IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-01777

GARY HEMBA — APPELLANT

v.

MISSISSIPPI DEPARTMENT OF CORRECTIONS — APPELLEE

ON APPEAL FROM THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY
HONORABLE WILLIAM H. SINGLETARY, CHANCELLOR

Gary Hemba v. Mississippi Department of Corrections
Cause Number G2005-2130 S/2

PLAINTIFF/APPELLANT GARY HEMBA'S REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This Court has the power and the responsibility to correct injustice wherever it occurs. In the case at bar, Plaintiff respectfully submits that a serious injustice has occurred and this Court should exercise its power to correct it. *See, e.g., Commercial Bank of Rodney v. State,* 4 Smedes & M. 439, Miss. Err.App (1845) ("equity corrects the imperfections of the law, by interposing its power for the prevention of injustice").

There are two questions that must be asked in regard to the instant appeal. First, is there a legal basis to reverse the chancellor's decision to dismiss the Complaint without allowing Plaintiff an opportunity to conduct discovery and develop the facts? Second, is there a significant reason - - a moral, ethical and legal imperative - - that mandates that the decision should be reversed? Plaintiff respectfully submits that both these questions should be answered in the affirmative.

First, there is a legal basis for reversing the decision, because Section 13 of House Bill 1279 (Laws 2004, Ch. 595, § 13) was improperly adopted in violation of the specific requirements of Article 4, Section 61 of the Mississippi Constitution of 1890, because the act does not identify or refer to any specific statute that was to be amended or altered.

More importantly, there is a significant reason that not only justifies reversal, but cries out that justice might be rendered in this case on behalf of the MDOC employees who were terminated under this legislation. Yes, the "wild-eyed" questions that Plaintiff has asserted are those that MDOC does not want to answer, or even ask:

- Why is section 13 of HB 1279 not codified in the Mississippi Code?
- Why were only three sections of the MDOC, which consisted primarily of African

American employees, included in the work force reductions that were promulgated by HB 1279, while the MDOC locations that predominantly employed white employees were sheltered from termination and retained the protections afforded by the state civil service statutes, rules and regulations.

- Why did MDOC not use the "Reduction in Force" provisions that existed in the State Personnel Board procedures to accomplish the staff reductions that were required to meet the budget cuts, so that terminations would proceed in a neutral, logical, fair and nondiscriminatory manner, rather than the arbitrary and capricious manner under which Section 13 was implemented?

In the case at bar, the "wild-eyed" Plaintiff respectfully submits that under Section 13 of HB 1279, the Division of Community Corrections, and South Mississippi Correctional Institute, which combined had over 1154 employees, and which constituted two MAJOR segments of MDOC in 2004, were left out of the "Streamlining Plan" adopted in HB 1279 by design, to protect those who were employed at those locations, even though the alleged purpose of the legislation was to reduce the overall size of MDOC staff, and cut costs across the board.

II. FACTS

This civil action is a constitutional challenge to House Bill 1279 enacted during the 2004 Regular Session of the Mississippi Legislature and signed into law by Governor Haley Barbour on May 27, 2004. As part of his gubernatorial campaign, Governor Barbour proposed to decrease the overall state workforce in order to bring government spending in line with collected revenue. Once in office, Governor Barbour unveiled **"Operation Streamline"** which included the plan to reduce the budget of the Mississippi Department of Corrections (MDOC) by

permanently reducing its workforce.

Operation Streamline only targeted three parts of MDOC: (1) the majority black (52%) MDOC Central Offices; (2) the majority black (87%) Parchman in Sunflower County; and (3) the majority black (78%) Central Mississippi Correctional Facility in Rankin County. The latter two facilities were two out of the three MDOC Institutions in Mississippi.

MDOC's third Institution South Mississippi Correctional Institute (SMCI), which had 62% white employees and was located in Greene County, was not Streamlined, nor was the entire Division of Community Corrections (55%) white. Together SMCI and the Division of Community Corrections contained over 674 white employees or nearly 60% of MDOC's entire white work force. These employees were not subject to unilateral termination without cause under the plan adopted after Section 13 of HB 1279 was enacted.

