

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0515

PAMELA METOYER

VERSUS

**DEPARTMENT OF HEALTH AND HOSPITALS,
OFFICE OF PUBLIC HEALTH**

Judgment Rendered: OCT 14 2008

On Appeal from the Civil Service Commission
Number 16,168

Honorable James A. Smith, Chairman

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Office of Public Health

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from the Louisiana Civil Service Commission by a state agency contesting the reversal of disciplinary action imposed by the agency on an employee. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are thoroughly detailed in the written reasons assigned by the Civil Service Commission referee, Roxie F. Goynes, stating:

Pamela Metoyer is employed by the Department of Health and Hospitals (DHH)-Office of Public Health (OPH), with permanent status. By letter dated April 12, 2007, OPH notified Ms. Metoyer that her pay would be reduced by ten percent for the pay period beginning April 23, 2007, and ending May 6, 2007. OPH alleges that Ms. Metoyer was insubordinate in that she failed to attend a staff meeting as directed by her supervisor, Clair Millet. On May 5, 2007, Ms. Metoyer filed an appeal in which she explains her actions and denies that she was insubordinate. As relief, Ms. Metoyer requests that her reduction in pay be overturned, expungement of her record, that she receive back pay and attorney's fees.

....

Findings of Fact

1. Pamela Metoyer is employed by DHH-OPH as a Public health Nurse 7, with permanent status. Ms. Metoyer's position serves as a statewide nursing consultant within the Office of Emergency Preparedness and Response.
2. Clair Millet, Public Health Nurse 9, Director of Nursing Services (chief nurse), is Ms. Metoyer's direct/administrative supervisor. Ms. Millet has held this position for approximately a year. Her office is located in the main DHH office, in downtown Baton Rouge. Ms. Millet supervises all of the nursing consultants. In order to share information, the nursing staff has monthly staff meetings. The agenda items remain the same, but the issues discussed are not the same. At these meetings each nursing consultant gives a monthly update.
3. The monthly nursing staff meeting was scheduled for Monday, March 19, 2007, at 10:00 a.m. These meetings last approximately one and one-half (1-1/2) to two (2) hours.

4. Doris Brown, Director of Center of Community Preparedness, is Ms. Metoyer's function/program supervisor. Ms. Metoyer's position is paid out of the Center of Community Preparedness' budget and she has certain budget and contractual responsibilities to the center. The Center of Community Preparedness is located in Baton Rouge, off of Bluebonnet Blvd. Ms. Brown formerly held Ms. Millet's job as "chief nurse" for 11 years.
5. On Friday, March 16, 2007, Ms. Metoyer received an e-mail from Valerie Clark, Ms. Brown's Administrative Assistant, which stated, "Please mark your calendars for the Budget Meeting on March 19, 2007. The meeting will be at 9:00 am and will be held in the EMS training room. Hope to see you there."
6. The Center for Community Preparedness was a new center, with many new staff members. Ms. Metoyer was working on a contract with community partners and Ms. Brown thought her participation in the budget and contract training was important. Ms. Brown felt that she had the authority to instruct Ms. Metoyer to attend the budget meeting.
7. At 3:29 p.m. on March 16, 2007, Ms. Metoyer forwarded the e-mail from Ms. Clark to Ms. Millet notifying her that "I may be a little late for the Nursing Meeting on Monday." At 4:37 p.m. Ms. Millet responded, "Please be on time. We have a lot to discuss. Thank You."
8. On March 19, 2007, Ms. Metoyer arrived at the Budget Meeting, only to learn after the meeting began, that it was all day training. At 9:22 a.m., Ms. Metoyer sent Ms. Millet an e-mail, "Major training - All day - sponsored by Budge Office. Discussing how to do contract now." [Ms. Metoyer had the ability to e-mail during the meeting from a handheld electronic device.] At 9:46 a.m., Ms. Millet sent an e-mail stating, "You need to present [sic] for staff meeting. There will be more trainings. Thank you."
9. Ms. Metoyer went to Ms. Brown and told her about the staff meeting and asked if other trainings were scheduled. Ms. Brown had specifically requested this training for her staff and was not aware of any additional training scheduled. Ms. Brown informed Ms. Metoyer that she needed to be there for the budget meeting.
10. At 10:10 a.m., on March 19, 2007, Ms. Metoyer sent an e-mail to Ms. Millet stating, "I checked for other dates. This will not be repeated."

11. Ms. Metoyer did not attend the nursing staff meeting on March 19, 2007. When Ms. Metoyer returned to the office that afternoon she sent an e-mail to Ms. Millet explaining what had occurred. This memo also indicates that Ms. Metoyer would get with a co-worker and get a copy of her notes from the nursing services meeting.
12. On March 19, 2007, there were no other budget and Contract training sessions scheduled. After this date, the budget staff scheduled another Budget and Contract training for the Center of Community Health, in Metairie.

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 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].

OPH charges Ms. Metoyer with insubordination by not attending the staff meeting as directed. By Ms. Metoyer's own admission, she did not attend the nursing staff meeting because she was attending the Budget and Contract training held at the same time.

