

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0107

ERIKA BOYD

VERSUS

**DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS-
LOUISIANA STATE PENITENTIARY**

consolidated with

2011 CA 0108

ERIKA BOYD

VERSUS

**DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS-
LOUISIANA STATE PENITENTIARY**

Judgment Rendered: SEP 14 2011

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On Appeal from a Decision of the State Civil Service Commission
State of Louisiana

Honorable James A. Smith, Chairman;
Burl Cain, Vice-Chairman;
David Duplantier, Wilfred Pierre, G. Lee Griffin,
Chatman Reed and John McLure
Shannon Templet, Director
Department of State Civil Service
Docket No. 16852 consolidated with S-16901

*** * * * ***

Erika Boyd
Baton Rouge, Louisiana

Plaintiff/Appellant
In Proper Person

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* * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

This matter comes to us on appeal from a decision of the Louisiana Civil Service Commission (the Commission) upholding the plaintiff's termination from employment by the defendant, the Louisiana Department of Public Safety and Corrections (the Department). We affirm.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Erika Boyd, was employed by the Department as a corrections sergeant with permanent status assigned to Louisiana State Penitentiary (LSP). During the time period at issue in this matter, Ms. Boyd was assigned to Camp D, C Team, which was the 5:15 p.m. to 5:30 a.m. shift. Early on the morning of February 13, 2010, Ms. Boyd was relieved of her duties and placed on paid suspension pending investigation (SPI) and forced compensatory leave. A DPSC Employee Rule Violations Report (VR-1) was issued charging Ms. Boyd with falsifying documents and aggravated malfeasance.

On February 15, 2010, Ms. Boyd appealed her suspension to the Commission, contending that she was incorrectly accused of failing to perform her job duties, that she was inappropriately placed on SPI and forced compensatory leave, that LSP already predetermined her penalty, as "Termination" was typed in the VR-1 when she was given her pre-disciplinary notice, and that she was not given an opportunity to respond to the VR-1. This appeal was docketed as No. 16852.

The initial review hearing, on February 18, 2010, resulted in a recommendation of dismissal.¹ In response, Ms. Boyd requested a unit head review, and Assistant Warden Leslie Dupont approved the recommended action on March 1, 2010. Ms. Boyd then appealed to the Secretary of the Department and, by letter dated March 15, 2010, was notified that after a review of the evidence her request for a Third Level Disciplinary Appeal Hearing was denied.

¹ The pre-disciplinary hearing was originally scheduled for February 17, 2010, but after a change in the charged rule violation, Ms. Boyd was given an additional day to prepare.

Thereafter, by letter dated April 8, 2010, the Department notified Ms. Boyd that she was being terminated as of April 15, 2010. On April 20, 2010, Ms. Boyd filed an appeal to the Commission of her dismissal, denying the charges and alleging that she was falsely accused and was being retaliated against because of prior grievances. This appeal was docketed as No. S-16901.

The appeals were consolidated, and a hearing was held on June 29, 2010, before the Civil Service Commission referee. On August 27, 2010, the referee issued her decision, finding that "DPSC has proved legal cause for discipline and that the penalty imposed, dismissal, is commensurate with the derelictions." As to appeal No. 16852, the referee ordered DPSC to restore 12.33 hours of compensatory leave to Ms. Boyd's compensatory leave balance and to code the 12.33 hour absence as SPI. All other claims in that appeal were dismissed, and Ms. Boyd's appeal of her dismissal, No. S-16901, was denied.

The Commission denied Ms. Boyd's application for review on October 11, 2010, and the decision of the referee became the final decision of the Commission. This appeal followed.²

STANDARD OF REVIEW

In civil service disciplinary cases, decisions of the Commission and its referees are subject to the same standard of review as a decision of a district court. **Harrell v. Department of Health and Hospitals, Office for Citizens with Developmental Disabilities, Pinecrest Supports and Services Center**, 10-0281, p. 5 (La.App. 1 Cir. 9/10/10), 48 So.3d 297, 301. Factual findings of the referee are subject to the clearly wrong or manifest error standard of review. **Bannister v. Department of Streets**, 95-0404, p. 8 (La. 1/16/96), 666 So.2d 641, 647. It is the province of the referee to determine the weight to be given to evidence in an administrative hearing. **Evans v. DeRidder Mun. Fire**, 01-2466, p. 10 (La. 4/3/02), 815 So.2d 61, 69, cert. denied, 537 U.S. 1108, 123 S.Ct. 884, 154 L.Ed.2d 779 (2003). As to the

