

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 1248**

**ROBERT REICH**

**VERSUS**

**DEPARTMENT OF HEALTH & HOSPITALS  
OFFICE OF CITIZENS WITH DEVELOPMENTAL  
DISABILITIES**

*WKM*

*FW*

Judgment Rendered: February 12, 2010

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On Appeal from the State Civil Service Commission  
Docket No. S-16542

Honorable James A. Smith, Chairman

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Robert Reich  
Forest Hill, LA

Plaintiff/Appellant  
In Proper Person

William Coco  
Alexandria, LA

Counsel for Defendant/Appellee  
Department of Health & Hospitals  
Office of Citizens with  
Developmental Disabilities

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Service

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**BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.**

**HUGHES, J.**

In this appeal, a former state employee challenges the denial of his request to withdraw his previously submitted resignation. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

The facts and procedural history of this case are detailed in the written reasons assigned by the Civil Service Commission (“Commission”) referee, Paul St. Dizier, stating:

[Statement of the Appeal:]

The Department of Health and Hospitals (DHH), Office for Citizens with Developmental Disabilities (OCDD) employed Robert Reich as an Administrative Assistant 4 and he served with permanent status.

On October 27, 2008, Mr. Reich executed and submitted to DHH a document stating that he was retiring “immediately,” although the Integrated Statewide Information System (ISIS) indicates Mr. Reich’s retirement became effective on November 4, 2008.

On December 1, 2008, the Department of State Civil Service received an appeal from Mr. Reich postmarked November 28, 2008. In his appeal, Mr. Reich contends DHH violated Civil Service Rule 14.1 in connection with his retirement. Specifically, he alleges that a DHH attorney “badgered” him into retiring by making false statements and threatening “legal ramifications” if he did not retire. He concludes the attorney’s actions violated Civil Service Rule 14.1 and his due process rights. As relief, Mr. Reich requests reinstatement and a Performance Planning and Review (PPR) evaluation.

On December 3, 2008, I issued a notice to Mr. Reich questioning whether he has established a right of appeal to the Commission. The notice gave him fifteen (15) calendar days to amend his appeal and/or to respond in writing why I should not summarily dismiss it.

DHH filed a Motion for Summary Disposition on December 10, 2008. In its motion, DHH contends that Mr. Reich’s appeal is untimely, because on October 27, 2008, he executed the document stating that he was retiring “immediately,” but his appeal is postmarked November 28, 2008, and was not received by the Department of State Civil Service until December 1, 2008.

On December 16, 2008, Mr. Reich responded to the December 3, 2008 notice. His response provides additional details of the coercive actions of the DHH attorney, all of which allegedly occurred prior to Mr. Reich's execution of the October 27, 2008 document concerning his retirement.

I issued a second notice to Mr. Reich on December 22, 2008. The notice gave him fifteen (15) calendar days to show cause in writing why I should not grant DHH's Motion for Summary Disposition and summarily dismiss the appeal as untimely filed. Mr. Reich responded to the notice on December 24, 2008. In his response, he apologizes for the delay in filing his appeal, and states that he is unsure when he became aware of his displeasure with DHH's actions.

Based on the review of the record and pursuant to Article X, § 12(A) of the Louisiana Constitution of 1974, as amended, I reach the following conclusions.

[Discussion and Conclusions of Law:]

Civil Service Rule 13.12 provides in pertinent part as follows:

***13.12 Delay for Making Appeal***

*(a) No appeal shall be effective unless a written notice complying with the requirements of Rule 13.11 is either (i) received in the office of the Director of the State Department of Civil Service at Baton Rouge, Louisiana, or (ii) is addressed to the Director of the State Department of Civil Service at Baton Rouge, Louisiana, with proper postage affixed, and is dated by the United States Post Office.*

- 1. Within thirty (30) calendar days after the date on which appellant received written notice of the action on which the appeal is based when written notice before or after the action is required by these Rules; or*
- 2. Within thirty (30) calendar days after the date when appellant learned or was aware that the action complained of had occurred when no written notice is required by these Rules or, if required, was given tardily or not at all.*

Civil Service Rules have the effect of law. Louisiana Constitution of 1974, Art. X, § 10(A)(4). In civil service appeals, timeliness is jurisdictional. *Acosta v. Department of Health and Human Resources*, 423 So.2d 104 (La. App. 1 Cir. 1982).

