NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0578

STEVEN TEETER

VERSUS

LOUISIANA DEPARTMENT OF CULTURE, RECREATION AND TOURISM – OFFICE OF STATE MUSEUM

DATE OF JUDGMENT: February 20, 2008

ON APPEAL FROM THE STATE CIVIL SERVICE COMMISSION
(NUMBER S-15497)
HONORABLE JAMES A. SMITH, CHAIRMAN;
BURL CAIN, VICE-CHAIRMAN; G. LEE GRIFFIN, ROSA B. JACKSON AND JOHN MCLURE, CHATHAM REED AND DAVID L. DUPLANTIER

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Downing, J. concurs.

Disposition: AFFIRMED.

Parro, J., concurs.

KUHN, J.

Plaintiff-appellant, Steven Teeter, an employee with permanent status working for the appointing authority, the Department of Culture, Recreation, and Tourism (the Department), as a museum curator at the U.S. Mint in New Orleans, appeals the decision of the Louisiana State Civil Service Commission (CSC), denying his appeal of his termination. We affirm.

In this appeal, Teeter urges the CSC erred: (1) when it substituted its decision for that of the CSC Referee (the Referee); (2) in concluding the appointing authority proved cause for his termination; (3) in its factual findings, particularly that he did not inform his supervisors that he would be evacuating before reporting to work on September 14, 2004; and (4) by imposing a penalty that was too severe under the circumstances.[1]

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[1] Teeter assigns as error the Referee's denial of his motion for summary disposition on the issue to his entitlement to reinstatement and attorney's fees. The denial of a motion for summary disposition is interlocutory and, therefore, not appealable as a final judgment. ***Spencer v. Dep't of Health and Human Resources***, 392 So.2d 149, 150 (La. App. 1st Cir. 1980). But because the merits of the motion are subsumed in the CSC's decision, our review necessarily encompasses the contentions Teeter raises in conjunction with this assignment of error. ***See Bd. of Trustees of State Employees Group Benefits Program v. St. Landry Parish Bd.***, 02-0393, p. 8 (La. App. 1st Cir. 2/14/03), 844 So.2d 90, 95, ***writ denied***, 03-0770 (La. 5/9/03), 843 So.2d 404. Additionally, Teeter avers that the CSC violated his constitutional right of due process and speedy resolution of disputes under the U.S. and Louisiana constitutions because it held the Department's request for review of the Referee's decision under advisement for approximately seven months. Without addressing the merits of the complaint, we note that Teeter raises this constitutional challenge for the first time on appeal and fails to articulate with specificity the provisions on which he relies or the relief he seeks. Thus, it is not properly before us. ***See Vallo v. Gayle Oil Co., Inc.***, 94-1238 (La. 11/30/94), 646 So.2d 859, 864; ***see also*** La. R.S. 13:4207 (requiring that district and city court judges to render a written judgment within thirty days from the time the cases are submitted for their decision) and ***Hansel v. Holyfield***, 00-0062 (La. App. 4th Cir. 12/27/00), 779 So.2d 939, ***writs denied***, 01-0279, 01-0276, 789 So.2d 591 (La. 4/12/01) (holding that although La. R.S. 13:4207 provides that a trial court shall render judgment within thirty days of submission of a case, its failure to do so within that time frame does not make the judgment invalid); ***accord Matthews v. Spears***, 24 So.2d 195, 197 (La. App. 1st Cir. 1945). Moreover, the CSC is without authority to determine the constitutionality of its own procedures. ***See Maurello v. DHH***, 546 So.2d 545, 548 (La. App. 1st Cir. 1989). Therefore, any claim of the unconstitutionality of the CSC's action of taking in excess of seven months to render judgment on a request for review is properly asserted in district court. ***See Clark v. Dep't of Transp. and Dev.***, 413 So.2d 573, 577 (La. App. 1st Cir. 1982).