III. ARGUMENT

A. Summary of issues on appeal.

This appeal challenges the validity of Section 13 of Laws 2004, Ch. 595 which was enacted by the Mississippi Legislature, and which is commonly referred to as "House Bill 1279" [hereinafter: H.B. 1279 or "The Act"]. This legislation provided:

> (1) For the period beginning upon the effective date of this section and through June 30, 2005, the personnel actions of the Mississippi Department of Corrections regarding **employees at the central offices of the department, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County shall be exempt from State Personnel Board procedures.** However, all new employees of the Department of Corrections at those locations shall meet the criteria of the State Personnel Board that presently exists for employment. **Whenever an employee at any of those locations is dismissed or involuntarily terminated under the authority of this section during that**

period of time, that employee's position shall be eliminated.

(2) **The Department of Corrections shall consult with the Office of the Attorney General before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law.**

Laws 2004, Ch. 595, Section 13 (emphasis added).[1]

This legislation **has not been codified anywhere in the official code of Mississippi,** which is published and copyrighted by LexisNexis for the State. The editors of Mississippi Code of 1972 Annotated only included the Section 13 portion of HB 1279 as an **"editor's footnote"** to Miss. Code Ann. § 25-9-127 (2007). But for that footnote, there would be no mention of Section 13 in the Mississippi Code.

Plaintiff challenges this legislation on the grounds that it violated Section 61 of the Mississippi Constitution of 1890, which provides: **"No law shall be** revived or **amended by reference to its title only, but the section or sections, as amended** or revived, **shall be inserted at length."** It is undisputed that Section 13 of HB 1279 does not refer to any specific Mississippi statute that was altered or amended by the legislation. However, Defendant contends that by implication, the Act amended all of the state statutes that provided MDOC employees with a property interest in their continued employment. This argument should be rejected because the legislation does not even mention the word statute, but only refers to "**State Personnel Board procedures**" from which the MDOC employees at three locations were to be exempt.

More significantly, this legislation did not amend by implication Miss. Code Ann. §

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[1]House Bill 1279 as passed by the 2004 Mississippi Legislature is available on-line at [http://billstatus.ls.state.ms.us/documents/2004/html/HB/1200-1299/HB1279PS.htm].

25-9-149 which provides:

> **Prohibition of discriminatory practices**
>
> It is the intent of the legislature that **no person** seeking employment in state service, as defined in section 25-9-107, Mississippi Code of 1972, or **employed in state service**, as defined in section 25-9-107, Mississippi Code of 1972, **shall be discriminated against on the basis of race, color, religion, sex, national origin, age or handicap**.

Miss. Code Ann. § 25-9-149 (West 2004).

As it was implemented, Section 13 of HB 1279 did not apply to all parts of MDOC, and did not subject all employees to unilateral termination on an equal footing. The fact is that only employees at three specific locations were targeted for termination, and this resulted in a racially discriminatory impact by the manner in which some MDOC employees were singled out for termination. In addition, as applied to MDOC, the Streamlining Plan improperly and unnecessarily injected politics and personal animosities into the decisions concerning which State Service employees would be fired, and it is clear that some employees were fired by their political enemies, and others were fired because they did not have political friends with enough power or influence to shield them from termination.

B. <u>Section 13 of HB 1279 not codified in the Mississippi Code Annotated</u>.

It is undisputed that Section 13 of HB 1279 is not codified anywhere in the Official Code of the State of Mississippi, which is published by Lexis Corporation. That is because the legislation did not, as Section 61 of the Mississippi Constitution requires, identify and incorporate the specific statutes that were being altered or amended by the legislation. In fact, no statutes are even referenced in the legislation.

C. **Operation Streamline.**

HB 1279 was part of the package pushed through the 2004 Legislature by Governor Barbour as part of **"Operation Streamline,"** which was designed to reduce the state employee workforce and the overall state budget. According to the Commissioner of MDOC, this allowed the agency to move forward by "focusing in on (and terminating) **those employees who were abusing the system** ... **by terminating employees who were not coming to work** ...." [August 30, 2004 Press Release by MDOC (emphasis added).[2]

This purported justification for HB 1279 was a subterfuge that offered a justification for why the MDOC should be allowed to terminate some employees unilaterally and without any just cause. However, the truth is that the firings that resulted after this legislation was adopted focused on just three MDOC locations which predominantly employed African American employees. This was improper and this Court should not countenance such actions.

D. **There was no need for authority under Section 13 of HB 1279 to reduce the MDOC workforce because of a budget shortfall.**

Under Operation Streamline, the administration sought to fire some MDOC because of the budget shortfall that the state faced in 2004. Plaintiff respectfully submits that this can be a legitimate exercise in governmental responsibility, provided that the terminations are fair and equitable. That was not done in this case.

