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CIVIL SERVICE COMMISSIONS

The *Boucher* litigation[1] moved closer to its conclusion during the 1958-1959 term. It may be recalled that during the previous term Boucher and his colleagues were successful in obtaining mandamus compelling the Division of Employment Security of the Department of Labor to pay back wages for the period between a dismissal, unlawful because of lack of proper notice, and a later dismissal based on a proper notification. The latter dismissal was upheld by the Civil Service Commission and Boucher *et al.* appealed.[2] The Commission filed a motion to dismiss on the ground that the Commission decision had been allowed to become final by failure to file timely application for appeal with the Commission. The court held, however, that a person operating a mail delivery service at the capitol was, in effect, acting for the Commission in receiving mail addressed to it. Consequently, an application for appeal received by such person within the constitutional period provided was timely filed even though physically delivered to the Commission after such date. To hold otherwise, the court said, would do violence to its policy of favoring appeals. The motion to dismiss the appeal being denied, a disposition on the merits remains to be made by the court.

The *Dickson* case[3] also required further attention from the court during the term. In *Dickson* there had been a dismissal, lawful as to notice given, which had been sustained on the merits by the Civil Service Commission. However, on appeal the Commission was reversed on the sufficiency of cause alleged and proved. The employee hence retained his civil service status, but in the event of no voluntary payment of back wages by the department was required to bring mandamus proceedings; the

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1. See *Administrative Law*, 18 LOUISIANA LAW REVIEW 79, 80 (1957) for resume of events prior to the 1958-1959 term.

2. Boucher v. Division of Employment Security, 235 La. 851, 106 So.2d 285 (1958).

3. Dickson v. Richardson, 236 La. 668, 109 So.2d 51 (1959).

Commission was said to be precluded from ordering such back pay since it did not itself reinstate the employee.[4] The employee made demand and the department indicated a willingness to pay, but insisted on offsetting wages earned elsewhere while the employee was illegally off the payroll. The department urged its action as in accordance with the rule generally applicable in public employment cases;[5] however, the court felt bound to follow its own jurisprudence where the court rather than the Commission had found the employee unlawfully off the payroll. In such previous jurisprudence the court had found no authority for offsetting wages earned and ordered full back pay;[6] the present case was similarly disposed of. The question as to whether reinstatement *ordered* by a civil service commission could be conditioned on such an offset as a matter of commission discretion was left open.

The *Hermann* case,[7] involving a dismissal after notification of charges, presented the question in the last-mentioned context. On appeal to the Civil Service Commission of the City of New Orleans, the Commission found a charge stated by the police department not to be the true charge; the employee was therefore ordered reinstated in his position with back pay from the time of his dismissal, less any amounts earned in the interim. Back pay for a period of suspension preceding dismissal was denied, apparently on the ground that continuances in the hearings on both the suspension and dismissal had been obtained by the employee for his convenience during the pendency of a federal indictment for income tax evasion. The court initially considered the dismissal to have been one made after written notice pursuant to the Constitution and hence a proper setting in which the Commission could exercise its power to order reinstatement "under such conditions as it deems proper."[8] Finding no errors of law in the Commission's order, the court affirmed. The above rationale was deemed to synchronize the holding with the *Dickson*[9] opinion handed down the same day, ordering the Department of Highways to pay back wages without deduction. *Dick-*

4. Dickson v. Department of Highways, 234 La. 1082, 102 So.2d 464 (1958). See *Administrative Law*, 19 LOUISIANA LAW REVIEW 352 (1959).

5. 236 La. 668, 670, 109 So.2d 51, 52 (1959).

6. State *ex rel.* Anderson v. Walker, Administrator of the Division of Employment Security, 233 La. 687, 98 So.2d 153 (1959). The court also cites Article 2749 as supplying an analogy from the area of private breach of contract.

7. Hermann v. New Orleans Police Department, 238 La. 81, 113 So.2d 612 (1959).

8. LA. CONST. art. XIV, § 15(o)(3).

9. 236 La. 668, 109 So.2d 51 (1959).

son was a case in which a Civil Service Commission had sustained a dismissal by the employing agency, but had been reversed by the court and a judgment entered that the employee retained his permanent civil service status. As noted, on later mandamus proceedings no offset for wages earned was deemed appropriate because Dickson was not reinstated by a Civil Service Commission pursuant to conditions as authorized by the Constitution, but had been found to retain his permanent civil service status by the court.

