

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1797

IN RE:  
APPEAL OF  
GARY FERRARI, JR.



***DATE OF JUDGMENT: September 15, 2006***

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT  
(NUMBER 79012 "B"), PARISH OF ASCENSION  
STATE OF LOUISIANA

HONORABLE THOMAS J. KLIEBERT, JR., JUDGE

\* \* \* \* \*

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\* \* \* \* \*

**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

**Disposition: AFFIRMED WITH MODIFICATION.**

*Welch J. dissents with reasons.*  
*J. Gaidry, J. - CONCURS*

KUHN, J.

City of Gonzales police officer Gary Ferrari, Jr., appeals the decision of the City of Gonzales Fire and Police Civil Service Board (the Board) upholding a four-day suspension by the Gonzales Police Department based on Officer Ferrari having engaged in an off-duty fight. Modifying the judgment for clarity, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Although the witnesses' accounts vary, the seminal facts are established by Officer Ferrari's testimony. Officer Ferrari stated that on April 14, 2004, after he, his girlfriend, Brigette Haydel, and fellow officer, Lance Bourgeois, who was the designated driver that evening, ate dinner at Superior Grill in Baton Rouge, they picked up Haydel's sister, Katie, and went to the Cadillac Café, which was very crowded that evening. Approximately an hour and fifteen minutes after their arrival, Brigette was not feeling well and sat at a table with Officer Ferrari nearby. A white male, who was at the Café with a group of other men, began talking to Brigette and placed his hands on her. Brigette asked Officer Ferrari to tell the man to leave her alone. Officer Ferrari told the man that Brigette was with him and that the man could talk to Brigette if she wanted him to, but that he should not touch her. The man indicated that he had no problem with Officer Ferrari's request and left without incident.

Approximately one and a half hours later, as Officer Ferrari sat alone in a corner of the bar, a companion of the man who had touched Brigette approached. Officer Ferrari, sensing a potential problem, sent Brigette to alert Officer Bourgeois. The second man came within an arm's length in front of Officer Ferrari, and he asked if Officer Ferrari had a problem with him. The man continued to badger

Officer Ferrari, insisting that Officer Ferrari had a problem with him despite Officer Ferrari's assurances to the contrary. Officer Ferrari warned the man to move away "before something goes bad." The man nevertheless persisted and eventually raised his arm and swung at Officer Ferrari. The swing missed, and Officer Ferrari seized the man by the back of his head and hit the man with his elbow. The man fell to the ground. Another member of the man's group then tried to hit Officer Ferrari, but Officer Ferrari ducked. A bystander, Seth LeBlanc, pushed the other man into a wall and Officer Ferrari "backed up." Bouncers arrived and ejected the two men who had swung at Officer Ferrari as well as the other man who had touched Brigitte.

According to his testimony, Officer Ferrari was dressed in regular street clothes that evening and never advised anyone at the Café that he was a police officer. He explained that after the man approached him in the corner, he did not retreat or seek help from the Café's security personnel because the man had him blocked in. Officer Ferrari stated that he felt that he had no choice but to use force after the man physically engaged him.

According to Police Chief Bill Landry, after an internal investigation was conducted by Detective Steve Nethken, Officer Ferrari was suspended without pay for four days. Chief Landry emphasized that he had earlier warned officers in a meeting that the next one involved in a physical altercation would be terminated, but in fairness to Officer Ferrari given the circumstances of the incident, he imposed the four-day suspension instead.

After a public hearing, the Board upheld the four-day suspension. Officer Ferrari filed a petition for judicial review and the district court upheld the four-day

suspension. Officer Ferrari appeals, and without raising any contentions suggesting that the punishment imposed is not commensurate with the offense, challenges only whether the Gonzales Police Department had good or lawful cause for taking disciplinary action.

### DISCUSSION

As a civil service employee, Officer Ferrari is protected against termination without sufficient legal cause. La. Const. Art. X, §8(A). An employee may appeal disciplinary action taken against him to the Board. La. R.S. 33:2501. On appeal, the Board has a duty to decide if the appointing authority has good or lawful cause for taking the disciplinary action. *Walters v. Department of Police*, 454 So.2d 106, 113 (La. 1984); La. R.S. 33:2501. The burden of proving legal cause by a preponderance of the evidence is on the Gonzales Police Department, the appointing authority, which must demonstrate not only that the complained-of conduct occurred, but also that it impaired the efficient operation of the governmental entity. See *Tackett v. City of Hammond*, 95-0317, p. 5 (La. App. 1st Cir. 11/9/95), 667 So.2d 1104, 1105-07. The department must also show a real and substantial relation between the conduct of the employee and the efficient operation of the department. See *AFSCME, Council #17 v. State ex rel. Dep't of Health & Hospitals*, 2001-0422, p. 7 n.7 (La. 6/29/01), 789 So.2d 1263, 1286 n.7. In reviewing the decision in a civil service case, an appellate court should not modify the Board's order unless it is arbitrary, capricious, or characterized by abuse of discretion. Arbitrary or capricious means the absence of a rational basis for the action taken. See *Bannister v. Dep't of Streets*, 95-0404, p. 8 (La.1/16/96), 666 So.2d 641, 647; *Tackett*, 95-0317 at p. 3, 667 So.2d at 1106. As in all civil cases, we review the factual findings

