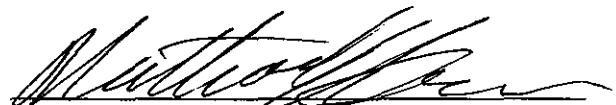


CERTIFICATE OF INTERESTED PARTIES

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 Supreme court may evaluate possible disqualifications or recusal.

1. Mississippi Department of Human Services, Appellant
2. Honorable Kathy Caldwell, Attorney for Appellant
3. Pamela W. McDonald, Appellee
4. Honorable Matthew Y. Harris, Attorney for Appellee
5. Don Thompson, MDHS Executive Director
6. Falton O. Mason, Jr., Hearing Officer, Mississippi Employee Appeals Board
7. William H. Smith, III, Hearing Officer, Mississippi Employee Appeals Board
8. Roosevelt Daniels, II, Hearing Officer, Mississippi Employee Appeals Board
9. Ingrid D. Williams, Hearing Officer, Mississippi Employee Appeals Board
10. W. Swan Yerger, Judge for Circuit Court of First Judicial District of Hinds County, Mississippi.



MATTHEW Y. HARRIS
Attorney for the Appellee

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STATEMENT OF ISSUES

The following issues were presented by Mississippi Department of Human Services as the Appellant and will be addressed by Pamela W. McDonald as Appellee:

- I. Whether the Circuit court erred in affirming the decision of the Hearing Officer to deny the Appellant's Motion to Dismiss the appeal, given that Rule 2(C) of the Administrative Rules of the Mississippi Employee Appeals Board provides that no person may appeal a non-greivable action.
- II. Whether the Circuit court erred affirming the Hearing Officer in failing to dismiss the appeal, for failure to comply with Rule 14(A)(5) of the Administrative Rules of the Mississippi Employee Appeals Board regarding the production of the witness list, given that the appellee failed to provide a brief summary of each witnesses testimony.
- III. Whether the Circuit Court erroneously found that the appellee had sustained her burden of proof, as the appellant produced evidence and testimony that the appellee had not been appointed with the approval of the Governor as required by statute.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below:

A hearing took place on May 4, 2004 in front of the Mississippi Employee Appeals Board. On May 26, 2004, Administrative Judge, Falton O. Mason entered an order in the case, ruling that Pamela W. McDonald was entitled to receive the appointment as MDHS County Director, Pontotoc County, Mississippi. R.E. at 39-41.

MDHS appealed to the Full Board of the Mississippi Employee Appeals Board (hereinafter "Full Board"). R.E. at 38. On October 8, 2004, the Full Board affirmed the decision of the Hearing Officer. R.E. at 36. MDHS then appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi. R.E. at 13. The Circuit Court entered an order on November 26, 2007, affirming the decision of the Full Board. R.E. at 12. On May 6, 2008, MDHS filed a Notice of Appeal to this Honorable Court. R.E. at 3.

B. Statement of Facts:

Pamella McDonald (hereinafter "McDonald") began her employment with the Mississippi Department of Human Services (hereinafter "DHS") in October of 1989. (R.E. at 27). At all times relevant to this case, McDonald worked as a DHS-Case Manager with Union County DHS. (Id.). In April of 2003, McDonald applied for the position of County Director for Pontotoc County DHS. (Id.). On December 26, 2004, McDonald received a letter stating, in pertinent part, that her recommendation for the Pontotoc position had been approved by former Governor Musgrove. (Id.). Further, in January of 2004, McDonald received a letter, dated January 9, 2004, from Gloria Jackson, the DHS Personnel Director, stating that she had been "promoted" to the Pontotoc position, and that she would receive a monthly salary in the amount of \$2,703.52. (Id.). The letter from Ms. Jackson

went on to state that “[a]ll *necessary paperwork* has been processed to promote you with an effective date of January 1, 2004...”(Id.). Pursuant to these letters, McDonald actually started work in her new position as County Director in Pontotoc County. (R.E. at 27-28).

