IN THE SUPREME COURT OF MISSISSIPPI

EMMA COX — APPELLANT

V. — CAUSE NO. 2006-SA-01611

MS DEPARTMENT OF CORRECTIONS — APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF SUNFLOWER COUNTY

BRIEF OF APPELLEE

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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. Emma Cox, Appellant
2. Falton O. Mason, Jr., EAB Hearing Officer
3. W. Ashley Hines, Circuit Court Judge
4. Christopher Epps, Commissioner, Mississippi Department of Corrections

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

For Appellee:

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2. Jane L. Mapp, Special Assistant Attorney General, State of Mississippi

For Appellant:

1. W. Ellis Pittman, Esq.
2. Jwon T. Nathaniel, Esq.

By: Jane L Mapp

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STATEMENT OF THE CASE

Former Mississippi Department of Corrections ("MDOC") employee Emma Cox ("Cox") filed an appeal from a decision of Circuit Court of Sunflower County, Mississippi affirming her termination of employment with MDOC. Prior to her termination which is the basis of this appeal, Cox was employed with MDOC as a Correctional Officer IV at Mississippi State Penitentiary ("MSP") in Parchman, Mississippi.

Following an agency administrative hearing held on February 24, 2005 and concluding on March 16, 2006, Cox was sent a Notice Termination of Employment from Lawrence Kelly, Superintendent of MSP on April 7, 2005. (Ex. 5). The Notice informed Cox that her employment was being terminated based on a violation of Group III, Number 7 and a violation of Group III, Number 11. (Ex. 5). A Group III, Number 7 is a "violation of safety rules where there exists a threat to life or human safety" and Group III, Number 11 is "an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees."

Cox's notice set out the specific basis of discharge as follows:

> On January 11, 2005 at approximately 1157 hours, Deputy Warden (DW) John Rogers entered Unit 32 Bravo. During his tour of the building, he observed "yard call" in progress. He then exited the building to monitor the detail, at approximately 1220 hours he observed you sitting down adjacent to the door. You had both eyes closed and did not know the DW Rogers had walked out onto the yard. After approximately five (5) seconds, he addressed you and

questioned you about sitting down during yard call and regarding your eyes being shut.

(Ex. 5).

Cox appealed her termination to the Employee Appeals Board ("EAB"). R2:1.[1] The case was heard on June 8, 2005, by Judge Falton O. Mason, Jr., in the Courtroom at the Mississippi State Penetentiary in Parchman, Mississippi. Cox was represented by attorney W. Ellis Pittman and MDOC was represented by Special Assistant Attorney General David Scott. Thereafter, on June 13, 2005, Judge Mason entered an order dismissing the appeal and sustaining the action taken by MDOC. (R2:34). He found that Cox, as the Appealing Party, failed to meet her burden of proving that the action taken by MDOC against her was "arbitrary or capricious, against the overwhelming weight of the evidence" and that she merits the relief requested." The Hearing Officer went on the find that MDOC's action in terminating Cox's employment was not arbitrary or capricious since "her inattentiveness to her duties placed herself as well as other in danger. She was alone in a yard with inmates who are classified as dangerous, being housed in a maximum security unit, and her failure to be alert could have resulted in injury to herself and others." (R2:34-35). Feeling aggrieved, Cox appealed the Hearing Officer's decision to the Full Board. (R2:36).

Prior to filing the transcript of the hearing with the EAB, the court reporter's office was damaged by Hurricane Katrina and she lost twenty-three (23) pages of shorthand notes

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[1]Citations to the Record will be in the form of (RX:YY) with "X" representing the volume number and YY representing the page number.

from the hearing. (R1:12). A 104 page transcript was filed with the EAB, without objection from Cox. Simultaneous briefs were filed by the parties and at no point did Cox object to the Full Board reviewing the Hearing Officer's decision without benefit of a complete transcript. (R2:39;45).[2] On November 17, 2005, the Full Board entered an Order affirming the decision of the Hearing Officer. (R2:86). Cox then appealed the Board's decision to the Circuit Court of Sunflower County, Mississippi. (R1:3).

