

IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF CORRECTIONS

APPELLANT

VS.

NO. 2006-CC-01485

JAMES R. TUTTLE

APPELLEE

**ON APPEAL FROM THE
CIRCUIT COURT OF
SUNFLOWER COUNTY, MISSISSIPPI**

**BRIEF OF APPELLEE
(James R. Tuttle, MDOC Employee)**

JAMES W. BURGOON, JR.
MSB NO. [REDACTED]
ATTORNEY FOR APPELLEE

BURGOON & OAKES, P.C.
101-103 FULTON STREET
POST OFFICE DRAWER 1640
GREENWOOD, MS 38935-1640
TELEPHONE: (662) 453-7373
FACSIMILE: (662) 453-7378

Oral Argument Not Requested

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that the justices of this Court may evaluate possible disqualifications or recusal:

1. James R. Tuttle, Appellee
2. Falton O. Mason, Jr., EAB Hearing Officer
3. Christopher Epps, Commission, Mississippi Department of Corrections.

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellee:

1. James W. Burgoon, Jr., Esq.

For Appellant:

1. David K. Scott, Special Assistant Attorney General, State of Mississippi
2. Jane L. Mapp, Special Assistant Attorney General, State of Mississippi

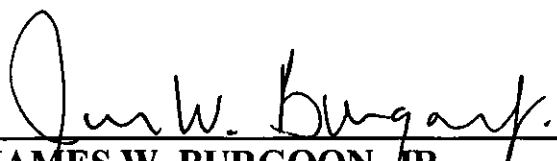

JAMES W. BURGOON, JR.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	ii
INTRODUCTORY STATEMENT	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	3-20
Nature of the Case	3
Background and Proceedings Below	3-5
Facts	5-7
ARGUMENT	7
A. Record Establishes That Appellee was MDOC Employee	7-13
B. Reinstated MDOC Employee Entitled to Full Back Pay	13-15
C. MDOC Not A "Third" Party Provided the Funds for Salaries of its Night School Instructors	15-19
D. MDOC'S Action Barring Appellee From Place of Work Renders it Liable for Salary	19-20
CONCLUSION	20-21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Statutes</u>	
§ 25-9-132 of the Mississippi Code	17
<u>Cases</u>	
<i>Boyd v. Crosby Lumber & Mfg. Co.</i> <i>166 So.2d 106 (Miss. 1964)</i>	10
<i>Gill v. Department of Wildlife Conservation</i> <i>574 So.2d 586, 591 (Miss. 1990)</i>	17
<i>MS Dept. Of Health v. Natchez Comm Hosp.</i> <i>743 So.2d 973, 977 (Miss. 1999)</i>	18
<u>Other Authorities</u>	
Note, Workers Compensation - Tests Applied to Determine Whether Logger is Independent Contractor or Employee 36 MLJ 266 (March, 1965)	10

INTRODUCTORY STATEMENT

This appeal involves an attempt by MDOC to avoid paying its employee, a diesel mechanics instructor at Parchman, his full back pay following the reinstatement of his employment after it was determined that he had been wrongfully terminated.

STATEMENT OF THE ISSUES

In its brief, Appellant's statement of the issue is erroneous in that it assumes third party employment is an issue. It is not. There was no proof of such third party employment.

The issue presented by this appeal may be stated as follows:

Whether a MDOC employee who was terminated but subsequently reinstated by order of the MEAB is entitled to full back pay and benefits?

Or, stated more precisely, whether a MDOC employee paid through Mississippi Delta Community College for teaching night school classes at MDOC is entitled to back pay for his salary following

reinstatement of his employment where the evidence established that MDOC reimbursed MDCC for such salary and the fringe benefits associated therewith?

Appellee submits that both questions should be answered in the affirmative under the record of the evidence and the applicable law and that the decision of the Circuit Court below reversing the Order of the Employee Appeals Board should be affirmed because the decision of the Appeals Board was contrary to and against the undisputed and uncontradicted evidence and was not supported by the law. Additionally, the decision of the Employee Appeals Board was not supported by any evidence; was arbitrary, capricious, and was in violation of the law and the previous order of the hearing officer which awarded Appellee all back pay following his reinstatement.