The pretext used for the adoption of Section 13 of HB 1279 was that it was necessary to accomplish a reduction in the MDOC workforce under Project Streamline in order to address the budget shortfall that Mississippi faced in 2004. However, the policies and procedures that the

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[2] MDOC press release available at:
http://www.mdoc.state.ms.us/PressReleases/2004NewsReleases/Cut%20Budget.htm

State Personnel Board already had in place provided a method for reducing the number of employees in state agencies due to a shortage of funds. These procedures are spelled out in the State Personnel Board Employee Handbook, Section 7 at pages 18 to 22, which is available on on the State Personnel Board Web site.[3]

E. <u>Reduction in Force terminations under SPB procedures when budgets are reduced</u>.

The Mission of the State Personnel Board is::

> (1) to support state government by providing a system of personnel management that enhances efficiency and effectiveness with regard to the use of personnel resources and (2) to provide the executive and legislative branches data necessary for budgetary and planning purposes. **The framework of personnel management provided by the State Personnel Board is <u>designed to be fair to all</u>, based on the state-of-art theory and practice, and <u>in compliance with federal and state laws and regulations</u>.**

SPB Employee Handbook, at 2 (emphasis added).

The SPB Employee Handbook also provides:

> **<u>State law provides</u> that no employee** of any department, agency or institution under the Statewide Personnel System and who is subject to the rules and regulations prescribed by the state personnel system **may be dismissed or have adverse action affecting their compensation or employment status except for inefficiency or other good cause**, and after written notice and opportunity to be heard within the department, agency or institution **as provided in rules and regulations promulgated by the State Personnel Board.**

SPB Employee Handbook, at 18.

Thus, the State Personnel Board explicitly recognizes a distinction between the statutes protecting state employees, such as Miss. Code Ann. § 25-9-127 (West 2004), and the policies, rules and regulations promulgated by the State Personnel Board.

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[3]http://www.spb.state.ms.us/SPB%20Documents/SPB/Handbook/Employee%20Handbook%207 2005.pdf

HB 1279 was not necessary to allow MDOC to fire employees because of mandated budget cuts and reorganization of the agency. Such terminations are specifically allowed under state law, Miss. Code Ann. § 25-9-127 and the policies and procedures that have been adopted by the State Personnel Board.

Miss. Code Ann. § 25-9-127 provides in pertinent part:

(1) **No employee** of any department, agency or institution who is included under this chapter ... and who is subject to the rules and regulations prescribed by the state personnel system **may be dismissed** or otherwise adversely affected as to compensation or employment status **except for inefficiency or other good cause**, and after written notice and hearing within the department, agency or institution as shall be specified in the rules and regulations of the State Personnel Board complying with due process of law; ... **provided, however, that THIS PROVISION SHALL NOT APPLY (a) to persons separated from any department, agency or institution DUE TO CURTAILMENT OF FUNDS OR REDUCTION IN STAFF when such separation is in accordance with rules and regulations of the state personnel system;** ....

Miss. Code Ann. § 25-9-127(1) (emphasis added).

In addition, the State Personnel Board has established specific "rules and regulations" to authorize work force reductions, while at the same time **keeping politics and favoritism out of the picture.** See State Personnel Board Employee Handbook at pp. 18-23.[4] The Employee Handbook generally provides:

> **REDUCTION IN FORCE**
>
> Except as otherwise provided in these rules, the tenure of an employee with permanent state service status shall be continued during good behavior and the satisfactory performance of assigned duties (Section 25-9-127, Mississippi Code of 1972, Annotated, as amended).
>
> **A. Reduction in force - an appointing authority may reduce the number of**

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[4]Available at http://www.spb.state.ms.us/SPB%20Documents/SPB/Handbook/Employee%20Handbook%2072005.pdf

employees in a state service agency whenever deemed necessary for the following reasons:

1. **shortage of funds** or work,
2. material change in duties or organization, or
3. a merger of agencies.

SPB Employee Handbook, at 18.

Prior to implementing the reduction in force, the agency must simply provide a written explanation or justification to the State Personnel Board citing one or more of the above reasons for the reduction in force. In addition to the explanation or justification, the agency must submit the following documentation to the State Personnel Board for approval sixty (60) calendar days before the reduction in force can be put into effect: (1) a proposed organization chart, and (2) a proposed staffing plan. SPB Employee Handbook, at 18.

