

## **Decision**

**Filed: February 18, 2011**

State of Louisiana  
Civil Service Commission

**Docket No. S-16783**

Christopher Gurba

Versus

Department of Transportation and Development – Crescent City Connection  
Police Department

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Rule(s): 5.4(a)2; 11.26(g)2; 12.2; 14.1(j)

Topic(s): Dismissal; false statements in State Employment Application,  
harassment of superiors, creation of a hostile work environment,  
inappropriate and unprofessional behavior; disparate treatment;  
retaliation

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Appearances: John Wells, counsel for Christopher Gurba  
David E. Tippett, counsel for DOTD, CCCPD

### **Statement of the Appeal**

The Department of Transportation and Development (DOTD) employed Christopher Gurba as a Police Officer 3-A with the Crescent City Connection Police Department (CCCPD) and he served with permanent status.

By letter dated October 5, 2009, DOTD dismissed Mr. Gurba from his employment effective October 16, 2009. DOTD alleges that Mr. Gurba made false statements in his State Employment Application, harassed his superiors, created a hostile work environment, and engaged in inappropriate and unprofessional behavior.

On October 29, 2009, Mr. Gurba filed an appeal of his dismissal. In his appeal, he denies the allegations of the disciplinary letter, and alleges that he is the victim of disparate treatment and retaliation, and that the penalty imposed by DOTD was too severe. As relief, Mr. Gurba requests reinstatement with back pay and benefits.

I held public hearings on May 19, 2010, through May 21, 2010, and on November 15, 2010, through November 19, 2010, in Bridge City, Louisiana. 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.

### **Preliminary Rulings**

At the hearing on May 19, 2010, Mr. Gurba moved for a summary disposition based upon the legal concept of *res judicata*. He argued that he should prevail in this appeal because he was previously granted unemployment benefits by the Louisiana Workforce Commission. I denied his motion, and now confirm that ruling. A classified state employee's receipt of unemployment benefits from the Louisiana Workforce Commission is not determinative of whether cause existed for the employee's dismissal, as Article 10, § 12(A) of the Louisiana Constitution of 1974 provides that the State Civil Service Commission has the exclusive power and authority to hear and decide all disciplinary cases involving classified state employees.

At the hearing on May 20, 2010, Mr. Gurba moved to exclude any charges that allegedly occurred while he was on military leave from August 6, 2004, through July 7, 2009, based upon the argument that he was not a state employee while on military leave. This argument is without merit. Although the federal Uniform Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. § 4301 et seq.) references an employee's "reemployment" with the non-military employer after the employee's military service, the Civil Service Rules provide that a classified employee on any type of leave, including military leave, remains a classified employee while on leave. For example, under Civil Service Rule 11.26(g)2, a classified employee on military leave continues to accrue annual and sick leave. I therefore denied Mr. Gurba's motion and now confirm that ruling.

At the hearings on May 20, 2010, and May 21, 2010, Mr. Gurba made a motion to exclude some of the charges based upon laches and prescription. However, there is no specific prescriptive period applicable to an appointing authority's ability to take disciplinary action against its employees, and the common law doctrine of laches does not apply in the State of Louisiana. *Fishbein v. State of Louisiana through Louisiana State University Health Sciences Center*, 898 So.2d 1260 (La. 4/12/05). I therefore denied Mr. Gurba's motion and now confirm that ruling.

On June 9, 2010, DOTD filed a motion to hold Mr. Gurba in contempt for his harassment and intimidation of a CCCPD police officer-witness in this appeal. On June 11, 2010, Mr. Wells filed a motion to withdraw as Mr. Gurba's counsel of record, and I granted his motion to withdraw on June 11, 2010. After a hearing held on August 9, 2010, I found Mr. Gurba guilty of contempt for attempting to intimidate the CCCPD police officer-witness, and ordered him to pay a \$500 fine and a \$59 witness fee.

At the hearing on November 15, 2010, DOTD made an oral motion that Mr. Gurba be held in contempt and that his appeal be dismissed for his non-payment of the contempt fine and witness fee from the August 9, 2010 contempt hearing. I referred this motion to the merits, as Mr. Gurba stated that he had mailed payment for the contempt fine and witness fee to the Department of State Civil Service. On November 29, 2010, the Department of State Civil Service received payment for the contempt fine and witness fee, so DOTD's motion is hereby denied as moot.

On November 23, 2010, after this appeal was submitted for decision, Mr. Gurba filed a motion to hold Lieutenant David Butler and Sergeant Theron Armstrong in contempt for committing perjury during their testimony. I hereby deny this motion, as I find no evidence that they committed perjury.

### **Findings of Fact**

1. DOTD employed Mr. Gurba as a Police Officer 3 with CCCPD and he served with permanent status.
2. On April 29, 2002, Mr. Gurba applied for a Police Officer position with CCCPD by submitting a State Employment Application (SF-10). In Block "B" of the "Work Experience" section of Mr. Gurba's SF-10, he states that he was an "Officer First Class" with the Gretna Police Department from July 15, 1992, to December 15, 1994. On the first page of Mr. Gurba's SF-10, he answered, "no" to the question, "Have you ever been fired from a job or resigned to avoid dismissal?" Mr. Gurba also states in his SF-10 that his reason for leaving the Gretna Police Department on December 15, 1994, was "Entered Military".
3. Prior to December 15, 1994, Mr. Gurba was a Reserve Officer with the Gretna Police Department, not an Officer First Class. A Reserve Officer is an unpaid volunteer with the Gretna Police Department who is also allowed to work uniformed detail jobs for private businesses. An Officer First Class is a paid employee who works 40 hours per week for the Gretna Police Department. Mr. Gurba never worked a regular 40-hour workweek for the Gretna Police Department and was never an Officer First Class of the Gretna Police Department.
4. On December 12, 1994, the Gretna Police Department terminated Mr. Gurba from his position as a Reserve Officer for unsatisfactory work performance. Mr. Gurba had made a traffic stop outside the jurisdiction of the Gretna Police Department.
5. In April 1995, Mr. Gurba approached Gretna Police Department Chief Arthur Lawson and requested that Chief Lawson allow him to submit a backdated letter of resignation to the Gretna Police Department. Chief Lawson agreed, so Mr. Gurba delivered a letter to the Gretna Police Department dated December 12,

1994, which states that he will be entering the United States Air Force/Louisiana Air National Guard on December 15, 1994, and that he is resigning from the Gretna Police Department effective December 14, 1994. Mr. Gurba and Chief Lawson signed the backdated letter of resignation.

