Louisiana Law Review

Volume 23 | Number 1
Louisiana Legislation of 1962: A Symposium
December 1962

Dismissal of Louisiana State Civil Service Employees

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Whether mineral interests can be created which have few or no rights of a mineral servitude except a share of production, yet are governed by the rules of prescription on servitudes, awaits elucidation of the legal and policy considerations governing mineral interests. In any event, it would seem beneficial, both to the parties to the conveyance and to the court which must interpret it, for the parties to stipulate the rules of prescription which they intend to apply to their agreement.

William Shelby McKenzie

DISMISSAL OF LOUISIANA STATE CIVIL SERVICE EMPLOYEES

The Louisiana Civil Service System is designed to establish as the basis of public employment a merit system of fitness and efficiency. A consequence of such a system is the elimination of appointment to or discharge from public office for political consideration.[1] Proper functioning of a merit system, however, requires an effective means of discharging employees who impair the efficient operation of the public service.[2] This Comment will critically consider the grounds and procedures for dismissal of Louisiana civil service employees[3] and for review of the dismissal by the Civil Service Commission and the courts.

Grounds for Dismissal

The Louisiana Constitution creates the Civil Service System[4] and provides that no person who has gained permanent civil service status[5] shall be dismissed by his "appointing authority"[6]

1. Gervais v. New Orleans Police Dept., 226 La. 782, 77 So.2d 393 (1954); State *ex rel.* Murtagh v. Department of Civil Service, 215 La. 1007, 42 So.2d 65 (1949); Ricks v. Department of State Civil Service, 200 La. 341, 8 So.2d 49 (1942); Carr v. New Orleans Police Dept., 144 So.2d 452 (La. App. 4th Cir. 1962); Gremillion v. Department of Highways, 129 So.2d 805 (La. App. 1st Cir. 1961).

2. Boucher v. Heard, 228 La. 1078, 84 So.2d 827 (1955); *In re* Coon, 141 So.2d 112 (La. App. 1st Cir. 1962).

3. The role of the New Orleans City Civil Service Commission is beyond the scope of this Comment. However, as much of the jurisprudence concerning the New Orleans Commission is applicable to the State Commission, cases dealing with the former will be cited throughout this paper as authority whenever they are applicable.

4. LA. CONST. art. XIV, § 15.

5. A civil service employee is appointed for a probationary period of six months before being eligible for permanent status. CIVIL SERVICE RULES, rule 9.1(a), *as amended*, 1957.

6. LA. CONST. art. XIV, § 15.1(3)(b) defines "appointing authority" as "any

except for "cause."[7] The Louisiana courts have interpreted "cause" to be conduct detrimental to the efficient operation of the public service in which the employee in question is engaged.[8] In determining whether the employee's conduct is detrimental to the public service, consideration is given not only to the type of conduct but also to the type of service in which the employee is engaged. An employee's personal conduct outside the scope of his employment,[9] as well as within,[10] may constitute grounds for dismissal. The following conduct has been held to constitute legal cause for dismissal: insubordination;[11] submission of false expense accounts;[12] confiscation of public property for private

official, officer, board, commission, council, or person having the power to make appointments to positions" in the civil service system.

7. *Id.* § 15(N)(1).

8. Leggett v. Northwestern State College, 242 La. 927, 140 So.2d 5 (1962); Brickman v. New Orleans Aviation Board, 236 La. 143, 107 So.2d 422 (1958).

9. Leggett v. Northwestern State College, 242 La. 927, 140 So.2d 5 (1962) (operation of house of prostitution as a private business); Dickson v. Department of Highways, 234 La. 1082, 102 So.2d 464 (1958) (inability to perform duties because of sickness resulting from accidental injury); Jordan v. New Orleans Police Dept., 232 La. 926, 95 So.2d 607 (1957) (policeman in an affray while intoxicated, though off duty and out of uniform); Broussard v. State Industrial School for Colored Youths, 231 La. 24, 90 So.2d 73 (1956) (counselor of wayward youths probably guilty of bigamy); Gervais v. New Orleans Police Dept., 226 La. 782, 77 So.2d 393 (1954) (while on vacation police officer shared hotel room with single woman of known police record).