The Handbook also provides the method to be used to accomplish the Reduction in Force:

> A reduction in force because of shortage of funds or work, or material change in duties or organization may be administered by the following method(s):
>
> a. By functional area (e.g., Office, Bureau, Division, Branch, Section, Unit);
> b. By location (e.g., counties, districts, state office, agency-wide);
> c. By job class; or
> d. By a combination of the preceding methods.

SPB Employee Handbook, at 19.

Once the method of reduction in force is determined and prior to implementation, the agency submits to the State Personnel Board a written statement of the method of the reduction in force to be administered and the proposed effective date. The result of applying the order for reduction in force formula (Section C) and the retention point formula (Section D) must then be

submitted to the State Personnel Board. SPB Employee Handbook, at 19.

The Reduction in Force formula provides that employees are to be terminated in the following order:

- those with emergency appointments first;
- then those with probationary or indefinite probationary appointments; and finally,
- the permanent State Service employees.

SPB Employee Handbook, at 19.

The Employee Handbook also provides a "Retention Point Formula" for prioritizing which employees will be fired last: "**Permanent state service status employees shall be the last group of employees to be separated in a reduction in force.** When permanent state service employees must be separated, employees with the lowest number of retention points based on seniority, performance appraisal ratings, and veterans' preference shall be dismissed first. The retention point formula is based on Seniority; Performance Appraisals over the past three years; and a preference for military veterans." SPB Employee Handbook, at 21.

Employees who are to be terminated by a reduction in force must be notified in writing of the effective date of the reduction in force termination at least ten (10) working days prior to the effective date of the layoff. The appointing authority and the State Personnel Board are required to attempt to place the employee in another position for which the employee is qualified, if such a position is available. SPB Employee Handbook, at 21.

Thus, it is clear that under the State Personnel Board policies and procedures, a State Service employee may be fired if there is a lack of funding for the agency. Section 10 of the Employee handbook sets forth the applicable standards for such terminations:

DISCIPLINE, CORRECTIVE ACTION AND SEPARATION OF EMPLOYMENT

> State law provides that no employee of any department, agency or institution under the Statewide Personnel System and who is subject to the rules and regulations prescribed by the state personnel system may be dismissed or have adverse action affecting their compensation or employment status except for inefficiency or other good cause, and after written notice and opportunity to be heard within the department, agency or institution as provided in rules and regulations promulgated by the State Personnel Board. **This provision does not apply to persons separated from employment: due to a curtailment of funds or a reduction in staff approved by the State Personnel Board;** during the initial twelve (12) month probationary period in state service; or as an executive officer of any state agency who serves at the will and pleasure of the Governor, board, commission or other appointing authority.

SPB Employee Handbook, at 64.

Finally, it is clear that under existing SPB policies and procedures, state employees may be dismissed or his/her employment terminated **voluntarily or involuntarily. "An involuntary severance of state employment can occur based upon a Reduction in Force (RIF),** disciplinary action, failure of the employee to continue to meet the eligibility criteria for the position held or an inability to perform the essential functions of the job." SPB Employee Handbook, at 71 (emphasis added).

F. Reduction in Force terminations because of budget cuts are non-grievable issues.

The Employee Handbook also provides that **"Reduction in Force" terminations are "non-grievable issues" under the SPB grievance procedures.** The following **DO NOT** give rise to a legitimate "grievance" under SPB policies and procedures:

> **C. budget and organizational structure**, including the number or assignment of employees or positions in any organizational unit; ....
> **G. termination or layoff from duties because of shortage of funds or work, material change in duties or organization, or a merger of agencies; ...**

and

J. an action by an agency pursuant to federal or state law or directives from the Governor's office or court order;

SPB Employee Handbook, at 74-75 (emphasis added).

Thus, it is clear that fair and equitable terminations can be effected by agencies such as MDOC under current law and procedures, in order to address budget deficits. Therefore, the alleged justification for the necessity of Section 13 of HB 1279 (to terminate employees who weren't coming to work) was pure fabrication, because procedures already existed to fairly and equitably terminate employees because of budget cuts, without the need to establish "just cause" for the termination, provided the retention policies for senior employees was followed. In practice, Section 13 of HB 1279 was used to fire those senior employees such as Plaintiff, against whom those in management positions held grudges because of past conflicts. *See Hemba v. Mississippi Dept. of Corrections*, 848 So.2d 909 (Miss. App. 2003) (reversing MDOC decision which suspended Plaintiff from his employment).

