

IN THE SUPREME COURT OF MISSISSIPPI

MS DEPARTMENT OF CORRECTIONS

APPELLANT

V.

CAUSE NO. 2006-CC-01485

JAMES R. TUTTLE

APPELLEE

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

APPELLANT'S BRIEF

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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 representations 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, Commissioner, Mississippi Department of Corrections
4. Richard A. Smith, Circuit Court Judge

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

For Appellant:

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

For Appellee:

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

By: 

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ISSUE

I. Whether the Circuit Court Erred in Reversing the Decision of the Employee Appeals Board and Ordering MDOC to Pay Tuttle Backpay for Third-party Employment?

STATEMENT OF THE CASE

Effective April 20, 2004 the Appellant, James Tuttle, was terminated from his position as a Correctional Vocational Education Instructor with the Mississippi Department of Corrections. He appealed this termination to the Mississippi Employee Appeals Board ("EAB"). Following a December 7, 2004 hearing before EAB Hearing Officer, Falton O. Mason, Jr., Tuttle was "reinstated to his previous position, with all back pay and benefits, subject to set off of any sums received from other sources." (R1:21; RE:6)¹.

On or about May 24, 2004, Tuttle, through his attorney, James W. Burgoon, Jr., filed a motion with the EAB entitled, "Motion to Enforce Order Requiring Payment of Portion of Back Pay Withheld Following Reinstatement; for Interest; Sanctions; and Attorney Fees." In the Motion Tuttle argued that while MDOC did reinstate all of his benefits and pay him a portion of his back pay, he was not reimbursed for the wages he would have earned as a night school vocational instructor at Parchman. (R1:24). MDOC filed a Response to this motion arguing that it had complied with the January 4, 2005 order requiring MDOC to reinstate Tuttle to his position with all back pay and benefits. MDOC denied that it was required to pay Tuttle back pay for wages he may have earned as a night school instructor at the Vocational Center since it constituted employment with a third party and MDOC had never compensated the Appellant for this work. (R1:33).

¹Citations to the Record will be in the form of (RX:YY) with "X" representing the volume number and YY representing the page number. Citations to the Record Excerpts will be in the form of (RE:X) with "X" representing the Tab number where the document can be found.

A hearing on the motion was held before Hearing Officer Mason on August 4, 2005. At the hearing, Tuttle testified that he worked at Parchman as an instructor teaching diesel mechanics from 7:30 a.m. until 3:30 p.m. and that MDOC did reimburse him for back pay for this work. (R3:3-4). Tuttle stated that he also taught a night class at Parchman for which he received a paycheck from Mississippi Delta Community College ("MDCC"). (RE: 4). When he was reinstated MDOC did not reimburse Tuttle for wages he would have earned teaching this night class. (R3:4-5). According to Tuttle, following his suspension and subsequent termination by MDOC he was not able to teach the night class because he was restricted from entering the vocational building. (R3:5-6).

On cross-examination, Tuttle reaffirmed that his paycheck for the night school classes came from Mississippi Delta Community College. (R3:9). Tuttle stated that he never received any compensation from the Department of Corrections for teaching night school. (R3:10-11).

Tuttle called June Williams, Personnel Coordinator for Mississippi Delta Community College ("MDCC") as a witness. Williams testified that MDCC and MDOC had an agreement whereby MDOC would send times sheets for the night school instructors to MDCC and MDCC cut the paychecks for the instructors. MDOC would then reimburse MDCC for the wages plus expenses. (R3:14-16).

On cross-examination Williams testified that Tuttle received a W-2 statement of earnings from the community college for his night school earnings. (R3:17). Williams stated

that this was not a unique arrangement in that MDCC received funds from third party sources such as the federal government to pay other MDCC workers and employees. (R3:18). When questioned about the ultimate source of the funds used to pay Tuttle for his night school instruction, Williams testified that according to a letter from Mike Corbin, Division Director I for MDOC, the majority of the money MDOC used to reimburse MDCC for these instructors came from the Department of Education and the remaining funds came from the Inmate Welfare Fund. (R3:21-22; Exhibit 4). Williams testified that the arrangement was made because “the Personnel Board ruled that the Department of Correction [sic] teachers could not be paid directly from the Department of Corrections from [sic] their evening jobs.” (R3:20).

On or about September 7, 2005, Hearing Officer Mason issued an Order denying Tuttle’s Motion, finding that Tuttle was not entitled to back pay from MDOC for his night school classes since he was paid for that work by a third party. (R1:41; RE:5). Feeling aggrieved, Tuttle filed his Request for Review by the Full Board on September 13, 2005. Thereafter, he also filed a “Motion for Reconsideration by Hearing Officer of, in the Alternative, for Recusal from Full Board Review.” Subsequently, on December 20, 2005, the Full Board entered an Order affirming the decision of the Hearing Officer and denying Tuttle’s request for recusal. (R1:57; RE:4) Still aggrieved, Tuttle filed his Notice of Appeal the Circuit Court of Sunflower County, Mississippi. (R2:3).