10. King v. Department of Public Safety, 236 La. 602, 108 So.2d 524 (1959) (insubordination); Daniels v. New Orleans Police Dept. House of Detention, 236 La. 332, 107 So.2d 659 (1958) (misuse of public funds); Reed v. Louisiana Wild Life & Fisheries Commission, 235 La. 124, 102 So.2d 869 (1958) (submission of false expense account); Barclay v. Department of Commerce & Industry, 228 La. 779, 84 So. 2d 188 (1955) (disregarding orders of superior and use of disrespectful language to superior); Jais v. Department of Finance of New Orleans, 228 La. 399, 82 So.2d 689 (1955) (misappropriation of public funds); Konen v. New Orleans Police Department, 226 La. 739, 77 So.2d 24 (1954) (arrest without proper cause and from personal prejudice); Cunningham v. Caddo-Shreveport Health Unit, 141 So.2d 142 (La. App. 1st Cir. 1962), *cert. denied* (incompetence); Knight v. Department of Institutions, 140 So.2d 485 (La. App. 1st Cir. 1962) (falsification of employment application); Lee v. Department of Highways, 138 So.2d 36 (La. App. 1st Cir. 1962) (misappropriation of public materials); Bernius v. New Orleans Police Dept., 135 So.2d 124 (La. App. 4th Cir. 1961) (receipt of graft payments); Miller v. State Dept. of Health, 135 So. 2d 570 (La. App. 1st Cir. 1961) (acceptance of gift of money from subordinates).

11. King v. Department of Public Safety, 236 La. 602, 108 So.2d 524 (1959); Barclay v. Department of Commerce & Industry, 228 La. 779, 84 So.2d 188 (1955); Melder v. Louisiana State Penitentiary, 144 So.2d 226 (La. App. 1st Cir. 1962).

12. Reed v. Louisiana Wild Life & Fisheries Commission, 235 La. 124, 102 So.2d 869 (1958); Anderson v. Division of Employment Security of the Department of Labor, 233 La. 694, 98 So.2d 155 (1957); Domas v. Division of Employment Security of Dept. of Labor, 227 La. 490, 79 So.2d 857 (1955). *Cf.* Colvin v. Division of Employment Security of Dept. of Labor, 132 So.2d 909 (La. App. 1st Cir. 1961), in which the only false element of the expense account was the recital that the trip for which the expenses were actually spent was to Texas, when in fact it was to Nebraska. The court found that this was not legal cause

use;[13] immoral or unethical conduct;[14] inability to perform assigned duties because of illness, when replacement was essential;[15] misuse of public funds;[16] receipt of graft payments;[17] use of disrespectful language to a superior;[18] acceptance of a gift of money from subordinates;[19] and inability to perform assigned duties because of incompetence.[20]

In addition to the broad criterion of "cause," the Constitution provides several specific grounds for discharge of civil service employees:[21] contribution or solicitation of funds for political purposes;[22] falsification of papers in connection with appointment of civil service employees;[23] payment or receipt of any valuable consideration for appointment or promotion to a civil service position;[24] taking part in a political campaign, other

for dismissal, because there was no intent to defraud, and by the falsification the employee gained no advantage to which he was not entitled.

13. Jais v. Department of Finance of City of New Orleans, 228 La. 399, 82 So.2d 689 (1955).

14. Leggett v. Northwestern State College, 242 La. 927, 140 So.2d 5 (1962) (keeping disorderly house as a private business, while employed as a college campus police officer); Broussard v. State Industrial School for Colored Youths, 231 La. 24, 90 So.2d 73 (1956) (counsel to wayward youth guilty of bigamy).

15. Dickson v. Department of Highways, 234 La. 1082, 102 So.2d 464 (1958); Bennett v. Department of Highways, 141 So.2d 669 (La. App. 1st Cir. 1962); Burton v. Department of Highways, 135 So.2d 588 (La. App. 1st Cir. 1961); Villemarette v. Department of Public Safety, 129 So.2d 835 (La. App. 1st Cir. 1961). Replacement of the employee must be shown to be essential to the efficient operation of the public service involved.

