

NOT DESIGNATED FOR PUBLICATION

**STATE OF LOUISIANA
COURT OF APPEAL**

FIRST CIRCUIT

2009 CA 2188 c/w 2009 CA 2189 c/w 2009 CA 2190

**EDWIN STEWART
VERSUS
LSU HEALTH SCIENCES CENTER
MEDICAL CENTER AT NEW ORLEANS**

c/w

**JEFFERY JENKINS
VERSUS
LSU HEALTH SCIENCES CENTER
MEDICAL CENTER AT NEW ORLEANS**

c/w

**ALFRED MILLER
VERSUS
LSU HEALTH SCIENCES CENTER
MEDICAL CENTER AT NEW ORLEANS**

Judgment Rendered: June 11, 2010

On Appeal from the Civil Service Commission
Numbers 16,578, 16,583, 16,587

Honorable James A. Smith, Chairman

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

This is an appeal from the decision of the Louisiana Civil Service Commission to uphold disciplinary action imposed upon a state employee. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Edwin Stewart, Jeffery K. Jenkins, and appellant, Alfred Miller, police officers with the Medical Center of Louisiana at New Orleans Police Department (MCLNO PD), were suspended from duty due to their failure to qualify with their department-issued firearms. They each filed an appeal to the State Civil Service Commission. The Civil Service Commission appointed Referee Paul St. Dizier to hold a hearing and take evidence on the matter.¹ The hearing was held on April 27, 2009. The facts and procedural history of this case are thoroughly detailed in the written reasons and conclusions of law assigned by Referee St. Dizier, as follows:

Louisiana State University Health Sciences Center (LSUHSC), Medical Center of Louisiana at New Orleans (MCLNO) employs Edwin Stewart, Jeffery K. Jenkins and Alfred Miller (hereinafter sometimes referred to collectively as "Appellants") as Police Officer 3s in the Medical Center of Louisiana at New Orleans Police Department (MCLNO PD) and they serve with permanent status.

By letters dated November 14, 2008, LSUHSC suspended Appellants for failing their annual Peace Officers Standards and Training (POST) firearms qualifications. LSUHSC suspended Mr. Stewart and Mr. Jenkins for 57.5 hours. Mr. Stewart's suspension was effective January 12, 2009, and Mr. Jenkins' suspension was effective January 26, 2009. LSUHSC suspended Mr. Miller for 55.5 hours effective January 18, 2009.

On February 2, 2009, Mr. Stewart appealed his suspension. He complains that LSUHSC failed to provide him with MCLNO PD policy regarding firearms qualification prior to his formal

¹ La. Const. art. 10, § 12(A) grants to the State Civil Service Commission the "exclusive power and authority to hear and decide all removal and disciplinary cases...." As an aid in the performance of its constitutional "power and authority," the Commission is authorized to appoint "a referee, with subpoena power and power to administer oaths, to take testimony, hear, and decide removal and disciplinary cases."

qualification attempts. As relief, Mr. Stewart requests reversal of the suspension, expungement, and back pay.

Mr. Jenkins appealed his suspension on February 6, 2009. His appeal is based upon his contention that LSUHSC failed to give him sufficient firearms training prior to his formal qualification attempts. As relief, Mr. Jenkins requests reversal of the suspension, expungement, and back pay.

On February 10, 2009, Mr. Miller filed an appeal of his suspension. In his appeal, Mr. Miller asserts that: 1) no written policy regarding firearms qualification existed at the time of his suspension, nor had he been given written notice of the firearms qualification policy prior to the formal qualification dates, 2) he failed one of his formal qualification attempts due to an eye infection, so LSUHSC should not have used that failed attempt against him, 3) LSUHSC did not take action against "other officers" who failed one formal qualification attempt and an unnamed officer who fired a gun into the air, 4) he has been harassed and intimidated by his supervisors, and 5) MCLNO PD Chief Kenneth C. Scott and other ranking members of MCLNO PD carry firearms illegally and without proper qualifications. As relief, Mr. Miller requests reversal of the suspension, expungement, cessation of the harassment, and multiple investigations of the MCLNO administration for violation of the Civil Service Rules and applicable laws.

