

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0792

CITY OF THIBODAUX

VERSUS

JASON TERRY

DATE OF JUDGMENT: February 9, 2007

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
(NUMBER 102351 "B"), PARISH OF LAFOURCHE
STATE OF LOUISIANA

HONORABLE JERAME J. BARBERA, III, JUDGE

Daniel A. Cavell
Thibodaux, Louisiana

Counsel for Plaintiff/Appellee
City of Thibodaux

Eric J. Hessler
Slidell, Louisiana

Counsel for Defendant/Appellant
Jason Terry

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AFFIRMED IN COMPLIANCE WITH LA. U.R.C.A. RULE 2-16.1B.

JJB Gaidry, J. concurs

KUHN, J.

Appellant, Jason Terry, appeals the trial court's judgment reversing the portion of the order of the Thibodaux Municipal Government Employees' Civil Service Board (the Board) that reinstated the policeman to employment with the Thibodaux City Police Department. We affirm.

After Terry appealed his termination from employment for having engaged in conduct unbecoming an officer, a violation of the Thibodaux Police Department Manual, Article 7.2 as well as having failed to maintain the standards of service as defined in Rule IX, Section 1 of the Thibodaux Civil Service Regulations, the Board concluded that the appointing authority, Chief of the Thibodaux Police Department, Craig Melacon, had just cause for discipline against Terry. But the Board found that the disciplinary action taken was unreasonable and reinstated the policeman to employment. The trial court determined that the Board's decision was not made in good faith, its order was arbitrary and capricious and therefore, its findings were clearly wrong, and it reversed the Board's reinstatement of Terry to employment.

On appeal, Terry challenges the trial court's conclusion that reversed his reinstatement, suggesting that the Board was at liberty to allot a less severe punishment than that taken by the appointing authority. He also urges that the trial court erred in failing to remand the matter to the Board to clarify its intent in rendering its decision.

It is well established that the Board has the authority to hear and decide disciplinary cases, which includes the authority to modify (reduce) as well as to reverse or affirm a penalty. La. Const. art. X, § 12. See La. R.S. 33:2501. The

appointing authority has the burden of proving by a preponderance of the evidence the occurrence of the complained of activity and that the conduct complained of impaired the efficiency of the public service. *Fernandez v. New Orleans Fire Dep't*, 01-0436, p. 4 (La. App. 4th Cir. 2/6/02), 809 So.2d 1163, 1165. While these facts must be clearly established, they need not be established beyond a reasonable doubt. *Id.*

Decisions of the Board are subject to the same standard of review as a decision of a district court. When reviewing the Board's findings of fact, the reviewing court is required to apply the manifestly erroneous or clearly wrong standard of review. But in evaluating the Board's 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 modify or reverse the Board's order unless it is arbitrary, capricious, or characterized by an abuse of discretion. *Brown v. Dep't of Health & Hosp. Eastern Louisiana Mental Health Sys.*, 04-2348, pp. 4-5 (La. App. 1st Cir. 11/4/05), 917 So.2d 522, 527, *writ denied*, 06-0178 (La. 4/24/06), 926 So.2d 545.

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. *Id.* The authority to reduce a penalty can only be exercised if there is insufficient cause for imposing the greater penalty. *See Branighan v. Dep't of Police*, 362 So.2d 1221, 1222 (La. App. 4th Cir. 1978). Thus, unless there is insufficient cause for the appointing authority to impose the discipline, the penalty must stand.

Durden v. Plaquemines Parish Gov., 05-1373, p. 5 (La. App. 4th Cir. 4/12/06), 930 So.2d 182, 185.

Like the trial court, we find the Board's order reinstating Terry to employment was erroneous. The implicit determination that there was insufficient cause for imposing the penalty of termination was arbitrary in that the Board disregarded the proper weight of the evidence; and it was capricious inasmuch as such a determination is contrary to the substantiated competent evidence.

The trial court expressly noted the failure of the Board to modify the order of termination by the appointing authority, pointing out that the Board merely ordered Terry's reinstatement. Finding that under La. R.S. 33:2501C(1), this failure of the Board to modify the order of termination was manifestly erroneous, rather than remanding the matter for clarification, the trial court "consider[ed] the Board's decision to say that it agrees with the finding of cause for discipline, but ... finds that a suspension without pay would be a more appropriate punishment considering the acts committed." Because the Board's order of reinstatement was arbitrary and capricious, a remand is not warranted since the appointing authority proved sufficient cause for imposing the penalty of termination. Given the evidence presented by the appointing authority to the Board, the greater penalty must stand and any lesser penalty was not within the province of the Board to impose. Thus, a remand to the Board would serve no purpose.

For all these reasons, the trial court's judgment reversing the Board's order of Terry's reinstatement to employment with the Thibodaux Police Department is affirmed. Appeal costs are assessed to Jason Terry.

AFFIRMED IN COMPLIANCE WITH LA. U.R.C.A. RULE 2-16.1B.