16. Daniels v. New Orleans Police Dept. House of Detention, 236 La. 332, 107 So.2d 659 (1958).

17. Bernius v. New Orleans Police Department, 135 So.2d 124 (La. App. 4th Cir. 1961).

18. Barclay v. Department of Commerce and Industry, 228 La. 779, 84 So. 2d 188 (1955).

19. Miller v. State Dept. of Health, 135 So.2d 570 (La. App. 1st Cir. 1961).

20. Cunningham v. Caddo-Shreveport Health Unit, 141 So.2d 142 (La. App. 1st Cir. 1962).

It is apparently no defense that the employee acts under the suggestion or instruction of a superior, unless the employee honestly believes that the instructions of the superior are true and correct and not in violation of any of the Constitution's or Commission's rules. Reed v. Louisiana Wild Life & Fisheries Commission, 235 La. 124, 102 So.2d 869 (1958); Domas v. Division of Employment Security of Dept. of Labor, 227 La. 490, 79 So.2d 857 (1955); *In re* Coon, 141 So.2d 112 (La. App. 1st Cir. 1962). Likewise, the fact that the conduct was a general practice among fellow employees who have not been subjected to disciplinary action therefor is no defense to the employee. Reed v. Louisiana Wild Life & Fisheries Commission, *supra*.

21. LA. CONST. art. XIV, § 15.

22. *Id.* § 15(N)(3).

23. *Id.* § 15(N)(4); Cottingham v. Department of Revenue, 232 La. 546, 94 So.2d 662 (1957) (dismissal upheld for knowingly giving incorrect answer to question as to criminal convictions in application to take an examination for a classified service position); Knight v. Department of Institutions, 140 So.2d 485 (La. App. 1st Cir. 1962) (substantial falsification as to education and prior employment upheld as ground for dismissal).

24. LA. CONST. art. XIV, § 15(N)(5).

than privately stating an opinion, voting, or serving as a poll commissioner or watcher;[25] and wilful refusal or failure to appear or testify at a Commission hearing on the ground of possible self-incrimination.[26] Any doubts as to the validity of the last ground would appear to have been obviated by the *Civil Service Rules*,[27] which provide that an employee who does testify "shall not be subjected to any disciplinary action . . . because of his giving . . . testimony."[28] It has been recently held, however, that this rule does not ban disciplinary action based upon the *facts* revealed by the testimony, but only precludes an employee's being subjected to disciplinary action based on the fact that he *gave the testimony*.[29]

There are certain matters which of themselves do not constitute "cause" for dismissal. The Constitution states that no civil servant may be dismissed because of his religious or political opinions or affiliations.[30] The jurisprudence reveals that the mere attainment of seventy years of age,[31] indictment for a crime,[32] rumors of improper conduct,[33] and inability to work with others[34] do not constitute legal cause for dismissal.

Procedure for Dismissal

The State Constitution requires that the cause for dismissal

25. *Id.* § 15(N)(7). See Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961).

26. LA CONST. art. XIV, § 15(P)(1); CIVIL SERVICE RULES, rule 13.25(a), as amended, 1957. These provisions have been held not violative of due process of law. Fallon v. New Orleans Police Department, 238 La. 531, 115 So.2d 844 (1959). See also Hughes v. Department of Police, 131 So.2d 99 (La. App. 4th Cir. 1961).

27. The *Civil Service Rules* were enacted by the State Civil Service Commission pursuant to the authority granted it by LA. CONST. art XIV, § 15(I).

28. CIVIL SERVICE RULES, rule 13.25(b) (1957).

29. Hays v. Louisiana Wild Life & Fisheries Commission, 143 So. 2d 71 (La. 1962). It is submitted that this case makes the protection of Rule 13.25(b) without substance and in reality subjects the employee to dismissal for either testifying or refusing to testify.

30. LA. CONST. art. XIV, § 15(N)(2).

31. Morrison v. Department of Highways, 229 La. 116, 85 So.2d 51 (1955).

32. Hearty v. Department of Police, City of New Orleans, 238 La. 956, 117 So.2d 71 (1960); Daniels v. New Orleans Police Dept. House of Detention, 236 La. 332, 107 So.2d 659 (1958). See also Hermann v. New Orleans Police Dept., 238 La. 81, 113 So.2d 612 (1959).

