

COPY

SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CITY OF LAUREL, MISSISSIPPI

FILED

APPELLANT

V.

SEP 11 2009
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SUPREME COURT
COURT OF APPEALS

CASE NO. 2008-CA-00984

KENNETH (KEN) KEYES

APPELLEE

APPEAL FROM JONES COUNTY CIRCUIT COURT
SECOND JUDICIAL DISTRICT
HONORABLE BILLY JOE LANDRUM

REPLY BRIEF FOR APPELLANT
CITY OF LAUREL, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

Attorneys for Appellant:

DEIDRA J. BASSI {MSB NO. [REDACTED]}
Hortman Harlow Bassi Robinson &
McDaniel, PLLC
414 West Oak Street (39440)
Post Office Drawer 1409
Laurel, Mississippi 39441-1409
Telephone: 601-649-8611
Facsimile: 601-649-6062

DAVID M. RATCLIFF {MSB NO. [REDACTED]}
525 Central Avenue (39440)
Post Office Box 706
Laurel, Mississippi 39441-0706
Telephone: 601-425-2303
Facsimile: 601-426-6728

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SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CITY OF LAUREL, MISSISSIPPI

APPELLANT

v.

CASE NO. 2008-CA-00984

KENNETH (KEN) KEYES

APPELLEE

REPLY BRIEF FOR APPELLANT
CITY OF LAUREL, MISSISSIPPI

Comes now the City of Laurel, Mississippi, Appellant, and files its Reply Brief in the above styled appeal.

I. INTRODUCTION

The facts of this case have been set out in the briefs of both parties. A brief summary of the facts is that this appeal stems from a City of Laurel fireman, Ken Keyes, not receiving a promotion from Shift Captain to Battalion Chief. Mr. Keyes appealed this decision. The Laurel Civil Service Commission heard Mr. Keyes' grievance and entered its order affirming the City's decision not to promote Mr. Keyes by its order of June 23, 2003. (R. 278) The Circuit Court found that the City's failure to promote Mr. Keyes was in violation of Rule 11(1) of the Civil Service Commission Rules, which provides: "Vacancies and positions shall be filled, so far as practicable, by promotion from among persons holding positions in a lower grade from the same office or area of activity of function in which the vacancy exists. . ." [Emphasis added] (R. 321; RE-040) The City argued to the Circuit Court that Rule 11(1) was not violated in that the promotion was given to a person in a lower grade; and it was not mandatory that the person in the "next" lower grade be promoted, just

“a lower grade”, and also because of the qualifying language of Rule 11(1), “so far as practicable”. The City went on to explain to the Circuit Court the process it followed in determining not to give the promotion to Mr. Keyes, but rather to another qualified person in a lower grade. Regardless, the Circuit Court found that the City’s failure to promote Mr. Keyes violated Rule 11(1) of the Civil Service Rules and was arbitrary and unreasonable as a matter of law, and in violation of their own rule. (RE-003) Below is a re-statement of the issues along with the argument in response to Keyes’ brief as submitted in this matter.

II. RE-STATEMENT OF THE ISSUES

1. Whether or not the Court or the Circuit Court below has subject matter jurisdiction to consider this appeal from a decision of the Laurel Civil Service Commission regarding a promotion.
2. Whether or not Mr. Keyes had standing to pursue the appeal.
3. Whether or not the Laurel Civil Service Commission’s decision to not promote Ken Keyes was in good faith for cause.
4. Whether or not the Jones County Circuit Court’s decision should be reversed and the Civil Service Commission’s decision affirmed.