On February 17, 2009, I consolidated the appeals for hearing in accordance with the provisions of Civil Service Rule 13.23. I also issued a notice to Mr. Miller questioning whether he had alleged sufficient specific facts supporting his claims of disparate treatment, except for his allegations regarding Chief Scott. I gave him fifteen (15) calendar days to allege facts in support of his disparate treatment claims or I would summarily dismiss them. Mr. Miller did not respond to the notice, so on March 6, 2009, I dismissed his claims of disparate treatment, except his claim regarding Chief Scott carrying a firearm illegally and without proper credentials.

I held a public hearing on April 27, 2009, in New Orleans, Louisiana. Based upon the evidence presented and pursuant to the provisions of Article X, § 12(A) of the Louisiana Constitution of 1974, as amended, I make the following findings and reach the following conclusions.

Findings of Fact

1. LSUHSC employs Appellants as Police Officer 3s in the MCLNO PD and they serve with permanent status. Appellants are all experienced veteran police officers. Mr. Jenkins has been a police officer for 28 years, and Mr. Miller has been a police officer for 25 years.

MCLNO PD officers are required to carry firearms as part of their job duties.

2. State law requires that all Louisiana police officers successfully complete the POST firearms qualification requirements annually. Police officers are required to qualify with the firearms they actually carry while on duty, e.g., an officer whose service weapon is a .357 caliber revolver must qualify with a .357 caliber revolver. Any change in service weapons, such as a change from a .357 caliber revolver to a .40 caliber semi-automatic pistol, requires an additional qualification with the new service weapon before the officer may carry it on duty.
3. MCLNO PD policy requires MCLNO PD officers to maintain their annual POST firearms qualifications. Failure to do so may result in an officer being disallowed from carrying firearms while on duty and disciplinary action up to and including dismissal.
4. In 2007, MCLNO PD management decided to standardize the firearms carried by its officers by requiring [them] to carry department-issued Glock Model 17 9 mm semi-automatic pistols while on duty. At the time MCLNO PD management made this decision and until full implementation, the officers provided firearms of their choosing, as long as they were properly POST-qualified for their chosen firearms. Under the weapons standardization policy, all officers were required to qualify with and thereafter carry a Glock Model 17. If an officer failed to qualify with the Glock, he/she could not carry *any* firearm on duty subsequent to the date of failure.
5. MCLNO PD management's goal was full implementation of the weapons standardization policy by the end of October 2008. To simplify the annual monitoring of the officers' POST qualifications, MCLNO PD management also decided to have all officers formally qualify during the month of October 2008.
6. MCLNO PD issued the Glocks to the officers at an eight (8) hour transitional training held in MCLNO's basement in early 2008, and informed the officers that the Glocks would be their new service weapons once the POST qualification process was completed. A POST certified instructor presented the transitional training. The training covered basic information about the Glock, such as how to hold, sight, assemble, clean, and maintain it, but did not include firing the weapons.
7. To prepare the officers for eventual qualification with the Glocks, MCLNO PD scheduled practice range dates with

the new weapons at Camp Villere in Slidell. Sixteen practice range dates were scheduled around the off-days for each shift. Four of the practice dates were mandatory, and each officer had to attend at least one before their first formal attempt at qualification. The remainder of the practice dates were voluntary, and the officers could attend as many as they wished. The officers received compensation for attending the practice sessions and MCLNO PD provided the ammunition, targets, and range fees at no charge to the officers. MCLNO PD also provided ammunition and targets at no charge to officers who wanted to practice with the Glocks on their own.