33. Leggett v. Northwestern State College, 242 La. 927, 140 So.2d 5 (1962).

34. Brickman v. New Orleans Aviation Board, 236 La. 143, 107 So.2d 422 (1958), overruled on other grounds in Leggett v. Northwestern State College, 242 La. 927, 140 So.2d 5 (1962); Carr v. New Orleans Police Dept., 144 So.2d 452 (La. App. 4th Cir. 1962). In this connection it has been held that slapping of a co-employee is legal cause for suspension, but not for dismissal. Simmons v. Division of Employment Security, 144 So.2d 244 (La. App. 1st Cir. 1962).

be expressed in writing by the appointing authority.[35] The *Civil Service Rules* amplify this by requiring that the written notice give "detailed reasons" for the dismissal.[36] This has been interpreted to mean that the letter of dismissal must contain a clear, fair statement of the conduct of the employee, including pertinent times, dates, and places.[37] Such clarity is required for three reasons: first, the facts contained in the letter of dismissal are accepted by the Commission as prima facie true;[38] second, on appeal parol evidence is inadmissible to "explain, supplement or enlarge" the facts contained in the letter of dismissal;[39] and third, after some evidence has been introduced to substantiate the conduct charged in the letter of dismissal, the burden of disproving the charges is on the employee.[40]

If the letter of dismissal is not received by the employee either personally or at his domicile,[41] the dismissal is illegal and will be set aside on appeal even if the appointing authority has told the employee its contents.[42] The dismissal may also be set aside if the appointing authority fails to furnish the State

35. LA. CONST. art. XIV, § 15(N)(1).
36. CIVIL SERVICE RULES, rule 12.3 (1957).
37. Hays v. Louisiana Wild Life & Fisheries Commission, 143 So.2d 71 (La. 1962).
38. CIVIL SERVICE RULES, rule 13.19(m) (1957).
39. *Ibid.*
40. LA. CONST. art. XIV, § 15(N)(1)(a), and CIVIL SERVICE RULES, rule 13.19(c) (1957) provide that on appeal the burden of proof, as to the facts, is on the employee. In Hays v. Louisiana Wild Life & Fisheries Commission, 143 So. 2d 71, 74 (La. 1962), the Supreme Court stated that "the employee . . . has the burden of disproving the facts stated in the letter of dismissal . . . ." However, in Foster v. Department of Public Welfare, 144 So. 2d 271, 275 (La. App. 1st Cir. 1962), *cert. denied*, the Court of Appeal, First Circuit, stated that "there is no duty devolved upon [the employee] to prove the falsity of the charges . . . until such time as there is in the record at least some evidence of substantiation of the charges." In reaching this conclusion, the court of appeal recognized that there was an apparent conflict between the two well-settled rules that the facts as stated in the letter of discharge are accepted by the Commission as prima facie proof of the conduct charged therein, and that where there is no evidence in the record to support the Commission's findings of fact, the dismissal is illegal as a matter of law. The court resolved this conflict by holding that the burden did not exist until evidence to substantiate the charge had been submitted. This result appears to be justified in that it is in keeping with the general spirit of the Civil Service Amendment, which is designed to prevent arbitrary and capricious discharge of civil servants. Wilson v. New Orleans Police Dept., 145 So. 2d 650 (La. App. 4th Cir. 1962) held that even though the burden of proof rested with the employee, it is the duty of the Commission to make an independent determination of the facts upon which the dismissal is based.
41. The requirement for written notice may be satisfied by leaving the letter at the employee's domicile. Bedgood v. Wild Life & Fisheries Commission, 128 So. 2d 267 (La. App. 1st Cir. 1961).
42. *E.g.*, Young v. Charity Hospital of Louisiana, 226 La. 708, 77 So. 2d 13 (1954).

Director of Personnel a copy of the letter within fifteen days after the employee is notified.[43]

Review of Dismissal by Civil Service Commission

Procedure for Obtaining Hearing. — The Constitution grants the Civil Service Commission the exclusive right to determine the legality of removals of civil service employees.[44] The *Rules* require that an application for a hearing by the Commission be in writing and state the employee's complaint, the date of his dismissal, the basis of the application, and the relief sought.[45] This application must be filed with the Director of Civil Service within thirty days after written notice of dismissal is given the employee.[46] The requirement that an application for a Commission hearing be timely filed may not be evaded on the ground that the dismissal was void *ab initio*.[47]

Proceedings before Civil Service Commission.—The Commission's Director must notify the employee and the appointing authority of the time and place of the Commission hearing at least ten days before it is to be held.[48] Hearings are open to the public, and parties have the right to be represented by counsel.[49] With a single exception, the rules of evidence that apply in Louisiana civil trials apply in hearings before the Commission.[50] The exception is that the appointing authority may not introduce

43. CIVIL SERVICE RULES, rule 12.3 (1957); Colvin v. Division of Employment Security of Department of Labor, 227 La. 774, 80 So. 2d 404 (1955); Anderson v. Division of Employment Security of Dept. of Labor, 227 La. 432, 79 So. 2d 565 (1955); Boucher v. Division of Employment Security of Dept. of Labor, 226 La. 227, 75 So. 2d 343 (1954).

