

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1750

ELIZABETH BISHOP

VERSUS

**DEPARTMENT OF HEALTH AND HOSPITALS – SOUTHEAST
LOUISIANA HOSPITAL**

Judgment rendered: December 28, 2006

**On Appeal from a decision of the State Civil Service Commission
Docket Number S-14939**

**The Honorable James A. Smith, Chairman
Burl Cain, Vice-Chairman
David Duplantier, Charles W. Dobie
G. Lee Griffin, Rosa B. Jackson
and John McClure**

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Department of State Civil Service**

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BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

*J. Pettigrew, Jr. concurs
Hughes, Jr. concurs.*

DOWNING, J.

Plaintiff/appellant, a nurse with the Louisiana Department of Health & Hospitals (DHH), was terminated because she no longer possessed an active Louisiana nursing license, a prerequisite for the position. The Civil Service Commission upheld the termination, and from that decision, this appeal arises. For the following reasons, we affirm.

Elizabeth Bishop worked as a registered nurse (RN3) at Southeast Louisiana Hospital until her dismissal, effective December 31, 2002.

The following summarizes Ms. Bishop's assignments of error:

1. The entire Civil Service appeal, hearing, and review procedure is unconstitutional on its face, and against public policy.
2. The entire Civil Service appeal, hearing, and review process is unconstitutional as applied to Ms. Bishop due to the inequitable delay from the date of her termination until final resolution by the Civil Service Commission.
3. By holding the matter under advisement for 281 days, the Referee committed manifest error and was arbitrary and capricious to the effect that it was impossible to render a fair decision and that the delay unconstitutionally prejudiced Ms. Bishop's right to a fair and speedy trial.
4. The Referee misapplied the facts, giving no weight to Ms. Bishop's effort to have her license placed on active status months before she was terminated and months before returning to work from a prior termination that was successfully appealed.
5. The Referee failed to find the real facts that include her retaliatory termination that was caused by the successful appeal of her earlier termination.
6. The Referee failed to see the true intentions of the appointing authority and unjustly penalized Ms. Bishop when she timely and in good faith did everything required to obtain her license.
7. The Referee's decision is internally inconsistent by finding that Ms. Bishop was not at fault and had

done everything required of her to obtain her active license, yet gave no weight to her testimony.

8. The Referee failed to give the proper weight to the unreasonable actions of the appointing authority by finding “Ms. Bishop knew or should have known that she could not practice nursing without a valid license and did so anyway.” In truth, she had done and was continuing to do everything required to have her license reactivated but was thwarted by the Nursing Board. Nonetheless, the appointing authority “forced” her to work as a nurse just so they could fire her rather than grant her reassignment to non-nursing duties or placing her on leave without pay pending resolution of the licensing issue.
9. The Referee erred in condoning the appointing authority’s actions in firing Ms. Bishop.
10. The Referee erred in finding that Ms. Bishop’s honesty required the Nursing Board to “take further action, which in fact prolonged the application process and further delayed renewal.”

ALLEGED FACIAL UNCONSTITUTIONALITY

Ms. Bishop’s first assignment of error concerns the constitutionality of the Civil Service Commission Rules. She claims that the Louisiana Constitution mandates the Commission to personally review the Referee’s decision when requested to do so, and that the Commission abrogated its sworn duty to conduct such personal review. Ms. Bishop argues that the Commission allegedly delegated its decision-making authority to its general counsel. She argues that the Commission then “rubber stamped” the general counsel’s conclusion instead of fulfilling its constitutional duty by impartially and independently reviewing the decision.

First, there is no evidence in the record that the Commission “rubber stamped” the decision. Ms. Bishop argues that the Commission somehow abrogated its duty by requesting an opinion from its counsel before making its decision. We, however, find no law or rule prohibiting such a request. In

fact, before deciding if Ms. Bishop's dismissal was warranted, the Commission was prudent to seek advice from its legal department.

After reviewing the Referee's decision, the general counsel responded that he was of the opinion that Ms. Bishop's dismissal should be upheld. We note that his response also clearly stated that his opinion was only a recommendation. The Commission's counsel also pointed out that Ms. Bishop's termination was a non-disciplinary dismissal. Specifically, the dismissal was not based upon Ms. Bishop practicing nursing without a license, which would have been a disciplinary dismissal for cause, but merely that she did not possess the required license to hold her job.

After a careful review of the record we conclude that the record contains no evidence substantiating allegations that the general counsel's opinion of the Referee's decision was "rubber stamped" by the Board. There is nothing in the record suggesting that the Board did not make its own factual determinations. Further, we know of no prohibition against the Commission seeking the advice from its own counsel.

