

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0634

NICHOLE DUPREE

VERSUS

DEPARTMENT OF HEALTH AND HOSPITALS, OFFICE OF PUBLIC
HEALTH, INJURY RESEARCH AND PREVENTION PROGRAM

Judgment Rendered: NOV - 9 2011

Appealed from the
State Civil Service Commission
State of Louisiana
Docket No. S-16915

Honorable David Duplantier, Chairman; John McClure, Vice Chairman; G. Lee
Griffin, Wilfred Pierre, D. Scott Hughes, Kenneth Polite, Jr. and Helen Jones,
Members

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

A state employee serving with permanent status appeals a decision of the State Civil Service Commission referee upholding an agency's disciplinary action to terminate her employment. Based on our review of the matter, we affirm.

FACTS AND PROCEDURAL HISTORY

Nichole Dupree was employed with the Louisiana Department of Health and Hospitals (DHH) as a Program Manager 1-B, in the Injury Research and Prevention Program of the Office of Public Health. She served with permanent status. By a certified letter dated May 7, 2010, Clayton Williams, assistant secretary of the Office of Public Health,¹ notified Mrs. Dupree that after considering her response to the notice of the proposed disciplinary action, the appointing authority² had decided to proceed with disciplinary action, which was to terminate her from her position as a Program Manager 1-B. The stated reason for the disciplinary action was "public payroll fraud through falsification of time and attendance records and violation of policy and procedure on compensatory time." This charge was premised on two occurrences. The first occurrence was relative to Ms. Dupree requesting and being credited with unapproved leave time for a professional development conference she attended in Austin, Texas in December 2008. The second occurrence was relative to Ms. Dupree requesting and being credited with approved leave time for a professional development conference held in New Orleans in October 2009.

Ms. Dupree appealed the decision of the appointing authority to the State

¹ Mr. Williams was appointed to the position of assistant secretary by Governor Bobby Jindal on January 19, 2010. Prior to that date, Dr. Rony Francois served in that position.

² Civil 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."

Civil Service Commission by a petition for appeal filed on May 19, 2010. The referee³ assigned by the Commission to hear and decide the matter found the evidence, in part, supported the charge and upheld the disciplinary action. It is from this decision that Ms. Dupree appeals.

ASSIGNMENTS OF ERROR

By this appeal, Ms. Dupree contends that the referee erred in upholding the appointing authority's disciplinary action in the following respects:

1. The Referee/Civil Service Commission erred in finding that the appointing authority proved by a preponderance of the evidence that appellant violated the Agency's compensatory time policy with respect to the New Orleans conference.
2. The Referee/Civil Service Commission erred in finding cause sufficient to warrant appellant's termination.^[4]

STANDARD OF REVIEW

Generally, decisions of Civil Service Commission Referees are subject to the same standard of review as decisions of the Commission itself. Decisions of the Civil Service Commission are subject to the same standard of review as a decision of a district court. Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans, 02-0295, p. 4 (La. App. 1st Cir. 2/14/03), 845 So. 2d 491, 494. Factual determinations should not be reversed or modified unless clearly wrong or manifestly erroneous. Gorbaty v. Department of State Civil Service, 99-1389, p. 4 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1159, 1162, writ denied, 00-2534 (La. 11/13/00), 774 So. 2d 147. However, in evaluating the determination as to whether the disciplinary action taken by the appointing authority is based on legal cause and commensurate with the infraction, the reviewing court should not

³ See Civil Service Rule 13.20.

⁴ Ms. Dupree also asserted that "[t]he Referee/Civil Service Commission erred in failing to award appellant attorney's fees." However, Ms. Dupree failed to brief this assignment of error; therefore, we deem this assignment of error to be abandoned in accordance with Uniform Rules, Courts of Appeal, Rule 2-12.4.

modify or reverse the Commission's order unless it is arbitrary, capricious, or characterized by abuse of discretion. Usun, 02-0295 at 4, 845 So. 2d at 494.

DISCUSSION

In her first assignment of error, Ms. Dupree asserts that the referee erred in finding that the appointing authority proved by a preponderance of the evidence that she had violated the DHH compensatory time policy.

In upholding the disciplinary decision of the appointing authority, the referee found that "DHH failed to prove its charges against Ms. Dupree arising out of the Austin conference." Therefore, Ms. Dupree's conduct, as it relates to the Austin conference, is not at issue. However, in regards to the New Orleans conference, the referee found:

On October 19, 2009, Ms. Dupree claimed 10 hours of compensatory time for her attendance at the [New Orleans] conference. None of the 10 hours was for travel time. This finding is based on my review of the conference schedule, Ms. Dupree's overtime request form, and her failure to testify otherwise. Ms. Dupree knew she was not claiming compensatory time for travel time, which was the only valid basis for a compensatory time claim under the circumstances. Her claim for 10 hours of compensatory time was therefore baseless, false, and in violation of DHH policy.

We find no error in this determination by the referee.

At the hearing before the referee, Ms. Dupree testified that she lived in New Orleans, and she acknowledged receiving a March 2, 2009 memo by email from the human resource director stating:

Employees attending conferences shall be granted compensatory time for travel to and from the conference when such travel occurs outside of the employee's established working hours. Participation in conferences (including all related meetings, presentations, and other events) is aimed at personal and professional development, and for this reason, Exempt employees will not earn compensatory time while attending a conference.