44. LA. CONST. art. XIV, § 15(o)(1).

45. CIVIL SERVICE RULES, rule 13.11 (1957).

46. *Id.* rule 13.12. Receipt of the application by the Administrative Services Section of the Louisiana Division of Administration, which distributes mail for the State Capitol Building, is considered delivery to the Commission. Boucher v. Division of Employment Security of Dept. of Labor, 235 La. 850, 106 So. 2d 285 (1958).

Whenever an appeal is applied for more than thirty days after the employee is given notice of dismissal, the Commission will dismiss the appeal. Purdy v. Department of Revenue, 238 La. 673, 116 So. 2d 290 (1959); Chadwick v. Department of Highways, 238 La. 661, 116 So. 2d 286 (1959).

Acceptance of an employee's oral resignation, *not* conveyed in writing to the employee and the Director of Personnel, does not commence the running of the thirty days in which an appeal must be filed. Day v. Department of Institutions, 228 La. 105, 81 So. 2d 826 (1955).

47. Purdy v. Department of Revenue, 238 La. 673, 116 So. 2d 290 (1959); Chadwick v. Department of Highways, 238 La. 661, 116 So. 2d 286 (1959).

48. CIVIL SERVICE RULES, rule 13.17 (1957). Under rule 13.15 it is the Commissioner's duty to set the time and place of the hearing.

49. *Id.* rule 13.19(a) and (b).

50. *Id.* rule 13.19(d).

parol evidence to "explain, supplement or enlarge the facts" expressed in the letter of dismissal.[51]

The Commission may subpoena witnesses and order the production of books and papers pertinent to the issues involved in the hearing, if they are within the state.[52] Applications for subpoenas and orders must be made to the Commission in writing at least five days before the date fixed for the hearing.[53] While arbitrary refusal by the Commission to summon witnesses vital to the employee's case is reversible error,[54] some discretion is given in the matter.[55] For instance, discretion may properly be exercised to prevent a recalcitrant employee's calling numerous witnesses to disrupt state business or merely to duplicate or corroborate testimony.[56]

The questions to be decided by the Commission at its hearing are whether the dismissal and application for a hearing were procedurally legal, whether the conduct charged in the letter of dismissal did or did not occur, and whether the conduct which did occur is "legal cause"[57] for dismissal.[58] The Commission has disturbed the appointing authority's determination that there was legal cause for dismissal only when that determination was arbitrary and capricious or motivated by political or religious discrimination.[59]

Appeal from Commission's Decision

Procedure for Obtaining Appeal. — A party who wishes to contest the Commission's decision must appeal to the courts.[60]

51. *Id.* rule 13.19(m). Of course, under this rule parol is admissible from the appointing authority to rebut proof offered by the employee in contradiction of the facts stated in the letter of dismissal.

52. *Id.* rule 13.21(a) and (b).

53. *Id.* rule 13.21(b) and (d).

54. Lee v. Department of Highways, 138 So. 2d 36 (La. App. 1st Cir. 1962).

55. CIVIL SERVICE RULES, rule 13.21(e) (1957).

56. Munson v. State Parks and Recreation Commission, 235 La. 652, 105 So. 2d 254 (1958); Lee v. Department of Highways, 138 So. 2d 36 (La. App. 1st Cir. 1962).

57. See note 8 *supra* and accompanying text for the definition of "legal cause."

58. Under LA. CONST. art. XIV, § 15(o)(1), authority is vested in the Commission to determine whether the penalty of dismissal is proper under the facts of the case, or whether the penalty should be only suspension. Simmons v. Department of Employment Security, 144 So. 2d 244 (La. App. 1st Cir. 1962).

59. Broussard v. State Industrial School for Colored Youths, 231 La. 24, 90 So. 2d 73 (1956), and the cases cited therein *id.* at 34, 90 So. 2d at 77.

