

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1255

**THEODORE LANGE
VERSUS
ORLEANS LEVEE DISTRICT**

CONSOLIDATED WITH

2009 CA 1256

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Judgment rendered: DEC 23 2009

**On Appeal from a Decision of the State Civil Service Commission
Docket Number: S-12650 and S-12479
The Honorable James A. Smith, Chairman;
Burl Cain, Vice-Chairman;
Chatham H. Reed, David Duplantier,
G. Lee Griffin, Rosa B. Jackson
and John McClure**

**Shannon S. Templet, Director
Department of State Civil Service**

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Director**

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

McClendon, J. concurs and Assigns Reasons.

DOWNING, J.

In this case, the Southeast Louisiana Flood Protection Authority – East, f/k/a Board of Commissioners of the Orleans Levee District (hereinafter OLD), appeals a ruling of the Louisiana Department of State Civil Service affirming the decision to overturn OLD's termination of employee Theodore W. Lange. Finding the decision is neither arbitrary, capricious nor an abuse of discretion, we affirm.¹

Mr. Lange became an employee of OLD in 1973. In 1993 Mr. Lange replaced the retiring Managing Director. Mr. Lange served in that position until February 14, 1997, when he was placed on suspension, pending investigation by the newly appointed OLD president, James Huey.

Mr. Lange was advised in a letter dated April 14, 1997, that an investigation conducted by a law firm hired by Mr. Huey disclosed inadequacies in his leadership, resulting in thirteen charges against him. The letter explained that Mr. Lange would have an opportunity to address these charges at a pre-deprivation hearing on May 21, 1997. When, however, he and his attorney arrived at the hearing, they were told that Mr. Lange would only be allowed thirty minutes to speak on his own behalf and that his counsel could not speak at all.

During the time allotted, Mr. Lange had only addressed seven of the charges. Without deliberation, a resolution was read finding Mr. Lange guilty of all thirteen charges, and he was terminated; his termination took effect on May 29, 1997.

Mr. Lange filed a notice of appeal to the Civil Service Commission on June 20, 1997. The Commission referred the matter to a Referee. The Referee held a trial and, on July 7, 1999, the Referee ordered OLD to reinstate Mr. Lange to his former position.

¹ The motion to strike appellant's brief filed by plaintiff on September 3, 2009 is denied. This Court seriously considered the assertions made therein in its review of the briefs submitted by both parties. While practitioners before this Court are cautioned not to contort the structure of their appellate brief in an attempt to circumvent the Uniform Rules of the Courts of Appeal, judicial economy and the final circumstances of this matter justify denial of this motion. The discussion of whether appellant's memorandum exceeded the twenty-eight page limit is pretermitted.

On July 21, 1999, OLD appealed to the Civil Service Commission challenging the Referee's decision; on September 22, 1999, the matter was remanded back to the Referee. A decision was rendered on March 1, 2002, stating that the pre-deprivation hearing was deficient; OLD again appealed the decision.

The matter was remanded and another trial was conducted by a different Referee; the decision was rendered November 19, 2008. The Referee reasoned, in pertinent part, that although Mr. Lange's behavior reflect poor judgment and demonstrated an unfitness to serve as Managing Director, taken in context, these incidents were not cause for dismissal. The Referee ordered that Mr. Lange be reinstated as an employee, but demoted from "Managing Director" to "Accountant Manager 1" at \$3,768/month, which is a GS-20 pay range. OLD appealed to the Civil Service Commission. The Commission upheld the Referee's decision on April 8, 2009. OLD filed an appeal to this court alleging that the Commission erred in the following (in pertinent part):

1. In its interpretation of Civil Service Rule 12.7;
2. When it failed to recognize that this case involved employee dishonesty and was accordingly governed by the principles of *Sanders v. Dept. of Health and Human Resources*, 394 So.2d 629 (La.App. 1 Cir. 1980) and *Gibson v. Housing Authority of the City of Morgan City*, 598 So.2d 545 (La. App. 1 Cir. 1992), in that the appointing authority had the discretion in choosing the appropriate discipline;
3. When it determined that the appointing authority had proven legal cause for significant discipline but that termination was not commensurate with the proven charges;
4. When the Commission decided that the charges were either not proven or did not rise to the level justifying termination;
5. In failing to recognize that charge five (5) constituted legal cause to terminate;
6. In failing to extend comity to the appointing authority in fashioning an appropriate level of discipline;