III. ARGUMENT

Standard of Review

The standard of review of an appeal of an order from a Civil Service Commission is limited and is specifically defined by statute, i.e., § 21-31-23 Miss. Code Ann. The applicable language in the statute is:

... The said Circuit Court shall thereupon proceed to hear and determine such appeal. However, such a hearing shall be confined to the determination of whether a

judgment or order of removal, discharge, demotion, suspension, or combination thereof made by the Commission was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds. (excerpt from Miss. Code Ann. § 21-31-23) [Emphasis added]

Accordingly, this statute provides the exclusive jurisdiction of the Circuit Court and the Supreme Court/Court of Appeals. Whether or not the decision of the Civil Service Commission was in “**good faith for cause**” is the standard to be used by this Court and is prescribed by statute. This standard was also articulated by the Supreme Court in *City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1989).

The Supreme Court in *Froshour* stated:

It is thus clear that the scope of review of the circuit court, and of this Court, is limited, and we must ever bear in mind that it is not what the court, had it been a member of the governing authority, might have done in a particular instance, or indeed whether or not the court thinks a mistake may have been made, but instead **the criterion is whether or not from an examination of the record there exists credible evidence substantiating the action taken by the city. It is upon this basis that the court determines whether or not the decision was in “good faith for cause.”** Courts are not empowered to supervise the intelligence, wisdom or fairness of the governing authorities, and no resources are available to a court to exercise such a function even if granted, in this extremely difficult task of determining the fitness of a particular person for a particular job. The task must be left to the governing authorities of the city. It is only when the record makes it clear that there is no “substantial evidence” supporting the governing authorities’ determination that a court can act, and in such case it must. [Emphasis added] *Id.*

Keyes cited *Davis v. Public Employees’ Retirement System*, 750 So.2d, 1225 (Miss. 1999) as support that the standard of review for this Court is 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. However, the *Davis* case was not a Civil Service Commission case such as the one at bar, which has a statute that specifically defines

the standard of review, i.e., Miss. Code Ann. § 21-31-23 (1972). Rather, the *Davis* case was a Public Employees' Retirement System (PERS) case which falls under the category dealing with administrative decisions of State agencies or boards that are to be decided pursuant to Rule 5.03 of the Uniform Circuit and County Rules.

Keyes also cites *Young v. Mississippi State Tax Commission*, 635 So.2d 869, 874 (Miss. 1994) as support for the above referenced standard of review. In this case, the State Tax Commission sought judicial review of a State Employee Appeals Board finding that a discharged employee should be reinstated with back pay and benefits. This case is also distinguishable from the case at bar and does not involve the same Mississippi state statute. Additionally, Keyes cites *Bertucci v. Mississippi Department of Corrections*, 597 So.2d 643 (Miss. 1992), which involves an appeal by the Department of Corrections from an Employee Appeals Board decision. In *Bertucci*, MDOC attempted to perfect its appeal pursuant to Miss. Code Ann. § 25-9-132 (1972) which provides, "any employee aggrieved by final decision of the Employee Appeals Board shall be entitled to judicial review ..." In *Bertucci*, the Court found that the Circuit Court did not have jurisdiction because the statute did not allow the *employer* the authority to appeal, just the *employee*, i.e., the Court applied strict statutory construction. Thus, *Bertucci* is also distinguishable from the case at bar that has a specific statute that provides the standard of review.

Issue 1: 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 Circuit Court lacked subject matter jurisdiction of this appeal from the Civil Service Commission and, subsequently, this Court does not have subject matter jurisdiction of this appeal. The jurisdiction of the Circuit Court and this Court to hear appeals from a Civil Service Commission

ruling is derived by statute, namely Miss.Code Ann. § 21-31-23. The applicable portion of this statute provides:

. . .The said circuit court shall thereupon proceed to hear and determine such appeal. However, such hearing shall be confined to the determination of whether the judgment or order of **removal, discharge, demotion, suspension or combination thereof made by the commission**, was or was not made in good faith for cause, and **no appeal to such court shall be taken except upon such ground or grounds.** [Emphasis added]

Thus, the statute covers **removals, discharges, demotions, or suspensions**. Keyes' situation does not fit into one of those categories. The situation at bar is that Keyes did not get a promotion.

