

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2008-CA-00984

CITY OF LAUREL, MISSISSIPPI

APPELLANT

VERSUS

KENNETH (KEN) KEYES

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

THOMAS T. BUCHANAN, MSB# [REDACTED]

JOHN D. SMALL WOOD, MSB# [REDACTED]

TUCKER BUCHANAN, P.A.

ATTORNEYS AT LAW

Post Office Box 4326

Laurel, MS 39441

T: (601) 649-8000


F: (601)-649-8009

ATTORNEYS FOR APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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 disqualification or recusal:

1. The City of Laurel, Mississippi, Appellant
2. David M. Ratcliff, Esq., of RATCLIFF & RATCLIFF (Laurel, MS), attorney for Appellant
3. Deidra J. Bassi, Esq. of HORTMAN, HARLOW, BASSI, ROBINSON & MCDANIEL, PLLC (Laurel, MS), attorney for Appellant
4. Kenneth (Ken) Keyes, Appellee
5. Thomas T. Buchanan, Esq. and John D. Smallwood, Esq. of TUCKER BUCHANAN, PA (Laurel, MS), attorneys for Appellee
6. Civil Service Commission of the City of Laurel, Mississippi
7. Honorable Billy Joe Landrum, Circuit Court Judge of Jones County, Mississippi



JOHN D. SMALLWOOD
Attorney for Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bertucci v. Mississippi Dep't of Corrections</i> 597 So.2d 643 (Miss.1992)	6
<i>City of Vicksburg v. Lane</i> 2009-MS-0603.144 (Miss. COA 2009)	6
<i>City of Jackson v. Froshour</i> 530 So. 2d 1348 (Miss. 1988)	6
<i>Davis v. Public Employees' Retirement System</i> 750 So.2d 1225 (Miss. 1999)	6
<i>Chandler v. Jackson Civil Service Comm.</i> 687 So.2d 142 (Miss. 1997) . . .	7, 8
<i>City of Meridian v. Davidson</i> 53 So.2d 48 (1951)	8
<i>City of Meridian v. Hill</i> 447 So.2d 641 (Miss.1984) . . .	8
<i>Gill v. Mississippi Dept. of Wildlife Conservation</i> 574 So.2d 586 (Miss.1990)	8
<i>Glover v. Jackson State Univ.</i> 755 So.2d 395 (Miss.2000)	7
<i>Griffith v. Griffith</i> 997 So. 2d 218 (Miss. COA 2008) . . .	8, 9, 11
<i>Price v. Clark</i> 2009-MS-0724.202 (Miss. 2009)	8, 9, 11
<i>Ridgewood Land Co. v. Simmons</i> 137 So.2d 532 (1962)	8
<i>River Region Medical Corp. v. Patterson</i> 975 So.2d 205 (Miss. 2007)	7

Tupelo Redevelopment Agency v. Gray Corp.
972 So. 2d 495 (Miss. 2007)

8, 9, 11

Young v. Mississippi State Tax Comm'n
635 So.2d 869 (Miss.1994)

6

Mississippi Code Annotated (1972)

Miss. Code Ann. §21-31-23 . . .

7, 8

Miss. Code Ann. § 11-51-93 . . .

7, 8

Miss. Code. Ann. § 11-51-95 . . .

7, 8

Rules & Regulations

Civil Service Rules and Regulations - Rule 11(1) . . .

10

Civil Service Rules and Regulations - Rule 11(3) . . .

10

RE-STATEMENT OF ISSUES

- I. WHETHER THE MISSISSIPPI SUPREME COURT AND THE JONES COUNTY CIRCUIT COURT HAVE SUBJECT MATTER JURISDICTION OF THE APPEAL FILED BY KEN KEYES FROM THE DECISION OF THE LAUREL CIVIL SERVICE COMMISSION.**
- II. WHETHER KEN KEYES HAD STANDING TO PURSUE HIS APPEAL FROM THE DECISION OF THE LAUREL CIVIL SERVICE COMMISSION.**
- III. WHETHER THE LAUREL CIVIL SERVICE COMMISSION ACTED IN GOOD FAITH IN FAILING TO PROMOTE KEN KEYES.**
- IV. WHETHER THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN REVERSING THE DECISION OF THE LAUREL CIVIL SERVICE COMMISSION.**