The court of appeal is not the proper entity to determine whether a standard of review should be applicable when the CSC reviews a decision of a referee. ***Burst v. Bd. of Commissioners, Port of New Orleans***, 93-2069, p. 4 (La. App. 1st Cir. 10/7/94), 646 So.2d 955, 957-58. Inasmuch as the CSC is created by the constitution and has the authority to adopt rules which have the effect of law, La. Const. art. X, §10(A)(4), the CSC is the proper entity to determine if a standard of review should be applicable. ***Id.***, 93-2069 at p. 4, 646 So.2d at 958. Thus, this court lacks authority to decide Teeter's contention that the CSC owed deference to the Referee's decision.

The final decision of the CSC is subject to review by the court of appeal on any question of law or fact. La. Const. art. X, §12(A). A reviewing court should not disturb the factual findings made by the CSC in the absence of manifest error. ***Walters v. Dep't of Police of City of New Orleans***, 454 So.2d 106, 113 (La. 1984); ***Greenleaf v. DHH, Metro. Developmental Ctr.***, 594 So.2d 418, 427 (La. App. 1st Cir. 1991), ***writ denied***, 596 So.2d 196 (La. 1992).

A classified civil service employee serving with permanent status cannot be disciplined without cause. La. Const. art. X, §8. Cause exists whenever the employee's conduct is detrimental to the efficient and orderly operation of the public service that employed him. ***Greenleaf***, 594 So.2d at 427. An appellate court should not reverse the CSC's determination of the existence of cause for a disciplinary action unless the decision is arbitrary, capricious, or an abuse of discretion. ***Walters***, 454 So.2d at 113. Generally, an abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. ***Burst***, 93-2069 at p. 5, 646 So.2d at 958. 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. ***Coliseum Square Ass'n v. City of New Orleans***, 544 So.2d 351, 360 (La. 1989).

The CSC's conclusion that the Department proved cause for disciplining Teeter for his failure to report for duty on Tuesday, September 14, 2004, when the threat from Hurricane Ivan was a viable one for New Orleans, is duly supported by the evidence and was articulated with much detail in both the Referee and the CSC decisions. Teeter would have us re-weigh the evidence in a manner more favorable to his version of the facts. But the CSC's conclusion that cause for disciplinary action existed under the facts of this case is not arbitrary, capricious, or an abuse of discretion.

Insofar as the CSC's factual finding that Teeter did not inform his supervisors that he would be evacuating before reporting to work on September 14, 2004, this determination is supported by the testimony of Sam Rykel, with whom Teeter spoke after work hours on the evening of Monday, September 13, 2004. Teeter relies heavily on the e-mail communication sent out by Tamera Carboni, the deputy director who was a superior to Rykel, to suggest that upon declaration of a state of emergency by the mayor of New Orleans his comment to Rykel that "if a state of emergency is declared, that's it, game over" informed the Department that he would be evacuating. According to Rykel, in response to that "game over" comment, he specifically told Teeter, "[Y]ou have to be there," on Tuesday morning. And Rykel testified that Teeter replied, "Okay, I will." Rykel testified that he told Teeter he had to be present on Tuesday morning twice. Both men agreed that no reference

was made to the email in their after-work-hours telephone conversation on Monday evening. Thus, assuming *arguendo* that Teeter's interpretation of the email as reasonably suggesting that upon declaration of a state of emergency, the only infraction an evacuating employee would suffer was leave without pay, Rykel's directive to Teeter that he be at work on Tuesday morning created, at a minimum, conflicting information for Teeter. And because it is undisputed that Teeter had telephone communication available to him, he certainly had the means to contact the Department. But Teeter chose to leave New Orleans without contacting anyone in the Department. Thus, Teeter, who was in the best position to clarify his responsibilities with the Department before leaving, chose not to do so. Accordingly, a reasonable factual basis exists to support the CSC's finding that Teeter did not inform his supervisors that he would be evacuating before reporting to work on September 14, 2004, and as such, it is not manifestly erroneous.

