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NOTICE OF DECISION

IN RE: Johnette Martin vs. Department of Revenue, Docket No. 18014

TO: Johnette Martin
10022 Glen View Ave.
Baton Rouge, LA 70809

Mary Ann White
Attorney at Law
628 St. Louis St.
Baton Rouge, LA 70802

Dear Gentlemen and/or Mesdames:

You are hereby served with a copy of the decision rendered by the Referee in the above case in which you are an attorney of record or in which you are a party. You may file with the State Civil Service Commission an application to request the Commission to review the Referee's decision. The application for review must comply with Civil Service Rule 13.36 and 13.37 and must be either postmarked or received within fifteen calendar days of the date the decision was filed. If no application for review is filed, the decision of the Referee becomes the final decision of the Commission as of the date the Referee's decision was filed.

Your attention is also invited to Rule III of the Uniform Rules of the Courts of Appeal and Article X, Section 12 of the Louisiana Constitution of 1974, as amended effective October 15, 1982.

Pursuant to Civil Service Rule 13.24(c), if judicial review of this decision is sought, the party requesting a transcript shall be responsible for paying the cost of transcription. Notice of estimated costs will be sent in accordance therewith.

I hereby certify that this notice and a copy of the decision were mailed to the above-listed attorneys and/or parties this date **May 7, 2018**.

Sincerely,

Martha Mansfield
Chief Referee

Attachment:
1) decision

cc: Kimberly Robinson
Sophia Pipsair

AP:MKM:srg

Note: We accept all filings by fax to 225-342-8058 or by e-mail to dscs.appeals@la.gov

Decision

Filed: May 7, 2018

State of Louisiana
Civil Service Commission

Docket No. 18014

Johnette Martin

Versus

Department of Revenue

Rule(s):	12.2
Topic(s):	Three (3) day suspension without pay; insubordinate and disrespectful behavior

Appearances: Johnette Martin, in proper person
 Mary Ann White, counsel for DOR

Statement of the Appeal

The Department of Revenue (DOR) employs Johnette Martin as an Attorney 3 and she serves with permanent status.

By letter dated January 21, 2015, DOR suspended Ms. Martin for three (3) days without pay effective January 26, 2015. DOR alleges Ms. Martin engaged in disrespectful and unprofessional behavior toward co-workers on two occasions; all in violation of agency policy.

On February 10, 2015, Ms. Martin appealed her suspension. In her appeal, she denies the allegations of the disciplinary letter. As relief, Ms. Martin requests rescission of the disciplinary action, back pay, and attorney's fees.

I held public hearings on December 10, 2015 and June 6, 2016, in Baton Rouge, Louisiana. At the June 6, 2016 hearing, I kept the record open and allowed the parties to brief the issue of whether or not the letter of November 13, 2013 was stale and should not be considered for any purpose.

On July 8, 2016, appellant filed her brief. On August 12, 2016, appellee filed its brief as well as a motion to strike and supporting memorandum requesting that the undersigned referee strike the allegations in appellant's briefs that went beyond the issue to be addressed.

On August 24, 2016, this matter was placed on hold as I was injured during the Great Flood of 2016. On September 16, 2016, appellant filed an opposition to motion to strike. On October 4, 2016, appellee filed a reply brief in further support of motion to strike. I issued a ruling on May 1, 2018 that the November 20, 2013 letter (Revenue Exhibit 3) was not stale for the purposes for which it was allowed into evidence (i.e. background and general notice to appellant to not engage in inappropriate and unprofessional behavior). In my May 1, 2018 ruling, I also ruled that I would not strike any portions of any pleadings although I would only consider those portions of pleadings that I considered relevant to the issue to be determined; and I also ruled that the matter was submitted as of the date of the ruling.

Based upon the evidence presented and pursuant to the provisions of Article X, § 12(A) of the Louisiana Constitution of 1974, as amended, I make the following findings and reach the following conclusions.