8. The practice sessions were held from May 16, 2008, through October 2, 2008. Four officers, all either expert or master marksmen, were present at each practice session to assist the other officers with their shooting. The practice sessions lasted several hours. Each practice session began with shooting practice and ended with practice attempts at the POST qualification test.
9. Shift supervisors informed the officers of the dates of the practice sessions and the formal qualification dates at daily roll call and by email. The dates were also posted on the bulletin board in the MCLNO PD office.
10. Chief Kenneth C. Scott, MCLNO PD Chief and MCLNO's Director of Public Safety, held mandatory meetings with all the officers in July 2008. At these meetings, Chief Scott discussed issues concerning the changeover to the Glocks, including qualification requirements and practice sessions.
11. On October 3, 2008, Captain Jonathan P. Holdam, MCLNO PD's training officer, distributed a copy of the MCLNO PD policy regarding POST firearms qualification to the shift supervisors, who in turn gave hard copies to the officers at roll call. This was the procedure in effect at the time for distributing policy to the officers.
12. Formal POST qualification sessions began in October 2008. They were held in Plaquemines Parish under the supervision of a POST certified firearms instructor. The course consisted of shooting at paper silhouette targets. Officers had three opportunities to shoot the course at each session, and the scores were averaged. To qualify, an officer had to score at least 96 out of a possible 120 points.
13. Officers who failed to qualify at their first formal qualification session were given a second chance to

qualify at a subsequent formal qualification session, and were allowed to keep working and carry their pre-Glock firearms. Officers who failed to qualify at their second formal qualification session had their firearm privileges suspended, and were initially barred from reporting for duty due to their inability to carry firearms. After several officers had failed to qualify at their second formal qualification sessions, Chief Scott decided to allow those officers to return to duty without their weapons and be posted to certain limited positions in the mental health areas of the hospital where officers do not carry firearms.

14. Each Appellant attended his mandatory practice session at Camp Villere before his first attempt at formal qualification.
15. Mr. Stewart attempted formal qualification at two separate sessions in October 2008, but failed both times. On the day of his second failed attempt, he was placed on leave without pay (LWOP) for 57.5 hours and his firearm privileges were suspended. After Mr. Stewart appealed his placement on LWOP, LSUHSC rescinded the LWOP and imposed the 57.5-hour suspension at issue in this appeal. The 57.5 hours represents the time from his second failed attempt at formal qualification until Chief Scott decided that the officers who had failed to qualify could return to work without their weapons in the mental health areas of the hospital. After taking a 40-hour remedial class twice, Mr. Stewart successfully qualified, his firearm privileges were restored, and he resumed his normal duties.
16. Mr. Jenkins attempted formal qualification at two separate sessions in October 2008, but failed both times. On the day of his second failed attempt, he was placed on LWOP for 57.5 hours and his firearm privileges were suspended. LSUHSC later rescinded the LWOP and imposed the 57.5-hour suspension at issue in this appeal. The 57.5 hours represents the time from his second failed attempt at formal qualification until Chief Scott decided that the officers who had failed to qualify could return to work without their weapons in the mental health areas of the hospital. After taking a 40-hour remedial class, Mr. Jenkins successfully qualified, his firearm privileges were restored, and he resumed his normal duties.
17. Mr. Miller attempted formal qualification at two separate sessions in October 2008, but failed both times. On the day of his second failed attempt, he was placed on LWOP for 55.5 hours and his firearm privileges were suspended. After Mr. Miller appealed his placement on LWOP, LSUHSC rescinded the LWOP and imposed the 55.5-hour suspension at issue in this appeal. The 55.5

hours represents the time from his second failed attempt at formal qualification until he successfully qualified on his third attempt. After he successfully qualified on his third attempt, Mr. Miller's firearm privileges were restored and he resumed his normal duties.