60. There is no provision in the Civil Service Rules for either a rehearing or a new trial, but it has been held that the denial of these by the Commission is not a denial of due process. Young v. Charity Hospital of Louisiana, 226 La. 708, 77 So. 2d 13 (1954); Patorno v. Department of Public Safety, 226 La. 471, 76 So. 2d 534 (1954).

Article XIV of the State Constitution provides that an appeal from Commission hearings shall be granted by the Louisiana Supreme Court.[61] However, this provision has been held impliedly repealed by an amendment to Article VII, Section 10, omitting civil service appeals from the exclusive list of cases appealable to the Supreme Court.[62] The resultant conflict between these provisions has been held settled by abolition of the Supreme Court rule regulating civil service appeals and provision in the Uniform Rules of Courts of Appeal for civil service appeals to those courts.[63] Application for appeal must be made to the appropriate court of appeal within thirty days after written reasons for a Commission decision are filed with the State Director of Personnel.[64]

Scope of Appellate Review. — On appeal from the Commission, the Constitution provides that the courts are to accept the Commission's findings of fact as final and are to review only questions of law.[65] The most frequently considered question of law is whether there was "legal cause" for dismissal. In reviewing this question the Louisiana courts conform with federal and the majority of state courts in applying the so-called "rational basis" test.[66] Under this, for a finding of "legal cause," a rational nexus must be found between the criterion of "impairment of the public service" and the type of conduct in which the employee is engaged.

Since the Constitution provides that the Commission's findings of fact are final,[67] the courts cannot consider the sufficiency of the evidence upon which the Commission's findings of fact

61. LA. CONST. art. XIV, § 15(o)(1).

62. Hughes v. Department of Police, 131 So. 2d 99 (La. App. 4th Cir. 1961); Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961). It is questionable whether the Constitution may be impliedly amended in view of the provision of LA. CONST. art. XXI, § 1, that it may be amended only by a majority of the state's electors voting in favor of an amendment proposed by a two-thirds vote of both House of the Legislature.

63. Hughes v. Department of Police, 131 So. 2d 99 (La. App. 4th Cir. 1961); Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961).

64. Uniform Rules of the Courts of Appeal, rule XVI, in 8 WEST'S LA. R.S. 78 (Supp. 1961).

65. LA. CONST. art. XIV, § 15(o)(1); Uniform Rules of Courts of Appeal, rule XVI(A).

66. Gray v. Powell, 314 U.S. 402 (1941); 4 DAVIS, ADMINISTRATIVE LAW § 30.05 (1958).

Scallan v. Department of Institutions, 143 So. 2d 160 (La. App. 1st Cir. 1962) is an excellent example that the determination of "legal cause" is a question of law.

67. LA. CONST. art. XIV, § 15(o)(1); Uniform Rules of Courts of Appeal, rule XIV(A).

are based.[68] Consequently, in reviewing fact determinations, the Louisiana courts apply the "scintilla of evidence" rule, under which the Commission's finding will not be disturbed so long as there is *any* evidence of record supporting it.[69] Of course, where there is *no* evidence to support a finding, the courts may properly reverse the finding as a matter of law, the rationale being that it is an error of law to base a purported fact determination on no evidence whatsoever.[70]

The federal and majority of state courts employ the "substantial evidence" rule in reviewing administrative agencies'

68. Leggett v. Northwestern State College, 242 La. 927, 140 So. 2d 5 (1962); King v. Department of Public Safety, 236 La. 603, 108 So. 2d 524 (1959); Konen v. New Orleans Police Dept., 226 La. 739, 77 So. 2d 24 (1954); Cunningham v. Caddo-Shreveport Health Unit, 141 So. 2d 142 (La. App. 1st Cir. 1962), *cert. denied*; Villemarette v. Department of Public Safety, 129 So. 2d 835 (La. App. 1st Cir. 1961); Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961).

69. Leggett v. Northwestern State College, 242 La. 927, 140 So. 2d 5 (1962); King v. Department of Public Safety, 236 La. 602, 108 So. 2d 524 (1959); Daniels v. New Orleans Police Dept. House of Detention, 236 La. 332, 107 So. 2d 659 (1958); Scallan v. Department of Institutions, 143 So. 2d 160 (La. App. 1st Cir. 1962); Knight v. Department of Institutions, 140 So. 2d 485 (La. App. 1st Cir. 1962); Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961).