² We hereby grant Ms. Boyd's motion to supplement her appellate brief with the page containing her arguments numbered 10 through 13, which she inadvertently omitted.

determination of whether the disciplinary action is based on legal cause and commensurate with the offense, the Commission's decision should not be modified unless it is arbitrary, capricious, or characterized by abuse of discretion. **Harrell**, 10-0281 at p. 5, 48 So.3d at 301. An administrative agency's conclusion is "capricious" when it has no substantial evidence to support it; it is "arbitrary" when the evidence has been disregarded or not given the proper weight. **Marsellus v. Dept. of Public Safety and Corrections**, 04-0860, p. 8 (La.App. 1 Cir. 9/23/05), 923 So.2d 656, 661.

DISCUSSION

Employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. LSA-Const. art. X, § 8(A). "Cause" for the dismissal of such a person includes conduct prejudicial to the public service involved or detrimental to its efficient operation. Stated differently, disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the public service. **Bannister**, 95-0404 at p. 8, 666 So.2d at 647. The appointing authority must prove by a preponderance of the evidence that the employee's conduct did, in fact, impair the efficient and orderly operation of the public service. **Harrell**, 10-0281 at p. 6, 48 So.3d at 301.

In her decision, the referee made several factual findings regarding Ms. Boyd's actions, which findings are supported by the record before us, and include the following. On the evening of February 12, 2010, through the morning of February 13, 2010, Ms. Boyd was assigned to Eagle 3 Dormitory, which housed approximately eighty-four male offenders and is a double bunk dormitory. In the early morning hours of February 13, 2010, following several complaints from other inmates regarding Ms. Boyd's behavior, Lieutenant Colonel Kenneth Dupuis and Major Daniel Davis entered the Eagle yard and observed Ms. Boyd through the window of Eagle 3. Although several of the windows were covered with clear plastic to keep out the cold, the last window was not. Lt. Col. Dupuis and Maj.

Davis observed Ms. Boyd behind the security counter sitting in a chair in a slouched position, with her hands folded across her chest and her chin resting on her chest. At no time did they see her get out of her chair from 12:43 a.m. until 1:45 a.m., except to acknowledge Captain Thomas Cole when he entered the dormitory to receive the inmate count from Ms. Boyd. Ms. Boyd did not get up to make rounds as she was required to do every hour, although the log book indicated that she did so at 1:00 and at 1:30. They also observed an inmate at approximately 1:35 a.m. go behind the security counter, stand behind Ms. Boyd, and masturbate, without Ms. Boyd ever moving from her slouched position. At 1:53 a.m., Lt. Col. Dupuis and Maj. Davis exited the Eagle Yard and entered Eagle 3 dormitory. Ms. Boyd was relieved of her duties and placed on SPI.

After a thorough review of the record, we conclude that the record supports the Commission's findings of fact. We cannot re-weigh the evidence, or make our own credibility determinations regarding the witnesses, or substitute our findings for those of the Commission and its referee. **Harrell**, 10-0281 at p. 11, 48 So.3d at 305. A reasonable factual basis exists in the record to support the referee's determinations. Further, we conclude that the Commission's determination that legal cause was established and that the punishment was commensurate with the violations had a rational basis and was not arbitrary or capricious, and was not characterized by an abuse of discretion. Ms. Boyd's behavior and actions clearly impaired the orderly and efficient operation of LSP, and her suspension and subsequent termination were commensurate with the violations.

Additionally, with regard to Ms. Boyd's argument that it should not have taken the Department almost 373 hours to investigate the charges against her and that she is entitled to the entire 125.26 hours of compensatory leave deducted from her compensatory leave balance, we agree that the time expended to complete this investigation appears lengthy in light of the charges. However, we can find no specific timetable for completing investigations imposed

upon the appointing authority by the Commission. Accordingly, we can find no error in the referee's decision to restore only 12.33 hours of compensatory leave.

CONCLUSION

Based on the foregoing, we find no error in the decision of the Commission denying Ms. Boyd's appeal and affirming the referee's August 27, 2010 opinion, which we adopt and attach as "Appendix A." Accordingly, we affirm the October 11, 2010 decision of the Commission denying Ms. Boyd's application for review and upholding the decision of the referee. This opinion is rendered in accordance with the Uniform Rules – Courts of Appeal, Rule 2-16.1B. Costs of this appeal are assessed to Erika Boyd.