6. Mr. Gurba began his employment with CCCPD on June 24, 2002, as a Police Officer.

7. While on duty on February 24, 2004 (Mardi Gras), Mr. Gurba attempted to lick a woman's exposed bare breast in public. Police Officer 2 Johnson L. Hale and Police Officer 2 Christopher L. Pesson were present and witnessed this incident. Officer Hale took two photographs of Mr. Gurba's head near the woman's exposed breast. Mr. Gurba pleaded with Officer Hale to delete the photographs. Officer Hale deleted one of the photographs but retained the other.

8. Mr. Gurba went on extended military leave as an Air National Guardsman on active duty with the U.S. Air Force from August 6, 2004, through July 7, 2009, although he occasionally returned to duty at CCCPD during this period to attend training and/or to make court appearances. While Mr. Gurba was on military leave, he applied for at least two promotions to the position of Sergeant with the CCCPD; however, Mr. Gurba was denied both promotions.

9. At some point during Mr. Gurba's military leave, Police Captain Hale<sup>1</sup> advised a CCCPD supervisor of the incident where Mr. Gurba attempted to lick the woman's exposed breast, and that he had a photograph documenting the incident. Chief Helmstetter obtained a copy of the photograph from Capt. Hale, but took no disciplinary action against Mr. Gurba while he was on military leave. Capt. Hale, Police Sergeant Pesson<sup>2</sup>, and Mr. Gurba all failed to report the February 24, 2004 breast incident to CCCPD. Capt. Hale and Sgt. Pesson received verbal reprimands for their participation in the breast incident and their failure to timely report it to CCCPD.

10. From March 28, 2008, through July 29, 2009, James Broadwater, a friend of Mr. Gurba's, owned the e-mail address gr8guyqq@aol.com, and allowed Mr. Gurba and others to use this e-mail address.

11. Mr. Gurba posted the following messages on the internet on the NOLA.com blog under the pseudonym *gr8guyqq*. Only the pertinent parts are quoted herein, and misspellings and/or other errors are as they appear in the original messages.

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<sup>1</sup>On June 30, 2004, Officer Hale was promoted to Police Sergeant; in June 2006, he was promoted to Lieutenant; and in November 2008, he was promoted to Police Captain A. He will be referred to as Captain Hale in the remainder of this decision.

<sup>2</sup>In October 2008, Officer Pesson was promoted to Police Sergeant. He will be referred to as Sergeant Pesson in the remainder of this decision.

Posted by **gr8guyqq** on 03/28/08 at 1:14PM

*The editor that wrote this should check into the court cases that the CCC Police Deparetement was and now involved in. . .The Chief sits in his office eating things out of the snack machine, drinking regular coke products and violating DOTD POlicy by smoking cigarettes on the porch of the Police Department, because he does not want to be at home with his nagging wife...Paisant a person that was suspended, WITH PAY, a couple of years ago for misappropriation of funds. Not surprising that he did not answer calls to his office . . . the entire Crescent City Connection Division does the same exact thing.*

Posted by **gr8guyqq** on 03/28/08 at 1:24PM

*The state law gives the CCC Police Department jusisdiction from US 90/90 B in Bridge City to N.O. Jefferson line. They DO NOT patrol according to law past Stumpf Blvd. due to not being able to hire officers. Not that they do not have qualified officers that apply. They want to continue to violate Federal Law by violating Employees Rights...Lets get rid of this Agency. . .*

Posted by **gr8guyqq** on 04/02/08 at 11:29AM

*This agency has a police force as it states in LA State Legislation. . .but this agency can not man it's Police Department due to the Corruption within its Agency!..Please call State Representative Pat Connick at (504) 371-0240 to voice your opinion about the waste of the CCC Police Department and requesting to abolish this Agency as it has proven not to fulfill its obligations to the motorist using the CCC. Also, did they beat this man like in the 1980s with the Channel 6 news reporter???????? I bet Chief Michael Helmsetter, Captain Peter Maggiore, Commander of Operations, are not ansering there phones! Make them anwser for there misappropriation of State Funds! Call the number listed above!*

Posted by **gr8guyqq** on 04/04/08 at 8:21PM

*The CCC (as well as other departments) could still be understaffed & spread thin post K. LET'S NOT MAKE ANYMORE EXCUSES....THIS AGENCY IS NOT STAFFED DUE TO THE UNLAWFUL TREATMENT BY THE ADMISTRATION....NAMELY CHIEF HELMSTETTER AND HIS CRONES. . .LET IT BE KNOWN THAT TWO FORMER LT'S ARE NO LONGER WORKING AT THE CCC FOR THERE ABUSIVE DECISIONS WITH SUBORDINATES. . .TRAINED PEOPLE HAVE APPLIED BUT THE CCC POLICE*

*DEPT DOES NOT WANT TRAINED OFFICERS, THEY WANT YES, MEN AND WOMEN!!!! AND THIS IS JUST THE HALF OF IT!*

Posted by **gr8guyqq** on 04/30/08 at 11:32AM

*We do not need the Causeway Police nor the CCC Police. The CCC Police can not and have not fulfilled their responsibilities to hire and staff the Department. I do not want to hear anymore excuses as Hurricane Katrina and nobody is applying . . . that is a lie. Chief Helmstetter and Captain Maggiore, Commander of Operations, have done nothing to help this agency and think that changing the face of the police cars and attempting to get it Accredited will help. . . you are just costing more money to the tax payers! New light bars, cages and the new decals. . .*

12. The following message was posted on the internet on the NOLA.com blog under the pseudonym *helmsitter*. Misspellings and/or other errors are as they appear in the original message.