The Circuit Court entered an Order dated August 9, 2006, reversing the decision of the EAB and finding that “Tuttle was an employee of MDOC, not MDCC; even though not paid directly by MDOC, ultimately MDOC did provide the salary for the night instructors.” and therefore the decision not to pay Tuttle back pay for his night school classes was a denial of his statutory rights. (R2:9-13; RE:3).

Feeling aggrieved by the decision of the Circuit Court, MDOC filed its Notice of Appeal to the Mississippi Supreme Court and this matter now ensues. (R2:15).

BURDEN OF PROOF AND STANDARD OF REVIEW

The general rule for judicial review of an administrative agency’s findings and decision is, “[a]n agency’s conclusions must remain undisturbed unless the agency’s order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one’s constitutional rights” *Allen v. Mississippi Employment Security Commission*, 639 So.2d 904, 906 (Miss. 1994). “Moreover, there is a rebuttable presumption in favor of the action of an administrative agency and the burden of proof is upon one challenging its actions.” *Ricks v. Mississippi State Dept. of Health*, 719 So.2d 173, 177 (Miss. 1998).

SUMMARY OF THE ARGUMENT

There was sufficient evidence to support the Hearing Officer’s finding that Tuttle is not entitled to receive back pay from MDOC for his part-time night class instruction since his night school wages were paid by a third party. The Circuit Judge seemingly based his

decision to reverse on the fact the MDOC reimbursed MDCC for Tuttle's night school pay, while at the same time ignoring the evidence that the money actually came not from MDOC's budget, but from the Department of Education and the Inmate Welfare Fund. If it does not matter where MDOC got the money to reimburse MDCC for Tuttle's wages, it should not matter where MDCC got the money to pay those wages in the first way. Accordingly, the Circuit Judge's decision should be reversed and the EAB Hearing Officer's decision dismissing Tuttle's motion should be reinstated.

ARGUMENT

I. Whether the Circuit Court Erred in Reversing the Decision of the Employee Appeals Board and Ordering MDOC to Pay Tuttle Backpay for Third-party Employment?

Tuttle was employed full-time by MDOC to teach daytime vocational classes at Parchman. He also taught classes at Parchman part-time at night, but was paid for this work by Mississippi Delta Community College ("MDCC"). When he was terminated by MDOC he was unable to continue his part-time work for MDCC because he was not allowed in the vocational building. After being reinstated MDOC paid Tuttle back pay for his full-time MDOC position, but did not reimburse him for lost wages from his part-time job for which he would have been paid by MDCC. The EAB Hearing Officer affirmed MDOC's actions regarding this matter finding that Tuttle was paid for teaching these night classes by a third party and thus was not entitled to back pay from MDOC.

The Circuit Court, in reversing the decision of the EAB, held that since MDOC reimbursed MDCC for his night school instruction he was an MDOC employee and therefore MDOC was required to reimburse him for the wages lost in connection with this job as well as for his full-time position. However, if this argument is allowed to run its full course, the evidence shows that MDOC was not the ultimate source of Tuttle's night school income. The documentary evidence showed and Tuttle's own witness, June Williams, testified that the money that MDOC used to reimburse MDCC for Tuttle's wages came primarily from the Department of Education and that the remainder came for the Inmate Welfare Fund.²

The EAB is a creature of statute and therefore only has the powers specifically granted to it by the legislature. *Miss. Employment Security Commission v. Culbertson*, 832 So.2d 519, 530 (Miss. 2002). Since MDOC and not MDCC was the responding agency to Tuttle's EAB appeal, the EAB did not have the authority to grant him back pay for missed work for which he would have been paid by MDCC. To order MDOC to pay Tuttle back pay for third party employment would amount to an award of damages, which the EAB has no authority to grant. Instead Tuttle, knowing that he was paid for his night classes by MDCC, should have made the school a party to his EAB appeal.