STATEMENT OF THE CASE

NATURE OF CASE

This is an appeal by the Mississippi Department of Corrections from the Order of the Circuit Court of Sunflower County reversing the final decision of the Mississippi Employee Appeals Board which declined to enforce the previous order of the hearing officer awarding appellee all of his back pay following the termination and reinstatement of his employment.

BACKGROUND AND PROCEEDINGS BELOW

Appellee, James R. Tuttle, was employed as a Correctional Vocational Education Instructor by the Mississippi Department of Corrections where he taught diesel mechanics to inmates at the Parchman Vocational Center operated by the prison. As part of his employment, he also taught night school classes to inmates from 3:30 until 7:30 four nights a week. On April 20, 2004, his employment was terminated by MDOC, and he was forbidden to go on prison grounds except for his place of residence (R1:21; RE:6).

After a hearing before the MEAB (Honorable Falton O. "Sonny" Mason, Jr.), his employment was reinstated with all back pay and benefits. MDOC paid the portion of his back pay for his regular day school but did not reimburse him for the salary he would have earned as a vocational instructor at the night school conducted by MDOC. (*1 bid.*)

Thereafter Appellee filed his Motion to Enforce Order Requiring Payment of Portion of Back Pay Withheld Following Reinstatement, seeking the remainder of his back pay in the amount of \$12,880.00, representing the amount he would have earned as a night school instructor but for his termination and being barred from the penitentiary grounds. A hearing on the motion was conducted at Parchman before Honorable Falton O. "Sonny" Mason, Jr., hearing officer, who denied the motion on the grounds that the funds used to pay the employee came from a third party, not the MDOC, even though the evidence established that MDOC reimbursed the third party for all expenditures connected with the employment (R1:24; 33).

Thereafter, the full MEAB affirmed the order of the hearing officer. Appellee then appealed to the Circuit Court of Sunflower County which conducted a thorough and painstaking review of the record before the MEAB, and in a well written five page order, held that the Appellee met his burden of proof and reversed the order of the MEAB and concluded that Appellee was, in fact, an employee of MDOC and thus entitled to all of his back pay (R2:9-13; RE:3).

FACTS

At the hearing before the MEAB hearing officer, Appellee, James R. Tuttle offered his testimony, that of June Williams, the personnel coordinator with Mississippi Delta Community College, and the exhibits introduced into evidence. The responding agency Appellant, MDOC, offered no proof whatsoever.

The facts established by the record are as follows:

James R. Tuttle, the Appellee, a Correctional Vocational Education Instructor with the MDOC, was terminated from his employment on April 20, 2004. His suspension and termination notice

stated that he was barred from entering the penitentiary grounds except to go to his residence (Exhibit "1") (R1:4-5). After a hearing, the employee was reinstated with full back pay and benefits. MDOC paid a portion of his back pay and benefits but did not pay the salary he would have earned as a Vocational Instructor at the night school conducted by MDOC.

Appellee Tuttle thereupon filed his Motion to Enforce the Order Requiring Back Payment of his Salary of \$12,880.00 as night class instructor from March through December, 2004 (R1:24-25).

At the hearing, it was established that Appellee, in addition to his full time job as a vocational instructor, had been employed by MDOC for several years as a night school instructor in diesel mechanics where he taught inmates from 3:30 p.m. to 7:30 p.m. at the penitentiary. His salary for the night school classes was paid through Mississippi Delta Community College, but the salary of all the night school instructors, including expenses, was reimbursed to the college by MDOC. [See the testimony of June Williams and Exhibit "4" and

"5"] (R3:2-12; R3:13-30; ARE - Tab 2).

ARGUMENT

A. RECORD ESTABLISHES THAT APPELLEE WAS MDOC EMPLOYEE

In its brief, Appellant MDOC argues that Appellee Tuttle's employment as a night school instructor at the Vocational Center was not a part of his employment with MDOC but rather constituted employment with a third party, MDCC.

The hearing officer apparently adopted this theory in that in denying the employee's motion he concluded that "the funds come from a third party, not from the Mississippi Department of Corrections," even though MDOC reimbursed MDCC for the salaries and expenses.

The record in this case emphatically establishes that Appellee was an employee of MDOC and not MDCC.