**MOTION TO SUPPLEMENT APPELLATE BRIEF GRANTED;
JUDGMENT AFFIRMED.**

Decision

Filed: August 27, 2010

State of Louisiana
Civil Service Commission

Docket No. 16852 consolidated with S-16901

Erika Boyd

Versus

Department of Public Safety and Corrections-Louisiana State Penitentiary

Rules: 12.2; 12.7; 12.10

Topics: Dismissal; failure to perform duties, inattentiveness to duties, failure to make rounds, falsifying logbook; suspension pending investigation; adequacy of pre-disciplinary procedure

Appearances: Floyd Falcon, representing Ms. Boyd
Terri Cannon, representing DPSC-LSP

Statement of the Appeal

Erika Boyd was employed by the Department of Public Safety and Corrections (DPSC)-Louisiana State Penitentiary (LSP) as a Corrections Sergeant and served with permanent status.

On February 15, 2010, Ms. Boyd filed an appeal complaining that: 1) she was accused of failing to perform her job duties, 2) she was inappropriately placed on suspension pending investigation and forced compensatory leave, 3) LSP predetermined the penalty, as it was typed on the Violation Report (VR-1) form when she was given the original pre-disciplinary notice, and 4) she was not given adequate pre-disciplinary notice or an opportunity to respond. This appeal was docketed as No. 16852.

By letter dated April 8, 2010, DPSC notified Ms. Boyd that she was being dismissed effective 4:30 p.m. on April 15, 2010, for failing to perform her duties by not making rounds, allowing an inmate to stand behind her and masturbate, and noting in her logbook that she made rounds when she did not.

APPENDIX A

On April 20, 2010, Ms. Boyd filed an appeal of her dismissal. In her appeal, she denies the charges, alleges that she is being falsely accused, and contends that she acted according to the prison's customary practices and procedures. As relief, Ms. Boyd requests reinstatement, back wages, interest and attorney's fees. This appeal was docketed as No. S-16901.

On May 6, 2010, I consolidated Docket Nos. 16852 and S-16901 for hearing. I held a public hearing on June 29, 2010, in Angola, 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.

Stipulations of Fact

At the hearing, the parties entered into the following stipulations of fact:

1. On February 13, 2010, Ms. Boyd was placed on paid suspension pending investigation (SPI) under Civil Service Rule 12.10 for 247 hours. DPSC then placed Ms. Boyd on 125.23 hours of forced compensatory leave. DPSC should have placed Ms. Boyd on SPI for an additional 12.3 hours, for a total of 260 hours, prior to placing her on forced compensatory leave or using any of her other leave balances.
2. Ms. Boyd was placed on SPI on Saturday, February 13, 2010, and ordered to appear at the prison on Monday, February 15, 2010. Ms. Boyd returned to the prison on February 15, 2010, and received a VR-1. When she received the VR-1, it had a disciplinary recommendation already typed in. Ms. Boyd was given time to respond to the VR-1 and a pre-disciplinary hearing was set for February 17, 2010. On February 17, 2010, the reviewing officer changed the charged rule violation and gave Ms. Boyd an additional day to prepare for the pre-disciplinary hearing.
3. A pre-disciplinary hearing was held on February 18, 2010, with Assistant Warden Troy Poret. Assistant Warden Poret scratched out the typed recommendation on the VR-1, and wrote in his recommendation of "Termination" with the stated reason, "Need to protect the institution." Ms. Boyd requested a unit head review. Warden Leslie Dupont reviewed this matter and approved the recommended discipline on March 1, 2010. Ms. Boyd then requested a review by the Secretary. On March 18, 2010, Ms. Boyd received a letter notifying her that her request for a Third Level Disciplinary Appeal Hearing was received, that the evidence had been reviewed and that her request was denied.