The First Circuit has held that an employee must follow an order unless it calls upon him or her to do something "illegal, immoral, unethical, or in dereliction of his duties." [**Department of Corrections v. Cage**], 418 So.2d 3, 5 (La. App. 1 Cir. 1982). Refusing to obey orders constitutes cause justifying severe disciplinary action. See [**Wells v. Department of Public Safety and Corrections**, 498 So.2d 266 (La. App. 1 Cir. 1986); **Ferguson v. Department of Health and Human Resources**, 451 So.2d 165 (La. App. 1 Cir. 1984)].

In essence, the appointing authority must show that Ms. Metoyer was given a lawful directive that she refused to obey without justification and that her refusal had a direct relation to impairment of the public service. In this case, DHH-OPH has proved that Ms. Metoyer was given two lawful directives, one from her direct/administrative supervisor and one from her functional/program supervisor. Ms. Metoyer was attempting to

comply with both orders when she learned that the Budget & Contract training was all day. At that point, Ms. Metoyer tried to notify both supervisors. Instead of getting clarification, what she received was further orders from both supervisors to be at both meetings. Ms. Metoyer then made a decision to go to the meeting that affected her program, rather than the monthly nursing meeting. Ms. Metoyer was in a no-win situation. While I find that DHH-OPH proved that Ms. Metoyer failed to attend the nursing staff meeting, under this specific set of circumstances, I find that this failure does not constitute cause for discipline.

Accordingly, I grant this appeal. Ms. Metoyer's reduction in pay is reversed. DHH-OPH is ordered to reimburse Ms. Metoyer for the reduction in pay, with interest. I order DHH-OPH to remove all documents concerning this disciplinary action from Ms. Metoyer's personnel file.

As to the issue of attorney's fees, in the Appeal of Alexander, Docket Number 8037, (decided March 25, 1992), the Commission recognized that attorney's fees should only be awarded where the action of the appointing authority was found to be unreasonable. Based on the evidence presented at the hearing, I conclude that DHH-OPH was unreasonable in going forward on these charges. Therefore, pursuant to the provisions of Civil Service Rule 13.35, I award attorney's fees to Pamela Metoyer in the amount of \$1500.00. The check for attorney's fees is to be made jointly to Ms. Metoyer and her counsel of record, Floyd Falcon.

A subsequent appeal by DHH-OPH to the Civil Service Commission was denied. DHH-OPH now appeals to this court, urging the following assignment of errors: (1) the Commission erred in upholding the finding of the referee that Ms. Metoyer was not insubordinate; (2) the Commission erred in upholding the finding of the referee that there were two lawful directives given; (3) the Commission erred in upholding the finding of the referee that Ms. Brown was Ms. Metoyer's "functional/program supervisor;" and (4) the Commission erred in upholding the referee's order of back pay and attorney fees.

DISCUSSION

A final decision of the Commission is subject to review by the court of appeal on any question of law or fact pursuant to LSA-Const. Art. X,

§12(A).¹

The standard of review set forth in **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993), is applicable, and a reviewing court should not disturb *factual findings* made by the Commission in the absence of manifest error. Thus, in order to reverse a factual finding made by the trier-of-fact the appellate court must: (1) find from the record that a reasonable factual basis does not exist for the finding, and (2) determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Burst v. Board of Commissioners, Port of New Orleans**, 93-2069, pp. 4-5 (La. App. 1 Cir. 10/7/94), 646 So.2d 955, 958, writ not considered, 95-0265 (La. 3/24/95), 651 So.2d 284. See also **Bannister v. Department of Streets**, 95-0404, p. 8 (La. 1/16/96), 666 So.2d 641, 647; **Khosravanipour v. Department of Transportation and Development**, 93-2041, p. 7 (La. App. 1 Cir. 10/7/94), 644 So.2d 823, 826-27, writ denied, 94-2729 (La. 1/6/95), 648 So.2d 930.²

The appropriate standard of review of an *action* by the Civil Service Commission is to determine whether the conclusion reached by the Commission was arbitrary and capricious. A conclusion of a public body is "capricious" when the conclusion has no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof.

¹ 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."

² We note that even though the standard of review set forth in LSA-R.S. 49:964(G) applies to district courts when they sit in an appellate mode and review an administrative agency's final decision or order in an adjudication proceeding, judicial review of final decisions of the Commission does not lie in any district court but is constitutionally vested in the First Circuit Court of Appeal, pursuant to LSA-Const. Art. X, § 12. Thus, the standard of review contained in LSA-R.S. 49:964(G) does not apply to review of decisions of the Commission, because judicial review is performed by the First Circuit Court of Appeal, not by a district court. **Ward v. Department of Public Safety and Corrections**, 97-1109, pp. 3-4 (La. App. 1 Cir. 9/18/98), 718 So.2d 1042, 1044.

Khosravanipour v. Department of Transportation and Development, 93-2041 at p. 8, 644 So.2d at 827 (citing **Coliseum Square Association v. City of New Orleans**, 544 So.2d 351, 360 (La. 1989); **Newman v. Department of Fire**, 425 So.2d 753, 754 (La. 1983); **Casse v. Department of Health and Hospitals**, 597 So.2d 547, 551 (La. App. 1 Cir. 1992)).