Findings of Fact

1. DOR employs Johnette Martin as an Attorney 3 and she serves with permanent status. At the time of her suspension, Mr. Martin had been employed at DOR for approximately ten years.
2. By letter dated November 20, 2013, Ms. Martin was placed on notice that in a meeting on October 8, 2013 with Taxpayer A¹ and his representatives, she was unprofessional as she was rude, arrogant and condescending to Taxpayer A's representatives and that in the future she should refrain from this type of behavior.
3. Ms. Martin's Performance Evaluation System (PES) dated August 26, 2014 and signed by Ms. Martin and Mr. Barfield rated Ms. Martin as "exceptional" and covered the time period of July 1, 2013 through June 30, 2014.
4. By e-mail dated August 28, 2014 from Tim Barfield, Secretary of DOR, Ms. Martin was put on notice that she was to remain professional while working with other DOR employees. This email arose because Mr. Barfield did not like Ms. Martin's behavioral response when he announced the name of an attorney who was being promoted at a litigation team meeting during the week of August 18, 2014. Ms. Martin was neither disciplined nor given an improvement letter for this incident as Mr. Barfield accepted Ms. Martin's explanation for her response at the meeting.

¹ The taxpayer is referenced as "Taxpayer A" so as to protect his confidentiality. Additionally, all taxpayers referenced in this decision are likewise referenced so as to protect their confidentiality.

5. On October 8, 2014, Taxpayer B had a hearing scheduled with the Louisiana Board of Tax Appeals (BTA). Ms. Martin represented DOR in this matter. Ms. Martin requested that Bryan Peters, Director of Tax Collections, and Ursula Branch Domingue, Revenue Management Consultant, attend as witnesses for the agency. Mr. Peters had never been a witness in a hearing in front of the BTA. Prior to the commencement of the hearing, Mr. Peters had been sequestered.

6. While Ms. Martin presented her case inside the hearing room of BTA, Mr. Peters and Ms. Domingue sat on a sofa in a small room outside the hearing room. An issue in the Taxpayer B case was prescription of the claim (i.e. whether DOR had waited too long to pursue Taxpayer B for taxes owed to it). At some point during the hearing, Ms. Martin walked out of the hearing room to where Mr. Peters and Ms. Domingue were sitting and she asked Mr. Peters, "what are we missing?" He replied that since Taxpayer B merely filed an "estimate of taxes" and never filed a tax return for the year at issue, the prescriptive period never commenced and the case was not prescribed.

7. Ms. Martin returned to the hearing room. After a period of time, Ms. Martin returned to where Mr. Peters and Ms. Domingue were sitting. Ms. Peters began yelling at Mr. Peters that it was his fault that she lost the case. She yelled at him and asked him why he didn't get on the stand and testify. Mr. Peters responded that she never called him as a witness to testify. Ms. Domingue then reminded Ms. Martin that Mr. Peters was sequestered and he was not allowed into the hearing room until he was called as a witness to testify.

8. Ms. Martin continued to yell at Mr. Peters and Ms. Domingue that it did not matter that Mr. Peters was sequestered because they knew that those tax returns were not filed and that was all that needed to be said. Mr. Peters and Ms. Domingue both repeated that when tax returns are not filed, prescription does not begin to accrue. Mr. Peters also stated that the taxpayer had filed "estimates" of taxes and because the taxpayer never filed a tax return, DOR's claim for taxes against the taxpayer did not prescribe.

9. At this point, Ms. Domingue went into the BTA hearing room. Mr. Peters walked to the hallway to the elevator. Ms. Martin followed Mr. Peters, continuing to yell at him that it was Mr. Peter's fault that the agency did not prevail on the prescription issue. Mr. Peters walked silently away from Ms. Martin in an effort to diffuse the situation; however, Ms. Martin continued to follow Mr. Peters and yell at him. When the elevator doors opened, an unidentified woman walked out of the elevator and Ms. Martin continued to yell at Mr. Peters while they walked up to and entered the elevator.

10. Mr. Peters and Ms. Martin were alone in the elevator and Ms. Martin continued to yell at him in the elevator. Finally, after the elevator door opened and Mr. Peters walked away from Ms. Martin toward his vehicle, Ms. Martin ceased yelling at Mr. Peters.

11. Tammalaya Tucker Aguillard, Confidential Assistant² for BTA, was not present at any time during this incident.

12. On November 5, 2014 at 5:15 p.m., Ms. Martin approached Joseph Vaughn, Assistant Secretary for Group 3³. Mr. Vaughn is not in Ms. Martin's chain of command; however, they knew each other well. Ms. Martin inquired of Mr. Vaughn if he knew about the personnel actions being taken against her or why such actions were being taken. He responded in the negative.