This rule has sometimes been expressed by the term "some evidence." Jordan v. New Orleans Police Dept., 232 La. 926, 95 So. 2d 607 (1957); Jais v. Department of Finance, 228 La. 399, 82 So. 2d 689 (1955); Foster v. Department of Public Welfare, 144 So. 2d 271 (La. App. 1st Cir. 1962); *In re* Coon, 141 So. 2d 112 (La. App. 1st Cir. 1962); Lee v. Department of Highways, 138 So. 2d 36 (La. App. 1st Cir. 1962); Villemarette v. Department of Public Safety, 129 So. 2d 835 (La. App. 1st Cir. 1961).

Several Louisiana decisions have stated that where there is *substantial* evidence to support the fact findings of the Commission, the findings will not be disturbed. Konen v. New Orleans Police Dept., 226 La. 739, 77 So. 2d 24 (1954); Cunningham v. Caddo-Shreveport Health Unit, 141 So. 2d 142 (La. App. 1st Cir. 1962); Miller v. State Dept. of Health, 135 So. 2d 570 (La. App. 1st Cir. 1961). Others have stated that where there is *probative* evidence to support the findings, they will not be disturbed. Mayerhafer v. Department of Police of the City of New Orleans, 235 La. 437, 104 So. 2d 163 (1958); Miller v. Department of State Civil Service, 135 So. 2d 570 (La. App. 1st Cir. 1961). However, a careful reading of the cited cases and Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961), shows that the test actually applied was whether there was *any* evidence to support the finding of fact, *i.e.*, the "scintilla of evidence" rule.

In Leggett v. Northwestern State College, 242 La. 927, 140 So. 2d 5 (1962), the court stated that if the record revealed *any* evidence upon which the Commission could have based a finding that an employee's conduct was prejudicial to the service involved, such finding would not be disturbed. Although this may appear to be application of the "scintilla of evidence" rule to questions of law, it is submitted that it is not. Rather, the court was applying the rule that if there is a rational basis for concluding that the conduct engaged in by the employee impaired the public service, the decision that it did so will not be disturbed.

70. Leggett v. Northwestern State College, 242 La. 927, 140 So. 2d 5 (1962); King v. Department of Public Safety, 236 La. 602, 108 So. 2d 524 (1959); Daniels v. New Orleans Police Dept. House of Detention, 236 La. 332, 107 So. 2d 659

findings of fact.[71] This rule defies precise definition;[72] but, broadly speaking, permits review of findings of fact if the evidence of record is not sufficiently persuasive, probative, and relevant to be acceptable to a reasonable man as adequate to support the finding in question.[73] The Model State Administrative Procedure Act adopts use of the rule on the theory that while administrative agencies charged with primary jurisdiction should determine the facts, court review should determine whether the findings were reasonable.[74]

The suggestion has been made that Louisiana adopt the "substantial evidence" rule.[75] Adoption would require amendment to the constitutional provision that the findings of fact by the Commission are final.[76] In the single case found in which the Louisiana Supreme Court has set aside a fact determination of the Commission, the reason given was that the finding was "arbitrary and capricious."[77] It is submitted that while the result of the case was desirable, the court acted without constitutional authority because there was *some* evidence upon which the finding was based.[78] Adoption of the "substantial evidence" rule would obviate problems of this sort by freely allowing the

(1958); Foster v. Department of Public Welfare, 144 So. 2d 271 (La. App. 1st Cir. 1962); *In re* Coon, 141 So. 2d 112 (La. App. 1st Cir. 1962); Gremillion v. Department of Highways, 129 So. 2d 805 (La. App. 1st Cir. 1961).

71. 4 DAVIS, ADMINISTRATIVE LAW § 29.01 (1958).

72. *Id.* at § 29.11. The author suggests that the vagueness of definition is probably desirable in that it permits variations in standards of review from case to case and court to court.

73. NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

In general, see 4 DAVIS, ADMINISTRATIVE LAW § 29.06 (1958) and Comment, *Substantial Evidence on the Record Considered as a Whole*, 12 LA. L. REV. 290 (1952).

Under this rule the court is free to set aside the fact determination only if reasonable men could not have differed as to which of two results was supported by the evidence. On the other hand, if there were two conflicting findings, either of which could have reasonably been made from the evidence, the finding may not be disturbed. NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105 (1942). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

74. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 329, § 12(7) (1944). This has not been adopted in Louisiana.