- A. Appellee testified that he was employed by MDOC (T. 1 & 2; ARE - Tab 1);**

- B. June Williams, the payroll clerk with MDCC testified that MDCC was reimbursed by MDOC for all night school instructors' salaries, the employer's share of FICA, retirement, unemployment compensation, plus a 5% administrative fee (T. 15; ARE - Tab 2);**
- C. The check for reimbursement for the above night school expenditures was from MDOC to MDCC (T. 15; ARE - Tab 4);**
- D. June Williams testified that the Appellee was not an employee of MDCC (T. 17-20; ARE - Tab 2);**
- E. Williams testified that MDOC selects the instructors for the night school, not MDCC (T.25; *1 bid*);**
- F. Exhibit #4 - A March 18, 1999 letter from MDOC to MDCC states in part that "the State Personnel Board has ruled that our staff that teaches in the evening programs can be paid the same hourly rate as their full time job pays (emphasis added) (ARE - Tab 4);**

Note: Exhibit #4 goes on to explain the arrangement between MDOC and MDCC regarding reimbursement for the expenses of the night school program since the State Personnel Board had previously ruled that MDOC could not pay these funds directly to their employees. See the testimony at page 20 of the transcript.

- G. Exhibit #4 - A March 29, 1999 letter from MDOC to MDCC clearly shows that even though "our twelve evening program instructors" will be placed on MDCC's payroll the expenses will be reimbursed by MDOC. The next to last sentence of MDOC Commissioner Anderson's letter states: "Any worker's compensation claims filed by evening instructors will be processed by our agency". (emphasis supplied) (ARE - Tab 3).**

The above statements in the exhibits are admissions by MDOC that Appellee, one of the night school instructors, was an employee of MDOC and, as such, MDOC is bound thereby and cannot be heard to contend otherwise.

One of the great maxims of the common law is that the law looks to substance, not form. That MDOC entered into a contractual arrangement with MDCC whereby the MDOC night instructors could continue teaching in MDOC's vocational program but be paid directly by MDCC and thereafter reimbursed by MDOC in order to get around a State Personnel Board ruling that MDOC could not pay its instructors directly for night school teaching, does not negate the fact that the night school instructors were, in fact, employees of MDOC.

The Court should look to who ultimately paid the employees, not to how the funds were routed through a different agency. It cannot be disputed that MDOC ultimately provided the funds for its night school program employees.

Borrowing from the law of worker's compensation, a field closely related to the state personnel laws, the Supreme Court has repeatedly examined the substance of employment relationships, as opposed to the form, to determine that an employee, regardless of contract and arrangements stating otherwise, is entitled to the benefits of the employment relationship. This is clearly set forth in the case of *Boyd v. Crosby Lumber & Mfg. Co.*, 166 So.2d 106 (Miss. 1964), and cases therein reviewed and cited. For additional rational for finding that a worker is, in fact, an employee although called an independent contractor, see Note, Worker's Compensation - Tests Applied to Determine Whether Logger is Independent Contractor or Employee, 36 MLJ 266 (March, 1965).

It is highly significant to note in the case sub judice that:

MDOC hired Appellee;

MDOC controlled his work;

MDOC directed his activity;

MDOC, in fact, terminated Appellee (but, he was reinstated).

It is also noteworthy that MDOC exercised all of its rights as an employer, albeit erroneously, under the state personnel law and policies.

To say that Appellee was not an employee of MDOC not only flies in the face of logic and reason but it also contrary to the undisputed evidence in the record.

To conclude, as the hearing officer and the Full Board apparently did, that Appellee Tuttle was an employee of MDCC, not MDOC, because his pay check came directly from MDCC even though it was ultimately reimbursed by MDOC, is specious and relies on form over substance, contrary to the facts and the law.

In the record before the Court, there is not an iota of evidence that Appellee was an employee of MDCC. The fiction (form) of

routing the money to pay the full time MDOC instructors for additional night school classes through MDCC for payment, does not negate the fact that these instructors were, in fact and in law, employees of MDOC and that Appellee, therefore, is entitled to the salary he would have earned as a night school instructor for MDOC, but for his termination.

As a matter of fact, the only mention of Appellee being employed by a "third party" and not MDOC is contained in the Response filed by MDOC (R. 33), as follows:

3. Appellant's employment as a vocational instructor at the Vocational Center is not part of his employment with MDOC, but rather constitutes employment with a third party.
4. MDOC has never compensated the Appellant for his position as a vocational instructor at the Vocational Center.