In its first three assignments of error (asserting that the Commission erred in upholding the findings of the referee: that Ms. Metoyer was not insubordinate, that there were two lawful directives given, and that Ms. Brown was Ms. Metoyer's "functional/program supervisor"), DHH-OPH contends the Commission erred in its factual findings. After a thorough review of the record presented on appeal in this case, we are unable to say that a reasonable factual basis did not exist for the factual findings of the Commission or that the findings were clearly wrong.

In so concluding, we find the following colloquy between the Commission referee and Dr. Erin Brewer, of DHH-OPH,³ particularly relevant:

REFEREE: ...[H]ow does an employee that has a programmatic Supervisor and an administrative Supervisor who obviously, from listening to the Supervisors sit here, had conflicting orders, okay, whether Ms. Brown should have maybe done something else to help her straighten out the situation. ... Maybe she did. How is an employee that is in that situation supposed to deal with those conflicting orders and did you take that into consideration when you made your decision that disciplinary action was appropriate?

[DR. BREWER:] I think it is the employee's responsibility if the two Supervisors are not communicating with each other to make sure that they know -- that each one of them knows what the other one is doing and if one employee is ... following one directive and not following another one, she probably needs to let the Supervisors know that. Why let one know and not let the other one know?

³ Dr. Brewer stated that she is the Medical Director of the Office of Public Health, the Director of the Center for Community Health, and the Assistant State Health Officer.

REFEREE: Does one order trump the other?

[DR. BREWER:] That is a really good question. I don't think the system has a clear answer for it.

REFEREE: ...[W]hen you were making your decision as to appropriate discipline, were you aware of what Ms. Brown said here today, that that's what she told her, to stay?

[DR. BREWER:] I wasn't aware of anything Ms. Brown did.

REFEREE: Would that have made a difference in your decision?

[DR. BREWER:] No.

Ms. Brown testified that she believed she had the authority to instruct Ms. Metoyer to attend the meeting at the center. Further, we note that in her pre-disciplinary letter to Dr. Brewer, Ms. Metoyer explained how she came to attend one meeting rather than the other: "I inquired of Doris Brown ... and she confirmed that this was an all day meeting for everyone. I then inquired if it would be repeated at another time so I could reschedule in order to attend the monthly nursing meeting at 10:00 a.m[.] I was informed that this was a one-time training that the Budget Department had prepared specifically for the Center for Community Preparedness; therefore I needed to attend the training." Thus Dr. Brewer was apprised, prior to imposing disciplinary action on Ms. Metoyer, that Ms. Metoyer had allegedly received opposing directives; however, Dr. Brewer failed to view this circumstance as having any bearing on the matter. Nevertheless, we agree with the Commission referee that Ms. Metoyer was placed in a "no-win" situation of having to decide which of two competing supervisory directives to obey.

As a general rule, a civil service employee's failure to follow a supervisory directive is insubordination, provided that the order is not manifestly illegal or immoral. **Lyons v. Grambling State University**,

2008-0017 (La. App. 1 Cir. 5/2/08) (unpublished opinion) (2008 WL 2066275) (citing **Bannister v. Department of Streets**, 95-0404 (La.1/16/96), 666 So.2d 641, 647-648). However, under the circumstances presented in this case, Ms. Metoyer's compliance with one directive necessitated disobedience to another. Therefore, we cannot say the Commission erred in concluding that disciplinary action was not appropriate in this case.

In its final assignment of error, DHH-OPH asserts that the Commission erred in upholding the referee's order of back pay and attorney fees. Having found no error in the Commission's finding that Ms. Metoyer was faced with competing directives from two different supervisors, and its conclusion that Ms. Metoyer's choice between them did not constitute cause for discipline, we find no error in its order of restitution of wages. Further, Civil Service Rule 13.35⁴ grants referees and the Commission the discretionary power to award attorney fees when the action of an appointing authority is modified or reversed, and an abuse of that discretion must be shown for this court to modify or vacate the award. **Morgan v. Louisiana State University Health Sciences Center--E.A. Conway Medical Center**, 2006-0570, p. 8 (La. App. 1 Cir. 4/4/07), 960 So.2d 1002, 1007 (citing **Price v. Department of Public Safety and Corrections, Avoyelles Correctional Center**, 03-0979, p. 3 (La. App. 1 Cir. 4/2/04), 878 So.2d 612, 614). We cannot say that the Commission's decision to award attorney's fees to Ms. Metoyer in this case was an abuse of discretion. We conclude that the actions taken by the Commission were not arbitrary or capricious.

⁴ Civil Service Rule 13.35 provides, in part: "When the Commission or a referee approves a settlement, rescission, or modification of an action that has been appealed, or renders a decision, including a decision on application for review, which reverses or modifies an action that has been appealed, the appellee may be ordered to pay attorney's fees in amount not to exceed \$1,500."

CONCLUSION

For the reasons assigned herein, the judgment of the Civil Service Commission is affirmed; all costs of this appeal, in the amount of \$342.00, are to be borne by the appellant, Department of Health and Hospitals - Office of Public Health.

AFFIRMED.