18. After his second failed attempt at formal qualification, Mr. Miller informed Captain Holdam that he was having eye problems. While he was out on LWOP and barred from reporting for duty after his second failed formal qualification attempt, Mr. Miller provided Captain Holdam with a doctor's excuse regarding the eye problems.
19. Out of 103 MCLNO PD officers, only seven officers failed formal qualification on their second attempt and were suspended. Approximately 90% of the officers formally qualified on their first attempt.
20. As an appointed chief of police, Chief Scott is exempt from the annual POST firearms qualification requirements under La. R.S. 40:2402(1)(a), but he does possess a POST firearms qualification.
21. Before LSUHSC took disciplinary action against Mr. Miller, it gave him a pre-disciplinary letter outlining the charges, along with a request form for a pre-disciplinary hearing. Mr. Miller then had a pre-disciplinary hearing with Adler Voltaire, MCLNO's Chief Administrative Officer, and Chief Scott.

Discussion and Conclusions of Law

The right of a classified state employee to appeal disciplinary actions is provided for in Article X, § 8(A) of the Louisiana Constitution of 1974. 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 the 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.

LSUHSC charges Appellants with failing their annual POST firearms qualifications. The evidence adduced at the hearing indicates that Appellants failed their first and second formal attempts at qualification. This resulted in Appellants' inability to carry their department-issued Glock pistols as mandated by MCLNO PD management, which in turn rendered them unable

to perform their usual duties as Police Officer 3s. As to Messrs. Stewart and Jenkins, this inability to work continued until Chief Scott made the generous decision to allow their assignment to the mental health areas. In Mr. Miller's case, it continued until he formally qualified on his third attempt. Their failure to qualify also impeded the implementation of the weapons standardization policy and necessitated the expenditure of agency time and resources to rectify their shortcomings. Appellants had months to prepare for their qualifications; this was not a "pop quiz" situation. Moreover, one would expect experienced veteran officers, who had been through the qualification process many times, to qualify without much difficulty.

I find the defenses offered by Appellants in response to the charges unpersuasive. Mr. Stewart and Mr. Miller complain that they were not given a copy of the MCLNO PD policy regarding firearms qualification prior to their formal qualification attempts; Mr. Miller denies that a policy even existed. These contentions are without merit. Captain Holdam testified that the shift supervisors distributed the firearms policy to the officers at roll call in early October, 2008. In any event, Appellants are veteran police officers and POST firearm qualification is an annual event. The necessity of qualifying with the new Glocks was discussed with the officers at the transitional training in early 2008 when the Glocks were handed out and at the mandatory meetings with Chief Scott in July 2008. Sixteen practice sessions were scheduled before the formal qualification sessions were held. It is simply unbelievable that any MCLNO PD officers were unaware of the necessity of formal qualification with the Glocks.

Mr. Jenkins contends that MCLNO PD did not provide him with proper training until after he failed to qualify. I disagree. MCLNO PD provided a basic orientation course when the Glocks were given to the officers in early 2008. Sixteen practice sessions were scheduled and the officers were compensated for attending. Ammunition, targets, and range fees were supplied at no charge, and four officers proficient in firearm use were available at each practice session to assist the other officers. Mr. Jenkins only attended one practice session prior to his first formal qualification attempt. Given that approximately 90% of the officers qualified on their first attempt, I find that the training provided by MCLNO was more than adequate.

Mr. Miller raises several additional defenses, none of which has any merit. He contends an eye infection caused him to fail formal qualification on his first attempt, and that he so informed Captain Holdam that same day. However, Mr. Miller reported for duty that day and did not report any eye problems prior to shooting. Captain Holdam testified Mr. Miller did not report any eye problems until after his *second* failed formal

qualification attempt, and that Mr. Miller did not provide him with any details. Captain Holdam did testify that Mr. Miller gave him a doctor's excuse after Mr. Miller's placement on LWOP, but this doctor's excuse was not produced at the hearing, no medical records were introduced into evidence, and the doctor did not testify. The only evidence that Mr. Miller had an eye infection at his first formal qualification attempt is his self-serving testimony, which I reject.

