

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1434

ROSA CARTER

VERSUS

**DEPARTMENT OF LABOR – OFFICE OF WORKERS’
COMPENSATION**

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Judgment Rendered: March 26, 2010

**Appealed from the
Civil Service Commission
State of Louisiana
Docket Number S-16479**

**Honorable James A. Smith, Chairman; John McLure, Vice-Chairman;
Burl Cain; Chatham H. Reed; David Duplantier; G. Lee Griffin; and
Wilfred Pierre**

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**Counsel for Director,
Shannon Templet**

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WHIPPLE, J.

Rosa Carter, a state employee with the Louisiana Department of Labor, Office of Workers' Compensation Administration (the OWC) appeals a decision of the State Civil Service Commission (the Commission) upholding the termination of her employment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The appellant, Rosa Carter, was employed as an administrative supervisor with the OWC, Louisiana Workforce Commission, and was serving with permanent status. On November 29, 2007, Carter was given a pre-deprivation notice, advising that disciplinary action was being considered against her for actions occurring in October and November 2007, regarding certain emails sent by Carter and a resulting disturbance in the office. Carter timely responded to the allegations in the pre-deprivation notice, and the OWC decided that further investigation was needed.

After the investigation was completed, Carter was given notice, by letter dated August 8, 2008, that disciplinary action "up to and including termination" from her current position was being considered by the OWC. The letter contained the policies and procedures that allegedly were violated and set forth the grounds for disciplinary action against her as follows: (1) inappropriate emails; (2) disruptive and violent behavior, profanity, and insubordination; (3) abusive, intimidating, and inappropriate behavior toward subordinates; and (4) racially derogatory remarks. A detailed breakdown of the events that had occurred and her inappropriate acts and misconduct was included in the pre-deprivation notice. Carter was given until the close of business on August 13, 2008 to respond. However, Carter

did not timely respond to the allegations set forth in the August 8, 2008 pre-deprivation notice.¹

Carter was then notified, by letter dated August 15, 2008, that she was being dismissed from her employment as an administrative supervisor effective at the close of business that day.

Carter appealed her dismissal to the Commission. Following a hearing conducted on October 29, 2008, and March 11, 2009, the Commission affirmed the decision of the appointing authority to terminate Carter's employment based on Carter's disruptive behavior and breach of decorum and her failure to follow orders of her superiors.²

From the decision of the Commission, Carter appeals, contending in her sole assignment of error that the referee and the Commission abused their discretion when Carter was terminated from her employment on August 15, 2008, for alleged misconduct that occurred on October 31, 2007. Carter further lists as issues presented on appeal: (1) whether she was deprived of her legal right to equal protection and due process when she was terminated from her employment on August 15, 2008 for alleged misconduct that occurred on or before November 1, 2007, and when an administrative law judge (apparently in an unemployment compensation hearing) found that her dismissal did not assess a disqualification for unemployment insurance benefits; and (2) whether this court should remand the case for the introduction of additional evidence when one witness's testimony at the

¹Despite the fact that Carter did not timely respond to the pre-deprivation letter, Chris Broadwater, then-director of the OWC, Louisiana Workforce Commission, testified that he nonetheless reviewed Carter's untimely response.

²Carter's appeal to the Commission was assigned to a referee for a hearing and decision. After the referee rendered a decision affirming the OWC's termination of Carter's employment, Carter filed with the Commission an application for review of the referee's decision. On May 7, 2009, the Commission denied Carter's application for review, thereby making the decision of the referee the final decision of the Commission. La. Const. art. 10, § 12(A).

Civil Service hearing differed from her testimony at the unemployment compensation hearing.