In OLD's first assignment of error it alleges that the Commission did not interpret Civil Service Rule 12.7 correctly. Rule 12.7 provides, in pertinent part, that no employee may be disciplined until he has been given oral reasons for the discipline and a description of the evidence against him and an opportunity to respond to the allegations. It is abundantly clear that Rule 12.7 was violated. Mr. Lange was not given a full opportunity to address the charges alleged against him. We conclude that the Commission did not err in its interpretation of Rule 12.7. This assignment of error is without merit.

Regarding the second, third, fourth and sixth assignments of error, the Commission has a duty to decide whether the appointing authority had good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the infraction. *See Bergeron v. Housing Authority of Morgan City*, 07-1605 pp. 4-5 (La.App. 1 Cir. 8/8/08), 993 So.2d 685, 687. In reviewing the Commission's exercise of its discretion in determining whether the disciplinary action is based on legal cause and the punishment is commensurate with the infraction, this court should not modify the Commission's order unless it is arbitrary, capricious or characterized by an abuse of discretion. *Id.* We find no merit to OLD's assignments of error alleging that the Commission erred in failing to terminate Mr. Lange considering the totality of the circumstances.

OLD, citing *Dept. of Social Services Office of Community Services v. Schneeweiss*, 588 So.2d 1185 (La.App. 1 Cir. 1991), claims in its fifth assignment of error that Mr. Lange committed or attempted to commit fraud when he asked a subordinate to "conceal" a subpoena from his boss, Mr. Huey. OLD seems to imply that since the Commission found that this conduct by Mr. Lange did occur, it must also find that the conduct rose to the level of malfeasance in office pursuant to La. R.S. 14:134.

We disagree. The facts of this case are different from those in **Schneeweiss**. In **Schneeweiss**, the Commission's decision to demote rather than terminate was reversed by the appellate court because the Referee did not consider all of the allegations against the employee. Moreover, the employee also violated criminal law. Despite OLD's argument alleging that Mr. Lange committed fraud the Referee heard and thoroughly analyzed these allegations. The Referee found and the Commission agreed that Mr. Lange's conduct in this matter reflected poor judgment and demonstrated his unfitness for the position. The Referee's decision articulates that it was fully aware of Mr. Lange's shortcoming, including, but not limited to, asking the secretary to not disclose that he requested to see the subpoena. No criminal charges were ever filed against Mr. Lange. We cannot say that this finding is arbitrary and capricious or an abuse of discretion. Therefore, there is no merit in this assignment of error.

Upon thoroughly reviewing the record, we cannot conclude, under the facts of this case, that the Commission erred in its factual findings or abused its discretion in ruling that the penalty commensurate with the conduct is to demote Mr. Lange rather than terminate him. The opinion of the Referee fully explains the facts of this case and the rationale for the decision. Accordingly, we find no merit to OLD's assignments of error.

DECREE

For the foregoing reasons, we affirm the decision of the Louisiana Civil Service Commission. Costs of this appeal are assessed to the Southeast Louisiana Flood Protection Authority – East, f/k/a Board of Commissioners of the Orleans Levee District in the amount of \$1,524.00. We issue this memorandum opinion in compliance with URCA Rule 2-16.1B.

AFFIRMED

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McCLENDON, J., concurs and assigns reasons.

While I am concerned with some of the allegations against Mr. Lange, particularly his uncooperative and undiplomatic responses to the legislative auditor and his instruction to Mr. Huey's secretary not to tell anyone that he had asked for a copy of a subpoena, I cannot say that the Commission was arbitrary and capricious in overturning the termination of Mr. Lange and imposing a demotion. Accordingly, I respectfully concur.