Plaintiff respectfully submits that he was included in the 2004 firing purely for retaliatory reasons, because HB 1279 gave MDOC officials *carte blanche* to fire any employees who either **had made political enemies within the agency, or who just had no political friends in power to intercede on their behalf.** If the MDOC terminations had been undertaken according to the existing State Personnel Board procedures as outlined above, Plaintiff respectfully submits that he would not have been terminated because his "Retention Point Formula" would have placed him above other employees.

G. **After the firings, staff positions of terminated employees were not eliminated, as required by Section 13 of HB 1279.**

The specific requirements of Section 13 provided: "**Whenever an employee at any of those locations is dismissed or involuntarily terminated under the authority of this section during that period of time, that employee's position shall be eliminated.**" Laws 2004, Ch. 595, Section 13 (emphasis added). Plaintiff respectfully submits that this provision was not followed because many of the senior MDOC employees who were terminated in 2004 were subsequently re-hired by MDOC in similar positions, but at substantially reduced salaries. These facts will be proven in the event this Court remands this case for discovery on the merits. This should not be the way that our government treats its employees who provide the valuable services necessary for operating our penal institutions.

H. **MDOC failed to consult with the office of the Attorney General before taking action under Section 13 of HB 1279, to be certain that those actions complied with state and federal law.**

The final part of Section 13 of HB 1279 provided: "The Department of Corrections shall consult with the Office of the Attorney General before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law." Laws 2004, Ch. 595, Section 13 (emphasis added). Specifically, applicable state law, specifically Miss. Code Ann. § 25-9-149, prohibits discriminatory employment practices. This statute provides: **"It is the intent of the legislature that no person** seeking employment in state service, as defined in section 25-9-107, Mississippi Code of 1972, or **employed in state service**, as defined in section 25-9-107, Mississippi Code of 1972, **shall be discriminated against on the basis of race, color, religion, sex, national origin, age or handicap.**" Miss. Code Ann. § 25-9-

107 (West 2004). Surely Defendant cannot contend that this statute was amended by implication, so that the discriminatory impact of the terminations can be ignored.

I. Section 61 of the Mississippi Constitution is not a mere rule of procedure.

In *Presley v. Mississippi State Highway Commission*, 608 So.2d 1288, 1296-97 (Miss.1992) (superceded by statute), this Court previously held that Miss. Code Ann. § 11-46-6 (Supp.1991), which purported to re-establish common law sovereign immunity was **unconstitutional** because it failed to comply with Article 4, Section 61 of the Mississippi Constitution. The Court explained that Section 61 was **"... not a mere rule of procedure 'addressed to and ending with the members of the legislature' and that '[a]n act of the legislature disregarding this would be disregarded by the courts.'"** Id. at 1297 (citing *Hunt v. Wright*, 70 Miss. 298, 11 So. 608 (1892)).

In *Presley*, the Court discussed its prior holding in *Moore v. Tunica County*, 143 Miss. 821, 107 So. 659 (1926), which involved the constitutionality of Chapter 160, Laws of 1922. In *Moore*, the Legislature had enacted changes in the compensation of chancery and circuit clerks, and the Court had held that the statute **"... cannot be clearly understood or applied without a reference to section 2163,** Code of 1906 (section 1844, Hemingway's Code)," and therefore, the Court concluded that the act violated Section 61 of the Constitution of 1890. Id at 1297 (citing *Moore*; emphasis added).

The Court explained in *Presley* that Section 61 had the purpose of **preventing "covert and incautious legislation,"** and the Court held:

> **The mischief designed to be remedied [by Constitutional limitations such as Section 61] was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their**

> **effect**, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, **in an act or section which was only referred to, but not republished, was well calculated to mislead the careless as to its effect and was perhaps sometimes drawn ... for that express purpose.** Endless confusion was then introduced into the law and **the Constitution wisely prohibits such legislation.**

Id. at 1297-98 (citations omitted). In the case at bar, it appears that the language of Section 13, HB 1279 was drawn in a manner to **"mislead the careless as to its effect and purpose,"** and our Constitution wisely prohibits such legislation.

