, upholding Mr. Bertrand's termination and noting that LDWF had proven "cause for discipline and that the penalty imposed, termination, [was] commensurate with [Mr. Bertrand's] offense." Thereafter, Mr. Bertrand applied to the Commission for a review of the referee's decision, which application was denied. The instant appeal by Mr. Bertrand followed.

In civil service actions, the final decision of the Commission is subject to review on any question of law or fact. La. Const. art. X, §12(A). As in other civil matters, deference will be given to the factual conclusions of the Commission. Thus, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review. **Bannister v. Department of Streets**, 95-0404, p. 8 (La. 1/16/96), 666 So.2d 641, 647. The present record, measured by that standard, discloses no error by the Commission. Therefore, and for the reasons assigned by the Commission, which we adopt as our own and attach hereto as "Exhibit A," the judgment of the Commission is affirmed in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.2A(2), (4), (5), (6), and (8). All costs associated with this appeal are assessed against Mr. Bertrand.

AFFIRMED.

Decision

Filed: December 29, 2006

State of Louisiana

Civil Service Commission

Docket No. S-15847

Dylan Bertrand

Versus

Louisiana Department of Wildlife and Fisheries

Rule: 12.2

Topic(s): Termination; failure to cooperate with an internal investigation & admission
against interest

Appearances: Christopher Zaunbrecher, representing Mr. Bertrand

Michael Landrum, representing LDWF

Statement of the Appeal

The Louisiana Department of Wildlife and Fisheries (LDWF) employed Dylan Bertrand as a Wildlife Enforcement Senior Officer. A letter dated November 21, 2005 notified Mr. Bertrand that he was being terminated effective November 29, 2005. LDWF alleges that Mr. Bertrand admitted to providing false information to his supervisor in his report and failing to cooperate with an internal investigation.

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On December 22, 2005, Mr. Bertrand filed an appeal in which he denies the allegations. Mr. Bertrand contends that he is being discriminated against due to his political beliefs, and that he is being retaliated against for reporting violations of another officer. He also contends that he is being discriminated or retaliated against because he asserted his due process rights during a pre-separation meeting, and that he was adversely affected because the appointing authority refused a pre-removal meeting with him. He further contends that he was deprived of due process because the secretary delegated responsibility to a non-member of the state service and that he is deprived of his due process rights because the secretary delegated responsibility to hear and consider pre-removal information to a person who previously recommended Mr. Bertrand to be discharged. Finally, Mr. Bertrand denies that he failed to cooperate with the investigation or that he flagrantly disregarded directives of his supervisors. As relief, Mr. Bertrand asked for reinstatement, lost wages, interest, emoluments, and attorney's fees.

I held a public hearing on March 29, 2006, in Lafayette, Louisiana and on May 25, 2006, in Baton Rouge, Louisiana. Based upon the evidence presented and pursuant to the provisions of Article X, Section 12(A) of the Louisiana Constitution of 1974, as amended, I make the following findings.

Preliminary Matters

Mr. Bertrand, through counsel, filed a Motion for Summary Disposition alleging that the charges in the letter of discipline were not specific, and that the agency did not have good grounds for the termination. Mr. Bertrand also contends that he did not refuse to cooperate with an internal investigation but that his due process rights had attached and he was entitled to notice of the charges against him, to respond or not, and to counsel. I held a hearing on the preliminary issues on March 29, 2006. I found the letter of discipline meet the specificity requirements of Civil Service Rule 12.8(a)2. The issue regarding whether or not the agency had good grounds for termination and whether Mr. Bertrand's due process rights were violated were referred to the merits.