On rehearing of the *Hermann*[10] case, after the *Dickson* decision, the court amended its judgment to provide for deleting from the Commission order the condition imposed as to offsetting wages earned during the illegal dismissal and the condition disallowing wages from the time of suspension to the time of dismissal. It was the court's judgment on rehearing that Hermann had been illegally dismissed, since the notice did not contain the true charge on which his dismissal was based. Hence, the court stated, there was "no necessity, in law or in fact, for a reinstatement." Presumably, in a case such as this, handing down findings of fact and conclusions of law by the Commission are to suffice as authority for restoration to a departmental payroll, without the necessity of a reinstatment or back pay order. The *Hermann* holding thus seems to narrow a bit more the area in which a civil service commission may enter a reinstatement order, accompanied by such conditions as it deems proper. Seemingly it may now do so only if the dismissal was preceded by written notice containing charges which are the true charges on which the dismissal was based and which after hearing are found by the Commission to be not proven it may, the court concedes, also order a penalty against an employee reduced where deemed to be excessive.[11] The construction placed upon the Commission's constitutional powers is justified on the ground that the Commission has no status as a court and cannot enforce its orders.[12] Despite this frailty, from which all administrative agencies suffer, the Constitution does clearly endow the agency with order-making power[13] and the constitutional objective of administrative disposition seems throttled by the court's deeming it unnecessary to remand reversed cases to a commission for appro-

10. 238 La. 81, 113 So.2d 612, 617 (1959).
11. 113 So.2d at 618.
12. Bennett v. Louisiana Wild Life and Fisheries Commission, 234 La. 678, 685, 101 So.2d 199, 202 (1958).
13. LA. CONST. art. XIV, § 15(o)(3).

priate orders and conditions. It seems plausible that all reinstatement orders and many pay orders of the Commission would be followed by departments without the need of court enforcement, particularly where a dismissal already has been found illegal by the court. Even though the rule now seems fixed that in *mandamus* proceedings the offsetting of wages earned elsewhere during an illegal severance from a state payroll will not be permitted under the general mandamus jurisprudence, the savings incident to such offsets might still be realized through *conditions* imposed in Commission orders.

The *King* case,[14] which was before the court a second time, was originally remanded to the Civil Service Commission for the purpose of taking evidence on the issue of political motivation for the dismissal; this evidence was previously excluded by the Commission on the ground that its only concern was whether the employee was able to disprove the *expressed* charge to its satisfaction. The court, however, ruled that such political evidence must be permitted to come in because it is pertinent to the truth or falsity of the formal charges made and hence to affording a fair and impartial trial.[15] The Commission, on remand, heard the excluded evidence, but found it without substance. The basis of this second appeal is that this was error and further that the evidence supporting the actual charge, namely, insubordination, did not justify or support the penalty of dismissal and that the Commission's order was hence arbitrary and capricious. The court noted, citing *Cottingham v. Department of Revenue*,[16] that "where there is a real and substantial *relation* between the assigned cause for dismissal and the qualification for the position, the *sufficiency* of the cause assigned for dismissal is a question of fact which the Civil Service Commission has the exclusive right to determine." Thus the court held that the quality of "insubordination" was a valid criterion for determining whether removal as an administrator would promote the efficiency of the particular service and a clear question of law for the court; however, since there was some evidence to support the *finding* of insubordination, the sufficiency thereof was deemed a question of fact solely for the Commission.[17]

14. King v. Department of Public Safety, 236 La. 602, 108 So.2d 524 (1959).
15. King v. Department of Public Safety, 234 La. 409, 100 So.2d 217 (1958).
16. 232 La. 546, 94 So.2d 662 (1957). See *Administrative Law*, 18 LOUISIANA LAW REVIEW 85 (1957).
17. 236 La. 602, 610, 108 So.2d 524, 527 (1959).

In the *Brickman* case[18] the court had further occasion to examine criteria for dismissal as formulated by the agency. The employee was charged in the notice of dismissal with "lack of adaptability" and "inability to work with others." In its initial disposition of the case, the court did not quarrel with the meaning ascribed to these terms by the New Orleans Aviation Board and, finding some evidence of facts from which "lack of adaptability" and "inability to work with others" as interpreted by the Board could be inferred, the court affirmed the ruling of the Civil Service Commission of the City of New Orleans. Rehearing was granted, however, to give further consideration to contentions that the notice inadequately apprised employee of any legal cause for dismissal and in any event imposed a penalty, namely dismissal, which was discriminatory, unjust, and improper under the circumstances. After extended discussion of the evidence, the court concluded that the Commission, despite its affirmance of the dismissal, had actually held that the charge of lack of adaptability had not been proven by the Aviation Board and that as to the charge of "inability to work with others," there was a failure on the part of the Board to make a showing that such a criterion was properly related to the primary statutory requirement that removals be for reasons prejudical to the efficiency of the service. The court concluded: "The mere fact that a civil servant has disagreements with her coemployees or superiors or that ill feeling develops between her and them or that she is unpleasant to work with or that she feels her superiors are incompetent (so long as she is outwardly respectful) does not subject her to disciplinary action, absent a showing that such personality defects produce results found to be prejudicial to the efficiency of the public service."[19] This is to say that "inability to work with others" is not a valid cause for dismissal unless it is further explicitly expanded to mean "inability to work with others in circumstances where such quality is prejudicial to the efficiency of the public service."