LAW AND DISCUSSION

Employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. La. Const. art. 10, § 8(A). “Cause” includes conduct prejudicial to the public service involved or detrimental to its efficient operation. McGee v. Department of Transportation and Development, 99-2628 (La. App. 1st Cir. 12/22/00), 774 So. 2d 1280, 1283, writ denied, 2001-0232 (La. 3/23/01), 788 So. 2d 432. 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. Newman v. Department of Fire, 425 So. 2d 753, 754 (La. 1983); McGee, 774 So. 2d at 1283. The appointing authority must demonstrate, by a preponderance of the evidence, that the conduct did in fact impair the efficiency and orderly operation of the public service.³ La. Const. art. 10, § 8; Newman, 425 So. 2d at 754.

Pursuant to article 10, § 12(A) of the Louisiana Constitution, the Commission has the exclusive power and authority to hear and decide all removal and disciplinary cases; it may appoint a referee to hear and decide such cases. The decision of the referee is subject to review by the Commission on any question of law or fact upon the filing of a timely application for review with the Commission. La. Const. art. 10, § 12(A); Williams v. Orleans Levee District, Board of Commissioners, 2000-0297

³Civil Service Rule 1.4 defines “appointing authority” as “the agency, department, board, or commission, and the officers and employees thereof authorized by statute or by lawfully delegated authority to make appointments to positions in the State Service.”

(La. App. 1st Cir. 3/28/01), 784 So. 2d 657, 659, writ denied, 2001-1730 (La. 9/14/01), 796 So. 2d 686.

A final decision of the Commission is subject to review by the court of appeal on any question of law or fact. La. Const. art. 10, § 12(A). However, a reviewing court should not disturb the factual findings made by the Commission in the absence of manifest error. Williams, 784 So. 2d at 659. Furthermore, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause and commensurate with the infraction, the court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by abuse of discretion. McGee, 774 So. 2d at 1282.

Generally, an abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof. A conclusion is "capricious" when there is no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. Burst v. Board of Commissioners, Port of New Orleans, 93-2069 (La. App. 1st Cir. 10/7/94), 646 So. 2d 955, 958, writ not considered, 95-0265 (La. 3/24/95), 651 So. 2d 284.

In her decision, which we attach hereto as "Appendix A" and make a part hereof, the Commission referee made numerous factual findings about Carter's actions and behavior towards co-workers, which findings are well supported by the record before us. Some of these actions include: (1) telling a co-worker that the co-worker's ex-husband had died of AIDS; (2) attempting to place that same co-worker on leave without pay despite the co-worker having a doctor's excuse for an absence; (3) sending emails to a subordinate, discussing men and sex; (4) calling a subordinate at home to

inquire as to whether the subordinate had personal feelings for an OWC superior; (5) sending an October 31, 2007 email to Karen Winfrey, Carter's superior and the appointing authority at the time, accusing Winfrey of "idle gossip" and "slander," in response to an email Winfrey had sent to Carter's superior regarding complaints Winfrey had received about Carter; (6) despite being directed by Winfrey to stop sending such emails, sending a subsequent November 1, 2007 email entitled "God knows everything and after this email I'll let him be the Judge of it all" to at least ten employees, including her superiors, which email contained personal information about herself, her marital status, her house, her religious practices and drinking habits, her vehicles, and the clothing she was wearing, a statement about the marital status of an OWC superior, and a statement that she had "never dealt with a lot of black people and don't want to"; (7) engaging in a verbal altercation on November 1, 2007, brought about by the "God knows everything" email, with an assistant attorney general assigned to the Workforce Commission, at which time Carter called the assistant attorney general a "big black [b---h]"; (8) refusing to return to her desk during the verbal altercation despite being told to do so by her supervisor and Willis Callihan, the director of Safety and Health at the OWC and Carter's superior; and (9) leaving the area of the altercation only when Callihan physically escorted her from the area by grasping her arm.