STATEMENT OF THE CASE

The basis of this appeal is the Findings of Fact and Conclusions of Law [R. 332] entered by the Circuit Court of Jones County, Mississippi, Second Judicial District on May 19, 2008. The Circuit Court's ruling was based upon the record made before the Laurel Civil Service Commission ["LCSC"] and briefs submitted by the City of Laurel ["the City"] and by Kenneth "Ken" Keyes ["Mr. Keyes"]. The Circuit Court's decision reversed a final agency Order [R. 278] rendered on June 23, 2003 by the LCSC. The Order from the LCSC denied a Grievance filed on March 14, 2003 by Mr. Keyes.

Aggrieved by the Findings of Fact and Conclusions of Law [R. 332], the City timely filed its Notice of Appeal [R. 335]. Mr. Keyes did not file a cross appeal.

STATEMENT OF THE FACTS

On March 14, 2003, Ken Keyes, having been a Shift Captain with the City of Laurel Fire Department since 1997, filed a Grievance with the City and the Laurel Civil Service Commission. [Appendix I]¹.

The factual basis for the appeal stems from the promotion of another fireman from a rank below Mr. Keyes to Battalion Chief, and the LCSC Order of June 23, 2003 [R. 278]. The LCSC upheld the promotion of a rank of Station Captain which is a rank below Mr. Keyes' rank of Shift Captain. It is uncontradicted that both men were highly qualified and that Mr. Keyes had a higher rank than the person appointed. It is also uncontradicted that Mr. Keyes scored the highest test score on one of the two tests administered and the second highest test score on the other test administered. [RE-30]. It is further uncontradicted that in 1998, Mr. Keyes received his promotion to Fire Department Shift Captain, which is a higher rank than Station Chief.

The issue is simply whether or not the city was authorized to appoint the Station Captain over Mr. Keyes, when Rule 11(1) of the Civil Service Rules and Regulations for the City of Laurel provides that:

"Vacancies in positions **shall** be filled, so far as practicable, by promotions from among persons holding positions in a lower grade from the same office or area of activity of function in which the vacancy exists..."

The City of Laurel has a long history of promoting on the basis of seniority, which

¹ In the Brief of Appellant and Record Excerpts, the City identifies a Grievance dated July 7, 1998. While that Grievance was filed, Mr. Keyes was not granted a hearing on that Grievance. The March 2003 Grievance was the subject of Mr. Keyes appeal to the Jones County Circuit Court and is the subject of this appeal. The correct Grievance is attached as Appendix I.

has created a strong and stable fire department in that City and that tradition was the basis of Rule 11(1) having been adopted. The City argued to the Circuit Court that "shall" does not make it compulsory that the City appoint the next highest ranking officer. The City argued that the wording somehow means that they could promote from any lower ranking officer and that the upholding of its decision by the LCSC was not arbitrary and capricious. The Circuit Court found that the City's appointment was clearly in violation of Rule 11(1) of the Civil Service Rules and that for the Civil Service Board to uphold that decision, when a qualified person holding the next highest rank was available, was arbitrary and unreasonable as a matter of law and in violation of their own rule. [RE-3].

SUMMARY OF THE ARGUMENT

In promoting to Battalion Chief an officer holding a rank below Mr. Keyes, the City of Laurel violated the *Civil Service Rules and Regulations*. Said actions were arbitrary, unreasonable, confiscatory, and capricious. The Findings of Facts and Conclusions of Law rendered by the Jones County Circuit Court finding the same and reversing the ruling of the Laurel Civil Service Commission was proper and should not be reversed by this Court.

ARGUMENT

STANDARD OF REVIEW

“Where an employee has instituted an appeal of a final agency decision to the proper circuit court, the scope of the this Court's review of the circuit court shall be limited to a review of the record made before the agency or hearing officer to determine if the action is unlawful for the reason that it was: a) Not supported by substantial evidence; b) Arbitrary or capricious; or c) In violation of some statutory or constitutional right of the employee.” *Davis v. Public Employees' Retirement System*, 750 So.2d 1225 (Miss. 1999); *Young v. Mississippi State Tax Comm'n*, 635 So.2d 869, 874 (Miss.1994); *Bertucci v. Mississippi Dep't of Corrections*, 597 So.2d 643 (Miss.1992).