Mr. Miller asserts that he was harassed and intimidated by his supervisors, but he did not produce any evidence in support of these allegations. He further asserts that he is the victim of disparate treatment, in that Chief Scott carries a firearm but lacks POST firearms qualification. Disparate treatment is a form of discrimination; therefore, under Civil Service Rule 13.19(s)(2), Mr. Miller has the burden of proof on this issue. Chief Scott testified without contradiction that he is an appointed chief of police and thus exempt from POST firearms qualification requirements under La. R.S. 40:2402(1)(a), but that he does possess a POST firearms qualification. Mr. Miller has failed to prove disparate treatment.

At the hearing, Mr. Miller challenged the adequacy of the pre-disciplinary procedure used by LSUHSC. This challenge is unfounded. Chief Scott testified that Mr. Miller was given a pre-disciplinary letter describing the charges, along with a request from for a pre-disciplinary hearing, which was subsequently held with Mr. Voltaire and Chief Scott. Mr. Miller complains that he was denied counsel at the pre-disciplinary hearing, but an agency is not required to allow an employee to have counsel at a pre-disciplinary hearing. See: *Green v. Department of Transportation and Development*, CSC Docket No. S-11229. LSUHSC complied with Civil Service Rule 12.7 by giving Mr. Miller sufficient notice of the charges against him and a reasonable opportunity to tell his side of the story.

Appellants knew in early 2008 that they would have to qualify with the Glocks. They were given basic training with the new weapons and plenty of opportunities to practice with them before the formal qualification sessions began in October 2008. Despite the best efforts of MCLNO PD to facilitate the transition to the Glocks, Appellants failed to meet the formal qualification requirements as directed, and thus were unable to work their normal details for a few days. Although the Appellants finally formally qualified on their third attempts, the agency had to expend additional time and resources to enable them to do so. LSUHSC has proved cause for discipline against Appellants.

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. & Development, 475 So.2d 368, 370-371 (La.App. 1st Cir. 1985). Based upon the foregoing reasons, I conclude that LSUHSC proved legal cause for discipline and that the suspensions imposed are commensurate with the offenses. Accordingly, I hereby deny these appeals. (Footnotes omitted.)

Pursuant to Civil Service Rule 13.36, appellant Alfred Miller filed a request for the Commission to review the Referee's decision and for reversal.² After review, the Commission denied Mr. Miller's request. At that time, the decision of the Referee became the final decision of the Commission.

Mr. Miller then appealed to this court.³ He raises the following assignments of error: (1) the Civil Service Commission erred in finding legal cause for the discipline of Officers Miller, Stewart, and Jenkins;⁴ (2) the Civil Service Commission erred in finding that the discipline imposed on Officer Miller was commensurate with the offending conduct; (3) the Civil Service Commission erred in finding that Officer Miller's conduct affected the efficient and orderly operation of L.S.U. Health Sciences Center-Medical Center of Louisiana at New Orleans, (4) the Civil Service Commission erred in finding that there was a real and substantial relationship between Officer Miller's conduct and any inefficient or disorderly operation of L.S.U. Health Sciences Center-Medical Center of Louisiana at New Orleans, (5) the Civil Service Commission erred in finding that the decision to discipline Officer Miller was not arbitrary and capricious, and (6) the Civil Service

² Mr. Jenkins and Mr. Stewart did not file a request for review of the decision of the Referee. The decision of the Referee became final as to them at that time.

³ Article X, § 12 of the Louisiana Constitution provides, in part: that "[t]he 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."

⁴ While Mr. Miller includes Mr. Jenkins and Mr. Stewart in this assignment of error and in assignment of error No. 6, we note that no appeal was filed on their behalf.

Commission erred in not overturning the disciplinary action taken against Officers Miller, Stewart, and Jenkins.