As the referee correctly concluded, Carter's actions violated: (1) Personnel Policy No. 1, entitled "Conditions of Employment," which prohibits "[c]oercion, intimidation, or threats, or any form of verbal, visual, physical, or sexual harassment against any visitor, client, supervisor, or employee, including abusive language"; (2) Personnel Policy No. 37, the "Anti-Violence in the Workplace" policy, which prohibits "threats or acts of

intentional force or violence in the workplace”⁴ and “[i]nsubordination”; and (3) Personnel Policy No. 38, the “E-mail/internet Policy,” which prohibits messages: that use “racially ... derogatory language”; that are considered “intimidating, abusive, harassing, or threatening”; “that do not conform to acceptable business or employment practices”; and that “degrade or insult [an] individual or a group, or ... serve to malign an individual or a group.”

Further, Chris Broadwater, who was then the OWC, Louisiana Workforce Commission director and the appointing authority, testified that Carter’s actions and behavior constituted an “ongoing disruption” within the OWC. Similarly, the testimony of Winfrey, the former assistant secretary and appointing authority of the OWC, set forth that Carter’s actions surrounding the “God knows everything” email were disruptive to her floor, eventually leading to a verbal altercation, and that Carter was a threat to the office.

Considering the foregoing, we conclude that the record supports the Commission’s findings of fact. Moreover, we conclude that the Commission’s determination that the punishment imposed was commensurate with the violations and had a rational basis, was not arbitrary or capricious, and was not characterized by an abuse of discretion. Carter’s behavior and actions clearly impaired the orderly and efficient operation of the OWC, and the discipline of termination was commensurate with the infraction.

Moreover, we find no merit to Carter’s assertion that her due process and equal protection rights were somehow violated by the passage of time

⁴“Violence” is defined within Personnel Policy No. 37 as “physical force or verbal abuse exerted for the purpose of harming, damaging, or causing injury to persons or property.”

between the events occurring on October 31, 2007, and November 1, 2007, and her subsequent termination on August 15, 2008. This court has previously stated that “[w]e recognize that there must be a point at which an appointing authority must take action relative to an employee’s misconduct or else be precluded from so doing.” Ragusa v. Department of Public Safety Division of State Police, 238 So. 2d 193, 195 (La. App. 1st Cir.), writ refused, 256 La. 885, 239 So. 2d 542 (1970). However, the alleged staleness of a charge alone is no reason for disregarding a charge, so long as it forms the real basis for the proposed disciplinary action. Ragusa, 238 So. 2d at 195. Here, the record clearly demonstrates that the OWC sought to more completely investigate the situation, given additional concerns that arose through Carter’s response to the initial pre-deprivation notice and given the implications of the racial comments made by Carter. Once the investigation was complete, action was timely taken.

Likewise, we find no merit to Carter’s argument that her due process and equal protection rights were somehow violated because, contrary to the determinations by the Commission herein, another administrative body, in the context of an unemployment compensation hearing, concluded that evidence of misconduct was not established **before that tribunal** and, accordingly, that unemployment compensation benefits should not be denied. The Commission’s authority to “hear and decide” disciplinary cases includes a duty to decide independently, **from the facts presented before the Commission**, whether the appointing authority had good cause for taking disciplinary action and whether the punishment was commensurate with the cause. See La. Const. art. 10. § 12(A); AFSCME, Council # 17 v. State Department of Health & Hospitals, 2001-0422 (La. 6/29/01), 789 So. 2d 1263, 1268. As more fully discussed above, the record developed before

the Commission amply supports the findings of fact made by the Commission and its conclusion that the discipline imposed was commensurate with the cause.

Finally, we also find no merit to Carter's assertion that this court should remand this matter to the Commission for the introduction of additional evidence on the basis that the testimony of Clarissa Johnson at the Civil Service hearing purportedly differed from her testimony at the unemployment compensation hearing.⁵ The record developed before the Commission is replete with testimony from numerous other witnesses, including Carter herself, and documentary evidence to support the Commission's decision. Accordingly, we conclude that remand is unnecessary.

CONCLUSION

For the above and foregoing reasons, the decision of the Commission denying Carter's appeal and upholding the termination of her employment is affirmed. Costs of this appeal are assessed against Rosa Carter.

AFFIRMED.