Findings of Fact

1. Dylan Bertrand was employed by LDWF as a Wildlife Enforcement Senior Officer, with permanent status.
2. LDWF conducts internal investigations by committee. The committee normally consists of Mr. Falcon, attorney for LDWF, Ms. Goins, Human Resource Director, and supervisors from an employee's chain of command. Mr. Falcon is authorized to conduct the investigations and offer and accept resignations. If there is a possibility that termination will be recommended Mr. Falcon explains their options to the employee. The committee makes a recommendation to the Secretary. The Secretary makes the decision whether to discipline, or issue the pre-deprivation letter. The Secretary also reviews any response and makes the ultimate determination as to the appropriate penalty. The Secretary listens to and considers the advice and recommendations of his attorney.
3. On September 27, 2005, LDWF conducted an Internal Investigation regarding damage to a vessel and the report regarding this damage by Mr. Bertrand. A meeting was conducted in Baton Rouge, Louisiana. Present were: Mark Falcon, Attorney for LDWF, Captain Lastie Cormier, Lt. Darrell Moore, Major Irvin H. "Sandy" Dares, III, and June Gillis, Human Resources Manager 3, on behalf of Joan Goins, Human Resource Director. The purpose of this meeting was for LDWF to gather facts regarding damage to a vessel, and for Mr. Bertrand to answer questions and explain the discrepancies in his report.
4. At the outset of this meeting Mr. Falcon identified everyone present, explained that they were conducting an internal investigation regarding the damage to the vessel, the report regarding this incident, and that the meeting would be recorded. As he was giving this explanation, Mr. Falcon laid all the reports on the table in front of Mr. Bertrand. After his explanation, Mr. Bertrand commented, "What I wrote in my report wasn't true." This statement was witnessed by all present.

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5. Upon hearing this Mr. Falcon asked Mr. Bertrand to walk outside. Mr. Falcon explained that based on Mr. Bertrand's statement that he had written a false report, and with Mr. Bertrand's prior reprimand, he was concerned that if they went forward there was a good likelihood that termination would be recommended to the Secretary. Mr. Falcon explained to Mr. Bertrand how resignations worked and that if he resigned prior to a recommendation of termination his resignation would not have to be coded as a "resignation to avoid" under CSR 12.11 and the negative consequences would not attach.
6. Mr. Bertrand asked to make a couple of telephone calls. This was allowed.
7. Mr. Falcon and Mr. Bertrand went back into the conference room to commence the investigation. Mr. Falcon turned on the tape recorder and Mr. Bertrand stated, "I am not answering anything." Mr. Falcon again explained the purpose of this meeting, the fact that it was an internal investigation and Mr. Bertrand was required to participate. Mr. Bertrand refused to answer any questions at that time. Major Sandy Dares ordered Mr. Bertrand to cooperate, participate in the investigation, and to be truthful. Major Dares also explained that if he refused it could put his job in jeopardy. Mr. Bertrand's response was "Cool." Mr. Bertrand continued to refuse to answer questions.
8. After some further discussion and clarification Mr. Bertrand asked to go off the record and for Mr. Falcon to step outside. This was done.
9. While outside Secretary Landreneau walked up and spoke to Mr. Falcon. When Mr. Falcon introduced Mr. Bertrand to Secretary Landreneau, Mr. Bertrand told him "I lied in my statement/reports and discussions with rank." Or "I lied to my supervisor, falsified a document and sent that document in." This was the first time Secretary Landreneau had met Mr. Bertrand. Secretary Landreneau was taken aback and surprised by his statement.
10. Secretary Landreneau told Mr. Bertrand that this was "very serious" and to listen to Mr. Falcon's advice and consider his options. Mr. Bertrand made additional phone calls while outside the conference room.

11. Mr. Bertrand and Mr. Falcon returned to the conference room to resume the investigation. Mr. Bertrand's first comment when back on the record was, "I was given legal advice not to say anything else." Mr. Bertrand had not spoken to a lawyer, but rather his grandfather (who is not a lawyer), who advised him not to say anything else.
12. Upon further questioning, Mr. Bertrand indicated to Mr. Falcon that he had spoken with an attorney and that the attorney had advised him not to speak with the committee until he was present.
13. Mr. Falcon reminded Mr. Bertrand that this was an internal investigation and that he had been ordered by his Major to participate in the investigation. Mr. Bertrand continued to refuse and this portion of the investigation was concluded.
14. Mr. Bertrand did not recant or change his statement during the course of this investigatory meeting.
15. The committee then discussed the situation and made a recommendation to Secretary Landreneau. This recommendation was that Mr. Bertrand be terminated due to his admission and his refusal to cooperate with the investigation.
16. On September 28, 2005, Secretary Landreneau sent Mr. Bertrand a pre-deprivation letter, which set forth the charges against him and gave him an opportunity to respond in writing to these charges.
17. Mr. Bertrand sent a letter of response to Secretary Landreneau on October 10, 2005. In his response Mr. Bertrand denies making a false statement in his report, and denies admitting that he made a false statement. Mr. Bertrand alleges he stated "I may have made a mistake." Mr. Bertrand admits in retrospect that refusing to answer questions at the meeting may have been a mistake in judgment, but considering the circumstance he thought his refusal was justified.