The court, having laid down the corrected criteria, then concludes that "as a matter of law from the facts found by the Commission . . . there was no legal cause for which appellant could constitutionally be subjected to disciplinary action." Put another way, the court seems to be saying that the Board, while it made

18. Brickman v. New Orleans Aviation Board, 236 La. 143, 107 So.2d 422 (1958).
19. *Id.* at 167, 107 So.2d at 431.

findings that the employee was unable to work with others, did not make findings that such inability was prejudicial to the efficiency of the public service. Analyzed in this way, the court is not going beyond its constitutionally limited role of reviewing for errors of law; it did not weigh the sufficiency of the evidence but rather found error in the failure of the Board to make any findings under the corrected criteria. Of course, the court might have concluded that the findings that the employee was unable to work with others were *impliedly* also findings that such inability adversely affected the efficiency of the public service.[20]

A dissenting Justice would have refrained from exploring the issue of whether the cause or criteria established as a basis for disciplinary action does or does not impair the efficiency of the service on the ground that such issue is "fundamentally within the orbit of the Commission's duties" and should not be disturbed in the absence of a clear showing of arbitrariness and capriciousness.[21] This is substantially the view sometimes encountered in review of federal agency action and is sometimes referred to as the "rational basis" scope of review; in effect, the judiciary contents itself with a determination that there can be a rational basis between the criteria used by the agency and the statutory standard and refuses to substitute judgment even though matter of law is involved.[22] The dissenting Justice would, nonetheless, remand this case to the Commission for what would seem a serious error in the procedure of the Commission, namely, in effect limiting itself to a *review* of departmental action for arbitrariness and capriciousness when the Constitution imposes upon it the duty "to hear and decide all appeals and the legality of all removal and disciplinary cases,"[23] including the issue of whether the dereliction of duty is such as to justify the punishment imposed. He finds the latter issue to be necessarily included in the issue of whether the disciplinary action was founded on cause.

A second Justice joined in chastising the Commission for failure to make affirmative findings of its own on these issues. He strongly expressed himself against the view, however, that in circumstances such as these there should be a remand of the mat-

20. *Cf.* DAVIS, ADMINISTRATIVE LAW § 16.07 (1959).
21. 236 La. 143, 169, 107 So.2d 422, 433 (1958).
22. Gray v. Powell, 314 U.S. 402 (1941); cases collected in DAVIS, ADMINISTRATIVE LAW § 30.08 (1959).
23. LA. CONST. art. XIV, § 15(o)(1).

ter to the Commission. Recognizing that the Constitution limits the court to questions of law alone, he restated the view, "adapted from a principle of law obtaining in criminal cases and implicit in several of our recent civil service opinions — that where there is *claimed* to be a complete lack of evidence to support proof of a 'cause' assigned for the disciplinary action taken in a case, there arises a question of law which this Court may decide after examination of the record."[24] (Emphasis added.) Certainly, if findings are made without evidence to support them, it is the court's duty to quash an agency order purporting to rest on such findings. Here, however, there is more involved; the majority on rehearing said there must be a showing not only of "inability to work with others" but a showing that such inability "produce[s] results found to be prejudicial to the efficiency of the public service." It would seem that in these circumstances greater decisional responsibility in the Commission would be encouraged by remanding the matter to it for the purpose of making the missing findings or not as the evidence dictates. If the Commission has not discharged its constitutional role as "trier of fact" it would seem salutary that it be ordered to do so rather than impose on the court the necessity of making determinations of fact from a "cold" record.