Mr. Reich executed and submitted to DHH a document stating that he was retiring “immediately” on October 27, 2008. The complained-of actions of the DHH attorney allegedly occurred prior to that date, and the nature of the alleged actions indicates that Mr. Reich had to know of them as they occurred. Such being the case, under Civil Service Rule 13.12(a)2, Mr. Reich had thirty (30) calendar days from October 27, 2008, in which to appeal, or until November 26, 2008. Since Mr. Reich’s appeal is postmarked November 28, 2008, and was received by the Department of State Civil Service on December 1, 2008, it is untimely.

(Footnote omitted.)

Finding that Mr. Reich’s appeal was not timely filed, the Commission referee recommended that the appeal be dismissed; the action was thereafter dismissed by the Commission. Mr. Reich now appeals to this court, asserting the Commission erred in dismissing his appeal as untimely and in failing to address the merits of his appeal.

#### LAW AND ANALYSIS

Ordinarily, a state employee who voluntarily resigns his position has no right of appeal. **Pugh v. Department of Culture, Recreation and Tourism, Sabine River Authority**, 597 So.2d 38, 41 (La. App. 1 Cir. 1992). However, a right to appeal has been recognized in favor of state employees who have voluntarily “resigned” under circumstances suggesting resignation was forced or chosen to avoid disciplinary action. See Stern v. New Orleans City Planning Commission, 2003-0817, p. 6 (La. App. 4 Cir. 9/17/03), 859 So.2d 696, 700; **Pugh v. Department of Culture, Recreation and Tourism, Sabine River Authority**, 597 So.2d at 41; **Peterson v. Department of Streets**, 369 So.2d 235, 237 (La. App. 4 Cir.), writ denied, 371 So.2d 1344 (La. 1979); **Duczer v. State Banking Department**, 277 So.2d 453, 454 (La. App. 1 Cir. 1973). It is well recognized that a classified state employee enjoys a property right, pursuant to LSA-Const. Art. X, §

8(A),<sup>1</sup> in continued employment that cannot be deprived without due process of law. **AFSCME, Council #17 v. State ex rel. Department of Health & Hospitals**, 2001-0422, p. 9 (La. 6/29/01), 789 So.2d 1263, 1269; **McGehee v. City/Parish of East Baton Rouge**, 2000-1058, p. 4 (La. App. 1 Cir. 9/12/01), 809 So.2d 258, 261 (citing **Murray v. Department of Revenue and Taxation**, 504 So.2d 561, 564 (La. App. 1 Cir. 1986), writs denied, 504 So.2d 880, 882, 883 (La.1987)); **Ruddock v. Jefferson Parish Fire Civil Service Board**, 96-831, p. 2 (La. App. 5 Cir. 1/28/97), 688 So.2d 112, 114.

In this case, Mr. Reich alleged that a DHH attorney “used the threat of the legal ramifications to [him] and [his] family if early retirement was not what [he] chose as an outcome.” Further, Mr. Reich asserted that he was “badgered into making [his] decision [to retire] without advice of [an] attorney, therefore denying [him] due process.” Mr. Reich contends these actions violated Civil Service Rule 14.1(j), which provides:

(j) No person shall make any false statement, certificate, mark, rating, form or report with regard to any application, test, certification, personnel transaction, appointment or employment made under any provision of the Article, the Rules, or a regulation of the Department of Civil Service, or in any manner commit or attempt to commit any fraud preventing the impartial execution of the Article, Rules and regulations.

Because Mr. Reich contends that his October 27, 2008 resignation resulted from the allegedly improper actions of DHH’s attorney, those actions presumably preceded his resignation. Thus, in accordance with Civil

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<sup>1</sup> Article X, § 8 of the Louisiana Constitution provides:

**(A) Disciplinary Actions.** No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. A classified employee subjected to such disciplinary action shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part. The burden of proof on appeal, as to the facts, shall be on the appointing authority.