This pleading, of course, is not evidence, and there was no testimony from any source that Appellee was employed by any agency other than MDOC or that he was ultimately paid by any agency other

MDOC. In truth and in fact, the record established by uncontradicted and undisputed evidence that (1) Appellee Tuttle was employed by MDOC, and (2) Appellee Tuttle's salary was ultimately paid by MDOC.

Had MDOC wished to argue that Appellee was employed by a third party, it could have and should have offered proof of such employment. Instead, it offered no evidence of any kind whatsoever.

**B. REINSTATED MDOC EMPLOYEE
ENTITLED TO FULL BACK PAY**

Even though the record empathically establishes that Appellee Tuttle was an employee of MDOC, which fact is conceded in its brief, MDOC, in its desperate attempt to avoid paying Tuttle all of his back pay, boldly asserts that Tuttle was paid by a third party, i.e. MDCC, and weakly suggests, contrary to the evidence, that he must be considered an employee of MDCC. The Department blatantly asserted that there is sufficient evidence to show that Tuttle's wages were paid by a third party. What evidence? The Department offered none. To the contrary, the evidence in the record overwhelmingly

establishes that MDOC ultimately provided the funds for Appellee Tuttle's salary and fringe benefits.

A careful examination of Exhibits 4 and 5 in evidence leaves no doubt that (1) the night school instructors at the penitentiary were, in fact, employees of MDOC and would continue to be such; and (2) that MDOC, regardless of where the funds originated, reimbursed MDCC for the salaries and fringe benefits of its night school instructors. The check for such reimbursement was from MDOC, *infra*.

Throughout this procedure, MDOC has adroitly attempted to avoid paying Appellee Tuttle his night school wages by hiding behind a fiction of its own making. As pointed out hereinabove, MDOC initiated, implemented, and followed a scheme whereby its employees in the night school could continue to be paid their salaries through the community college because at one point the State Personnel Board had ruled that MDOC could not directly pay its full time instructors for additional part time work. Ingeniously, the Department worked out an arrangement with MDCC for the salaries to be paid by MDCC and

then reimbursed by MDOC. This arrangement has been in place for several years, and was the procedure followed at the time Appellee Tuttle was improperly terminated. This can be clearly seen by examining Exhibit "#4" which consists of two letters from the MDOC to MDCC setting up the procedure, and Exhibit "#5" which contains checks from MDOC to MDCC covering the expenses for salaries and fringe benefits for MDOC's night school instructors.

**C. MDOC NOT A "THIRD" PARTY PROVIDED
THE FUNDS FOR SALARIES OF ITS
NIGHT SCHOOL INSTRUCTORS**

In this case, MDOC takes the highly superficial position that the funds paying the salary of the night school instructors came from a third source, supposedly meaning that the funds were not those of MDOC.

Again, looking at Exhibit "4", consisting of letters in 1999, it can clearly be seen that prior to that date MDOC used grant funds from the Department of Education and funds in the Inmate Welfare Fund to pay the salaries of its full time instructors for their part time night

school teaching, but in order to get around a state personnel ruling that the department could not continue paying them directly, these funds were routed through MDCC's system so that MDOC's instructors could continue to be paid.

It should be noted that all funds of MDOC come from "third" sources. It is well known that MDOC receives funds from (1) appropriations by the legislature; (2) grants; (3) inmate canteen fund; (4) earnings from its farm operations; and (5) other sources, such as rebates from phone usage. The point is, regardless by where MDOC obtained the funds, MDOC provided the money to pay the salaries of its night school instructors.

In its brief, MDOC states that Tuttle provided absolutely no supporting authority for his contention that he is entitled to back pay.

The Order of the Hearing Officer in this cause reinstating Appellee Tuttle dated January 4, 2005 [Exhibit "B" to Motion to Enforce Order] states: "The Appealing Party has sustained his burden of proof, and is hereby reinstated to his previous position, with

all back pay and benefits . . .".

Here, MDOC did not pay him all of his back pay. The aforesaid order is the law of the case and should be enforced.

What authority is needed to enforce that order? Unquestionably, Appellee Tuttle was an employee of MDOC. He was paid from funds coming from MDOC, although routed through MDCC to permit the MDOC to get around a ruling from the personnel board that the department could not directly pay its full time employees for part time work.