Findings of Fact

1. Erika Boyd was employed by DPSC-LSP as a Corrections Sergeant and was serving with permanent status. Ms. Boyd was assigned to Camp D, C Team, which was the 5:15 p.m. to 5:30 a.m. shift.
2. On the evening of February 12, 2010, through the morning of February 13, 2010, Ms. Boyd was assigned to Eagle 3 Dormitory. Eagle 3 houses approximately 84 male offenders and is a double bunk dormitory.
3. Prior to February 12, 2010, Major Daniel Davis received several inmate complaints about an inmate committing obscene acts in Ms. Boyd's area, and that the acts were committed so close to Ms. Boyd that the other inmates felt she was OK with it. Colonel Kenneth Dupuis had also received information from three inmates in Eagle 3 Dormitory that an officer was sleeping and that they felt endangered.
4. In the early morning hours of February 13, 2010, Maj. Davis and Col. Dupuis went through the Falcon yard out onto the Eagle Yard where they could observe Ms. Boyd through the windows of Eagle 3 Dormitory. Maj. Davis and Col. Dupuis observed Ms. Boyd from approximately 12:43 a.m. until 1:53 a.m. when they exited the yard.
5. The lights were on all night in Eagle 3 Dormitory over the security desk and in the shower area, as well as the security lights were on in the bed area. Ms. Boyd was seated behind the security desk, which is an "L" shaped counter. She was seated to the rear of the security desk in front of the microwave and closest to the last window. Several of the windows in Eagle 3 Dormitory were covered with clear plastic to help keep out the cold, but the last window was not. Ms. Boyd had a portable heater plugged in under the counter in that area. She had a limited view of the bed area from where she was seated.
6. Maj. Davis and Col. Dupuis observed inmate Dwyane Butler, #402278, who was the dormitory orderly, going back and forth between the security desk and the game room. Inmate Butler had several conversations with Ms. Boyd and would tap on the counter as he walked by or if someone was approaching.
7. The LSP Post Orders for Outcamp Dormitory Officers requires that all officers keep a daily log of activities. These activities include inmate counts, rounds, call-outs, shakedowns, inspections, etc. Ms. Boyd was required to make rounds every hour in the dormitory. "Rounds" requires that an officer get up, walk around the dormitory, check the entrance and exit doors and physically count the inmates.

8. Between 12:43 a.m. and 1:45 a.m., Ms. Boyd never got up out of her chair, except to acknowledge Captain Thomas Cole when he entered the dormitory at 1:15 a.m. Ms. Boyd's log entry for 1:00 a.m. states, "Made rounds All Secure Rear Exit Door Locked." At 1:15 a.m., Capt. Cole walked up to the security counter to receive the inmate count from Ms. Boyd. Ms. Boyd acknowledged Capt. Cole and gave him a count of 84. Maj. Davis and Col. Dupuis could hear Ms. Boyd's response from their position outside the window. At 1:30 a.m., Ms. Boyd wrote in the logbook, "Made rounds All Secure Rear Exit Door Locked."
9. After Capt. Cole left the dormitory, Ms. Boyd remained seated to the rear of the security desk in front of the microwave and closest to the last window. Ms. Boyd was seated in a slouched position. She had her jacket on, her arms folded across her waist/chest, and her chin resting on her chest. Maj. Davis and Col. Dupuis could see her side and/or back.
10. Maj. Davis and Col. Dupuis observed inmate Butler walk behind the security desk several times. According to LSP Dormitory Officer Post Orders, "At no time will offenders be allowed inside the officer's station, except to clean up the area. While an offender is cleaning the station, he will be closely supervised by the officer..." The officer should be aware when a dormitory orderly cleans in the security area, and it is good security practice for the officer to stand up, especially for the female officers assigned to the dormitories. It is a security risk to allow an offender to stand behind a security officer.
11. Around 1:35 a.m., inmate Butler walked behind Ms. Boyd to put a mop in the corner, then pulled out his erect penis and began masturbating. Ms. Boyd never moved or acknowledged that inmate Butler was in her area. Maj. Davis and Col. Dupuis exited the yard and went to Eagle 3 Dormitory.
12. At approximately 1:53 a.m., Maj. Davis and Col. Dupuis entered Eagle 3 Dormitory, removed inmate Butler, and took him to administrative segregation. Inmate Butler was issued a disciplinary report for Sex Offense - Aggravated. He was found guilty of the offense and sentenced to the main prison working cellblock.
13. At 2:15 a.m., Ms. Boyd was relieved of her duties, placed on suspension pending investigation, and told to return to the prison on Monday, February 15, 2010.
14. Corrections Services Employee Manual Rule 13(g) states: "Each employee must perform his duties so as to fulfill the purpose and responsibility of his assignment."

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 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.

Docket No. 16852

Ms. Boyd challenges the appropriateness of her being placed on suspension pending investigation and forced compensatory leave. She also challenges the pre-deprivation procedure, in that a disciplinary recommendation was typed in on the VR-1 form prior to the initial pre-disciplinary hearing.