Posted by **helmsitter** on 04/05/08 at 9:58AM

*LT.TERRY RUTHERFORD- forced to retire  
LT. WILLIAM (BILL) WRIGHT- forced to retire  
CAPT. PETER MAGGIORE- promoted to rank of captain because he married Chief MICHAEL Helmstetter's Niece.  
CHIEF MICHAEL HELMSTETTER's -promoted to rank of Chief after becoming a whistleblower/RAT against former Chief Shaw... I fully agree with gr8guyqq no matter if he has personal or inside knowledge of corruption with in this agency. The motorist that utilize the CCC should be aware of the mishandling of the state ran police department. This blog is in full force of the 1st amendment rights that everyone is afforded. (FREEDOM OF SPEECH)  
Of coarse this police department would do everything in their power to have the truth removed from public knowledge due to their inproprieties.  
LET'S ABOLISH THE CCC POLICE DEPARTMENT!!!!!!*

13. In October 2008, John Evanco, CCCPD Executive Director, approved the working title of "Deputy Chief" for Police Captain Peter Maggiore. At that time, Capt. Maggiore's position description was rewritten to include the duty that he assumes the role of Chief when the Chief is absent.

14. Sometime between November 3, 2008, and July 8, 2009, Mr. Gurba called Peggy Olivier, CCCPD Acting Director. Mr. Gurba complained to Ms. Olivier that he had seen Chief Helmstetter smoking on CCCPD's back porch. Ms. Olivier

advised Mr. Gurba that as the appointing authority for CCCPD, she had the authority, pursuant to DOTD policy, to designate a smoking area and that she had designated CCCPD's back porch as a smoking area. Mr. Gurba told Ms. Olivier that he would arrest Chief Helmstetter if Mr. Gurba saw him smoking on the back porch again.

15. Mr. Gurba returned to full-time duty with the CCCPD from military leave on July 8, 2009. He was required to read and familiarize himself with the CCCPD policy manual prior to being allowed to patrol by himself.

16. On July 8-9, 2009, and July 9-10, 2009, Denise McMahon, Police Officer 3, and Mr. Gurba worked together on the night shift (6:00 p.m. to 6:00 a.m.). Mr. Gurba and Officer McMahon discussed the fact that Officer McMahon had had a breast removed due to breast cancer. Officer McMahon asked Mr. Gurba if he wanted to see her tattoo that covered her reconstructed breast, as she had a photograph of it on her cell phone. Mr. Gurba agreed and looked at the photograph. Mr. Gurba later asked Officer McMahon if he could see the photograph of her tattoo again, to which she consented. After Mr. Gurba saw the photograph of the tattoo for a second time, he commented, "That's pretty." Viewing the photograph did not offend Mr. Gurba.

17. On July 22, 2009, Mr. Gurba signed an acknowledgement form stating that he had received a copy of the CCCPD policy manual and that he had up to 30 calendar days to read it. Mr. Gurba added a statement to the acknowledgement form stating that he would only review the policies "while at work," and he refused to sign the portion of the form indicating his understanding of the policy manual and his agreement to abide by it. Mr. Gurba never signed the portion of the form acknowledging that he had read, understood and would abide by the CCCPD policy manual.

18. On July 24, 2009, Mr. Gurba submitted a document to CCCPD stating that he had read the CCCPD policy manual. In this document, Mr. Gurba also makes the following statements. Misspellings and/or other errors are as they appear in the original document.

A) *Policy Number 3.03 Regulations – On and Off Duty 1st Amendment Rights – Freedom of Speech Off Duty is that – OFF DUTY*

B) *Policy Number 303.60 Carrying a Concealed Weapon (Off Duty)  
This Department DOES NOT authorize the carrying of Firearms Off Duty*

C) *Policy Number 4.01.4 c (2) Deputy Chief Position . . . Where in Civil Service/DOTD does this position exist*

D) Policy Number 18.01 Community Relations

*This Agency established a P.I.O. Public Information Officer and the policy states – Meets with the Community and develop and promote Highway Safety Training (I live in the local community and have several friends and family that have heard nothing of the sort).*

*Continued Community Relations*

1) Concerns – Manhattan Blvd. to 90/90b Patrolling, if the Jefferson Parish Sheriff's Office is short do they not patrol in Marrero, if N.O.P.D. is short in any District do you think that they just don't patrol

2) Minimum staffing on the shift

...

A) All Police Officers will rotate as the Dispatcher for each specific watch. This is not fair across the board. Police Officer Patrick Murphy, "C" Watch DOES NOT dispatch?

B) Civil Service has positions for CCCPD Dispatcher. Why hasn't this Agency opened up this position? That means that 4 more officers are available on the street.

C) Deputy Chief of Police Position. There is no position in Louisiana State Civil Service or DOTD that the CCCPD has within the Chain of Command. This Agency seems to override at their will and do what they want. CCCPD has paid for a new badge and also 3 star epaulets for a Deputy Chief. Where is this legal. And if it is, why wasn't this position announced within Civil Service.

D) PPR – I still have not received a response in reference to clarification on the rating. I understand how to earn a 3 as being Satisfactory but nowhere on the PPR that I was reviewing with Sgt. Armstrong stated how to earn a 4 or 5. Secondly, this PPR infers under Quality & Quantity of initiated work product refers quotas. Louisiana Revised Statutes states that an agency CAN NOT even infer to the contrary.

E) I have asked my rank on my shift about the minimum manning and they advised me that they can only call in overtime if someone calls in sick. I wish to know what is the minimum Manning and why aren't we patrolling our assigned area according to Louisiana State Law to now include the Behrman Park Area?

19. In July 2009, David Butler, Police Lieutenant A, advised Mr. Gurba that the title "Deputy Chief" was a working title for Capt. Maggiore. In response, Mr.

Gurba told Lt. Butler that Mr. Gurba did not recognize the title "Deputy Chief" as a proper title.

