

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1667

JASON LAMARCA

VERSUS

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

Judgment Rendered: May 2, 2012

**Appealed from the
State Police Commission
Docket Number 10-196-S**

**Mark Oxley, Chairman;
Jason Turner, Vice-Chairman, Franklin Kyle, William Goldring, Freddie
Pitcher & Joseph S. Cage, Jr., Members**

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Commission**

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Guidry, P. Dissents.

WHIPPLE, J.

This matter is before us on appeal by defendant, the Department of Public Safety and Corrections, Office of State Police, from a decision of the State Police Commission concluding that the appointing authority failed to prove the charges against plaintiff, Louisiana State Police Trooper Jason LaMarca, thereby granting LaMarca's appeal and removing the letter of suspension from his file.¹ For the following reasons, the decision of the State Police Commission is affirmed.

FACTS AND PROCEDURAL HISTORY

Trooper LaMarca was employed by the Louisiana Department of Public Safety and Corrections, Office of State Police ("the Department"), for eleven years as a Trooper First Class with permanent status. The Department, through its appointing authority, Colonel Michael Edmonson, Superintendent of the Louisiana State Police, issued a letter dated November 18, 2010, notifying Trooper LaMarca that he was suspended for twelve hours without pay and allowances as a result of his actions during a February 6, 2010 traffic stop of Alejandro Soliz, which stop was recorded on a mobile video recorder on Senior Trooper Chris Anderson's unit. In the letter, Colonel Edmonson advised that he was prompted by United States District Judge Eldon Fallon, whose observations were detailed in a letter to Edmonson, to initiate the underlying internal investigation. Colonel Edmonson noted that during the internal affairs investigation of the incident, Trooper LaMarca admitted to utilizing a maneuver not trained for by the Louisiana State Police as the method by which he assisted Soliz to the ground. The cause for Trooper LaMarca's suspension was based on alleged violations of the following Louisiana State Police Policy and Procedure

¹The State Police Commission was created by constitutional amendment and given the "exclusive power and authority to hear and decide all removal and disciplinary cases." LSA-Const. art. X, §§ 43 and 50. The State Police Commission's power to "hear and decide" cases is identical to that granted the State Civil Service Commission. Department of Public Safety and Corrections, Office of State Police v. Mensman, 95-1950 (La. 4/8/96), 671 So. 2d 319, 320, n. 1.

Orders: (1) the use of force policy as set forth in LSP Procedure Order 901-25; (2) the use of force reporting policy as set forth in LSP Procedure Order 238-10; and (3) conduct unbecoming of an officer as set forth in LSP Procedure Order 901-04, which conduct “caused a United States District Court Judge to question the methods and practices of the Louisiana State Police.”

Trooper LaMarca filed a timely appeal of his suspension to the State Police Commission (“the Commission”), denying the allegations and conclusions set forth in the letter and requesting that a public hearing be conducted. In the appeal, Trooper LaMarca noted: (1) that the minimal use of force he had applied herein did not involve a weapon or injury to the suspect; (2) that he used the method available under the circumstances as it was not possible to use the more traditional procedures at the moment; (3) that no one was injured; (4) that no one complained; (5) that at the time, he was engaged in a large and dangerous drug bust and that he devoted all of his efforts to the apprehension of the suspect and the safety of all involved; and (6) that the investigation and initiation of disciplinary action was untimely. Finally, Trooper LaMarca contended that the suspension imposed was unwarranted and, alternatively, excessive. Thus, he sought back pay and emoluments, that his record be expunged of these charges, and attorney’s fees.

The matter was heard before the Commission on May 19, 2011. After hearing the testimony of witnesses and receiving evidence, the Commission took the matter under advisement. On August 1, 2011, the Commission rendered a decision on review of the alleged violations of the procedure orders relating to “use of force” and “use of force reporting,” noting that Colonel Edmonson testified that he did not use the violation of the “conduct unbecoming an officer” procedure order as a basis for the discipline. In its decision, the Commission made the following “Findings of Fact:”