Ms Boyd was placed on SPI on February 13, 2010. She remained on SPI for 247 hours. Ms. Boyd was then placed on forced compensatory leave for 125.23 hours. DPSC correctly placed Ms. Boyd on SPI. However, DPSC should have used the full 260 hours of SPI allowed by Civil Service Rule 12.10 prior to putting Ms. Boyd on forced compensatory leave. Its failure to do so was a violation of Civil Service Rule 12.10. See: *Craig v. Department of Public Safety and Corrections, Swanson Correctional Center for Youth*, CSC Docket No. S-15157.

It is the contention of Ms. Boyd that it should not have taken DPSC almost 373 hours to investigate these charges. While the time expended to complete the investigation does appear lengthy in light of the relative simplicity of the charges, there is no specific timetable for completing investigations imposed upon appointing authorities by the Civil Service Rules.

Ms. Boyd also challenges the pre-disciplinary process and the fact that the disciplinary recommendation was already typed in when she received the initial VR-1. DPSC-LSP uses a pre-printed form for its VR-1s. Despite the form inadvertently having a disciplinary recommendation already typed in when Ms. Boyd received it, Assistant Warden Perot held a pre-disciplinary hearing and made his recommendation based on the information presented at the hearing. Ms. Boyd was properly notified of the charges against her and given a reasonable opportunity to respond. I do not find that DPSC violated Civil Service Rule 12.7 or the requirements of due process in this case.

Docket No. S-16901

LSP charges Ms. Boyd with failing to perform her duties by not making rounds, allowing an inmate to stand behind her and masturbate, and for falsely noting in her logbook that she had made rounds.

As a dormitory officer, Ms. Boyd was responsible for being aware of what was going on in her area, making rounds, checking the doors, physically counting the inmates and keeping adequate log records of her activities. Maj. Davis and Col. Dupuis observed Ms. Boyd through the window for approximately an hour, from about 12:43 a.m. until 1:53 a.m. Ms. Boyd never left her chair during this period and did not make rounds in the dormitory. Despite never leaving her chair, Ms. Boyd's logbook indicates that she made rounds at 1:00 a.m. and 1:30 a.m. Since Ms. Boyd did not get up and move around the dormitory and physically check the front and rear doors, these entries are false. DPSC proved Ms. Boyd did not make rounds, and that she falsified her logbook to indicate that she had done so.

Ms. Boyd also had a responsibility to be aware of what was going on around her in the dormitory. Maj. Davis and Col. Dupuis observed inmate Butler walk behind Ms. Boyd's chair in the security area several times, but Ms. Boyd did not stand or acknowledge inmate Butler in any way. Allowing an inmate to go in and out of the security area unchecked is a breach of security. Then, they observed inmate Butler masturbate behind Ms. Boyd. She did not move or react, and appeared to be unaware of this activity. Allowing an inmate to stand directly behind a security officer is a breach of security, which gives the inmate an opportunity to overpower the officer, especially a female officer. Moreover, Ms. Boyd's allowing, or being unaware, that an inmate was standing behind her masturbating was a particularly egregious breach of security; it evidences a complete disregard for the discharge of her duties that undermines DPSC's mission to protect the safety of the inmates, public and security officers.

Ms. Boyd contends that Maj. Davis and Assistant Warden Poret were angry with her for going over their heads to obtain permission to bring a portable heater into the dormitory, and that she is being falsely accused. After listening to and observing Maj. Davis, Col. Dupuis and Assistant Warden Poret, I found them to be credible and believable witnesses. Ms. Boyd failed to perform her duties, to the detriment of the state service. DPSC has proved cause for discipline against Ms. Boyd.

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). As a dormitory officer, Ms. Boyd was responsible for securing the area, making sure the prisoners did not escape, and generally being attentive to the area around her. This attention to her area included making rounds, checking the doors, physically counting the inmates and keeping adequate log records of her activities. To perform these tasks, Ms. Boyd had to be alert, observant, and vigilant, but on February 13,

2010, she was not. Unfortunately, a few minutes are all it takes for an inmate to escape, take a hostage, or to assault an officer. Based on the foregoing, I conclude that DPSC has proved legal cause for discipline and that the penalty imposed, dismissal, is commensurate with the derelictions.

Accordingly, as to Ms. Boyd's appeal bearing Docket No. 16852, I hereby order DPSC to restore 12.33 hours of compensatory leave to Ms. Boyd's compensatory leave balance, and to code the 12.33 hour absence as suspension pending investigation. All other claims in that appeal are dismissed. Ms. Boyd's appeal of her dismissal, bearing Docket No. S-16901, is hereby denied.

Roxie F., Goynes
Civil Service Commission Referee