20. On July 27, 2009, Officer McMahon overheard Mr. Gurba complaining to Theron Armstrong, Police Sergeant, about the CCCPD. Officer McMahon asked Mr. Gurba not to discuss his complaints against the CCCPD around her.

21. On July 28, 2009, Mr. Gurba filed a written complaint against Officer McMahon alleging sexual harassment, based on her twice showing him the photograph of the tattoo on her reconstructed breast. In this written complaint, Mr. Gurba also stated that in July 2002, soon after Mr. Gurba joined the CCCPD, Deputy Chief Maggiore (who was then a Police Sergeant) told Mr. Gurba, upon meeting him, that, "My Dispatcher is going to like you, she's gonna try and blow you." Mr. Gurba alleged in his complaint that the statement was a reference to oral sex and Officer McMahon, who was the permanent dispatcher at the time. However, Deputy Chief Maggiore never made this statement to Mr. Gurba.

22. On July 29, 2009, Mr. Gurba emailed his National Guard Military Drill Schedule to Sgt. Armstrong from Mr. Broadwater's gr8guyqq@aol.com email address.

23. On August 5, 2009, Mr. Gurba submitted a memorandum to Sgt. Armstrong that states in relevant part as follows. Misspellings and/or other errors are as they appear in the original memorandum.

*Upon returning from my extended Military Leave, I have been afforded the opportunity to review the new Crescent City Connection Division Police Department Policy Manual. I am again requesting clarification on several policies that state issues while Off Duty*

*Policy #3.03 Code of Conduct, #3.03.03 Policy, #3.03.07 Conduct Unbecoming An Officer, #3.03.38 Police Actions While Off Duty, #3.03.41 Commissioned Officers Subject To Call While Off Duty, #3.03.60 Carrying Concealed weapons In Other States and While Off Duty.*

*The above referenced Policies are pertaining to Off Duty. First of all, this Department is the only Police/Sheriff's Department/Office in the continental United States that does not allow their officers to carry a firearm Off Duty. Since that being said, how can the State of Louisiana, DOTD/CCCD/CCCPD control and/or instruct any commissioned officer while Off Duty. This Agency allows us to use our knowledge and training up to and including Deadly Force while on-duty but has zero faith with allowing its commissioned officers to carry a firearm Off Duty. Since this Policy is in effect, the*

*department seems to have no grounds to counsel, discipline or regulate the actions when I am not on duty.*

24. On August 5, 2009, Mr. Gurba submitted a second memorandum to Sgt. Armstrong that states in relevant part as follows. Misspellings and/or other errors are as they appear in the original memorandum.

*Upon returning from my extended Military Leave, I have been afforded the opportunity to be re-formularized with the Dispatching duties of this Department. I was informed that all Police Officers will rotate within the Dispatch area to Dispatch. I was then informed that one Officer namely, PO Patrick Murphy, "C" Watch, refuses to dispatch and threatens to quit and he was told never mind you won't have to dispatch. I was then made aware during a conversation with the Executive Director, Ms. Peggy Olivia, that she is holding that position for Light Duty.*

*Just recently, Lt. Peter Johnson, "B" Watch Commander, requested Light Duty and was refused by Chief Michael Helmstetter.*

*Louisiana State Civil Service has a position for Crescent City Connection Police Dispatchers but since I have been employed the CCCPD has never opened the position up for applicants. Making (4) four more Police Officer available for Patrolling.*

- 1.) *If this Agency is going to keep Police Officers Dispatching then it should be fair across the board, not if someone out and out refuses to comply with duties set forth by Supervisors, that employee should be reprimanded.*
- 2.) *If the Executive Director authorizes a Light Duty position then all Police Officers whether PO I, II or III and Ranking Officers should be able to fulfill this required position. Lt and Sergeants are required to do our duties and theirs at a competent level then they should be able to be placed on Light Duty.*
- 3.) *If this Agency refuses to enforce that all Police Officers will dispatch, then I request the Policy that states such and I am given a copy of the Policy.*

*I was hired by this Agency as a Police Officer not a Dispatcher, but in my opinion it is not fair to all parties involved.*

*I hope to hear from someone in the very near future in reference to this complaint.*

*I also wish for this Complaint to be forwarded to the Executive Director, Ms. Peggy Olivia, for her review.*

25. On August 5, 2009, Mr. Gurba submitted a third memorandum to Sgt. Armstrong. This memorandum has the subject line "Subject: Violation of Policy #1.01 Written Directives by: CCCPD Administration, mainly: Chief Michael Helmstetter, Chief of Police, Captain Peter Maggiore, Commander of Operations," and states in relevant part as follows. Misspellings and/or other errors are as they appear in the original memorandum.

*I am writing this Inter Office Memorandum due to not being able to perform my duties that I was hired with the State of Louisiana, DOTD, CCCD, CCCPD as a Police Officer, due to being indirectly harassed with the duties to read the Departments Policy Manual several times.*

*The above listed personnel refuse as I asked you every time I reported for duty since my return from Military Service, "Sgt. Armstrong, Have you received a response to my request as per Policy #1.01, 1.01.07(B) Issuing the manual. Every employee of the Crescent City Connection Division Police Department shall, upon issuance of a copy of this manual, sign an acknowledgement of receipt. The referenced form shall be retained by the employee's supervisor for a period of thirty days, during which time the employee shall be required to become familiar with the content of the manual and shall be afforded opportunities to receive an explanation of entries contained in the manual. Thereafter, the employee shall be required to complete and sign the portion of the acknowledgement of receipt form, indicating that he/she has read and understands the manual. Completed forms will be forwarded by the supervisory personnel to the Records Division to be housed in the employee's master personnel file. Copies of the form are to be retained at shift level.*

*I will continue to do my assigned duties as requested by my Supervisor, but I feel that this is a form of indirect Harassment by the above listed personnel that are in Violation of this Policy-1.01. Written Directives. and needs to be reported to the Executive Director of the Crescent City Connection Division, Ms. Peggy Oliver.*

26. On August 5, 2009, Mr. Gurba submitted a fourth memorandum to Sgt. Armstrong that states in relevant part as follows. Misspellings and/or other errors are as they appear in the original memorandum.