13. Ms. Martin also asked Mr. Vaughn why she had been removed as a speaker from the agenda for an Auditor Conference and he advised her that she had been bumped because a more important topic replaced the topic she was to discuss. Ms. Martin did not raise her voice with Mr. Vaughn at any time. Neither did Mr. Vaughn request that Ms. Martin cease conversing with him nor did he advise her that the subject matter or location of their discussion was inappropriate. While Ms. Martin and Mr. Vaughn conversed near the elevators, other DOR employees walked by them.

Discussion and Conclusions of Law

An employee with permanent status in the classified civil service may be disciplined only for cause expressed in writing. Cause for disciplinary action is conduct of the employee that is prejudicial to the public service or detrimental to its efficient operation. *Bannister v. Dept. of Streets*, 666 So.2d 641 (La. 1996). The right of a classified state employee with permanent status to appeal disciplinary actions is provided for in Article X, § 8(A) of the Louisiana Constitution of 1974. That section states that "[t]he burden of proof on appeal, as to the facts, shall be on the appointing authority." The appointing authority is required to prove its case by a preponderance of the evidence, which is evidence that is of greater weight or more convincing than that which is offered in opposition thereto. Proof is sufficient to constitute a preponderance when, taken as a whole, it shows the fact or causation sought to be proved as more probable than not. *Wopara v. State Employees' Group Benefits Program*, 2002-2641 (La. App. 1 Cir. 7/2/03); 859 So.2d 67.

DOR charges Ms. Martin with making inappropriate and unprofessional comments to co-workers in violation of agency policy.

Ms. Martin's behavior outside of the BTA hearing room

On October 8, 2014, Ms. Martin yelled at Mr. Peters and Ms. Domingue and she continuously blamed Mr. Peters for losing the BTA case on the prescription issue, even though she did not call him as a witness. Additionally, Ms. Martin continued to yell at and

² This was Ms. Aguillard's job title on October 8, 2014. However, at the time of the hearing on December 10, 2015, she was no longer employed at BTA and she was employed as a Benefits Analyst for Louisiana Workforce Commission, Department of Labor.

³ Mr. Vaughn retired on November 12, 2015.

belittle Mr. Peters even when a member of the public approached them. Ms. Martin's outburst was rude and disrespectful to her co-workers as well as to the member of the public who happened to walk by them.

Ms. Martin testified at the hearing that when she first approached Mr. Peters outside of the BTA hearing room and asked him what was the prescription issue other than Bankruptcy, he did not properly advise her that the other issue was that since no tax returns had been filed, prescription did not begin to run. However, this defense fails for two reasons. First, even if this allegation were true, it does not justify Ms. Martin's unprofessional behavior toward Mr. Peters and Ms. Domingue. It is Ms. Martin's responsibility to remember the legal issues in her cases – not the witness's. Furthermore, the fact that a witness does not remember an issue does not entitle an attorney to yell and belittle them in front of co-workers and members of the public. Second, the detailed and emotional testimony of both Mr. Peters and Ms. Domingue was much more credible than the self-serving testimony of Ms. Martin. Additionally, Ms. Martin failed to produce any credible evidence to support the assertion that either Mr. Peters or Ms. Domingue had any reason to make up such a factually detailed story about her.

Similarly, Ms. Martin also defended this charge by testifying that she did not raise her voice when speaking with Mr. Peters or Ms. Domingue outside the BTA hearing room. For the reasons discussed above as to the credibility of the parties, I find this assertion to be untrue. Likewise, as a defense, Ms. Martin also testified that it was Mr. Peters that followed her to the elevator and not the other way around. However, the detailed, heartfelt testimony of Mr. Peters was again more credible than Ms. Martin's on this point.