1. On February 6, 2010, Senior Trooper Chris Anderson made a traffic stop of an 18-wheeler flat bed truck being driven by Alejandro Soliz.
2. The Mobile Video Recorder (MVR) on Trooper Anderson's unit recorded the stop.
3. On July 9, 2010, Col. Michael Edmonson, Deputy Secretary, Department of Public Safety and Corrections, received a letter dated July 6, 2010 from U.S. District Judge Eldon E. Fallon, which letter commented on Judge Fallon's observation of Appellant's conduct, as recorded on the MRV. Judge Fallon had reviewed the MRV recording while conducting a sentencing hearing for the truck driver Soliz.
4. In the July 6, 2010 letter, Judge Fallon opined that he saw (Appellant) 'without apparent cause, strike Mr. Soliz on the back of the head and/or neck with what appears to be a flashlight or similar item.' Judge Fallon further stated that the recording shows 'three other troopers laughing at this act.'
5. Judge Fallon asks Col. Edmonson to consider the matter and take 'appropriate action.'
6. Assisting Trooper Anderson in the stop and subsequent search of the 18-wheeler were Troopers Patrick Dunn, Tim Mannino and Appellant.
7. Before the 18-wheeler was searched, its driver was 'patted down' and no weapons found.
8. The search of the 18-wheeler revealed a large quantity of cocaine hidden in the structure of the vehicle (roof).
9. After the cocaine was discovered, the truck driver was ordered numerous times to 'get down on the ground.' As he disobeyed those orders, Appellant drew his taser and, when the driver refused to get on the ground, Appellant forced him to the ground.
10. Appellant attempted to holster his taser before taking the driver to the ground, but could not. However, the taser was not in the hand used by Appellant to put the driver on the ground.
11. The disciplinary action taken against him was timely.

Given its findings of fact, the Commission concluded that the appointing authority failed to prove the charges against Trooper LaMarca. Thus, it ordered that Trooper LaMarca be "made whole" as to pay and allowances and that the letter of suspension be removed from his file. In doing so, the Commission noted:

[O]ur reviewing of the video and the testimony of all witnesses is to the effect that Appellant had nothing in the hand he used to 'put the driver on the ground.' Likewise, we do not perceive Appellant's actions, in doing so, to be the use of excessive force. While the driver had been cooperative until the drugs were found, he became uncooperative thereafter and refused numerous orders to get on the ground.

While the maneuver used by Appellant to take the driver to the ground may not be the one 'taught' at the Academy, it was effective and did not appear to be the use of 'excessive' force.

We likewise do not perceive the other Troopers to be 'laughing' at Appellant's actions. All testified that, while they were pleased with the big 'drug bust' they were not laughing at Appellant's conduct.

As we do not find that Appellant violated the 'Use of Force' Policy Order, he likewise did not violate 'Use of Force Reporting.'

However, the Commission denied Trooper LaMarca's request for attorney's fees, finding that the appointing authority did not act unreasonably.

The Department filed the instant appeal of the decision by the Commission, contending that the Commission erred in:

1. Finding that there was no violation of the Use of Force policy despite its acknowledgment that the "maneuver" used by LaMarca to take the driver to the ground was not taught at the Louisiana State Police Academy;
2. Its requirement that there be a finding of "excessive" force to establish legal cause to support the policy violations of Use of Force and Use of Force Reporting;
3. Ruling that there was no need to complete a "Use of Force" report in the face of its finding that LaMarca, in fact, used force when LaMarca "forced him to the ground;"
4. Focusing its fact finding on irrelevant facts, (namely, the letter from Judge Fallon), rather than on the relevant factors which implicated LSP

policies as set forth in the Final Suspension letter from the appointing authority, Colonel Michael Edmondson.

STANDARD OF REVIEW

An employee who has gained permanent status in the classified state police service cannot be subjected to disciplinary action except for cause expressed in writing. LSA-Const. art. X, § 46(A). Such an employee may appeal to the Commission, where the burden of proof, as to the facts, is on the appointing authority. LSA-Const. art. X, § 46(A). The Commission shall have the exclusive power and authority to hear and decide all disciplinary cases. LSA-Const. art. X, § 50. The Commission's authority "to hear and decide" disciplinary cases includes a duty to decide independently from the facts presented whether the appointing authority has good cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the cause. Department of Public Safety and Corrections, Office of State Police v. Mensman, 95-1950 (La. 4/8/96), 671 So. 2d 319, 321; Berry v. Department of Public Safety and Corrections, 2001-2186 (La. App. 1st Cir. 9/27/02), 835 So. 2d 606, 611.