Second, Ms. Bishop also argues that the Civil Service process in general is unconstitutional. This court will usually not consider an issue raised for the first time at the appellate level, which was not pleaded, urged or addressed in the court below.¹ *Johnson v. State*, 02-2382, p. 4 (La. 5/20/03), 851 So.2d 918, 921. While we possess a broad supervisory jurisdiction granted to us by the State Constitution, a court of appeal generally will not act on the merits of a claim not yet raised or acted upon by a lower tribunal. LSA-Const. Art. 5 § 10; Uniform Rules, Courts of Appeal,

¹ Since the Civil Service Commission has no authority to determine the constitutionality of its own rules and procedures, *Maurello v DHH*, 546 So.2d 545, 548 (La.App. 1 Cir. 1989) citing *Murray v. Dept. of Rev. and Taxation*, 504 So.2d 561, 563 (La.App. 1 Cir. 1986), and since we will not usually consider constitutional issues for the first time here, the jurisprudence seems to suggest that constitutional issues must first be raised at the district court level. "The function of interpreting the constitution and laws of the state, in final analysis, rests exclusively upon the courts." *State, Through D ept. of Highways v. Constant*, 359 So.2d 666, 671 (La.App. 1 Cir. 1978).

Rule 1-3; *Jordan v. City of Baton Rouge*, 93-2125, p. 7 n.5 (La. App. 1 Cir. 3/10/95), 652 So.2d 701, 705 n.5; *Cf. Mallard Bay Drilling, Inc. v. Kennedy*, 04-1089, pp. 9-10 (La. 6/29/05), 914 So.2d 533, 541-542. Especially in claims where the facts do not support the constitutional issue raised, we should decline to exercise our supervisory jurisdiction.

In this case we decline to exercise our broad supervisory jurisdiction to decide the constitutional issues regarding the Civil Service Commission Rules. We therefore pretermitt this discussion.

**ALLEGED UNCONSTITUTIONALITY AS APPLIED
TO MS. BISHOP**

In Ms. Bishop's second and third assignments of error, she complains about the unconstitutionality of the Civil Service Commission Rules because of the time it took for her appeal to be processed. She also argues that the Referee somehow erred constitutionally in rendering its opinion so long after the hearing process had finally been completed. Ms. Bishop claims that the Referee could not make a fair decision so long after the hearing, and that these delays somehow violated her due process rights. She alleges that she was harmed because the Commission did not decide the matter promptly in accordance with its constitutional duty. She lists the following chronology of events:

She was notified of her termination December 23, 2002.

Her appeal was filed January 9, 2003.

The matter was heard April 1, 2003, continued, and concluded September 29, 2003, then taken under advisement.

The Referee rendered a decision July 6, 2004.

Ms. Bishop requested a review on July 21, 2004.

The transcript was prepared on November 17, 2004.

Her application for review was denied on May 9, 2005.

Basically, Ms. Bishop's argument is that somehow her constitutional rights were violated because of the length of time it took for her termination appeal to be heard and for a final decision to be rendered. However, in her

argument she points to no specific constitutional provision that was allegedly breached. Rather, she cites an alleged violation of Civil Service Rule II § 4.16. Also, she fails to explain how a violation of this rule rises to a constitutional violation.

In pertinent part, Civil Service Rule II § 4.16 provides:

Appeals to the Commission shall be decided promptly, but in any event within ninety (90) calendar days after ... receipt by the Commission of the Hearing Officer's report and official transcript of the testimony of said hearing.

Ms. Bishop also maintains that it was unconstitutional for the Commission to deny her request for oral argument. She maintains that since the Commission is sitting as an appellate tribunal, it must allow the appellant to argue its case. She cites no authority for this proposition.

Ms. Bishop also seems to claim that the alleged untimely delay caused her unconstitutional prejudice because it became impossible for the Referee to render a reasoned decision. She seems to claim that the decision must have been either manifestly erroneous or arbitrary and capricious due to this impossibility, resulting in a constitutional violation.

As stated above, since these matters were not addressed in a lower court, we decline to exercise our supervisory jurisdiction to decide whether the Civil Service Commission Rules, as applied to Ms. Bishop, are unconstitutional. Ms. Bishop's argument is so vague that we are unable to determine what exactly her claimed constitutional privations are. Nor has she given us any statute or case law to substantiate her claims. Therefore, we pretermitt the discussion of these alleged constitutional issues.