House Bill 1279, section 13 does not refer to any particular statute, but attempts to abolish an entire body of statutory law concerning the property rights of certain MDOC employees by reference, while leaving those protections for other similarly situated MDOC employees. Such UNEQUAL PROTECTION is prohibited by our laws, and should not be allowed to slide by in this case under the guise of budget management.

It is readily apparent that the terms employed in Section 13 are incomplete on their face, and that one would be forced to examine a plethora of statutes to determine what the law is. Under these circumstances, Plaintiff respectfully submits that it cannot be said that the average legislator, lawyer and layman alike, had a reasonable chance of understanding all that was enacted, or how the terminations would be effected. For example, Plaintiff respectfully submits that most, if not all of our state legislators would NOT have voted to allow the MDOC staff reductions authorized by HB 1279, if they had known that the terminated employees would only be those from the three MDOC sites that had a majority of black employees, while the locations with a majority of white employees were insulated from such terminations.

J. The McMurtray Case relied on by MDOC is clearly distinguishable from the case at bar.

Under Mississippi law, state employees are categorized in one of two ways: "state service" employees or "non-state service" employees. *McMurtray v. Holladay*, 11 F.3d 499, 501 (5TH Cir. 1993) (citing Miss.Code Ann. § 25-9-107(b), (c)). "State Service" employees are afforded the protections of the state personnel system, Miss. Code Ann. § 25-9-121 and Miss. Code Ann. § 25-9-127. Id. at 501.

In *McMurtray*, the Fifth Circuit held that language similar to Section 13 of HB 1279 authorized the Mississippi Department of Economic Development to terminate employees without cause and without the hearing referenced in Miss. Code Ann. § 25-9-127(1). *McMurtray*, 11 F.3d at 501. However, the legislation in the *McMurtray* case **dissolved the entire Department of Economic Development, and did not unfairly target only certain employees within that Department.** The removal of the ENTIRE Agency from the protections of the State Personnel Board thereby reflected EQUAL treatment for all employees regardless of race, color, religion, sex, national origin, age or handicap. This is consistent with Federal and State anti-discrimination laws, and specifically, Miss. Code Ann. § 25-9-149, which prohibits discrimination in state employment practices on account of race.

In *McMurtray*, the court noted that the Act was intended to affect every employee at the DED, which qualifies as a general class of people, and the Fifth Circuit did not approve the removal of "a mere piece" of the DED, or a small group of employees. Therefore, unlike the case at bar, the DED was not drawn and quartered along racial lines with white majority divisions retaining their State Personnel rights to due process, while conversely stripping black

majority divisions of the same due process guarantees promised under the SPB and Miss. Code Ann. § 25-9-149.

As previously noted, surely MDOC cannot assert that the civil rights protections guaranteed by Miss. Code Ann. § 25-9-149 were also "amended by implication," so that those protections were no longer available to MDOC employees in the three targeted locations. To take such a legal position would also be in direct conflict with the due process and equal rights protections afforded by the 14th Amendment of the U.S. Constitution ("No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws") and the Mississippi Constitution, art. 3, § 14 (1890) ("No person shall be deprived of life, liberty, or property except by due process of law.")

K. HB 1279 impaired vested property rights and the obligation of contracts.

Both the U.S. and Mississippi Constitutions prohibit the legislature from enacting laws that impair vested property rights and the obligation of existing contracts. U.S. Constitution, Art. 1, § 10 and Mississippi Constitution, Art. 3, § 16 (1890). Section 13 of HB 1279 did just that.

Miss. Code Ann. § 25-9-107(b) defines **state service employees** as "all employees of state departments, agencies and institutions as defined herein, except those officers and employees excluded by this chapter." Miss.Code Ann. § 25-9-107(b) (West 2004). Plaintiff/Appellant contends that he was a state service employee with property interests in his state employment which could not be taken away without compliance with the procedures enumerated in Miss. Code Ann. § 25-9-127 (West 2004).

Public employees who have a property right in continued employment cannot be deprived of that property right by the state without the protections afforded by the Due Process Clause. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39,105 S.Ct. 1487 (1985). Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). *See also, Paul v. Davis*, 424 U.S. 693, 709, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976) ("a property interest in employment can, of course, be created by ordinance or by an implied contract ... in either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law").