The decision of the Commission shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the Commission is located. LSA-Const. art. X, § 50. In these instances, the appellate court is presented with a multifaceted review function. Bannister v. Department of Streets, 95-404 (La. 1/16/96), 666 So. 2d 641, 647. First, as in other civil matters, the Commission's factual findings are entitled to deference and will not be disturbed unless clearly wrong or manifestly erroneous. Huval v. Department of Public Safety & Corrections, 2009-0699 (La. App. 1st Cir. 10/23/09), 29 So. 3d 522, 527-528. Second, in evaluating the Commission's exercise of its discretion in determining whether the disciplinary action is based

on legal cause and the punishment is commensurate with the infraction, the reviewing court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by an abuse of discretion. Huval v. Department of Public Safety & Corrections, 29 So. 3d at 528.

DISCUSSION

As set forth in his suspension letter of November 18, 2010, Colonel Edmonson based his disciplinary action on Trooper LaMarca's alleged violations of the following provisions of the LSP Procedure Orders concerning "use of force" and "use of force reporting:"²

910-25 USE OF FORCE

- i) Commissioned officers shall not use more force than is reasonably necessary under the circumstances.
- ii) Officers shall use force in accordance with applicable law, Department guidelines, and training.

238-10 USE OF FORCE REPORTING

- i) The officer(s) involved shall complete an electronic Use of Force Report (DPSSP 6660) when the officer(s):
 - a) Discharges a firearm for other than training or recreational purposes.
 - b) Takes an action that results in, or is alleged to have resulted in, injury or death of another person.
 - c) Applies deadly or non-deadly force.
- ii) Supervisors shall review the Use of Force Report and indicate whether actions taken by the officer complied with policy and procedure and training. Any training and weapons deficiencies shall be addressed by the Training Academy. Comments shall be addressed in the comments section of the Use of Force Report or on the Use of Force Supplemental form.

²While the pertinent provisions are cited in pleadings contained in the record and in the briefs on appeal, we note that it does not appear that copies of the State Police Procedure Orders were ever introduced in evidence in these proceedings.

ASSIGNMENT OF ERROR NUMBER ONE

In its first assignment of error, the Department argues that the Commission erred in its determination that Trooper LaMarca did not violate the “use of force” procedure order, where Trooper LaMarca used a maneuver that was not taught at the State Police Training Academy to take the suspect to the ground. We disagree.

A plain reading of the “use of force” procedure order implicitly recognizes that an officer may not use more force than is reasonably necessary. The undisputed evidence shows that after large quantities of cocaine were found in the cab of the tractor trailer, Trooper LaMarca and Trooper Dunn approached the suspect, giving him multiple repeated loud commands to get on the ground, which the suspect refused to comply with initially. Trooper Dunn testified that both he and Trooper LaMarca yelled, “Get on the ground. Get on the ground. Get on the ground.” When the suspect refused to cooperate, Trooper LaMarca took him to the ground, and they handcuffed him. Trooper Dunn testified that in a felony arrest, it is customary to “put” someone on the ground and cuff them. He testified that this is what they are taught to do. Additionally, Trooper Mannino, who was present on the scene and assisted in the stop and subsequent arrest of the suspect, testified that although they may not have been trained “in that particular manner, ... it was a felony arrest and [they] are trained to take subjects down.”

Trooper LaMarca testified that after finding several kilos of cocaine, he exited the cab of the tractor trailer and headed toward the suspect down the side of the trailer, all the while repeatedly giving loud, verbal commands to the suspect to “get on the ground.” Trooper LaMarca testified that the suspect, who was taller than Trooper LaMarca and forty-five to fifty pounds heavier than Trooper LaMarca, stared at him and refused to comply with his commands. Once within arms’ length of the suspect, while attempting to re-holster his taser, Trooper

LaMarca attempted to escort the suspect to the ground to “affect the arrest” with no one getting hurt and to make sure that the suspect was not going to try to signal someone else or a “tail car” who may have been following “the load.”

On review of the video and testimonial evidence concerning the surrounding circumstances at the scene of the arrest, we find no error in the Commission’s finding that the force and manner used by Trooper LaMarca to secure the suspect and “affect the arrest” was not more than was reasonably necessary under the circumstances, and hence did not violate procedure order 910-25.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In its second assignment of error, the Department contends that the Commission erred in using the term “excessive” in rendering its finding that the actions taken by Trooper LaMarca “did not appear to be the use of ‘excessive’ force” in connection with its review of the “use of force” procedure order. The language set forth in the “use of force” procedure order states that “officers **shall not use more force than is reasonably necessary** under the circumstances.” (Emphasis added).

On review, we find the verbiage used by the Commission in concluding that the force used by LaMarca was not “excessive,” was simply synonymous with the Commission’s ultimate finding that there was no violation of the “use of force” procedure order, *i.e.*, that the use of force by Trooper LaMarca was reasonably necessary under the circumstances.