18. Mr. Bertrand, through his attorney of record, also sent Secretary Landreneau two other letters, dated October 10, 2005 and November 2, 2005. In these letters Mr. Bertrand requested a face-to-face meeting with the secretary.
19. Secretary Landreneau considered these responses. The fact that Mr. Bertrand had told him personally that he lied to his supervisor and submitted a false report. Based on this Secretary Landreneau determined that nothing beneficial would come out of a personal meeting, so the request was denied.
20. Colonel Winton Vidrine did not participate in the investigation or the pre-deprivation procedure regarding Mr. Bertrand.
21. Law Enforcement Officers must be truthful. LDWF has had officers whose veracity has been so questioned that the courts have refused to accept testimony from them.
22. DWF Code of Conduct states, in pertinent parts: "Agents shall conduct themselves at all times, both on duty and off duty, in such a manner as to reflect favorably on the Department." "Unbecoming conduct is that conduct which: May reasonably be expected to destroy public respect for, or confidence in, the Department of Wildlife and Fisheries, or its employees." "No agent shall make any false statement or falsify any written report knowing such statement to be incorrect or misleading." "It shall be the duty of every agent to cooperate with any internal investigation."
23. Agent Jason Dreher received a suspension for falsifying his time sheet. Agent Dreher appeared in front of the committee, admitted his wrong doing, fully cooperated with the investigation, took responsibility for his actions, and had no prior disciplinary actions or reprimands. Based on this the committee recommended a suspension. Secretary Landreneau accepted this recommendation.

24. Mr. Bertrand reported to Captain Cormier that Sergeant James "Dusty" Rhodes went to a ballgame while on duty. Lt. Moore investigated this allegation. No disciplinary action was recommended.
25. By letter dated February 3, 2003, Sergeant Rhodes received a one-day suspension for insubordination. This disciplinary action was taken under the prior administration.
26. By letter dated November 3, 2003, Mr. Bertrand received a written reprimand for making false statements.

Conclusions of Law

The right of a classified state employee to appeal disciplinary actions is provided for in Article X, Section 8(A) of the *Louisiana Constitution*. That section provides that "[t]he burden of proof on appeal, as to the facts, shall be on the appointing authority." The appointing authority must prove its case by a preponderance of the evidence. A preponderance of evidence means evidence that is of greater weight or more convincing than that which is offered in opposition thereto. Proof is sufficient to constitute a preponderance when, taken as a whole, it shows the fact or causation sought to be proved as more probable than not." *Wopara v. State Employees' Group Benefits Program*, 2002-2641, (La. App. 1 Cir. 7/2/03), 859 So.2d 67.

Mr. Bertrand admitted to Mr. Falcon, Capt. Cormier, Lt. Moore, Major Dares, and Ms. Gillis that what he wrote in his report was not true. Then Mr. Bertrand admitted that he lied to his supervisor and falsified his report to Mr. Falcon and Secretary Landreneau. "A statement which is against a party's interest is considered reliable because a person rarely knowingly lies to his disadvantage..." *Department of Public Safety and Corrections, Office of State Police v. Piazza* 588 So.2d 1218 (La. App. 1st Cir. 1991), *rehearing denied*, January 3, 1992; *writ denied*, 594 So.2d 1305 (La. 3/20/92). Mr. Bertrand now denies these admissions and states that he actually said "I may have made a mistake." I have no reason to disbelieve Mr. Falcon, Captain Cormier, Major Dares, Lt. Moore, Ms. Gillis and Secretary Landreneau's testimony to the contrary.