*Upon conducting my duties as required and reading the Department's Policy Manual, again I have concerns with several*

*policies contained within the Manual. Since, Lt. Butler and you refuse to answer any questions concerning the PPR and the Department's Policy Manual; I feel the need to document my entire request after prior submitting it on the 24 July 2009.*

*I contacted Louisiana State Civil Service and DOTD in Baton Rouge and both advised me that they DO NOT have a Deputy Chief of Police-Bridge position for the Crescent City Connection Police Department.*

*According to the above listed policy # 4.01 Organization and Administration, Addendum #4.04-01 it clearly shows a Deputy Chief of Police. Captain Maggiore is also sporting the Rank on his uniform as Deputy Chief.*

*At this present time, the State of Louisiana, DOTD and the Crescent City Connection Division is doing their best to save money and it seems that this Administration is spending useful resources on Rank Insignia and New Badges that seems to be in violation.*

*It is in my opinion then Captain Peter Maggiore, Commander of Administration, is clearly Out of Uniform. I feel that this violation not only shows a Do What I say, Not as I Do attitude within this Agency, and bringing the moral of the Department in a downward position.*

*I also wish that this Complaint be forwarded to the Executive Director of the Crescent City Connection Division, Ms. Peggy Olivia for her review.*

27. On August 5, 2009, Mr. Gurba submitted a fifth memorandum to Sgt. Armstrong that states in relevant part as follows. Misspellings and/or other errors are as they appear in the original memorandum.

*Upon returning from extended Military Leave, I have been assigned to "D" Watch Night Shift and this Department and shift is understaffed for patrol officers. I asked Lt. David Butler, "D" Watch Commander what is the minimum staffing on our shift. Lt. Butler advised that he is only allowed to call in overtime personnel if someone calls in sick. So, "D" Watch has a Lt, Sgt, a Dispatcher and (2) Two Patrol Officers. For safety reasons Lt. Butler does not want us patrolling past the Manhattan Blvd.*

*In Policy # 4.01 Organization and Administration, # 4.01.02 Authority, states:*

A. The authority and responsibility afforded the Chief of Police is delegated by the Secretary of DOTD pursuant to the authority granted in Title # 48 section 1101.1, Louisiana Revised Statutes.

B. The functions, principles, and duties of the Crescent City Connection Division Police Department members are defined in Title #48 section 1101.1 Louisiana Revised Statutes.

According to Title #48 section 1101.1, it clearly states our area of responsibilities are the Westbank Expressway on the Westbank from US 90/90B throughout New Orleans to the Broad Street overpass, but includes all ferry landings and terminals. Just recently, the law was amended to include the Behrman Park Area in the City of Algiers.

*Chief Michael Helmstetter is in Violation of Louisiana State Revised Statute 14:134 Malfeasance in Office, since he is failing to staff or allowing to call in overtime to accomplish the mission of this Agency according to the Authority Granted to him by the Secretary of DOTD under LA Revised Statute Title # 48 section 1101.1*

#### **§134. Malfeasance in Office**

*Malfeasance in office is committed when any public officer or public employee shall:*

- (1) *Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or*
- (2) *Intentionally perform any such duty in an unlawful manner; or*
- (3) *Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or perform any such duty in an unlawful manner.*

*Any duty lawfully required of a public officer or public employee when delegated by him to a public officer or public employee shall be deemed to be a lawful duty of such public officer or employee. The delegation of such lawful duty shall not relieve the public officer or employee of his lawful duty.*

*Whoever commits the crime of malfeasance in office shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars or both.*

*Amended by Acts 1980, No. 454, §1; Acts 2002, 1<sup>st</sup> Ex. Sess., No. 128, § 6.*

*Chief Helmstetter is putting all certified law enforcement officers under his command in jeopardy for Civil Litigation, involving us by Vicarious Liability.*

*The questions I am most concerned with are:*

- 1.) *What is a shift's minimum manning?*
- 2.) *Is Chief Helmstetter going to allow Shift Commanders/Supervisors to call in overtime for staffing to cover the area of responsibility according to Louisiana State Law?*
- 3.) *Is Chief Helmstetter going to allow Shift Commanders/Supervisors to staff the shift for safety reasons and not allow him or a delegate to give an excuse that they have two ranking officers on the shift. Both ranking officers have several other duties that require them to be in their office to accomplish. Making it again a safety hazard for the patrol officers.*
- 4.) *Is an investigation going to be opened on Chief Helmstetter for violation of Louisiana State Revised Statute 14:134 Malfeasance in Office?*

*I hope to hear from someone in the very near future in reference to this complaint.*

*This Violation of State Law needs to be forwarded to the Executive Director, Ms. Peggy Olivia, as soon as possible, for her review.*

28. From July 8, 2009, through August 18, 2009, CCCPD officers did not patrol the entire area of CCCPD's territorial jurisdiction. Ms. Olivier had decided not to have the officers patrol the entire area of CCCPD's territorial jurisdiction for the officers' safety.
29. On August 7, 2009, Jacob Coleman, Police Officer 3, heard that Mr. Gurba had filed a complaint against CCCPD Officer Patrick Murphy. Officer Coleman walked into CCCPD's lobby and told Mr. Gurba that he had a problem with Mr. Gurba writing complaints regarding Officer Murphy and other CCCPD employees. Mr. Gurba responded that Officer Coleman should mind his own business, and that if he wanted to discuss this matter further, Officer Coleman should consult Mr. Gurba's "rank," i.e. his supervisors. Mr. Gurba also told Officer Coleman, "to go play". During this conversation, Mr. Gurba took an aggressive stance and posture toward Officer Coleman, and yelled at him; Officer Coleman did not respond in kind toward Mr. Gurba, nor did Officer Coleman use any expletives during this conversation. Officer Coleman had his hand on his magazine pouch during this incident, but not on his sidearm.
30. On August 11, 2009, Mr. Gurba filed a written harassment complaint with CCCPD against Officer Coleman. Mr. Gurba alleged that during their August 7, 2009 conversation, Officer Coleman said in a louder than normal tone of voice, "Who the fuck you think you are to be filing all these complaints about people you don't even know?" Mr. Gurba also alleged that "Officer Coleman was in an aggressive stance and was standing in my personal space," and that Officer Coleman had his hand on his sidearm during their conversation.