Accordingly, we also find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER THREE

The Department next contends that the Commission erred in finding that because Trooper LaMarca did not violate the “use of force” procedure order, there

was no violation of the “use of force reporting” procedure order. The “use of force reporting” procedure order 938-10 states that officers are required to report the use of force when: (1) a firearm is discharged; (2) when an action is taken that results in injury or death; or (3) when an officer applies deadly or non-deadly force.

The record before us contains no evidence that a firearm was discharged or that an injury was reported or complained of in the suspect’s arrest herein. The Department contends, however, that Trooper LaMarca’s use of non-deadly force to bring the suspect to the ground to affect the arrest should have been reported. Contrariwise, Trooper LaMarca argues in brief that to carry the Department’s argument to its logical extent, any time a suspect is taken down and placed in hand cuffs, this interpretation of the order would require the filing of a use of use of force report whether the suspect is cooperative or not.

Trooper LaMarca testified that at the time he brought the suspect down, he did not feel that he used more force than necessary. Considering the fact that the suspect was not complying with the either of the officers’ commands and was being uncooperative, Trooper LaMarca stated that he did not feel that he had any other options at that time. He further testified that he had nothing in his left hand when he put it at the back of the suspect’s head, and that his left hand was open. Trooper LaMarca stated that he was not trying to hurt the suspect, that he did not perceive the suspect as being hurt in any way, and that the suspect did not complain of an injury. Trooper LaMarca further testified that he did not report the use of force because he did not see his actions as involving a use of force. The Commission apparently agreed.

Even in circumstances where we may have found differently, given the standard of review to which we are bound as a reviewing court, we cannot reverse the decision of the Commission. See Boyer v. Department of Public Safety and

Corrections, Office of State Police, 2009-0700 (La. App. 1st Cir. 10/23/09)(unreported opinion). Further, on review, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER FOUR

In its final assignment of error, the Department argues that the Commission erred in focusing its fact finding on irrelevant facts (namely, the letter from Judge Fallon), rather than on the relevant factors which implicated Louisiana State Police procedure orders as set forth in the final suspension letter from Colonel Edmonson.

At the outset, we note that on review of this matter, we find the decision of the Commission thoroughly and sufficiently reviewed the evidence and testimony produced at the hearing and addressed the procedure order violations lodged against Trooper LaMarca in the suspension letter issued by Colonel Edmonson. Nonetheless, to the extent that the Department contends the Commission erred in addressing or “disproving portions” of the observations set forth in Judge Fallon’s letter, we note that in the suspension letter, Colonel Edmonson stated that he was “[p]rompted by the observations of United States District Judge Eldon Fallon[,] which were detailed in a letter to [him]” to initiate an administrative investigation. Furthermore, Colonel Edmonson’s phone call from Judge Fallon and subsequent receipt of Judge Fallon’s letter outlining his concerns of this matter, which “prompted” this investigation, were also discussed at length during Colonel Edmonson’s testimony at the hearing of this matter. Thus, to that extent that the allegations set forth by Judge Fallon are addressed in the Commission’s decision, we find no error.

This assignment of error also lacks merit.

CONCLUSION

In sum, although the Department complains that the Commission erred in granting Trooper LaMarca's appeal and vacating the discipline imposed, we are bound to affirm unless the Commission's order is "arbitrary, capricious, or characterized by an abuse of discretion." See Bannister v. Department of Streets, 666 So. 2d at 647. A conclusion of a public body is "capricious" when the conclusion has no substantial evidence to support it or the conclusion is contrary to the substantiated competent evidence. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof. Bailey v. Department of Public Safety and Corrections, 2005-2474 (La. App. 1st Cir. 12/6/06), 951 So. 2d 234, 243.

In the instant case, after thorough review of the testimonial and video evidence herein, in evaluating the Commission's exercise of discretion in determining whether the disciplinary action is based on legal cause and the punishment is commensurate with the infraction, we find the decision of the Commission is supported by substantial evidence. For these reasons, we cannot say that the Commission's decision is arbitrary, capricious, or an abuse of its discretion.

For the above and foregoing reasons, the August 1, 2011 decision of the Commission granting Trooper LaMarca's appeal is affirmed. Costs of this appeal in the amount of \$647.00 are assessed against the Defendant-Appellant, the Department of Public Safety and Corrections, Office of State Police.

AFFIRMED.