of the trier of fact under the manifest error/clearly wrong standard of review. *Tackett*, 95-0317 at p. 3, 667 So.2d at 1105. Thus, mindful of the findings of fact implicit in the Board's determination upholding the four-day suspension, the question to be answered is whether the Board had a rational basis for its decision that the department met its burden of proving that Officer Ferrari engaged in the altercation and that his conduct impaired the efficiency of the Gonzales Police Department. See *Bannister*, 95-0404, p. 8 (La.1/16/96), 666 So.2d 641, 647.

It is undisputed that Officer Ferrari engaged in a fistic altercation at the Cadillac Café during the evening of April 14, 2004. But the gist of Officer Ferrari's appellate complaint is that the record is devoid of any evidence proving the connection between his conduct and its interference with the efficient operations of the Gonzales Police Department. Emphasizing that the evidence shows he was off duty, not in uniform, and did not attempt to utilize his position as a law enforcement officer to gain an advantage, Officer Ferrari urges that the Gonzales Police Department failed to cite a policy or procedure violation demonstrating a real and substantial relationship between his involvement in the altercation and the efficient operation of the department. We disagree.

In the letter notifying Officer Ferrari that he was the subject of an administrative investigation that may result in disciplinary action against him, Chief Landry advised if it was found that Ferrari had been "involved in a fistic altercation with an unknown male," the incident was "clearly a violation of the Gonzales Police Department Policy Manual SOP 112," which states "members shall conduct themselves on and off duty in a manner that reflects most favorably on the department." Officer Ferrari neither denies having received a copy of the manual

nor knowledge of the substance of SOP 112. Although additional facts were developed through the testimony of Detective Nethken, assuming the most favorable version of the facts as presented by Officer Ferrari, a rational basis exists for the Board's decision to uphold the four-day suspension.

The public puts its trust in the police department as a guardian of its safety, and it is essential that the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust. See *Newman v. Dep't of Fire*, 425 So.2d 753, 756 (La. 1983). In this case, Chief Landry explained that "an officer is a direct reflection of my representation of the police department and I'm only as good as my worst man." He said that he believed police officers have more responsibility than ordinary citizens to notify proper authorities of problems and to refrain from involvement in fist fights. According to the standard Chief Landry set for his department, a police officer should be at a level above others in representing himself in public. Based on Officer Ferrari's account of the incident, the chief concluded that the police officer did not use his best judgment.

Although we cannot say that every fistic altercation in which an off-duty police officer may be involved necessarily will reflect unfavorably on the department, in this case, based on Officer Ferrari's own version of the incident, the record supports a finding that Officer Ferrari did not conduct himself in a manner that reflected most favorably on the department. According to Officer Ferrari, the man who took a swing at him *missed*. Officer Ferrari's response to the missed punch was to seize the man by the back of his head and hit the man with his elbow. Officer Ferrari acknowledged that as the man approached, he anticipated a problem and had

sufficient time to send Brigitte to get Officer Bourgeois. The evidence additionally establishes Chief Landry specifically warned that the next officer involved in a fistic altercation would be terminated.

Under the facts of this case as established by Officer Ferrari, we cannot say the Board lacked a rational basis for concluding that his conduct at the Cadillac Café impaired the efficient operation of the department. Chief Landry explained the high standard of conduct he has established for the Gonzales Police Department's employees, specifically requiring that they refrain from engaging in fistic altercations. Officer Ferrari's failure to resolve the problem the man had with him without resorting to a forceful response addresses itself to the level of discipline the Gonzales Police Department has set in place in fulfillment of its role as the guardian of the public's safety and, therefore, bears a real and substantial relationship to the department's efficient operation. Accordingly, we cannot say that the Board's decision to uphold the four-day suspension imposed against Officer Ferrari by the Gonzales Police Department is arbitrary, capricious or an abuse of its discretion.

#### **DECREE**

For these reasons, we affirm the judgment of the district court, but for clarity, modify it to expressly state that Officer "Ferrari's petition for review of the Board's decision is dismissed." *See* La. C.C.P. art. 2164. Appeal costs are assessed against Gary Ferrari, Jr.

**AFFIRMED WITH MODIFICATION.**

**IN RE:**

**NUMBER 2005 CA 1797**

**APPEAL OF**

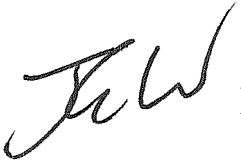
**FIRST CIRCUIT**

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**WELCH, J., DISSENTING.**



I respectfully dissent. The record is crystal clear that Officer Ferrari was acting in self-defense. Under the circumstances and evidence presented, his conduct and actions were reasonable, justified, and not excessive. A police officer should not be punished for defending himself.

Because of this, in my view, the Board's action was arbitrary, capricious, and an abuse of discretion.