After Cox filed her notice of appeal with the Circuit Court, Cox then filed a Motion for New Trial based on the fact that several pages of the transcript from the EAB hearing had been destroyed and were not part of the record on appeal. (R1:7). Following briefing by both parties, the Circuit Court entered an Order dated August 16, 2006 denying Cox's Motion for New Trial and affirming her termination of employment. (R1:13). In his Order, the Circuit Judge denied Cox's Motion for New Trial stating that she had failed to Comply with Rule 10(c) of the Mississippi Rules of Appellate Procedure which requires the appellant to prepare a statement of missing evidence within sixty (60) days after filing the notice of appeal. (R1:15). The Circuit Judge went on the find that Cox's termination was "supported by substantial evidence, not arbitrary or capricious, and not in violation of some statutory or constitutional right of Ms. Cox...." (R1:16). Still aggrieved, Cox filed her Notice of Appeal to this Court and this matter now ensues[3]. (R1:18).

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[2]While Cox was represented by attorney W. Ellis Pittman at the EAB Hearing, in the Circuit Court and here before this Court, Cox filed a pro se brief with the Full Board.

[3]Cox had a copy of the transcript of her hearing before the Mississippi Department of Employment Security regarding her application for Unemployment Benefits made a part of the

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

Cox failed to comply with MRAP 10(c) regarding supplementing the brief with written statements of the evidence therefore she can not now complain that there in not a complete transcript of the hearing available to the court.

There is sufficient evidence to support the Hearing Officer's decision to sustain the action taken by MDOC in terminating Cox's employment and therefore this matter should be affirmed.

ARGUMENT

I. Whether the EAB TO Sustain Ms. Cox's Termination Without the Benefit of a Complete Transcript Was Done in Violation of Article Three,

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Record on Appeal in this case. However, this transcript was not part of the record before the EAB or the Circuit Court and has no bearing on this appeal. Therefore, it was not properly included as part of the Record before this Court. ***See***, M.R.A.P. 10(a).

Section Fourteen of the Constitution of the State of Mississippi and the Fourteenth Amendment to the Constitution of the United States of America, Creating a Constitutional Fact Whereas this Court May Review the Board's Actions under the Independent Judgment Test.

Cox argues that she is entitled to a new hearing because a portion of the court reporter's notes from her hearing were destroyed and therefore the Full Board did not have a complete transcript in order to conduct a *de novo* review. Cox claims that the Full Board erred in affirming the decision of the Hearing Officer when it did not have a "full and complete record before it for review."

Cox was entitled to and received a *de novo* hearing before the EAB hearing officer and was afforded all applicable safeguards of procedural due process. Beyond that, the review of the actions of the terminating agency is not *de novo*, but instead is based on the pleadings, documentary evidence filed for the record at the EAB hearing, the transcript of the hearing, and briefs of the parties. ***See***, Mississippi State Employee Handbook, § 11, page 97 (Rev. July 2005). "This Court, as well as the circuit court, reviews a decision of an administrative agency for substantial evidence supporting that agency's finding, and the scope of review is limited to the findings of the agency." ***Mississippi Dept. of Human Services v. McNeel***, 869 So.2d 1013, 1016 (Miss. 2004).

Cox is not automatically entitled to a new hearing merely because portions of the transcript are missing. Rule 10(c) of the Mississippi Rules of Appellate Procedure provides for a procedure to supplement the transcript when portions of it are missing. Rule 10(c) states as follows:

> If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. he statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule.

M.R.A.P. 10(c).

Cox has never filed a statement of the evidence as required by Rule 10(c), and in fact, Cox did not even object to the lack of a complete transcript when the matter was pending before the Full Board for review. Cox can not seek a new hearing when she has failed to even attempt to supplement the transcript as required by M.R.A.P. 10(c). Furthermore, the Mississippi Supreme Court in ***Watts v. State***, 717 So.2d 314, 318 (Miss. 1998), held that when an appellant is represented on appeal by the same attorney that represented her at trial, it is incumbent upon the attorney to "show specific prejudice by the missing portions of the record in order to mandate reversal and remand for a new trial."

While Cox filed her own pro se brief with the Full Board, Attorney Pittman represented Cox at her hearing before the EAB Hearing Officer, before the Circuit Court, and here before this Court. However, there was no attempt made when the case was before the

Full Board or the Circuit Court to supplement the transcript with a statement of the evidence or to show a specific prejudice from the missing portions of the transcript.

Additionally, the available portions of the transcript are sufficient to show the two differing versions of the incident leading to Cox's termination. The record contains the full testimony of Deputy Warden Rogers and the full adverse testimony of Officer Cox where they each detailed the incident. The record also contains abundant testimony regarding Cox's alternative argument that even if she was sleeping, her termination was arbitrary and capricious because other officers caught sleeping only received written reprimands. The testimony included in the missing pages would merely be redundant as to these two issues.