Keyes argues, in essence, that the Circuit Court and Courts of Appeal have *carte blanche* to second guess any employment decisions by the City and confirmed by the Civil Service Commission, and Keyes goes on to mis-characterize the appeal issue at bar as a question of law. Whether or not Keyes should have been promoted is not a question of law. It is an employment related decision of the City of Laurel, not that of the Circuit Court or the Mississippi Appeals Court. It is not an issue of discrimination or unlawful behavior. It is merely an employment issue.

Keyes correctly cites *Chandler v. Jackson Civil Service Comm.*, 687 So.2d 142, 143 (Miss. 1997), and Miss. Code Ann. § 11-51-93 (1972) as follows: "Writs of certiorari are granted to the circuit court to determine **questions of law** on the face of the record and proceedings." [Emphasis added] Miss. Code Ann. § 11-51-93 (1972) provides for a certiorari review only when a pure question of law is presented. *Lott v. City of Bay Springs*, 960 So.2d 525 (Miss. Ct. App. 2006). An employment decision made by the City of Laurel and affirmed by the Civil Service Commission is not a pure question of law.

While it is really unnecessary to cite law to support the well established law in Mississippi that statutes are to be strictly construed, below is such authority. In *Chandler v. Jackson, supra*. The

Court noted that, "When called upon to apply statutes to specific factual situations, we apply the statutes literally according to their plain meaning." *Id.*, citing *Jones v. Mississippi Employment Sec. Comm.*, 648 So.2d 1138, 1142 (Miss. 1995); *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 124 (Miss. 1992). The Court went on to state: "Where the language used by the legislature in a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation." *Id.*, citing *Marx v. Broom*, 632 So.2d 1325, 1318 (Miss. 1994); *City of Natchez v. Sullivan*, 612 So.2d 1087, 1089 (Miss. 1992); *Forman v. Carter*, 269 So.2d 865, 868, (Miss. 1972). In the case at bar, the statute clearly and unambiguously sets out the categories in which an appeal is appropriate, i.e. "removal, discharge, demotion or suspension." Thus, not getting a promotion does not fit into those categories and no subject matter jurisdiction exists.

Issue 2: Whether Ken Keyes had standing to pursue his appeal from the decision of Laurel Civil Service Commission.

As stated above, Mr. Keyes is complaining about not getting a promotion, and the statute that provides jurisdiction of this matter and governs the employment related decisions of the Civil Service Commission, provides an appeal proceeding for the employee if they are complaining of removal, discharge, demotion, suspension, or a combination thereof. Not getting a promotion does not fall into one of the required categories under the statute. The statute clearly provides "no appeal to such court shall be taken except upon such ground or grounds." (Miss. Code Ann. § 21-31-23) The language of the statute could not be any more explicit than that. As stated above, statutes should be strictly construed and, therefore, Mr. Keyes lacks standing to bring the appeal that is before the Court.

Issue 3: Whether the Laurel Civil Service Commission acted in good faith in failing to promote Ken Keyes.

If the Court finds the Circuit Court and this Court does have subject matter jurisdiction of this dispute, then there are several reasons the Circuit Court should be reversed. As discussed above, the standard of review for the Circuit Court is provided by Miss. Code Ann. § 21-31-23. The standard for the Circuit Court was that it should determine whether the order of the Civil Service Commission was or was not made in good faith for cause. However, the Circuit Court provided a different standard, which is incorrect. In its May 19, 2008 order, the Circuit Court found:

The Court finds from the evidence that the City's appointment was clearly in violation of Rule 11(1) of the Civil Service rules and 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.** [Emphasis added] R. 332-334; RE-002-004.