31. CCCPD Policy and Procedure Manual (PPM) No. 13 prohibits police conduct that intimidates co-workers and which adversely affects morale within the CCCPD. CCCPD PPM No. 13 also prohibits sexual harassment, which is defined as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when... submission to or rejection of such conduct is used as the basis for employment decisions...or such conduct has the purpose or effect of ... creating an intimidating, hostile, or offensive working environment.”

32. CCCPD PPM No. 29 prohibits police conduct that constitutes harassment, exaggerated criticism, intimidation, and disparaging or derogatory comments as to co-workers. CCCPD PPM No. 29 also prohibits false accusations of sexual harassment made in bad faith.

### **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.

### ***False statements in his State Employment Application***

DOTD charges Mr. Gurba with falsifying the State Employment Application (SF-10) he submitted to CCCPD when he applied for the position of Police Officer on April 29, 2002.

In his SF-10, Mr. Gurba states that he was an Officer First Class with the Gretna Police Department from July 15, 1992, to December 15, 1994. He also states in his SF-10 that he had never been fired or resigned to avoid dismissal, and that his reason for leaving the Gretna Police Department was to enter military service. All of these statements were false.

Mr. Gurba was an unpaid, volunteer Reserve Officer with the Gretna Police Department, not a full-time, paid Officer First Class; a very significant distinction

that Mr. Gurba surely understood and should have accurately reported in his SF-10. He failed to do so.

The Gretna Police Department terminated Mr. Gurba's employment on December 12, 1994, for unsatisfactory job performance. That fact was unchanged by Gretna Police Department Chief Lawson's post-termination acceptance of Mr. Gurba's backdated resignation letter in April 1995. Mr. Gurba should have indicated in his SF-10 that he was fired from the Gretna Police Department, or at the very least, reported that he had resigned in lieu of termination; he did not do so.

Mr. Gurba thus falsified his SF-10 as to many crucial facts. His testimony at the hearing that he made no misrepresentations on his SF-10 is blatantly untrue. Civil Service Rule 14.1(j) prohibits employees from making false statements on state job applications. Falsification of an SF-10 has been held to constitute cause for dismissal. *Board of Trustees, State Employees Group Benefits Program v. Moncrieffe*, 644 So.2d 679, 93 1393 (La.App. 1 Cir. 10/7/94). DOTD has proved cause for discipline with this charge.

#### ***Inappropriate and unprofessional behavior: Mardi Gras 2004 incident***

DOTD charges Mr. Gurba with acting inappropriately and unprofessionally on Mardi Gras 2004. Specifically, DOTD alleges that while on duty on February 24, 2004, Mr. Gurba attempted to lick a woman's exposed bare breast in public.

Capt. Hale and Sgt. Pesson witnessed the February 24, 2004 incident. They testified that Mr. Gurba attempted to lick a woman's exposed bare breast while he was on duty and in public. Capt. Hale even took a photograph of Mr. Gurba in near proximity to the woman's bare breasts, which was introduced into evidence.

Mr. Gurba admits that he is in the photograph, but contends that he was pulling away from the woman's exposed breasts. I find this contention utterly without merit, based upon the testimony of Capt. Hale and Sgt. Pesson and an inspection of the photograph. The photograph reveals that Mr. Gurba was not moving his head away from the woman's exposed breasts; on the contrary, his gaze is focused intently on them with evident interest. Moreover, the testimony of Capt. Hale and Sgt. Pesson was manifestly more credible than the self-serving testimony of Mr. Gurba.

In his defense, Mr. Gurba asserts that the results of a polygraph examination performed on him show that he did not touch the woman's exposed breast. While I allowed Mr. Gurba to introduce the report of the polygraph examination into evidence, I cannot make any findings based upon it, as Mr. Gurba failed to produce testimony from the polygraphist to corroborate the hearsay report. Although the rules prohibiting the admission of hearsay are relaxed in administrative hearings, any hearsay evidence which is admitted must be

corroborated by competent evidence in order to form the basis of a finding of fact, *Superior Bar & Grill v. State*, 94-CA-1879, (La. App. 1 Cir. 5/5/95), 655 So.2d 468.

In any event, whether Mr. Gurba touched the exposed breast is irrelevant. DOTD charged him with *attempting* to lick the exposed breast, which I conclude that he did. His conduct was inappropriate, unprofessional, and obviously reflected poorly on the CCCPD. DOTD has thus proved cause for discipline with this charge.

### ***Harassment of Chief Helmstetter and Deputy Chief Maggiore***

DOTD charges that Mr. Gurba actively and intentionally harassed Chief Helmstetter and Deputy Chief Maggiore. Specifically, DOTD references: 1) Mr. Gurba's NOLA.com internet postings about Chief Helmstetter and Deputy Chief Maggiore, 2) harassing telephone calls and text messages from Mr. Gurba to Chief Helmstetter, and 3) Mr. Gurba's August 5, 2009 memorandum to Sgt. Armstrong that alleges Chief Helmstetter is guilty of Malfeasance in Office.

DOTD failed to produce any evidence in support of its allegations that Mr. Gurba made harassing telephone calls to Chief Helmstetter or sent him harassing text messages. I also find that DOTD did not prove that Mr. Gurba made an internet posting under the name "Helmsitter" on April 4, 2008, due to the lack of clear evidence connecting Mr. Gurba to the posting. Accordingly, these charges are hereby dismissed.