The *Munson* case[25] illustrates that there may be ways to "spread the work" among the politically faithful even though all positions involved are covered by civil service. In this instance, the Civil Service Commission found that two relatively high-ranking positions, a landscape architect position and an engineer position, were abolished by the State Parks and Recreation Commission and the occupants of the positions laid off after appropriate advance notice. Thereafter, no attempt was made to fill the positions but subsequent to the lay-off new employees were hired, principally laborers. There was no evidence that the employing Commission was activated by the political or religious views or activities of the occupants of the positions and the Civil Service Commission abstained from reviewing the propriety of the action of the employing commission in abolishing positions, since it was acting within its authority and without personal political animosity. Opportunity, in accordance with the *King*

24. 236 La. 143, 181, 107 So.2d 422, 436 (1959).
25. Munson and Carpenter v. State Parks and Recreation Commission, 235 La. 652, 105 So.2d 254 (1958).

case,[26] was found to have been afforded employees to prove improper political motivation, subject only to some curtailment of the witnesses sought to be subpoenaed under the Commission rules[27] for preventing unnecessary disturbance and disruption of the work of the state. Finding no error in the proceedings, the order of the Commission dismissing the appeal was affirmed by the court.

SCHOOL BOARDS

In *Lewing v. DeSoto Parish School Board*,[28] the court had in issue before it the meaning of the provision in the Teachers' Tenure Act that a permanent teacher may petition a court of competent jurisdiction for a *full hearing* to review action of a school board in dismissing her on charges of wilful neglect of duty. The school board sought to adduce additional evidence to sustain its order of dismissal on the appeal of such order to a district court. The district court ruled that the case be submitted on the record as made before the school board and on the basis of such record quashed the dismissal. The school board appealed to the Supreme Court, alleging error in the failure of the district court to admit such additional evidence and error in its decision that the record as submitted contained substantial evidence to sustain the charges. On the first mentioned allegation of error, the court not only sustained the trial court but added that "*full hearing* at the district court level was provided for the protection of permanent school teachers and that such provision confined the school board to the record on which it had acted unless the discharged teacher chose to introduce additional evidence in her behalf; only in such an event would the school board have an opportunity to adduce additional evidence."[29] A limiting analogy might have been drawn from the statutory provisions governing appeal from an order of the Public Service Commission where additional evidence may be adduced at the trial court level, but such evidence must be referred to the Commission for consideration and possible amending action before action by the court.[30]

The court, noting that it was mindful of its own rule of re-

26. 234 La. 409, 100 So.2d 217 (1958).
27. 235 La. 652, 664, 105 So.2d 254, 259 (1959).
28. 238 La. 43, 113 So.2d 462 (1959).
29. 113 So.2d at 465.
30. LA. R.S. 45:1103, 1194 (1950).

view that it would not substitute judgment where substantial evidence supported the agency order, but mindful also that it was not limited to questions of law as in review of Civil Service Commission appeals,[31] reviewed the record before the school board and concluded, as had the district court, that the board acted arbitrarily and without substantial evidence.

In the *Sepulvado* case[32] a school teacher leveled a charge, among others, that school board action amending maternity leave regulations was retroactive and therefore illegal as to her, since she was at the time eight months pregnant. The teacher in question reluctantly complied with school board rules (when her pregnancy could no longer be concealed) and went on mandatory maternity leave for a period of fifteen months. The next development, however, was not specifically provided for; a second pregnancy was some seven or eight months advanced when the fifteen-month leave expired. The child was born on August 17; a week later she informed the school board she would be ready for the fall term opening September 3, attaching an appropriate doctor's certificate. Cannily foreseeing this development, the Board had, on August 7, adopted an amendment to its rules requiring a teacher in such circumstances to take additional maternity leave for six months after the birth of the second child and refused to return her to duty. Her petition in the district court having been dismissed, the teacher appealed, attacking the rule on the ground, among others, that it was retroactive and therefore illegal as to her. While the court might have ruled that the amendment contained only such retroactivity as necessary in the public interest to the orderly operation of the school system,[33] it chose rather to leave this question unanswered and to uphold the amendment on the ground that it was merely interpretive of the earlier general regulation and actually unnecessary since there was an obligation under such general regulation to ask for additional leave of absence in the event of a second pregnancy even though the teacher was not then on active duty.

31. LA. CONST. art. VII, § 10.

32. State *ex rel.* Sepulvado v. Rapides Parish School Board, 236 La. 482, 108 So.2d 96 (1959).

33. LA. R.S. 17:1211 (1950) directs school boards to grant leaves of absence to regularly employed women teachers for a "reasonable time before and after childbirth." Some degree of retroactivity will inevitably be involved whenever a school board implements the statute by appropriate rules unless it exempts therefrom all existing pregnancies; however substantive due process would hardly seem to preclude such retroactivity since it seems reasonable and necessary to the orderly operation of the schools. See DAVIS, ADMINISTRATIVE LAW § 5.08 (1959) for collected cases.