DISCUSSION

The Commission has a duty to independently decide, from the facts presented, whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed was commensurate with the infraction. **Walters v. Dep't of Police**, 454 So.2d 106, 113 (La. 1984). Legal cause for disciplinary action exists whenever an employee's conduct impairs the efficiency of the public service in which that employee is engaged. **Cittadino v. Department of Police**, 558 So.2d 1311, 1315 (La.App. 4 Cir.1990).

On review to this court, we must apply the manifestly erroneous or clearly wrong standard of review to the Commission's findings of fact. **Bannister v. Department of Streets**, 95-0404, p. 8 (La.1/16/96), 666 So.2d 641, 647. However, in reviewing 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, this Court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by an abuse of discretion. **Walters**, 454 So.2d at 114. "Arbitrary or capricious" means that there is no rational basis for the action taken by the Commission. **Bannister v. Department of Streets**, 95-0404, p. 8 (La.1/16/96), 666 So.2d 641, 647.

The evidence establishes that the ability to carry a weapon is an essential part of the duties and responsibilities of a Police Officer at MCLNO. In order for a police officer to maintain his commission to carry a weapon, he must qualify with that weapon according to the standards set forth by the Peace Officer Standards and Training course (P.O.S.T.) In

2008, MCLNO PD began its transition to a department-wide standardized firearm, the 9 mm Glock. The new guns were issued to the officers during the first quarter of 2008. At that time, an 8-hour transitional meeting was held wherein the officers were both informed of the department-wide transition to the new guns, and instructed regarding the mechanics of the gun, *i.e.*, how to load it and break it down, among other things. Chief Scott testified that in July he also held a mandatory meeting wherein he advised the officers of the upcoming qualifications for certification with the Glock. Sixteen practice sessions were scheduled. The list of dates for the practice sessions were emailed and posted on the bulletin board in the MCLNO PD office. The officers were also advised of the available practice sessions by their supervisor at roll call. The qualification dates were emailed to the supervisors on October 3, 2008. The supervisors then scheduled their shifts for qualification. There are one-hundred three officers employed by the MCLNO PD. Officer Miller was one of only six officers who failed to qualify at the second qualification attempt. All six of those officers were placed on leave without pay (LWOP) pending qualification. The "Use of Necessary Force" policy of MCLNO PD states, in part, that:

If officers are unable to obtain a qualifying score on the Peace Officer Standards and Training course, they will be given an opportunity to fire again; their scores will be added together and divided by the amount of attempts. If the officer is unable to qualify during his/her annual P.O.S.T. certifying qualification period, then that officer will surrender to the Range Officer or their [sic] immediate supervisor, all departmental weapons and *will not resume enforcement duties* until they have successfully completed the course. (Emphasis added.)

Officer Miller argues that he failed his first qualification attempt due to an eye infection. Captain Holdam testified that Mr. Miller made no

mention of an eye problem until after he failed the qualification the second time. Nevertheless, Mr. Miller admits that he never requested that the certification attempt be re-scheduled, as specified by MCLNO PD policy:

Any officer who is injured or has other mitigating circumstances, which prohibit the officer from qualifying, may request permission of the Chief of Police to delay qualification until the officer is cleared for duty.

After a thorough review of the testimony and evidence presented to the Commission in this case, we are unable to say that there was error in either the findings of fact, or the action taken. There is a reasonable basis in the record for concluding that, at a minimum, Mr. Miller knew that the department was requiring transition to the new firearm, was given ample opportunity to train with the new weapon, and yet failed his annual P.O.S.T. qualification. The inability of a police officer to carry a firearm impedes that officer's ability to properly perform his duties. Moreover, the written policy states that if an officer does not P.O.S.T. certify, he "will not resume enforcement duties" until he does certify. We cannot then say that the Commission's action was arbitrary, capricious, or an abuse of discretion.

CONCLUSION

For the reasons assigned herein, the judgment of the Civil Service Commission is affirmed. All costs of this appeal are to be borne by the appellant, Alfred Miller.

AFFIRMED.