⁵Counsel for the OWC, as an officer of the court, filed with the Commission below a "Disclosure to the Tribunals," informing the Commission that there were discrepancies between Johnson's testimony in the Civil Service hearing and in the subsequent unemployment compensation hearing. In the disclosure, counsel for the OWC outlined the discrepancies she found in Johnson's testimony.

Decision

Filed: **March 31, 2009**

State of Louisiana

Civil Service Commission

Docket No. **S-16479**

Rosa Carter

Versus

Department of Labor-Office of Worker's Compensation

Rule: 12.2

Topic(s): Termination

Appearances: Ortha C. Nelson, Sr., representing Ms. Carter
Cynthia Batiste, representing LDOL-OWC

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Statement of the Appeal

Rosa Carter was employed by the Louisiana Department of Labor (LDOL)-Office of Worker's Compensation (OWC), Workforce Commission as an Administrative Supervisor, with permanent status. By letter dated August 15, 2008, Ms. Carter was notified that she was terminated effective close of business, August 15, 2008. OWC alleges that Ms. Carter sent inappropriate e-mails, was insubordinate, was abusive, intimidating and inappropriate toward her subordinates, and made racially derogatory remarks.

On September 8, 2008, Ms. Carter filed an appeal in which she denies the allegations. As relief, Ms. Carter asked for recession of the disciplinary action, back wages and attorney's fees.

I held a public hearing on October 29, 2008, and March 11, 2009, 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.

Findings of Fact

1. Rosa Carter was employed with LDOL-OWC in the Safety and Health Unit/OSHA Consultation Division as an Administrative Supervisor, with permanent status. Ms. Carter's immediate supervisor was Cheryl Lavallais, Administrative Assistant 4. Ms. Lavallais' supervisor was Willis Callihan, Worker's Compensation Safety and Health Director. Mr. Callihan's supervisor was Karen Winfrey, Assistant Secretary for the Office of Worker's Compensation and the Appointing Authority, until February 2008. Shortly thereafter, Chris Broadwater became the Assistant Secretary of the Office of Worker's Compensation and the Appointing Authority.
2. Earlene Gordon worked in Ms. Carter's unit from January 2007 through July 2007. When she came to work in the unit Ms. Carter approached Ms. Gordon about her ex-husband and told Ms. Gordon that he had died of aids. As far as Ms. Gordon knew this was not true. Ms. Gordon was very shocked and upset. Ms. Gordon saw a doctor and was absent for six days due to this incident. When she returned she had a doctor's excuse. Ms. Carter did not believe her excuse and told Ms. Gordon that she was placing her in leave without pay (LWOP). Ms. Lavallais intervened.
3. On August 23, 2007, Ms. Carter sent an e-mail to her subordinate Clarissa Johnson at 4:04PM which stated, "@age 36 how old of a man for a woman. How old is too old of a man if he likes you." At 4:14 PM, Ms. Carter sent Ms. Johnson

an e-mail which stated, "That's the problem. All of the old ones that try to hit on someone that I know of won't to feed you. They don't or can't have sex. They most definitely won't offer any money. Would you like someone in their 60's if they had money." Then at 4:21 PM, Ms. Carter sent Ms. Johnson an e-mail which stated, "I hear that. We wouldn't want to kill the poor soul."

4. Ms. Carter contacted Ms. Johnson at home to inquire if someone was interested in Mr. Callihan, and implied it was her (Ms. Johnson). Ms. Johnson indicated that she was not interested in Mr. Callihan and told Ms. Carter that work was work. Ms. Carter also contacted Ms. Johnson's father to inquire if she had a temper.¹
5. Ms. Carter's subordinates perceived that Ms. Carter received preferential treatment from Mr. Callihan. They noticed that Ms. Carter was away from her desk a lot, that she seemed to be in Mr. Callihan's office a lot, and that she was allowed to park in Mr. Callihan's preferred parking spot.
6. In the fall of 2007, Ms. Winfrey began to hear complaints about the Worker's Compensation Safety and Health Section. On October 9, 2007, Ms. Winfrey sent an e-mail to Mr. Callihan, which stated:

I am receiving complaints daily about Rose and you regarding treatment of the secretarial staff. I am told all are looking for other jobs, meetings are being taped, all are being told they cannot come

¹ The Johnson's are neighbors to Ms. Carter. Ms. Johnson is 37 years old.

to me with concerns, and that those on probation will not be made permanent and that these statements were made in a staff meeting.