Mississippi laws governing public employees create vested permanent employment rights in favor of the employees. *Montgomery v. Mississippi*, 498 F.Supp.2d 892, 911 (S.D. Miss. 2007). The Mississippi public service statutes plainly create such a property interest in Public Service employees who are entitled to retain their positions absent good cause for termination. *Lollar v. Baker*, 196 F.3d 603, 607-08 (5th Cir. Miss. 1999) (citing Miss. Code Ann. § 25-9-127 (1999)). See also, Mississippi State Employee Handbook § 5, p. 12 (recognizing a property interest in each state service employee's job).

In *Public Employees Retirement System of Mississippi v. Porter*, 763 So. 2d 845, 846 (Miss. 2000), the Court was called upon to determine the constitutionality of a statute which changed prior rules and mandated that the pre-retirement death benefits due to a member of the Mississippi Public Employees' Retirement System member had to be paid to the member's surviving spouse, regardless of whom the member had designated as his or her beneficiary.

The Court explained that since PERS had based its decision to award benefits to the decedent's husband based on Miss. Code Ann. § 25-11-114(2)(a), the question was whether that statute was constitutional. The Court explained that "[t]he obligation of a contract, in the meaning of these depends on the law in existence when the contract was made ... and [means] the law under which the contract was made ... [l]egislation of state impairing the obligation of a contract made under its authority is void ..." Id. at 849 (citing *Tucker Printing Co. v. Board. of Supervisors*, 171 Miss. 608, 616, 158 So. 336, 338 (1934)). As the Court pointed out in *Tucker Printing*, the "obligation" of a contract, in a constitutional sense, depends on the law in effect when that contract was made. When the decedent in *Gaines* joined PERS in 1980, the law provided that if a PERS member with a sufficient amount of credible service died prior to retirement, then his or her retirement benefits would go to his or her designated beneficiary, and there were no laws providing for a mandatory spousal benefit in the event of a member's pre-retirement death. The Court explained that the legislature may alter a retirement system member's contractual rights, but if that subjects the member to a substantial disadvantage, a substantial new advantage must also be conferred upon that member in order to pass constitutional muster under the *ex post facto clause*. The Court concluded that the amendment to the statute deprived the decedent of a significant contractual right without bestowing any additional benefits onto him, and therefore the statute was unconstitutional under both the U.S. and the Mississippi Constitutions, as it impaired a contractual right which the decedent had previously acquired. Id. at 850.

In the case at bar, the vested property rights of Plaintiff and other similarly situated MDOC employees relating to their state employment was unconstitutionally impaired by HB

1279 which amounted to an unlawful *ex post facto law*. This was particularly egregious because other similarly situated MDOC employees were not subjected to the same treatment.

L. Repeal by implication is not favored.

To amend a statute there must be specific mention in the amendatory act of the statute sought to be amended. *Seay v. Laurel Plumbing & Metal Co.*, 110 Miss. 834, 71 So. 9 (1916). The only means by which a statute can be amended under Section 61 of the Mississippi Constitution is to specifically mention in the amendatory act the statute that is to be amended. *State ex rel. Booze v. Cresswell*, 117 Miss. 795, 78 So. 770, 771 (1918) ("It is sufficiently clear that the Legislature did not have in mind section 3435, for the obvious reason **the section was not specifically mentioned in the act.**")

Section 61 of the Mississippi Constitution of 1890 has no reference to amendment or repeal by implication. *Hart v. Backstrom*, 148 Miss. 13, 113 So. 898 (1927). In *Lamar County School Bd. of Lamar County v. Saul*, 359 So.2d 350 (Miss.1978), the Court explained that **repeal by implication is not favored under Mississippi law.** The Court stated: "Repeals by implication are not favored and are seldom permitted except on grounds of repugnancy and never when former act can stand together with new act."

Although there may be circumstances in which repeal by implication may be appropriate, taking away the vested property rights of a small group of MDOC employees is not one of them. A temporary repeal by implication of SPB protections should not be recognized in this case, and Plaintiff respectfully submits that this technique should never be recognized as a legitimate means of work force reductions, because allowing such unfettered terminations would damage the state employment system. Furthermore, such an approach is unnecessary in view of the

specific State Personnel Board procedures that allow for the speedy termination of employees in a fair and equitable manner, if that is necessary to deal with a budget crisis.

M. MDOC failed to consult with the Attorney General's office concerning the legality of the terminations.

State Personnel Board policy explicitly provides that **"[p]erformance appraisals shall be administered in a fair manner without unlawful discrimination as to age, race, sex, religion, political affiliation, national origin, or disability."** SPB Employee Handbook, at 58. Plaintiff has also asserted that the HB 1279 was not constitutionally applied because MDOC officials failed to **"... consult with the Office of the Attorney General before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law."** One aspect of both state and federal law that is at issue here is whether the mass firing of MDOC employees unfairly targeted minority employees, and therefore resulted in unlawful discrimination.