However, DOTD did prove that the NOLA.com internet postings by gr8guyqq about Chief Helmstetter and Deputy Chief Maggiore were made by Mr. Gurba, despite his testimony to the contrary. Mr. Gurba had access to the gr8guyqq e-mail address; therefore, gr8guyqq was a likely choice for a pseudonym for internet posting by Mr. Gurba. On July 29, 2009, Mr. Gurba e-mailed his National Guard Military Drill Schedule to Sgt. Armstrong using the gr8guyqq@aol.com email address. Additionally, some issues referenced in the postings are subjects that Mr. Gurba has complained about to employees of CCCPD. For example, Mr. Gurba complained to CCCPD staff about Chief Helmstetter smoking on the porch of the CCCPD and about officers not patrolling CCCPD's entire territorial jurisdiction. For these reasons, I find that Mr. Gurba authored the gr8guyqq internet postings.

CCCPD PPM No. 29 prohibits harassment of CCCPD employees, as well as exaggerated criticism, intimidation, and disparaging or derogatory comments about them. According to Mr. Gurba's gr8guyqq internet postings, Chief Helmstetter spends his workdays in his office eating, drinking, and not answering his telephone, with an occasional smoke break on the back porch allegedly in violation of agency policy; all because he does not want to be at home with his nagging wife. Mr. Gurba accuses Chief Helmstetter and Deputy Chief Maggiore

of misappropriation of state funds, unlawful treatment of employees, and doing "nothing" to help CCCPD. However, these accusations are mere conclusions unsupported by any factual details.

Mr. Gurba contends that his statements are protected speech under the constitutions of the United States and of the State of Louisiana. This contention is incorrect, except as noted below.

Not all speech by a public employee is constitutionally protected. The interest of the public employee, as a citizen, in commenting upon matters of public concern must be balanced against the interest of the agency in promoting the efficiency of the public services it provides. Police officers have reduced free speech rights compared to other public employees due to the need for high morale and internal discipline in a police force. Statements are not a matter of public concern if they pertain to personal disputes and grievances, and they are not calculated to disclose misconduct. *Normand v. City of Baton Rouge, Police Department*, 572 So.2d 1123 (La. App. 1<sup>st</sup> Cir. 1990).

I conclude that Mr. Gurba's gr8guyqq internet postings were not constitutionally protected. Mr. Gurba was a police officer with the CCCPD, so his free speech rights were reduced. The unsubstantiated statements in his gr8guyqq internet postings were calculated to embarrass Chief Helmstetter, Deputy Chief Maggiore, and the CCCPD, not to disclose misconduct in any meaningful way. Mr. Gurba was not concerned with the betterment of the CCCPD; he was engaged in his own private vendetta to abolish it, as reflected in his gr8guyqq internet postings dated March 28, 2008, April 2, 2008, and April 30, 2008. He was thus pursuing his personal grievances against the CCCPD rather than any public concern. The CCCPD's interest in running an orderly and efficient police department outweighed any interest Mr. Gurba had to free speech as to the gr8guyqq internet postings.

However, the allegation in his August 5, 2009 memorandum to Sgt. Armstrong that Chief Helmstetter is guilty of the crime of Malfeasance in Office is different. Unlike the anonymous, unsubstantiated gr8guyqq internet postings to the public at large, this statement was made in writing by Mr. Gurba to his superior, and contains reasons why Mr. Gurba believed Chief Helmstetter's actions were unlawful. This communication involves a matter of public concern, and thus is constitutionally protected. This charge is therefore dismissed.

Mr. Gurba's constitutionally unprotected gr8guyqq internet postings had the effect of calling into question the integrity of Chief Helmstetter and Deputy Chief Maggiore, and the potential to adversely affect not only public respect for the CCCPD, but also the morale of the officers and their respect for CCCPD management. Statements made by a police officer that call into question the integrity of the police chief can, by their very nature, have only detrimental effects on the public service. *Dix v. City of Lake Charles*, 569 So.2d 1112 (La. App. 3<sup>rd</sup>

Cir. 1990). Mr. Gurba's gr8guyqq internet postings were harassing, disparaging and derogatory. I conclude that his gr8guyqq internet postings violated CCCPD PPM No. 29 and were detrimental to the state service. DOTD has proved cause for discipline as to Mr. Gurba's gr8guyqq internet postings.

### ***Creation of a hostile work environment***

DOTD charges that Mr. Gurba intentionally created a hostile work environment at CCCPD. Specifically, DOTD alleges: 1) Mr. Gurba made false harassment complaints against his coworkers, 2) Mr. Gurba did not cooperate in reviewing and agreeing to be bound by the CCCPD policy manual, and 3) Mr. Gurba exhibited disrespect to Deputy Chief Maggiore by refusing to recognize his working title. The evidence produced at the hearing establishes that Mr. Gurba created a hostile work environment at CCCPD, as set forth below.

I find that Mr. Gurba made false harassment complaints against his coworkers. On July 28, 2009, Mr. Gurba filed a sexual harassment complaint against Officer McMahon based on her twice showing him the photograph of the tattoo on her reconstructed breast. However, Mr. Gurba's request to see the photograph a second time and his comment, "That's pretty," about the tattoo clearly reveals that the photograph did not offend Mr. Gurba and that his harassment complaint was unjustified. Mr. Gurba filed his harassment complaint against Officer McMahon in retaliation for Officer McMahon's having chastised Mr. Gurba the day before for discussing his complaints against CCCPD in front of her, not because he was offended by the photograph.

In his July 28, 2009 harassment complaint, Mr. Gurba also alleges that in July 2002, Deputy Chief Maggiore told Mr. Gurba, upon meeting him, that, "My Dispatcher is going to like you, she's gonna try and blow you." In light of Deputy Chief Maggiore's testimony that he never made this statement to Mr. Gurba, coupled with the extreme tardiness of Mr. Gurba's allegation, I find that Mr. Gurba's harassment complaint against Deputy Chief Maggiore was false.