This court further opined that “[o]n appeal here, the question before [the appellate court] is whether or not the action of the Civil Service Commission was in good faith for cause. Intertwined with this question is whether or not there was substantial evidence before the Civil Service Commission to support its order and whether it is arbitrary, unreasonable, confiscatory, and capricious.” *City of Vicksburg v. Lane*, 2009-MS-0603.144 (Miss. COA 2009); *City of Jackson v. Froshour*, 530 So. 2d 1348, 1355 (Miss. 1988).

Preliminary Statement of Response

In its Statement of the Issues, the City identified four (4) issues, (1) subject matter jurisdiction, (2) standing to appeal, (3) whether Commission acted in good faith, and (4) whether the Circuit Court should be reversed. However, through its summary of the argument and its argument, the City raises multiple other issues. Though Mississippi jurisprudence clearly provides that only those issues identified on appeal will be considered by this Court, out of an abundance of caution, Mr. Keyes will address those other issues not listed but argued, as needed. [see *River Region Medical Corp. v. Patterson*, 975 So.2d 205 (Miss. 2007); *Glover v. Jackson State Univ.*, 755 So.2d 395, 398 (Miss.2000)].

I. WHETHER THE MISSISSIPPI SUPREME COURT AND THE JONES COUNTY CIRCUIT COURT HAVE SUBJECT MATTER JURISDICTION OF THE APPEAL FILED BY KEN KEYES FROM THE DECISION OF THE LAUREL CIVIL SERVICE COMMISSION.

The City argument here boils down to its argument that Mr. Keyes cannot appeal the LCSC Order because it did not involve a “removal, discharge, demotion, suspension or combination thereof” relying on *Miss. Code Ann.* §21-31-23. The City’s argument ignores long standing Mississippi law regarding appeals from final agency orders.

“Writs of certiorari are granted to the circuit court to determine questions of law on the face of the record and proceedings.” *Chandler v. Jackson Civil Service Comm.*, 687 So.2d 142, 143 (Miss. 1997); *Miss. Code Ann.* § 11-51-93 (1972). Additionally, *Miss. Code Ann.* § 11-51-95 (Supp.1988) provides that “[l]ike proceedings as provided

in section 11-51-93 may be had to review the judgments of all tribunals inferior to the circuit court, whether an appeal be provided by law from the judgment sought to be reviewed or not." *Id.* "A municipal civil service commission is included within "tribunals inferior," so the limitations under § 11-51-93 would apply to it. *Id.*, see also *Gill v. Mississippi Dept. of Wildlife Conservation*, 574 So.2d 586, 591 (Miss.1990).

It is well settled that the court may make determinations of arbitrariness in decisions by boards, agencies and commissions. *Chandler* at 144; see *Gill, supra*; *Peterson, supra*; *City of Meridian v. Hill*, 447 So.2d 641, 643-644 (Miss.1984); *Ridgewood Land Co. v. Simmons*, 137 So.2d 532, 536 (1962); *City of Meridian v. Davidson*, 53 So.2d 48, 52-53 (1951). The Jones County Circuit Court clearly had subject matter jurisdiction to consider Mr. Keyes appeal. This Court has the same.

Furthermore, as to the issue raised by the City in section B., pages 5-6 in its Brief of Appellant, it should be noted that the City has failed to provide any case law to support its argument, citing only *Miss. Code Ann.* §21-31-23. As this Court is well aware, on appeal, failure to cite authority in support of claims precludes appellate review of those claims. *Price v. Clark*, 2009-MS-0724.202 (Miss. 2009); *Griffith v. Griffith*, 997 So. 2d 218, 225 (Miss. COA 2008); *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 517 (Miss. 2007).

II. WHETHER KEN KEYES HAD STANDING TO PURSUE HIS APPEAL FROM THE DECISION OF THE LAUREL CIVIL SERVICE COMMISSION.

Though this is the second issue identified by the City in the “Statement of Issues”, the City’s argument on this issue was included in its argument that the Circuit Court and this Court lacked standing all being contained in section B., pages 5-6 in its Brief of Appellant. Mr. Keyes response hereinabove to issue I. applies to issue II. as well. As such, no further response is required. Mr. Keyes would though reiterate that here again, the City has failed to provide authority for this Court to consider this issue. *Price v. Clark*, 2009-MS-0724.202 (Miss. 2009); *Griffith v. Griffith*, 997 So. 2d 218, 225 (Miss. COA 2008); *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 517 (Miss. 2007).