As shown in the record presented to the Circuit Court, and as recounted in the City of Laurel's Brief to this Court, not only was the decision of the Civil Service Commission dated June 23, 2003 made in good faith for cause, but the evidence shows it was not arbitrary and unreasonable as a matter of law, nor was it in violation of their own rule. Keyes argues that the Circuit Court found that Rule 11(1) was compulsory, and that that rule required that when a qualified person holding the next highest rank was available, the City's hands were tied and it was mandated to promote that person. Keyes then stretches even further by saying that Rule 11(1) must be read in conjunction with Rule 11(3) in order to get the true meaning of the rule. Keyes argues that somehow Rule 11(1) and Rule 11(3) of the Civil Service Rules can be construed to provide a mandatory lock-step promotion of Keyes.

As stated above, Mississippi prescribes to strict construction of statutes when the language is plain and unambiguous. Rule 11(1) of the Civil Service Commission Rules and Regulations

which deals with promotions provides: "Vacancies and positions shall be filled, **so far as practicable**, by promotion from among persons holding positions in a **lower grade** from the same office or area of activity of function in which the vacancy exists. . ." [Emphasis added] (R. 321; RE-040) Contrary to the argument by Mr. Keyes, the rule does not limit the City to fill the vacancy by promoting a person from the next lowest position. The Circuit Court found that when a qualified person holding the next highest rank was available and the City did not promote that person, it was a violation of Rule 11(1) and was arbitrary and unreasonable as a matter of law. (R. 332-333; RE-002-003). The Court also stated as support for its decision that the City has a long history of promoting on the basis of seniority, which has created a strong and stable fire department in the City, and that tradition was the basis of Rule 11(1) having been adopted. The Court stated that the rule itself is compulsory, provided Mr. Keyes or another candidate of equal rank was qualified. (R. 332-334; RE-002-004)

In *Davis v. Public Employee's Retirement System*, 750 So.2d 1225, 1233 (Miss. 1999), the Court noted that:

. . . When called upon to apply statutes to specific factual situations, we apply the statutes literally according to their plain meaning, and there is no occasion to resort to rules of statutory interpretation where the language used by the legislature is plain, unambiguous and conveys a clear and definite meaning. *Id.*, citing *Chandler v. City of Jackson Civil Service Comm.*, 687 So.2d 142, 144 (Miss. 1997); citing *Jones v. Mississippi Employment Comm.*, 648 So.2d 1138, 1142 (Miss. 1995); *Marx v. Brook*, 632 So.2d 1315, 1318 (Miss. 1994); *City of Natchez v. Sullivan*, 612 So.2d 1087, 1089 (Miss. 1992); *Forman v. Carter*, 269 So.2d 865, 868 (Miss. 1972)

In the case at bar, the words that are essential in conducting the review that is before the Court are the words highlighted below:

Rule 11(1) provides, "Vacancies and positions shall be filled, **so far as practicable**, by promotion from among persons holding positions

in a lower grade from the same office or area of activity or function in which the vacancy exists. . . [Emphasis added] R. 321; RE-040.

The plain language provides that the City should seek to fill vacancies and positions “so far as practicable” by promoting a person from “a lower ranking position”. Clearly the rule does not make it mandatory for the City to promote a person from “the next lowest position” as argued by Mr. Keyes and held by the Circuit Court. The Circuit Court and Keyes are simply incorrect in stating that this rule was compulsory.

Further evidence that the rule does not require a compulsory lock-step promotion is found by examining Civil Service Rule 11(3), which addresses who may take Civil Service promotion examinations. Rule 11(3) provides that, “Promotion examinations shall be open, as far as practicable, to employees who are employed in permanent positions in the **next** lowest position or grade. . .” [Emphasis added] R. 321; RE-040. Obviously, the drafters of the rules knew that they could have used the word “**next**” as they did in Rule 11(3) when drafting Rule 11(1). However, this was not done by the drafters in Rule 11(1); rather, the drafters stated “**persons holding positions in a lower grade**” and not the “**next**” lowest position. However, both rules gave the City and the Civil Service Commission discretion by placing the phrase “as far as practicable” in both rules. The plain and unambiguous meaning of “as far as practicable” provides an element of discretion on the decision maker’s part. If the drafters of the rules had wanted the City to be mandated to lock-step promotions to the next lowest position, then the wording would have been different. Thus, the Circuit Court’s finding and the argument being made by Keyes that Rule 11(1) made it compulsory that Mr. Keyes be promoted since he was the next lowest position is simply an inaccurate construing of the clear, unambiguous language of the statute and violates long standing Mississippi law. It is abundantly clear that the drafters of the rule inserted this qualifying language so that the rule was not