Addressing Teeter's contention that the appointing authority failed to prove that his action in failing to report for duty on Tuesday, September 14, 2004, impaired the efficient and orderly operation of the Department, we note that the record supports a finding of insubordination by Teeter because he refused to follow Rykel's directive. Additionally, we find no merit in Teeter's assertion that because the Department was able to successfully move artifacts to more secure places before the time it expected to do so, his absence was not an impairment. Simply stated, if all employees were to absent themselves during hurricane preparations, the loss to the State would be immeasurable. Moreover, the additional energy and effort that Teeter's presence would have produced should have resulted in a quicker

completion of the task. Thus, the CSC's decision finding cause for disciplining Teeter for failure to report for work on September 14, 2004, is not erroneous.

In deciding the Department proved cause for disciplining Teeter for failing to report for work on Friday, September 17, 2004, the CSC stated:

> Additionally, not only did appellant on Tuesday morning [September 14, 2004] fail to maintain communication with his [managers] about their needs for him at the museum, he did the same thing after he had evacuated. He testified he knew on Wednesday that Hurricane Ivan had turned away from the Louisiana coast. He also testified he knew he was going to be needed at the State Museum in order to undo that which had been done to protect the artifacts. He did not seek to contact any of his supervisors until Thursday afternoon, however, after it was too late for him to get back to New Orleans on Friday, which was the day his services were needed.

Likewise, the record contains ample evidence to support the CSC's conclusion that Teeter's failure to report for duty on Friday, September 17, 2004, was cause for disciplining him and, thus, is neither arbitrary, capricious, or an abuse of discretion. Similarly to his failure to report on Tuesday, the additional energy and effort that Teeter's presence would have produced should have resulted in a quicker completion of the re-mantling task, which demonstrates how Teeter's absence on Friday, September 17, 2004, impaired the efficient and orderly operations of the Department.

The standard pursuant to which an appellate court is to review a disciplinary penalty imposed by the CSC is to determine whether the action by the CSC is arbitrary, capricious, or characterized by an abuse of discretion. ***See Walters***, 454 So.2d at 114. Given that a reasonable factual basis exists to support a finding of insubordination by Teeter when he disregarded Rykel's directive that he report for work on Tuesday, termination is a warranted penalty. Moreover, the failure of

Department employees to report to work to tend to hurricane preparedness could cause an immeasurable loss in property and artifacts. The CSC's decision to uphold the appointing authority's termination of Teeter was not arbitrary, capricious, or an abuse of discretion.

We affirm the CSC's decision, which upholds Teeter's termination by the Department of Culture, Recreation, and Tourism, and issue this opinion in compliance with La. U.R.C.A. Rule 2-16.1.B. Appeal costs are assessed against plaintiff-appellant, Steven Teeter.[2]

AFFIRMED.

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[2] Teeter asserted in an assignment of error "[u]pon information and belief" that no member of the CSC read and studied the record and transcript before rendering its decision on the appointing authority's request for review. This assignment of error was premised on the grant of a motion to supplement the record with a CSC staff attorney's memorandum filed with this court by Teeter. Having determined that: (1) despite Teeter's contention in his appellate brief to the contrary, a memorandum is not a pleading, ***see M.J. Farms, Ltd. v. Exxon Mobil Corp.***, 07-0450, p. 2 (La. 4/27/07), 956 So.2d 573, 574; (2) an appellate court must render its judgment on the record on appeal, ***see*** La. C.C.P. art. 2164; (3) the record on appeal is that which is sent by the administrative tribunal to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments, and other rulings, unless otherwise designated, ***see Frank v. Frank***, 06-1223, pp. 6-7 (La. App. 3d Cir. 2/7/07), 948 So.2d 1224, 1228; and (4) appellant did not designate the memorandum as part of the record as permitted under La. C.C.P. art. 2128, we denied the motion. Accordingly, having failed to brief this assignment of error, we consider it abandoned. ***See*** La. U.R.C.A. Rule 2-12.4.