III. WHETHER THE LAUREL CIVIL SERVICE COMMISSION ACTED IN GOOD FAITH IN FAILING TO PROMOTE KEN KEYES.

As to this issue, the City argues its position in sections C., D. and E. of the Brief of Appellant. The just of the City’s argument is counsel’s interpretation of Rule 11(1) of the Civil Service Commission Rules and Regulations and the City’s argument that two (2) candidates in the next lowest rank of Shift Captain was not enough to choose from.

First and foremost, the City has once again failed to provide any authority whatsoever in support of the “good faith” argument made in sections C., D. and E. of the Brief of Appellant. *Price v. Clark*, 2009-MS-0724.202 (Miss. 2009); *Griffith v. Griffith*, 997 So. 2d 218, 225 (Miss. COA 2008); *Tupelo Redevelopment Agency v. Gray Corp.*,

972 So. 2d 495, 517 (Miss. 2007). The arguments made by the City in each of these sections of its Brief are nothing more than argument and interpretation of counsel.

Secondly, the Circuit Court, armed with the record and briefs of the parties and the civil service rules involved, found that Rule 11(1) was compulsory. The Circuit Court found that as a matter of law that “the City’s appointment was in clearly in violation of Rule 11(1) of the Civil Service Rules and that for the Civil Service Board to uphold that decision, when a qualified person holding the next highest rank was available, was arbitrary and unreasonable as a matter of law and in violation of their own rule.” [RE-3].

The Circuit Court’s findings are supported based upon reading Rule 11(1) in conjunction with Rule 11(3). The City is asking to read Rule 11(1) in a vacuum and through its interpretation, however they must be read in conjunction with the other. In doing so, it is clear that a candidate for promotion pursuant to Rule 11(1) must take promotion examinations pursuant to Rule 11(3). The promotion examinations provided for in Rule 11(3) “shall be open, as far as practicable, to employees who are employed in permanent positions in the next lowest position or grade..” [RE-40]. The uncontradicted evidence in the case at hand is that Mr. Keyes and another employee held the next lowest rank of Shift Captain when the Battalion Chief position came open. [R. 125-126]. The uncontradicted evidence is the Mr. Keyes had the highest test score of any of the candidates who took the exams. [RE-7].

These uncontradicted facts along with a proper application of the Rules of Civil Service led the Circuit Court to the clear conclusion that the LCSC promotion of a

Station Captain over a higher ranking Shift Captain was “arbitrary and unreasonable as a matter of law”. The City’s argument otherwise is not supported by the facts and the Circuit Court Findings of Facts and Conclusions of Law should be affirmed accordingly.

IV. WHETHER THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN REVERSING THE DECISION OF THE LAUREL CIVIL SERVICE COMMISSION.

As to this issue, the City appears to argue its position in section F. of the Brief of Appellant. The just of the City’s argument is its claim that because at the time of the filing of the Brief of Appellant, Mr. Keyes was retired from the City, the appeal is moot. The City also argues that the Circuit Court exceeded its authority with its retroactive promotion plus it would be “hardly an easy task, if not impossible”.

First and foremost, the City has once again failed to provide any authority whatsoever in support of these arguments. *Price v. Clark*, 2009-MS-0724.202 (Miss. 2009); *Griffith v. Griffith*, 997 So. 2d 218, 225 (Miss. COA 2008); *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 517 (Miss. 2007).

Secondly, as to the mootness issue, the City is the Appellant in this matter, not Mr. Keyes. It is the City who is seeking to reverse the Circuit Court’s decision. Additionally, the City’s position that retroactive promotion may be impossible is simply not true and nothing more than an accounting issue. Simply pay Mr. Keyes the increased salary from 2003 until his retirement in 2009, adjust his retirement benefits accordingly and any other benefits which might have been involved. As these would have been Mr. Keyes highest

four years in terms of salary, his PERS retirement would be increased.

As to the assundry other issues raised by the City, these are issues which are not a part of the record and thus not germane to the issues before this Court. As such, Mr. Keyes will not address the merits of those facts except to say that he remains retired from the City of Laurel. Likewise, as to section G. of the Brief of Appellant, that argument was not raised as an issue of appeal is not germane to the issues before the Court and the City has once again failed to cite authority to support whatever issue is raised therein.