Accordingly, Cox is not entitled to a new hearing in this matter.

II. Whether the EAB's Affirming Ms. Cox's Termination Failed to Meet the Requirements of the "Substantial Evidence Test" So as to Violate Fundamental Procedural Principles of Administrative Law and Instinctively Making the Abs's Decision Arbitrary and Capricious, Thereby Entitling the Circuit Court of Sunflower County, Mississippi Not to Give Deferential Treatment to the EAB's Prior Decision to Affirm Ms. Cox's Termination.

The Hearing Officer in his Order summarized the evidence presented at the hearing as follows:

> The testimony of Deputy Warden John D. Rogers reflected that on January 11, 2005, he was touring Unit 32 B-Building, and observed "yard call" in progress, that he exited the building to monitor the detail. That when he entered the area, he observed the Appealing Party sitting down adjacent to the door, that her head was down and her eyes closed, that he stood beside her for approximately 5 seconds, and she never acknowledged his presence, that while he was watching her, the inmates were watching both of them. That he asked the Appealing Party why she was sitting down and why she did not realize that

he had walked into the yard. He also asked her whether she had received a directive about sitting down while holding "yard call". That the Appealing Party stated she was looking in the other direction from him. That he instructed the Appealing Party to be more responsible on her post.

There was testimony that earlier there had been an incident where an Officer was injured by inmates during "Yard Call."

The Appealing Party testified that she was looking the other way, that she was sitting down because she hurt her back earlier and it and her legs were hurting. That she had never read any general order or policy, nor received any directive, state that an Officer was not to or could not sit while holding "yard call". That there were chairs and crat4es out there for Officers to sit. She also testified that she was either calling or talking on the hand held radio at the time he came out into the yard. The Appealing Party complained that the incident was never investigat4d by Internal Affairs, as it should have been, that policy required that where an officer appears to be asleep on their post. Deputy Warden Rogers never testified that the Appealing Party was asleep, rather he testified that she was inattentive at a time when such inattention could result in harm to herself and others.

There was testimony that the Appealing Party was not treated the same as other employees who had been charged with sleeping on duty. There was evidence the two other employees who were with sleeping on duty, were issued written reprimands. The testimony reflected that these two employees were on tower duty, and isolated from inmates, and that they were observed by the camera. The Appealing Party was in a yard with a number of inmates, and was observed by a Deputy Warden to be inattentive. The testimony reflected that the circumstances between the observation by camera of the employees who appeared to be asleep in the tower, is very different from being in a yard with a number of inmates, and being observed personally by a Deputy Warden to be inattentive and open to possible attack from inmates.

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her inattentive ness to her duties placed herself as well as other in danger. She was alone in a yard with inmates who are classified as dangerous, being housed in a maximum security unit, and her failure to be alert could have resulted in injury to herself and others."

(R2:34).

The Hearing Officer as the trier of fact is in the best position to determine the credibility of witnesses and to determine who and what to believe when there are conflicts in testimony since he is able to listen to each witness and observe their demeanor. The Hearing Officer's findings of fact should not be disturbed unless manifestly wrong. ***See, Pride Oil Co., Inc. v. Tommy Brooks Oil Co.***, 761 So.2d 187 (Miss. 2000); ***St. Dominic-Jackson Memorial Hosp. v. Miss. State Dept. of Health***, 728 So.2d 81, 97 (Miss. 1998).

Cox was charged with committing a Group III, Number 11 offense:

> an act or acts of conduct occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees

She was also charged with committing a Group III, Number 7 offense, a "violation of safety rules where there exists a threat to life or human safety".

The evidence clearly shows that Deputy Warden John Rogers went to Unit 32-B building on January 11, 2005 and while making rounds he went out the doors to the yard pen. He noticed the yard was full of inmates and Officer Cox was sitting down adjacent to the door just a few feet away with her head down and her eyes appeared to be shut. Rogers testified he observed Officer Cox, but did not see her eyes open and that after approximately five seconds it became apparent that the inmates were watching her so he addressed her at that point. According to Rogers, Cox seemed somewhat startled and she stated that she was sitting down because her leg was swelling. After he addressed her, Officer Cox got up so he went back inside the building and reported the incident. (R3: 4-5).