The statute, §25-9-132 of the Code, authorizes a reversal of the Employee Appeals Board if its decision:

- (a) Is not supported by any substantial evidence;**
- (b) Is arbitrary or capricious; or**
- (c) Is in violation of some statutory or constitutional right of the employee.**

In *Gill v. Department of Wildlife Conservation*, 574 So.2d 586, 591 (Miss. 1990), the Supreme Court established and stated that a decision

of an administrative agency which is unsupported by any evidence is by definition arbitrary and capricious.

Here, the agency (MDOC) offered no evidence whatsoever.

Again, in *MS Dept. Of Health v. Natchez Comm. Hosp.*, 743 So.2d 973, 977 (Miss. 1999), stated:

If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious. An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. *Burks v. Amite County Sch. Dist.*, 708 So.2d 1366, 1370, 125 Ed. Law Rep. 1012 (Miss. 1998). An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlled principles. *Id.* (emphasis added)

Here, the Circuit Court held that the decision of the Hearing Officer and the MEAB was not supported by any evidence, substantial or otherwise. In fact, the decision was contrary to the evidence. The decision was arbitrary and capricious because there was nothing in the record to support it. Finally, the MEAB order deprived the

employee (Tuttle) of his back pay contrary to the order of the hearing officer awarding him all back pay and was a violation of the employee's statutory and constitutional rights.

In its callous effort to avoid paying Appellee Tuttle's full back pay, MDOC at page 8 of its brief weakly asserts that under the law the award of back pay is discretionary with the Board. MDOC interpretation of the statute and rule is erroneous and misplaced. While it may or may not be true that the MEAB in the first instance has some discretion with respect to back pay, MDOC overlooks or ignores the fact that the order of the MEAB reinstating his employment awarded Appellee all of his back pay. In other words, the hearing officer exercised his discretion and awarded full back pay. Appellee is entitled to the remainder of his pay.

**D. MDOC'S ACTION BARRING APPELLEE
FROM PLACE OF WORK RENDERS IT
LIABLE FOR SALARY**

Finally, there is yet another independent reason why MDOC is liable for Appellee's salary as a night school instructor. Even if

Appellee should be held to be an employee of MDCC for teaching the night school classes, which he was not, the action of MDOC in not only terminating his employment but also barring him from the penitentiary grounds prevented Appellee from working at the night school, and the action of MDOC barring him from the work site renders the department liable for the salary he would have earned but for his termination.

CONCLUSION

MDOC's contention that its employee (Appellee Tuttle) was paid by a "Third Party" is flawed and fallacious, which can be clearly seen from the fact that MDOC, not a third party, terminated his employment! He was reinstated but not paid all of his back pay. In view of the evidence in the record, it is submitted by Appellee that the action of his employer, MDOC, in refusing to reinstate his back pay as a night school instructor for the department was arbitrary, capricious, against the evidence, and merited the relief granted by the

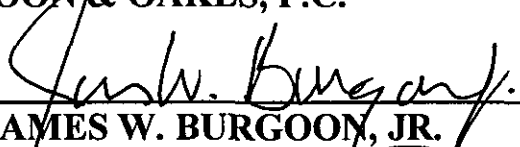
Circuit Court.

This Court should, therefore, affirm the action of the Circuit Court.

RESPECTFULLY SUBMITTED this the 5th day of March, 2007.

BURGOON & OAKES, P.C.

BY:



JAMES W. BURGOON, JR.

Mississippi State Bar No. [REDACTED]

ATTORNEY FOR APPELLEE

JAMES R. TUTTLE

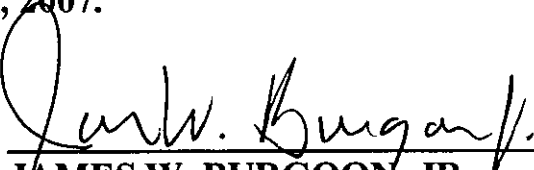
CERTIFICATE OF SERVICE

I, James W. Burgoon, Jr., attorney for James R. Tuttle, do hereby certify that I have this date caused to be mailed, via United States Postal Service, postage prepaid, a true and correct copy of the Brief of Appellee in the above styled and numbered cause to the following:

Honorable Richard A. Smith
Circuit Court Judge
Post Office Box 1953
Greenwood, MS 38935-1953

Jane L. Mapp
Special Assistant Attorney General
For the State Of Mississippi
510 George Street, Suite 212
Jackson, MS 39202

THIS the 5th day of March, 2007.



JAMES W. BURGOON, JR.