As the New Orleans conference did not require travel, according to the above quoted provision, Ms. Dupree was not entitled to receive compensatory time for

her attendance at the conference. Nevertheless, she submitted a request for the time, and the request was approved by her immediate supervisor.

At the hearing before the referee, Ms. Dupree explained that on October 19, 2009, when she submitted her request for 10 hours in compensatory time for the New Orleans conference, which was held October 11-15, 2009, she did not recall the above-quoted policy. However, two days later, on October 21, 2009, she stated that she remembered the policy in response to a request for compensatory time from two subordinates. According to Ms. Dupree, the subordinates' request is what triggered her memory regarding the policy, and upon her remembrance, she sent an email to those persons she supervised to make sure they were aware of the policy.

The referee, however, was not persuaded by Ms. Dupree's assertion that she did not remember the policy at the time she submitted her request for compensatory time. In so finding, the referee stated:

Despite Ms. Dupree's assertion that she "forgot" about the March 2, 2009 memorandum, I conclude that she knew before the New Orleans conference that she was only entitled to compensatory time for travel. Only nine months earlier, Dr. Francois had denied her claim for additional compensatory time for the Austin conference, undoubtedly a memorable workplace event for Ms. Dupree. A few days after the New Orleans conference, she reminded her subordinates of the DHH policy regarding the earning of compensatory time at conferences, including a reference to her "past experience" that Dr. Francois will only approve compensatory time for travel for a conference. As a supervisor, Ms. Dupree had a heightened responsibility to be aware of and comply with DHH's compensatory time policy. She failed to do so; instead, she intentionally attempted to obtain compensatory time under false pretenses, an action that is manifestly detrimental to the state service. DHH has proved cause for discipline against Ms. Dupree.

It is the province of the Commission, through its referee, to determine the weight to be given Ms. Dupree's testimony in the administrative hearing. See Marsellus v. Department of Public Safety and Corrections, 04-0860, p. 7 (La. App. 1st Cir. 9/23/05), 923 So. 2d 656, 661. When there is a conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not

be disturbed on review. When there are two permissible views of evidence, the fact finder's choice cannot be manifestly erroneous. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). As such, we find no manifest error in the referee's finding.

Accordingly, we must now consider Ms. Dupree's second assignment of error relative to the disciplinary action imposed. Article 10, Section 8(A) of the Louisiana Constitution provides that a classified employee may not be "subject to disciplinary action except for cause expressed in writing." Such "cause" is defined as "conduct that impairs the efficiency of the public service and bears a real and substantial relation to the efficient and orderly operation of the public service in which the employee is engaged." Dunlap v. Louisiana State University Health Sciences Center, 05-1605, pp. 4-5 (La. App. 1st Cir. 6/9/06), 938 So. 2d 109, 112.

In reviewing whether a penalty is commensurate with the offense proven, an appellate court must apply the "abuse of discretion" or "arbitrary and capricious" standard of review. A conclusion of a public body is "capricious" when it does not have substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. Likewise, the word "arbitrary" implies a disregard of evidence or of the proper weight thereof. Norbert v. LSU Health Sciences Center, 07-0161, p. 5 (La. App. 1st Cir. 11/2/07), 978 So. 2d 947, 950, writ denied, 08-0218 (La. 4/18/08), 978 So. 2d 348.

At the hearing before the referee, Mr. Williams, the assistant secretary for the Office of Public Health, explained that Ms. Dupree's actions impaired the efficiency of state government because:

the misrepresentation of the compensatory time and not following the rules [result] in cost to the Department and especially in difficult budget times, we're being careful about how time is spent and whether we grant or disallow compensatory time, which turns into money and I think either the subordination issue as well, you can't run an agency if people do not follow the policies.

As pointed out by the appointing authority, Ms. Dupree's conduct could be viewed as insubordination in light of her prior knowledge of the compensatory time policy. Even though Ms. Dupree did enforce the policy as it related to her subordinates, as a supervisor, her actions still did not set a good example. Moreover, we observe that this matter involves a situation where there existed a policy that specifically governed her conduct, and Ms. Dupree violated that policy. Cf. Lasserre v. Louisiana Public Service Commission, 04-0615, pp. 6-7 (La. App. 1st Cir. 4/8/05), 903 So. 2d 474, 478-479 (where this court reversed the disciplinary decision of the appointing authority after noting that the employee's conduct did not violate any established rule or policy of the agency). As such, although we may have imposed a discipline other than the ultimate penalty of termination, considering the substantial deference that must be afforded the appointing authority, we cannot say that the decision was arbitrary, capricious, or characterized by an abuse of discretion. See Mathieu v. New Orleans Public Library, 09-2746, pp. 10-14 (La. 10/19/10), 50 So. 3d 1259, 1265-1268 (where despite the fact the employee had worked for the City of New Orleans for 25 years with no prior disciplinary record, and that at the time of her errant conduct, the library lacked a director and had a shortage of personnel, the Louisiana Supreme Court reversed the appellate court and reinstated the termination decision of the appointing authority).

CONCLUSION

Therefore, considering the foregoing review of the evidence and the applicable law, we affirm the decision of the State Civil Service Commission. All costs of this appeal are assessed to the appellant, Nichole Dupree.

AFFIRMED.