compulsory and there was no intent that lock-step promotions were required. To hold otherwise would make the phrase "as far as practicable" have no meaning, which is in violation of the Mississippi rule of strict construction.

As discussed in the City's appeal brief, the City's process of choosing the person to be promoted, which was not Mr. Keyes, was sound, well thought out, fair, and in no way political. When the Battalion Chief position came open in 2002 due to a retirement, there were only 2 Shift Captains, one of whom was Ken Keyes. (R. 125-126) Instead of limiting the list of persons eligible to take the Civil Service examination to 2 Shift Captains, which meant that the Fire Department would have started a 2-year period with a less than the desired minimum of 3 persons on the promotion list as required by Rule 8(5) of the Civil Service Rules, the Fire Department opened up the examination to the Station Captains and Lieutenants and allowed 12 people to take the test. (R. 128, 129, 131) The test was given and 7 people passed. (R. 128, 129, 138) Thereafter, the Fire Department Promotion Board, composed of Chief Steve Russell, Battalion Chief Alford Jordan, Greg King, and David Chance, met to consider who to recommend to fill the vacancy of Battalion Chief. (R. 138) Civil Service Rule 11(2) guided them, which states: "Promotions shall be based upon merit and competition and upon superior qualifications of the person promoted, as shown by his previous service, due weight given to seniority. . ." (R. 321; RE-040)

Accordingly, test scores, as well as years of service, merit, and qualifications were considered in deciding who to recommend. (R. 145-147) Based on those considerations, the Fire Department decided that David Chancellor, who had 21 years of seniority vs. Mr. Keyes with 17 years of seniority, would be the best candidate for Battalion Chief. (R. 143, 146-147) This decision was based upon Chancellor's leadership skills, interpersonal skills, superior qualifications, merit, test scores, and seniority. (R. 139, 146) This recommendation was made to the Mayor for promotion

and, based upon that recommendation, the Mayor approved David Chancellor's promotion. (R. 156-157) Accordingly, there is no evidence that the Fire Department or the Mayor did not act in good faith for cause. Further, there is nothing in the record to indicate that the Civil Service Commission did not act in good faith for cause in upholding the City's decision.

The other actions showing that the Civil Service Commission acted in good faith with cause in not promoting Mr. Keyes are as follows:

- The Civil Service Commission conducted a public hearing on June 20, 2003. (R. 278-280; RE-030-032)
- Mr. Keyes was represented by counsel (Tucker Buchanan) at the hearing. (R. 278-280; RE-030-032)
- Sworn testimony was taken and written exhibits were presented at the Civil Service Commission hearing (R. 278-280; RE-030-032).
- A substantial order was provided by the Civil Service Commission explaining the factors considered by them in making their decision and noting that it saw no evidence that the promotion of Mr. Chancellor was not based upon merit, efficiency, and fitness. (R. 278-280; RE-030-032)

These facts constitute credible evidence substantiating the actions taken by the City and the Civil Service Commission. Thus, the Civil Service Commission acted in good faith for cause in offering affirming the City's action in not promoting Keyes.

Issue 4: Whether the Circuit Court erred as a matter of law and abused its discretion in reversing the decision of the Laurel Civil Service Commission.