At no time during these proceeding has Cox denied that she was sitting down during yard call, but she has repeatedly denied that she was asleep or inattentive. She stated that she did not notice Deputy Warden Rogers because she was looking the other way and talking on her radio. (R3:76).

This conflict in the testimony between the only two people involved in the actual incident is best resolved by the trier of fact. It was up the hearing officer to determine whether or not Cox met her burden of proving that she was not sitting down with her eyes closed during yard call, inattentive to her surroundings. Clearly, the Hearing Officer resolved the conflict in favor of the testimony of Deputy Warden Rogers. This decision can not overturn unless found to be manifestly wrong.

The only other issue left to be resolved is that of whether the punishment imposed was arbitrary and capricious. Cox argues that two other officers at Unit 32 who appeared to be sleeping on duty only received written reprimands and therefore her harsher punishment was arbitrary and capricious. However, the testimony at the hearing showed that the other two officers were not personally seen, but instead were caught by security cameras("ESOC"). Also, those two officers were in a secure tower separated from the offenders by sliding gates and bars, whereas Officer Cox was alone in a pen with a group of over twenty maximum security offenders with very little protection. (R3:28, 33).

Connie Ayers, the Administrative Hearing Officer who recommended that Cox be terminated testified that the two employees that were given written reprimands were not

brought before her for administrative review hearings. She testified that other staff had come before her with no prior disciplinary action and were terminated after being caught sleeping on duty. (R3:62-64; 66).

There was much testimony regarding two memos issued after Officer Cox's Administrative Review Hearing. The first was issued by Deputy Warden Rogers on March 21, 2005 at the direction of Warden Lee regarding disciplinary action for staff who appeared to be sleeping on post as reported by ESOC. According to the memo, disciplinary action for a first offense was to be a written reprimand and disciplinary action for a second offense was two be a request for administrative hearing. (Ex. 7; R3:37). On May 25, 2005, at the direction of Superintendent Lawrence Kelly a second memorandum was issued superceding the previous memo. The May 25, 2005 memo stated that stated that "any staff that appears to be asleep or inattentive while on duty will be subject to disciplinary action that might include request for Administrative Review Hearing." This memo did not differentiate between personal observation and ESOC observation. (R3:46-47; Ex. -8).

Superintendent Kelly testified that Warden Lee did not consult him before having Deputy Warden Rogers issue the first memo. He stated that it had always been the position of MDOC to request an Administrative Review Hearing when a staff person was observed to be inattentive or appeared to be asleep. (R3:85-86).

Superintendent Lawrence Kelly went on to testify that there is a significant difference when an officer is personally observed by a supervisor as being asleep or inattentive and

when such action is captured on the electronic surveillance system. Kelly testified that the video is panning and is often grainy, sometimes making it hard to make out an image. Also, the person may have their back to the camera and you just see grainy video of someone sitting in a chair, making the evidence inconclusive. (R3:84-85, 88-89).

Under SPB rules, if there is evidence to support the agency's findings and "if the personnel action taken by the responding agency is allowed under said policies, rules and regulations, the Employee Appeals Board shall not alter the action." Mississippi State Employee Handbook, §11, page 96 (Rev. July 2005). ***See, Johnson v. Miss. Dept. of Corrections***, 682 So.2d 367, 369-71 (Miss. 1996). The Mississippi State Employee Handbook, §10 (C), page 66 (Rev. July 2005), states that the "[c]ommission of one (1) Group Three offense may be disciplined by a written reprimand and/or may result in suspension without pay for not less that one (1) nor more than six (6) workweeks (in increments of workweeks), demotion, or dismissal. There was sufficient evidence presented to show that the facts surrounding the written reprimands issued to Officers Rias and Price were distinguishable from the facts surrounding Cox's termination. Accordingly, since the action taken by MDOC of terminating Cox was allowed under the policies, rules and regulations of the State Personnel Board the EAB hearing officer, the Full Board and the Circuit Court were correct in affirming Cox's termination.

CONCLUSION

The actions of MDOC, the EAB and the Circuit Court were neither arbitrary nor capricious and Cox failed to meet her burden of proof in this matter. Accordingly, the decision of the Circuit Court should be affirmed.

Respectfully submitted,

MISSISSIPPI DEPT. OF CORRECTIONS
APPELLEE

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Mississippi Attorney General

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By: Jane L. Mapp
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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 **Brief of Appellee** in the above styled and numbered cause to the following:

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This the 11th day of May, 2007.

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