**(B) Discrimination.** No classified employee shall be discriminated against because of his political or religious beliefs, sex, or race. A classified employee so discriminated against shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part. The burden of proof on appeal, as to the facts, shall be on the employee.

Service Rule 13.12, Mr. Reich's appeal was required to have been filed "[w]ithin thirty (30) calendar days after the date when appellant learned or was aware that the action complained of had occurred," i.e., within thirty calendar days of October 27, 2008, at the latest.

Mr. Reich was given the opportunity, in December 2008, to inform the Commission of any circumstances that would legally justify the untimely filing of his appeal. Mr. Reich informed the Commission, in a letter dated December 24, 2008, that he was "not exactly sure when [he] realized what had happened and that [he] did not like it." However, Mr. Reich had previously stated, in a letter to the Commission dated December 16, 2008, that in a meeting with the DHH attorney and two other DHH employees, the DHH attorney informed him (Mr. Reich) that charges of "workplace violence" against him (Mr. Reich) were under consideration, "that the local DA would be involved and that the local news media would find out." Also during that meeting, the DHH attorney allegedly "handed [him (Mr. Reich)] a SF-14 [resignation form] and told [him] that if [he] filled it out and returned it to the HR office by close of business Friday October 24<sup>th</sup>, [he] would avoid embarrassment for and possible reprisals against his wife and son." Mr. Reich further stated in this December 16, 2008 letter that after discussing the matter with his wife, they agreed that the "accusation of workplace violence would not stand, but that the possibility of negative publicity was real." Therefore, on the following Monday (October 27, 2008) he decided to follow the DHH attorney's instructions and submit his resignation.

Under the facts of the instant case, Mr. Reich's statements to the Commission detailed alleged wrongful acts of DHH that took place prior to his October 27, 2008 resignation. No allegation was made before the

Commission by Mr. Reich that he had not learned of or was not aware of the actions complained of by the date of his October 27, 2008 resignation. Therefore, the delay for Mr. Reich's appeal began to run no later than October 27, 2008.

We note that Mr. Reich represents in brief to this court that “[i]t wasn't until much later, when coworkers began to contact me to ask of my condition and when I would return to work[,] that I began to realize that I had been duped.” However, Mr. Reich failed to present this argument to the Commission.

Appellate courts generally find it inappropriate to consider an issue raised for the first time on appeal that was not pled, urged, or addressed in the court below. **Johnson v. State**, 2002-2382, p. 4 (La. 5/20/03), 851 So.2d 918, 921; **Geiger v. State ex rel. Department of Health and Hospital**, 2001-2206, p. 11 (La. 4/12/02), 815 So.2d 80, 86; **Jackson v. Home Depot, Inc.**, 2004-1653, pp. 6-7 (La. App. 1 Cir. 6/10/05), 906 So.2d 721, 725; **Hudson v. East Baton Rouge Parish School Board**, 2002-0987, p. 3 (La. App. 1 Cir. 3/28/03), 844 So.2d 282, 285; **Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters Subscribing to Cover Note 95-3317(A)**, 2001-2219, p. 36 (La. App. 1 Cir. 11/20/02), 837 So.2d 11, 41, writ denied, 2003-0418 (La. 4/21/03), 841 So.2d 805, writs denied, 2003-0417, 2003-0427, 2003-0438 (La. 5/16/03), 843 So.2d 1129, 1130. See also Uniform Rules-Courts of Appeal, Rule 1-3. Since the Commission was given no opportunity, in the instant case, to consider Mr. Reich's contention that he realized “much later” that he “had been duped,” we conclude this argument was not properly preserved for review on appeal and we decline to consider it, as it is presented for the first time in this court. See Johnson v. State, 2002-2382 at p. 4, 851 So.2d at 921.

Accordingly, we find no error in the Commission's ruling that Mr. Reich's appeal was untimely and warranted dismissal. Having decided the appeal on this basis, we find it unnecessary to consider Mr. Reich's motion to supplement the record.

### **CONCLUSION**

For the reasons assigned herein, the judgment of the Civil Service Commission is affirmed. Mr. Reich's motion to supplement the record is denied. All costs of this appeal are assessed to plaintiff/appellant, Robert Reich.

**AFFIRMED; MOTION TO SUPPLEMENT DENIED.**