Your reply to these statements would be appreciated.

7. On October 31, 2007, 10:14 AM., Ms. Winfrey received an e-mail from Ms. Carter titled "Accusations." This e-mail was in response to Ms. Winfrey's e-mail to Mr. Callihan. In this e-mail Ms. Carter accused Ms. Winfrey of "idle gossip" and stated in part:

...Today, October 29, 2007 I was devastated about an email that stated that you've received Daily complaints about me and the way I'm treating clerical staff. I read it and almost had an anxiety attach [sic] over reading it. I really didn't know what questions to ask about the email except who could say such a thing and why. Karen, with you being an assistant Secretary of Labor and participating in idle gossip; I think that this is considered slander. I want to know why me and where you're getting this information from. How can I work in a office with people who just take upon themselves to lie about me. ...

Ms. Carter also provided information about the issues with her subordinates and raised the issue of an inappropriate e-mail she had received from one of her subordinates.

8. Ms. Winfrey was offended by this e-mail and took it as a personal attack on her reputation as an attorney and Assistant Secretary.

9. Ms. Winfrey responded to Ms. Carter and cc'ed Mr. Callihan on October 31, 2007, at 1:28 PM. In this e-mail Ms. Winfrey noted that Ms. Carter's e-mail contained many misrepresentations and that she only brought the accusations to Ms. Carter's supervisor's attention after she had assured herself that sufficient evidence existed. Ms. Winfrey also noted that "I will hold a meeting with you for YOU to explain to me why your behavior has been inappropriate."

10. Later on the afternoon of October 31, 2007, Ms. Winfrey met with Mr. Callihan and Ms. Carter to discuss Ms. Carter's e-mail. Ms. Winfrey was still upset and admits to raising her voice, pointing her finger and telling Ms. Carter that she had had enough. Once Ms. Winfrey calmed down she apologized for her behavior, and then addressed the issue of Ms. Carter's original e-mail being inappropriate. Ms. Winfrey told Ms. Carter that she wanted the e-mails to stop, that it was a "done deal." Mr. Callihan recalls Ms. Winfrey telling Ms. Carter that the e-mails were to stop.

11. On November 1, 2007 at 11:43 AM, Ms. Carter sent an e-mail entitled "God knows everything and after this email I'll let him be the Judge of it all" to at least ten (10) employees including Ms. Winfrey, Mr. Callihan, and Tina Darensbourg,

Assistant Attorney General, assigned to the Workforce Commission. This e-mail contained personal information about herself, her marital status, her family, her education and work history, her religious practices, drinking habits, cars, and the clothes that she was wearing. The e-mail also discusses Ms. Winfrey's subordinates and the allegations in Ms. Winfrey's e-mail. Ms. Carter also stated, "Yes, I'm black and proud of it but never dealt with a lot of black people and don't want to."

12. This e-mail became the topic of conversation in the office. Ms. Darensbourg received Ms. Winfrey's e-mail around lunch time and was stunned because Ms. Winfrey had sent it to her supervisors. Ms. Darensbourg went to Dedra Washington's cubicle, sat down across from her and was discussing the contents of the e-mail with her when she heard Ms. Carter say loudly, "Tina, Tina, if you have something to say come around here and say it to my face". Ms. Darensbourg and Ms. Washington ignored her. Ms. Carter said the same thing a second time. When Ms. Darensbourg didn't respond Ms. Carter came around the cubicle toward where Ms. Darensbourg and Ms. Washington were sitting.
13. As she approached Ms. Darensbourg and Ms. Washington, Ms. Carter was ranting and raving that this was why she didn't like working with "big, fat, black" people, and commented on Ms. Darensbourg's appearance, clothes and her being an attorney. Ms. Darensbourg recalls Ms. Carter saying these things at least three times.