IV. CONCLUSION

The purpose of the creation of the State Personnel Board **"... was to get state employees out of internecine politics."** *Mississippi Forestry Commission v. Piazza*, 513 So.2d 1242, 1250 (Miss.1987). "The idea implicit in [Mississippi's] state civil service statutes is [that] below the policy-making levels, **the public needs and is entitled to the service of a competent professional core of state employees with reasonable job security amidst the shifting of the political winds."** *Gill v. Mississippi Dept. of Wildlife Conservation*, 574 So.2d 586, 594 (Miss.1990). **"A state employee's job should not turn on whether he has the right political**

friends, or, as in this case, a combination of no political friends and the wrong political enemies." *Gill*, 574 So.2d at 594.

Section 13 of HB 1279 was unconstitutional because it failed to identify the specific Mississippi Statutes, or any Mississippi statute that was being amended by the legislation. This violated Section 61 of the Mississippi Constitution. In addition, Section 13 was discriminatory in its application, because it took only three groups of predominantly African American MDOC employees out of the protections ordinarily afforded State Service employees, and targeted those employees for termination, while protecting employees who worked at majority white MDOC locations. Thus, the manner in which Section 13 was implemented had a discriminatory impact that should not in equity and good conscience be allowed to stand.

Furthermore, under HB 1279, the MDOC administrators were required to consult with the Mississippi Attorney General's office to be certain that the terminations as implemented by MDOC did not violate federal or state law, such as by illegally discriminating against the terminated employees because of their race. However, MDOC officials failed to do that.

MDOC predominantly had African American employees, and HB 1279, § 13 was designed to make the Agency less black, while protecting the two largest white employee MDOC populations from termination. Plaintiff respectfully submits that MDOC officials should not be allowed to engage in conduct that resulted in the unilaterally termination of black employees, while white employees at other MDOC locations were were insulated from being fired.
In addition, Plaintiff contends that his termination was retaliatory because of his prior litigation against MDOC.

According to a press release issued by MDOC, "Operation Streamline and House Bill

1279 allowed the agency to "move forward by focusing in on those employees who were abusing the system ... by terminating employees who were not coming to work ...." MDOC press release August 30, 2004. The press release also noted that MDOC eliminated 164 positions during June, July and August 2004 under the authority of Section 13, House Bill 1279 which removed employees at the central offices of MDOC, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County from State Personnel Board procedures for one year. [See http://www.mdoc.state.ms.us/PressReleases/2004NewsReleases/Cut%20Budget.htm]. Even though HB 1279 was adopted to allow unilateral terminations of MDOC employees, MDOC was at the same time hiring new employees. See Volume 6, Issue 7 (July 2004) Issue of THE RESOURCE, (published by the Mississippi Department of Corrections). This fact undercuts the contention that MDOC was only using HB 1279 to reduce its workforce.

Furthermore, the Fifth Circuit's decision in *McMurtray* decision should not be read as persuasive authority to allow state agencies to install a contemporary version of archaic Jim Crow legislation into Mississippi Government by allowing agencies to parse employees within the same agency into segments where some will be protected from arbitrary decisions and some won't. Plaintiff respectfully submits that the cause of justice and fairness in this case demands that Section 13 of HB 1279 be rejected as an improper exercise in legislative activity.

Finally, HB 1279 provided that after the employees were fired, their positions were to be "eliminated." However, the facts will show that many of the terminated MDOC employees were simply re-hired later at lower salaries. This fact undermines Defendant's arguments that this was fair and reasonable method of reducing the MDOC workforce. Accordingly, Plaintiff respectfully requests that the case be remanded to the trial court for further proceedings on the

merits, or in the alternative, that Section 13, HB 1279 be declared unconstitutional outright.

Respectfully submitted, this the 9th day of July, 2008.

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CERTIFICATE OF SERVICE

I, David L. Calder, attorney for Plaintiff/Appellant, GARY HEMBA, certify that I have this day served a true and correct copy of Plaintiff's Rely Brief on Appeal by United States mail, first class postage prepaid, or by comparable overnight delivery service to the following persons at these addresses:

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This the 9th day of July, 2008.

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