CONCLUSION

Based upon the foregoing, the Findings of Facts and Conclusion of Law rendered by the Circuit Court of Jones County, Mississippi should be affirmed.

Respectfully submitted:

A handwritten signature in black ink, appearing to be 'T. Buchanan', written over a horizontal line.

THOMAS T. BUCHANAN, MSB# 7022
JOHN D. SMALLWOOD, MSB# 9760
Attorneys for Appellee

CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Appellee's Brief on all parties to this matter by first class mailing to the attorneys and on the date listed below:

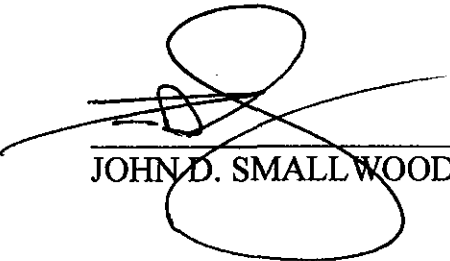
Hon. Billy Joe Landrum
JONES COUNTY CIRCUIT COURT JUDGE
Jones County Courthouse
Laurel, MS 39440

HAND DELIVERED

David M. Ratcliff, Esq.
P. O. Box 706
Laurel, MS 39441-0706

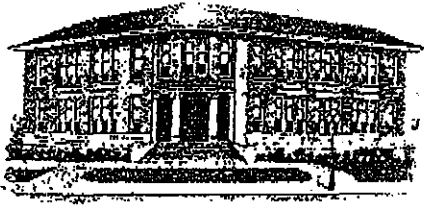
Deidra J. Bassi, Esq.
PO Drawer 1409
Laurel, MS 39441-1409

This the 27th day of July, 2009.



JOHN D. SMALLWOOD

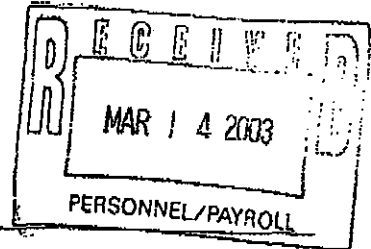
TUCKER BUCHANAN, P.A.
ATTORNEYS AT LAW
Post Office Box 4326
Laurel, MS 39441
T: (601) 649-8000
F: (601)-649-8009



The City of Laurel

Mississippi

GRIEVANCE PROCEDURE



Date of Grievance 3/1/03

Name of Employee Involved KENNETH VEVES

Department PUBLIC SAFETY (FIRE DEPARTMENT)

Job Classification SHIFT CAPTAIN

Date of First Discussion of Grievance with Supervisor or Department Head ~~3/2~~ 2/6/03

Nature of Grievance IN SECTION 3-5 Page 13 OF THE PERSONEL RULES & REGULATIONS OF THE CITY OF LAUREL, A PROMOTION OCCURS WHEN A PERSON IS ELEVATED IN POSITION AND GRADE. THEREFORE A SHIFT CAPTAIN'S RANK IS AN ELEVATION IN POSITION AND GRADE AND IS A RANK ABOVE A STATION CAPTAIN. IN RULE ELEVEN Page 38 SECTION II & III OF THE Civil Service Rules & Regulations A PROMOTION TO BATTALION CHIEF SHOULD COME FROM THE RANK OF SHIFT CAPTAIN DUE TO THE FACT IT IS THE NEXT LOWEST POSITION & GRADE, WHEN PRACTICABLE.

Remedy Requested CLARIFY THE STATUS OR POSITION OF SHIFT CAPTAIN AND HOW PROMOTIONS ARE DERIVED FROM THIS RANK.

Supervisor BATTALION CHIEF David Chance Department Head CHIEF STEVE RUSSELL

Grievant's Signature Kenneth Vevés

CERTIFICATE OF MAILING

I, John D. Smallwood, attorney for Appellee, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure do hereby certify that I have this day deposited in the United States mail, postage prepaid, the original Brief of Appellee along with three (3) copies of the same as required by M.R.A.P. Rule 31.

This the 27th day of July, 2009.



JOHN D. SMALLWOOD, MSB# [REDACTED]