Ms. Martin's final defense to this charge was that Tammalaya Tucker Aguillard viewed this entire incident and could attest that Ms. Martin did not raise her voice at any time. However, this last defense was likewise not persuasive. Ms. Aguillard testified that it was within her job description on October 8, 2014, in general, when she was not attending to other matters such as retrieving files, etc., to sit at a desk in the small waiting room area outside of the BTA hearing room. She also testified that she recalled no incident involving Ms. Martin who she knew before October 8, 2014 and that she would have recalled if Ms. Martin raised her voice. This testimony is to no avail to Ms. Martin as Ms. Aguillard conceded on cross examination that she may have not been at work on October 8, 2014; and that she may have been away from her desk attending to other matters or on a restroom break at the time of the incident. Therefore, Ms. Aguillard's testimony does not contradict the credible testimony of Mr. Peters and Ms. Domingue.

Ms. Martin's unprofessional and rude behavior was clearly disruptive to the workplace and detrimental to the state service. Both Mr. Peters and Ms. Domingue testified that Ms. Martin's loud and abusive behavior caused them much grief and they did not want to be anywhere near her after this incident. Additionally, Mr. Peters testified that he went into "shutdown" mode and he had to block out Ms. Martin's behavior toward him just so he could remain professional while around her.

Moreover, Ms. Martin knew better than to engage in this type of behavior as Ms. Martin had been placed on notice twice as to her inappropriate behavior prior to October 8, 2014. The first time by letter dated November 20, 2013 wherein Ms. Martin was notified that in a meeting on October 8, 2013 she was unprofessional and rude to a taxpayer's representatives. The second time by e-mail dated August 28, 2014 which advised her that her behavior was unprofessional in a meeting with her co-workers held in August 2014. Both of these communications advised Ms. Martin that she should be professional in the performance of her duties in the future; yet, she failed to do so. DOR has proved cause for discipline against Ms. Martin with this charge.

Ms. Martin's conversation with Mr. Vaughn

Ms. Martin approached Mr. Vaughn on November 5, 2014, and engaged in a conversation with him. The topics of the conversation were: 1) was Mr. Vaughn aware of the personnel decisions that were being made as to Ms. Martin and 2) why was Ms. Martin removed from the agenda for an auditor's conference. Mr. Vaughn, even though he was not in her chain of command, answered her questions. At no time did Ms. Martin raise her voice with Mr. Vaughn. Additionally, Mr. Vaughn never told Ms. Martin that he was uncomfortable having this conversation with her or that the subject matter or location of the conversation was inappropriate.

In her defense, Ms. Martin testified at the hearing that she had a normal conversation with Mr. Vaughn and she did nothing wrong. I agree.

In the disciplinary letter, DOR alleges that Ms. Martin created a hostile work environment for Mr. Vaughn as he was outside her chain of command and as other DOR employees may have heard the conversation as they were near the elevators in a public place. However, I find that Ms. Martin did not create a hostile work environment for Mr. Vaughn. Ms. Martin did not raise her voice during their conversation. Moreover, I find that the subject matter and location of Ms. Martin's conversation with Mr. Vaughn to be appropriate, especially as Mr. Vaughn voiced no objection to the topics or to the location of the conversation at the time of the conversation.

Additionally, DOR did not introduce into evidence any policy or rule that would prohibit a DOR employee from discussing the topics she discussed with Mr. Vaughn or that would prohibit a DOR employee from talking with a supervisor outside of her chain of command. Based upon all of the reasons discussed above, I conclude that DOR has failed to prove cause for discipline against Ms. Martin with this charge.

Conclusion

The Supreme Court of Louisiana has held that it is the duty of the Commission and its Referees to independently decide from the facts presented whether the appointing authority has legal cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *AFSCME, Council #17 v. State ex rel.*

Dept. of Health and Hospitals, 789 So.2d 1263 (La., 2001). Ms. Martin contends that her three (3) day suspension is too severe. I disagree. Although DOR failed to prove its second charge, it did prove that Ms. Martin was rude, disrespectful and unprofessional to two of her co-workers, all to the detriment of the state service. Based upon the forgoing reasons, I conclude that DOR proved legal cause for discipline and that the penalty imposed, a three (3) day suspension, is commensurate with the offense. Accordingly, I hereby deny this appeal.

Pursuant to Civil Service Rule 13.27(b) and (c), I hereby order DOR to pay witness fees and mileage to the subpoenaed witness who is not a state employee, as follows: Joseph Vaughn - \$75.80.

s/Brent Frederick

Brent C. Frederick
Civil Service Commission Referee