The Hearing Officer in his discretion awarded Tuttle back pay, but held that he was

²The Inmate Welfare Fund is established pursuant to Miss. Code Ann. 47-5-158. The monies in the fund are to be used for the benefit and welfare of inmates. The fund is derived from monies earned from interest on inmate deposits, the operation of inmate canteens, and from a portion of the commissions earned through inmate telephone calls. The monies in the Inmate Welfare Fund are not part of MDOC's general budget.

not entitled to back pay for his night classes. The Hearing Officer found that a third party and not MDOC paid Tuttle for teaching night classes. In his Order the Hearing Officer found in part as follows:

The documentary evidence clearly reflects that the Department of Education grants to the Mississippi Department of Corrections funds for the teaching of the evening classes at the Mississippi Department of Corrections, the same evidence reflects that the grant is usually not sufficient to cover the entire fiscal year, and that the Mississippi Department of Corrections uses funds from the Inmate Welfare Fund. The fact is that the Appealing Party and all others who teach evening classes do not receive payment directly from the Mississippi Department of Corrections, but do receive their payment directly from Mississippi Delta Community College.

It is apparent that the majority of these funds paid through Mississippi Delta Community College, come from a grant from the Department of Education a, with a smaller portion coming from the Inmate Welfare Fund. There is no evidence as to what portions come from which source, however, all funds come through the Mississippi Delta Community College, a third party.

Both Tuttle and the Circuit Court maintain that since MDCC was reimbursed for the wages they paid to Tuttle then he could not be considered an employee of the school. This argument is spurious since that same logic could be used to say Tuttle was not an employee of MDOC for the purposes of his night school classes since the funds used to pay his wages actually came from the Department of Education and the inmate's themselves. If Tuttle insists on following the money trail, it should be followed to its origin. Tuttle should not be allowed to pick the most beneficial stop along the way. However, if as Tuttle argues, it does not matter where MDOC got the money to reimburse MDCC for his wages, then it should not matter where MDCC got the money to pay those wages in the first places. MDCC, as the agency that drafted Tuttle's check and issued him a W-2, was in fact his employer.

Furthermore, the administrative rules established pursuant to Miss. Code Ann. § 25-9-129, *et seq.* state that the EAB “may reinstate a prevailing party in employment with his or her responding agency and restore all his or her employee rights and benefits including back pay, medical leave and personal leave.” *See*, Mississippi State Employee Handbook, page 87 (Rev. 2005). There is nothing in the statute that requires that the EAB grant a prevailing party back pay. The statute uses the permissive “may” therefore whether or not to grant back pay within the hearing officer’s discretion. In this case the EAB hearing officer specifically stated in his September 7, 2005 that his award of back pay did not include back pay for Tuttle’s night classes. Therefore, even if the Court concludes that Tuttle was an employee of MDOC as it relates to his night classes, the EAB still should have been affirmed because it was within the hearing officer’s discretion not to award Tuttle back pay for his night classes.

In his arguments to the EAB and the Circuit Court Tuttle provided absolutely no supporting authority for his contention that even though Tuttle was paid for his night school work through MDCC that it still amounted to MDOC employment and thus he was entitled to back pay from MDOC. Tuttle cited only one case in an attempt to support his argument. In *Boyd v. Crosby Lumber & Mfg. Co.*, 166 So.2d 106 (Miss. 1964), the Mississippi Supreme Court held that for worker’s compensations purposes “that the right to control, not actual control of, the details of the work is the primary test of whether a person is an independent contractor or an employee.” *Id.* at 440. This case is not on point as it deals

exclusively with worker's compensation law, not state government personnel law." Tuttle cited no case to support his argument that upon reinstatement to a state service position by the EAB, the employing agency is required to reimburse the employee for lost wages that would have been paid by a third party.

As stated *supra*, the general rule for judicial review of an administrative agency's findings and decision is, "[a]n agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights" *Allen v. Mississippi Employment Security Commission*, 639 So.2d 904, 906 (Miss. 1994). There is sufficient evidence to support the Hearing Officer's finding that Tuttle is not entitled to receive back pay from MDOC for his part-time night class instruction since his night school wages were paid by a third party. Alternatively, it was within the Hearing Officer's discretion to deny Tuttle back pay for his night school work. Accordingly, the Circuit Court's decision should be reversed and the decision of the Hearing Officer and the EAB denying Tuttle back pay for his night school classes should be reinstated.

CONCLUSION

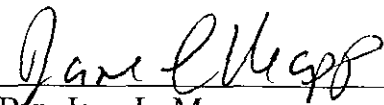
Based on the arguments of fact and law herein above, it is clear that decisions of the Circuit Court were arbitrary, capricious and not supported by any substantial evidence. The Circuit Court's decision should be reversed and the decision of the Employee Appeals Board should be reinstated.

Respectfully submitted,

MISSISSIPPI DEPT. OF CORRECTIONS
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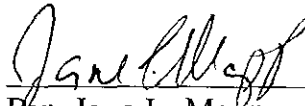

CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing **Appellant's Brief** in the above styled and numbered cause to the following:

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This the 7th day of February, 2007


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