14. Ms. Lavallais and Mr. Callihan heard the commotion and went to see what was going on. Ms. Lavallais verbally ordered Ms. Carter back to her desk, she did not go. Ms. Lavallais ordered her again. Ms. Carter still did not return to her desk and continued to rant and rave at Ms. Darensbourg. Mr. Callihan intervened by placing his hand on Ms. Carter's forearm and turning her toward her office. Ms. Carter attempted to pull away from Mr. Callihan. Ms. Darensbourg finally had enough and told Ms. Carter that she should dress like a fifty year old not a "hochie mama."

15. Trikina Talbert had heard the confrontation and rolled her chair into the isle to see what was going on. Ms. Talbert heard Ms. Carter call Ms. Darensbourg a "big Black bitch." Ms. Washington also heard this statement. Ms. Lavallais recalls Ms. Carter referring to Ms. Darensbourg as a "big Black something." Ms. Carter admits to calling Ms. Darensbourg a "big Black thing", but denies calling her a bitch.

16. DOL's Conditions of Employment state, among other things, that an employee must satisfactorily carry out assigned supervisory duties and responsibilities and that an employee must be considerate of the morale and well being of their subordinates during all phases of the work operation. This policy prohibits the discussion of confidential matter, except with authorized personnel, the insubordination or failing to carry out any reasonable order of a superior, and

"Coercion, intimidation, or threats, or any form of verbal, visual, physical, or sexual harassment against any visitor, client, supervisor, or employee, including abusive language." Ms. Carter signed for this policy on April 19, 2006.

17. LDOL's Personnel Policy Statement No 37, Anti-Violence in the Workplace states in pertinent part,

...All intention acts and credible threats of violence must immediately be reported to supervisory personnel. Behavior that must be reported include, but is not limited to:

- i) Unwelcome name calling and obscene and other abusive language
- ii) Intimidation through direct or veiled verbal threats ...

Ms. Carter signed for this policy on April 19, 2006.

18. LDOL Personnel Policy statement No. 38 deals with E-Mail/Internet Policy.
Ms. Carter signed for this policy on April 19, 2006.

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.

State classified employees must obey the orders of their superiors, and failure to do so impairs the efficiency of the public service. *Ben vs. Housing Authority of New Orleans*, 2003-1664, (La.App. 1 Cir. 5/14/04); 879 So.2d 803. Insubordination by its very nature is detrimental to the state service. *Housing Authority of Morgan City v. Gibson*, 598 So.2d 545 (La.App. 1 Cir. 1992).

In essence, the appointing authority must show that Ms. Carter 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. OWC has proved each of these requisites occurred on several different occasions.

Appointing Authorities and their subordinate managers are entitled to the right to maintain discipline and decorum at the workplace. Basic respect for the rights of supervisors and co-workers is properly demanded by managers. Absence such discipline decorum or respect for basic rights, a work place can neither be a proper place to perform, or a viable environment in which to accomplish the goals of the agency. It can readily be seen that breach of decorum will impair the efficiency of state service. OWC has clearly presented facts, which show such a breach. Ms. Carter's acts were disruptive and if left unpunished would set an unacceptable tone for the work environment. See: *Appeal of William H. Smith*, Docket Number 9075; *Appeal of Jimmie Malone*, Docket Number 3697; *Appeal of Norman Schlatre*, Docket Number S-14622;

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). Based on the totality of the evidence, I find that OWC has proved cause for discipline and that the penalty imposed, termination, is commensurate with the offense.

Accordingly, this appeal is denied.

Roxie F. Goynes

Civil Service Commission Referee