Legislative history reveals that the "substantial evidence" rule is designed to give the courts more responsibility for reasonableness and fairness of agency action than does the "scintilla" rule, which forces courts to accept findings based on *any* evidence, no matter how lacking in probative force. Sen. Doc. No. 248, 79th Cong. 2d Sess. 375 (1946).

75. Dakin, *Administrative Law*, 19 LA. L. REV. 358 (1959).

76. LA. CONST. art. XIV, § 15(o)(1).

77. Day v. Department of Institutions, 231 La. 775, 93 So. 2d 1 (1957). See this case discussed in *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Administrative Law*, 18 LA. L. REV. 79, 86 (1957).

78. Day v. Department of Institutions, 231 La. 775, 777, 93 So. 2d 1, 4 (1957).

court to set aside unreasonable fact determinations of the Commission.

Right to Reinstatement and Back Wages

As a general rule, the employment of a civil servant found to have been illegally dismissed is considered never to have terminated. Consequently, it has been held that the employee's permanent status is unaffected, and he is entitled to his regular salary for the period of his wrongful dismissal.[79] However, if it is the Commission which finds that the employee has been illegally dismissed, reinstatement by the Commission is made under such conditions as it deems proper,[80] including deduction of earnings from other employment during the period of illegal separation from the service.[81] On the other hand, if the Commission denies the employee relief and its decision is reversed by a court which grants a writ of mandamus ordering reinstatement and payment of back wages, the Commission lacks jurisdiction to order any deduction of other earnings.[82]

Conclusion

The Louisiana Civil Service System seems deficient only in the area of court review of Commission fact determinations.

79. Hearty v. Department of Police of City of New Orleans, 238 La. 956, 117 So. 2d 71 (1960); Dickson v. Department of Highways, 234 La. 1082, 102 So. 2d 464 (1958); Bennett v. Louisiana Wild Life & Fisheries Commission, 234 La. 678, 101 So. 2d 199 (1958); Boucher v. Heard, 232 La. 499, 94 So. 2d 451 (1957); Day v. Department of Institutions, 231 La. 775, 93 So. 2d 1 (1957); Boucher v. Heard, 228 La. 1078, 84 So. 2d 827 (1955).

80. LA. CONST. art. XIV, § 15(o)(3); Boucher v. Heard, 238 La. 1078, 84 So. 2d 827 (1955). Under this provision, the Commission has the authority to determine whether the penalty imposed by the appointing authority is justified under the facts, *e.g.*, whether the penalty should be dismissal or suspension. Simmons v. Department of Employment Security, 144 So. 2d 244 (La. App. 1st Cir. 1962). On the other hand, the courts are without authority to decide what punishment should have been imposed on the erring employee; they are limited to reviewing whether there was a real and substantial relation between the assigned cause for dismissal and the qualification for the position. Reed v. Louisiana Wild Life & Fisheries Commission, 235 La. 124, 102 So. 2d 869 (1958); Cottingham v. Department of Revenue, 232 La. 546, 94 So. 2d 662 (1957); Domas v. Division of Employment Security of Dept. of Labor, 227 La. 490, 79 So. 2d 857 (1955); Miller v. State Dept. of Health, 135 So.2d 570 (La. App. 1st Cir. 1961). *Cf.* King v. Department of Public Safety, 236 La. 602, 108 So. 2d 524 (1959).

81. Dickson v. Richardson, 236 La. 668, 109 So. 2d 51 (1959); Anderson v. Walker, 233 La. 687, 98 So. 2d 153 (1957); Boucher v. Heard, 232 La. 499, 94 So. 2d 451 (1957).

82. See note 81 *supra*. If the Commission refuses to order payment of back wages, mandamus lies to compel payment, even though an appeal is pending before the Commission in regard to a subsequently attempted dismissal. Boucher v. Heard, 228 La. 1078, 84 So. 2d 827 (1955); State *ex rel.* Murtagh v. Department of Civil Service, 215 La. 1007, 42 So. 2d 65 (1949).

Adoption of the "substantial evidence" rule would place Louisiana in line with the federal and a majority of state systems in allowing court determination of reasonableness of findings of fact. It is recommended that the legislature propose a constitutional amendment to adopt the "substantial evidence" rule, thus allowing the courts to assume more responsibility for reasonableness and fairness of Civil Service Commission action.[83]

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83. See note 74 *supra*.