State classified employees must obey the orders of their managers so long as those orders are not illegal or otherwise unreasonable, and failure to do so impairs the efficiency of the public service. *Bannister vs. Department of Streets*, 95-0404, Pg. 5 (La. 1/16/96) 666 So.2d 641, 645; *Wells vs. Department of Public Safety and Corrections*, 498 So.2d 266, 269 (La. App. 1st Cir. 1986); *Ferguson vs. Department of Health and Human Resources*, 451 So.2d 165, 168 (La. App. 1st Cir. 1984); *Hamilton vs. Louisiana Health and Human Resources Administration*, 341 So.2d 1190, 1196 (La. App. 1st Cir. 1976).

Mr. Falcon and Major Dares gave Mr. Bertrand several orders to cooperate with the internal investigation. Mr. Bertrand refused. Mr. Bertrand admits, in retrospect, that this may not have been a good decision, but that under the circumstance he felt it was justified, due to Mr. Falcon's explanation that there was a good chance termination would be recommended and that he could resign to avoid the negative consequences of a termination. Mr. Bertrand argues that, at this point, the investigation was complete and he was entitled to pre-deprivation notice. This is not the case. The investigation had not been completed, no recommendation had been made to the Secretary, and at this point Secretary Landreneau had not made a decision on how to proceed with this matter. The committee was in the middle of its investigation and Mr. Bertrand was still under an obligation to cooperate with the investigation. See *Lemoine v. Department of Police*, 301 So.2d 396 (La.App. 4th Cir. 1974). Mr. Bertrand also told the committee that he had spoken with an attorney and been advised not to say anything else until his attorney was present. It turns out this was not true. Mr. Bertrand later admitted that it was his grandfather, who is not an attorney, who advised him not to say anything else until he could hire an attorney. I find nothing in either of these defenses to justify Mr. Bertrand's refusal to cooperate with the internal investigation. Further, Mr. Bertrand misled the committee to believe he had spoken with an attorney when he had in fact had not. This puts his veracity in question.

Mr. Bertrand reported an alleged violation by Sgt. Rhodes. Lt. Moore investigated the allegation and determined that no violation had occurred. Mr. Bertrand contends that he was being retaliated against due to his reporting Sgt. Rhodes' violation; I find no evidence to support this contention. As to the contention that Mr. Bertrand was discriminated against due to his political

beliefs, I find no evidence to establish this. As to contention that Mr. Bertrand was treated differently than other officers under investigation, I find no evidence to support this contention.

As to the penalty, the Civil Service Commission and its Referees have a duty to decide "whether the punishment imposed is commensurate with the dereliction." *Guillory v. Department of Transp. & Devel. Etc.*, 475 So.2d 368, 370-371 (La. App. 1st Cir. 1985). Mr. Bertrand received a prior written reprimand, by letter dated November 3, 2003, regarding making false statements. The State Civil Service Commission has held that written reprimands can be used to support the severity of an action taken against an employee for the same or similar offense that was the subject matter of the previous counseling or reprimand. See: *Katherine Green-Ejieme v. LSUHMC-Medical Center @ N.O.*, Docket No. 12625, (1/7/98), *Appeal of Emma Williams*, CSC No. 4117, (8/24/84), and *Appeal of Patrick Dwyer*, CSC No. 4287, (6/25/84). Law Enforcement Officers must be truthful. Conduct, such as Mr. Bertrand's, jeopardizes an officer's veracity, which can affect their ability to testify and present cases in court, as well as, their ability to be trusted by the public and fellow officers. LDWF has had officers whose veracity has been so questioned that the courts have refused to accept testimony from them. LDWF's ability to trust Mr. Bertrand's veracity directly impacts the department's credibility and role, and Mr. Bertrand's ability to perform his job.

Based on the totality of these events, I find that LDWF has proved cause for discipline and that the penalty imposed, termination, is commensurate with the offense.

Roxie F. Goynes

Civil Service Commission Referee