THE REFEREE'S DECISION

Pertinent Legal Precepts

In *Bannister v. Dept. of Streets*, 95-0404, (La. 1/16/96), 666 So.2d 641, the Louisiana Supreme Court gave an in-depth explanation of the purpose and ramifications of Civil Service Rule II § 4.16. It stated that civil service provisions in the state constitution are designed to protect public career employees from political discrimination by eliminating the “spoils” system. *Id.* at 645. Essentially, civil service laws and rules establish a system for “non-policy forming” public employees. These employees are selected on the basis of merit and cannot be discharged for religious or political reasons. *Id.* To further these goals, and in addition to its primary function as a quasi-judicial body, the Civil Service Commission is empowered to generally supervise the civil service system and to establish rules to administer that system. *Id.*

In regard to whether a rule is mandatory or directory, such a construction will be made in accordance with the standards for interpreting statutes. *Id.* If the rule is to be considered mandatory, beyond requiring the doing of the thing specified, the provision will also describe the penalty or result that will follow if the thing is not done. *Id.*

Therefore, concerning imperatively phrased procedural requirements such as the time limitation in this case, the determination of whether the language is mandatory cannot be based upon a mere literal reading. *Id.* In deciding whether a requirement will be given mandatory or directory effect, a significant consideration lies in comparing the results to which each such construction would lead. *Id.* at 646.

As disclosed in its introductory clause, the purpose of § 4.16 is to assure that the Commission promptly renders a decision in its appeals. The provision states that such determinations are to be rendered “in any event” within ninety days after receiving the hearing officer’s work. The secondary

nature of this added clause, although seemingly couched as an imperative, discloses intent to merely guide the Commission in its duties by proposing system and dispatch in its proceedings. *Id.* We thus read the indicated time specification to amplify the rule's stated purpose, but, nevertheless, to be merely directory in nature. *Id.* We also note that the rule does not set the result that will follow a failure to comply. *Id.* It should also be noted that a great injustice could arise from suffering the continuance of incompetent civil servants just because the time deadline had not been met. *Id.* It should also be noted that the Commission has the authority to award back pay, to reinstate benefits, and to modify disciplinary action which can be utilized to rectify the potential prejudice resulting from a delayed ruling. *Id.* at 646-47.

Analysis

The remaining assignments of error deal with various allegations explaining why the decision was arbitrary and capricious. These include misapplication of the facts, weighing the evidence incorrectly, and failure to see the true retaliatory intent of the Nursing Board and Appointing Authority.

In reviewing a Civil Service Commission decision, an appellate court should apply the clearly wrong or manifest error rule to factual questions. *Bannister*, 95-0404 at p. 8, 666 So.2d at 647. Great deference is given to the factual conclusions of the Commission. *Id.* However, when evaluating the Commission's determination as to whether the action is commensurate with the infraction, the court should not modify the Commission's order unless it is arbitrary, capricious, or an abuse of discretion. *Id.*

Here, the Referee found that at the time of Ms. Bishop's termination, she did not have an active Louisiana license to practice as a professional registered nurse. She therefore could not legally perform her duties. This

fact is undisputed. Although Ms. Bishop alleges that she was “forced” to resume her nursing position after winning her previous appeal so that the Authority would have an excuse to fire her, there is no evidence in the record to substantiate this allegation. In fact, until Ms. Bishop voluntarily told the Nursing Board that she was working without a valid license, the Authority was unaware of this deficiency. Moreover, when Ms. Bishop was reinstated to her position as RN3, she had ample opportunity to explain to her employers that she could not return to her job until her lapsed license had been reinstated. Instead, she chose to work without a valid license.

Additionally, we note that Ms. Bishop’s proceedings complied with all applicable procedures governing classified employees. Ms. Bishop appears to have received the full and thorough evaluation she requested. The record does not reflect any deliberate delay in the rendering of her decision. Nor does the record reflect any prejudice to Ms. Bishop resulting from the delays.

Ms. Bishop also argues that her termination was too severe a penalty for the offense. This is especially true, she argues, when she was doing everything she could to regain her active license and the Nursing Board was deliberately delaying the reinstatement process. Our review of the record, however, reflects that the Nursing Board would have issued her a valid license nearly one week prior to her termination had she been willing to sign the Consent Agreement. Ms. Bishop refused to sign this document and, consequently, lost her position because she did not have the required license to retain it. Ironically, two months after her termination, Ms. Bishop signed the exact same document that would have prevented her from losing her job.

Accordingly, these assignments of error are without merit.

DECREE

For the foregoing reasons, we affirm the Civil Service Commission's decision. Costs of this appeal are assessed against the plaintiff/appellant, Elizabeth Bishop.

AFFIRMED