The Circuit Court's decision in this appeal is exactly what the Supreme Court in *Froshour*, supra, was warning against when it said:

... we must ever bear in mind that it is not what the court, had it been a member of the governing authority, might have done in a particular instance, or indeed whether or not the court thinks a mistake may have been made, but instead the criterion is whether or not from an

examination of the record there exists credible evidence substantiating the action taken by the city. It is upon this basis that the court determines whether or not the decision was in "good faith for cause. . ." (*Id.*)

The Circuit Court was presented with an abundance of credible evidence which substantiated the action taken. This has been recapped above and in the City's Brief to this Court. Conversely, the Circuit Court was not presented any credible evidence that the Civil Service Commission was acting in an unlawful manner. There exists a difference of opinion between the Court and the Civil Service Commission on the promotion decision. Accordingly, the Circuit Court erred as a matter of law and abused its discretion in reversing the decision of the Laurel Civil Service Commission, which was made in good faith for cause.

Throughout Keyes' brief, he argues that the City has failed to cite authorities to support several issues raised within the brief. As discussed above, the City is attempting to demonstrate that the Civil Service Commission's ruling was made in good faith for cause. In order to do so, a factual discussion of what took place and what the decision was based upon is necessary. The legal theories promoted by the City in its brief have been supported by case law; however, the factual discussion is just that. Accordingly, Keyes' constant reference that the City has no legal authority for its positions is misplaced. The facts are exactly what this Court needs to be presented with and the Court has been supplied with legal authorities where needed.

The City has argued that since Mr. Keyes has retired from the City, this appeal is moot, and if not moot, it presents a very practical problem. The Circuit Court in its order dated May 19, 2008 ordered the City to "promote the Appellant as a Battalion Chief, effective June 23, 2003, with all the promotions, benefits and privileges, of the Battalion Chief rank, which was the rank he deserved." (R. 334; RE-004) Keyes argues he wants the City to simply pay him the increased salary from 2003

until his retirement, adjust his retirement benefits accordingly, and pay any other benefits which might have been involved, but he does not intend to be Battalion Chief if the City's appeal is denied. However, that is not what the Circuit Court ordered. It ordered the City to place Keyes in the position. While some monetary benefit could be calculated and paid to Mr. Keyes, that is not the sole remedy required by the Circuit Court. Another person has been in that position since 2003 and the City would be placed in the position of dealing with what to do with that person. However, the City's position is that the decision to not promote Keyes, which was confirmed by the Civil Service Commission, was done in good faith for cause. Accordingly, for the reasons set forth above, the Circuit Court's order should be reversed, and the Civil Service Commission's decision should be affirmed.

Respectfully submitted,

THE CITY OF LAUREL, MISSISSIPPI
Appellant

BY: *Deidra J. Bassi*
Deidra J. Bassi, Of Counsel

DEIDRA J. BASSI {MSB NO. [REDACTED]}
HORTMAN HARLOW BASSI ROBINSON & MCDANIEL, PLLC
414 WEST OAK STREET (39440)
POST OFFICE DRAWER 1409
LAUREL, MS 39441-1409
TELEPHONE: 601-649-8611
FACSIMILE: 601-649-6062

DAVID M. RATCLIFF {MSB NO. [REDACTED]}
525 CENTRAL AVENUE (39440)
POST OFFICE BOX 706
LAUREL, MISSISSIPPI 39441-0706
TELEPHONE: 601-425-2303
FACSIMILE: 601-426-6728

CERTIFICATE OF SERVICE

I, Deidra J. Bassi, do hereby certify that I have this served a true and correct copy of the above and foregoing Brief to:

Honorable Billy Joe Landrum
Jones County Circuit Court Judge
Jones County Courthouse
Laurel, MS 39440

Thomas T. Buchanan, Esq.
John Smallwood, Esq.
Post Office Box 4326
Laurel, MS 39441
Attorney for Kenneth (Ken) Keyes, Appellee

This, the 11th day of September, A.D. 2009.


Deidra J. Bassi