On August 11, 2009, Mr. Gurba filed a harassment complaint against Officer Coleman. Mr. Gurba alleged that on August 7, 2009, Officer Coleman, while in an aggressive stance, yelled at him, used obscenities, and had his hand on his sidearm. Officer Coleman testified at the hearing, and denied Mr. Gurba's version of the incident. Officer Coleman's testimony was more credible than Mr. Gurba's was, and thus I find that Mr. Gurba's harassment complaint against Officer Coleman was false.

Mr. Gurba testified that his harassment complaints were justified. For the reasons stated above, I reject this assertion. Mr. Gurba's false harassment complaints against coworkers were bad for morale and caused other officers not to trust Mr. Gurba, which creates a safety issue for the agency and the public. DOTD has proved cause for discipline against Mr. Gurba with this charge.

Mr. Gurba did not cooperate in reviewing and agreeing to abide by the CCCPD policy manual. On July 22, 2009, Mr. Gurba received an acknowledgement form regarding the policy manual. At that time, Mr. Gurba signed the form acknowledging that he had received a copy of the policy manual and that he had up to 30 calendar days to read it, but refused to sign the portion of the form indicating that he had read and understood the policy manual and would abide by its provisions.

On July 24, 2009, Mr. Gurba submitted a memorandum to CCCPD in which he states that he had read the policy manual. In this memorandum, Mr. Gurba states his disagreement with, rather than a lack of understanding of, several of the policies. Mr. Gurba argues that this July 24, 2009 memorandum stating his disagreement with several of the CCCPD policies relieved him of his responsibility to sign the acknowledgement form. This argument is without merit, as the memorandum does not specify any areas of the CCCPD policy manual that he did not understand. Such being the case, I find that this memorandum establishes that Mr. Gurba had read and understood the policy manual as of July 24, 2009.

However, Mr. Gurba never signed the portion of the acknowledgement form verifying that he had read, understood and would abide by the CCCPD policy manual. His failure to do so was uncooperative and unjustified. In addition, it showed a disconcerting lack of respect for CCCPD management and rules, and resulted in the simply impossible situation of an armed employee with arrest powers whose agreement to adhere to agency policy was unclear. I conclude that DOTD proved cause for discipline with this charge.

In October 2008, CCCPD's Executive Director approved the working title of "Deputy Chief" for Capt. Maggiore. In July 2009, Lt. Butler advised Mr. Gurba that the title "Deputy Chief" was a working title for Capt. Maggiore. Despite this instruction from a superior, Mr. Gurba responded that he did not recognize the title "Deputy Chief" as a proper title. Mr. Gurba also questioned Deputy Chief Maggiore's designation as Deputy Chief in Mr. Gurba's July 24, 2009 memorandum regarding the policy manual and in his fourth August 5, 2009 memorandum to Sgt. Armstrong.

Mr. Gurba claims that "Deputy Chief" is not a civil service job title, but this claim is without merit, as Civil Service Rule 5.4(a)2 allows an agency to use working titles for its employees. By his actions, Mr. Gurba exhibited his refusal to accept Deputy Chief Maggiore's working title, and thereby exhibited disrespect for Deputy Chief Maggiore, which constitutes insubordination. Insubordination by its very nature is detrimental to the state service. *Housing Authority of Morgan City v. Gibson*, 598 So.2d 545 (La.App. 1 Cir. 1992). In view of the foregoing, I conclude that DOTD has proved cause for discipline against Mr. Gurba with this charge.

### ***Retaliation and disparate treatment claims***

Mr. Gurba claims he is the victim of retaliation and disparate treatment. Retaliation and disparate treatment are forms of discrimination; therefore, under Civil Service Rule 13.19(s)2, Mr. Gurba has the burden of proof on these issues.

It is the contention of Mr. Gurba that he is the victim of disparate treatment as to the 2004 Mardi Gras breast incident, as Capt. Hale and Sgt. Pesson failed to report the incident to CCCPD and were only given verbal reprimands, while Mr. Gurba was dismissed. This contention is without merit for two reasons. An officer placing his face very near an exposed breast and attempting to lick it is a much more serious offense than just watching the incident and failing to report it, as did Sgt. Pesson, or photographing the incident and failing to report it, as did Capt. Hale. Secondly, Capt. Hale and Sgt. Pesson were both reprimanded for this one incident; whereas Mr. Gurba was dismissed for the plethora of incidents described in this decision. Mr. Gurba failed to prove that he is the victim of disparate treatment.

Mr. Gurba also contends he is the victim of retaliation, in that DOTD dismissed him for being a “whistleblower.” I conclude that this contention lacks merit. The only evidence supporting Mr. Gurba’s contention is his own testimony, which I find to be completely lacking in credibility. The record of this proceeding is replete with the factual basis for Mr. Gurba’s dismissal. DOTD’s decision to dismiss Mr. Gurba was not tainted by any retaliatory intent. Mr. Gurba has thus failed to prove that he is the victim of retaliation.

As to the penalty, the Civil Service Commission and its Referees have a duty to decide, “whether the punishment imposed is commensurate with the dereliction.” *Guillory v. Department of Transp. & Development*, 475 So.2d 368, 370-371 (La. App. 1<sup>st</sup> Cir. 1985). Mr. Gurba asserts his dismissal was too severe. However, Mr. Gurba falsified his State Employment Application, engaged in inappropriate and unprofessional behavior while on duty during Mardi Gras 2004, and harassed his superiors. He created a hostile work environment by making false harassment claims against his coworkers, being uncooperative with required policy manual acknowledgements, and by his refusal to recognize Deputy Chief Maggiore’s working title, which was an act of insubordination. Based upon the forgoing reasons, I conclude that DOTD proved legal cause for discipline and that the penalty imposed, dismissal, is commensurate with the offenses. Accordingly, I hereby deny this appeal.

Pursuant to Civil Service Rule 13.27(b) and (c), I hereby order DOTD to pay witness fees and mileage to the subpoenaed witness who is not a state employee, as follows: Charles Whitmer - \$25.60.

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Brent C. Frederick  
Civil Service Commission Referee