On or about January 25, 2004, McDonald then received a letter, dated January 22, 2004, from Don Taylor, the Executive Director of DHS (R.E. at 28). This letter rescinded McDonald’s promotion, stating “as written approval from the former Governor was not obtained prior to your appointment, this action is null and void.” (Id.). Based on this letter, McDonald returned to her previous duties as DHS-Case Manager in the Union County office, where she remains. (Id.). An aggrieved McDonald contacted the State Personnel Board and proceeded to file an appeal through the Mississippi Employee Appeals Board. (R.E. at 66-68) Judge Mason conducted the hearing on the matter on May 4, 2004 and issued a Memorandum Opinion stating that DHS had failed to carry its burden of proof, and that McDonald was entitled to the relief she requested. (R.E. 39-41).

DHS, through the Attorney General’s office, then appealed Judge Mason’s decision to the Full Board of the Mississippi Employee Appeals Board who affirmed Judge Mason’s decision. (R.E. at 36 and 38). MDHS then appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi where Circuit Court Judge Swan Yerger affirmed the decision of the Full Board. (R.E. at 12). MDHS then appealed the case to the Mississippi Supreme Court where it now resides. (R.E. at 3).

SUMMARY OF THE ARGUMENT

The Order of the Mississippi Employee Appeals Board is supported by substantial evidence. In order to have the ruling overturned, MDHS would have to prove that the ruling of the lower court was not based upon substantial evidence or was arbitrary, capricious, or against the overwhelming weight of the evidence. The record clearly supports the Appeals Board's decision, affirmed by the Circuit Court, which took into consideration all of the evidence offered by Pamella W. McDonald and MDHS. The evidence shows that McDonald is entitled to the relief she requested.

The recommendation of the Mississippi Employee Appeals Board was correctly determined by the Circuit Court to be supported by substantial evidence and is neither arbitrary nor capricious. The Board made its decision based on substantial evidence, employment regulations, and relevant statutes under Mississippi law. Based on the evidence and the testimony elicited at the hearing appearing in the record, it is clear that the only decision the Full Board could make, as upheld by the Circuit Court, was that McDonald was entitled to the requested relief.

ARGUMENT

A. Standard of Review

The judicial review of an administrative appeal is limited. The judiciary is not allowed to retry *de novo* matters on appeal from administrative agencies. *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So.2d 664 (Miss.1969). The courts are not allowed to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited

one, however, since the courts cannot enter the field of the administrative agency. The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. This rule has been thoroughly settled in this state. *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So.2d 664 (Miss.1969)(See also *United Cement Company v. Safe Air for the Environment, Inc.*, 558 So.2d 840 (Miss.1990); *Melody Manor Convalescent Center v. Mississippi State Department of Health*, 546 So.2d 972 (Miss.1989); *Spradlin v. Board of Trustees of Pascagoula Municipal Separate School District*, 515 So.2d 893 (Miss.1987); *Eidt v. City of Natchez*, 421 So.2d 1225 (Miss.1982); *Mainstream Savings and Loan Association v. Washington Federal Savings and Loan Association*, 325 So.2d 902 (Miss.1976).

"The only grounds for overturning administrative agency action by the appellate process is that the state agency has acted capriciously, unreasonably, arbitrarily; has abused its discretion or has violated a vested constitutional right of a party." *Melody Manor Convalescent Center v. Mississippi State Department of Health*, 546 So.2d 972, 974 (Miss.1989). "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 action." *County Board of Education of Alcorn County v. Parents and Custodians of Students at Rienzi School Attendance Center*, 251 Miss. 195, 168 So.2d 814, 818 (1964)(See also *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir.1983)). "A presumption of validity attaches to agency action, and the burden of proof rests with the party challenging such action." *Id.*

A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. *Public Employees' Retirement System v. Howard*, 905 So.2d 1279 (Miss. 2005); *Melody Manor Convalescent Center v. Mississippi Department of Health*, 546 So.2d 972 (Miss. 1989); *United Cement Company v. Safe Air for the Environment*, 558 So.2d 840 (Miss. 1990). In *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So.2d 664, 665 (Miss. 1969), this Court stated:

Our Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies and are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. ***The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency. (Emphasis added).***

In administrative matters, the agency, not the reviewing court, sits as finder of fact. The fact finding duty includes assessing credibility of witnesses and determining the proper weight to give a particular witness's testimony. *Public Employees' Retirement System v. Cobb*, 839 So.2d 605, 609 (Miss. App. 2003). The appellate court is obligated to give substantial deference when reviewing an administrative determination on appeal, and the court exceeds its authority when it re-evaluates evidence and makes its own determination of trustworthiness of particular testimony. *PERS v. Cobb*, 839 So.2d 605, 609 (Miss. App. 2003). The findings of fact by the Mississippi Employee Appeals Board must not be disturbed on appeal where sustained by substantial evidence. *City of Meridian v. Davidson*, 211 Miss. 683, 53 So.2d 48, 57 (1951); *Harris v. Canton Separate Public School Board of Education*, 655 So.2d 898, 902 (Miss. 1995).

A rebuttable presumption exists in favor of the Board decision and the burden of proving to the contrary is on the appellant. *PERS v. Howard*, 905 So.2d 1279 (Miss. 2005); *Mississippi State Board of Accountancy v. Gray*, 674 So.2d 1251, 1257 (Miss. 1996); *Mississippi Commission on Environmental Quality v. Chickasaw County Board of Supervisors*, 621 So.2d 1211, 1215 (Miss. 1993).

A reviewing court cannot substitute its judgment for that of the agency or reweigh the facts of the case. Chancery and Circuit Courts are held to the same standard as this Court when reviewing agency decisions. When we find the lower court has exceeded its authority in overturning an agency decision we will reverse and reinstate the decision.

Mississippi State Board of Accountancy v. Gray, 674 So.2d 1251, 1253 (Miss. 1996)(*Emphasis added*).

The Order of the Mississippi Employment Appeals Board was supported by substantial evidence and was neither arbitrary nor capricious. The Board was within its authority in making this determination and no constitutional rights were violated. Thus, the Circuit Court properly affirmed the Order of the Full board and the Lower Court's decision should be affirmed on appeal.

B. Arguments.

I. The Circuit Court was correct in affirming the decision of the Hearing Officer to deny the Appellant's Motion to Dismiss the appeal as Rule 2(C) of the Administrative Rules of the Mississippi Employment Appeals Board does not apply.

Appellant argues that McDonald was not entitled to appeal MDHS's actions because her claim is non-grievable. McDonald has argued that the actions of MDHS affected her compensation. MDHS cannot say that this does not affect McDonald's compensation just because she never received compensation as a county director. McDonald had already been appointed to the job and

received confirmation of the amount that her salary would be including a beginning date. The promotion had already been received. There is no doubt that revoking that promotion affected McDonald's salary.

The EAB Rules cannot be read so narrowly or McDonald will have **no** administrative or legal recourse for the adverse actions taken against her. EAB Rule 2(A) states "a permanent state service employee may appeal **any** action adversely affecting his or her compensation or employment status." (*Emphasis added*).

The facts are that McDonald earned \$27,131.86 annually in her employment as a case manager and was to have made \$32,442.24 annually in her promotion. Clearly her compensation was adversely affected by the rescission of her appointment. She even attempted to file a grievance and was told she could not do so. The rescission of her promotion was clearly an action adversely affecting both compensation and employment status.

Furthermore, the Appendix B of the EAB Rules state that an action is only non-grievable if it pertains to:

The **selection** of an individual by the appointing authority, department head, or designee to fill a position through promotion, transfer, demotion, or appointment unless it is alleged that the selection is in violation of a written agency policy or of a State Personnel Board rule on filling vacancies.

EAB Rules, Appendix B(E)(*Emphasis added*). This is not a question of selection of McDonald for the job. Governor Musgrove and his Chief of Staff, William Renick, testified that she had been selected. The rules reference a situation where one employee is miffed that another employee has been chosen rather than themselves. The only question at hand is whether Governor Musgrove's approval was obtained, which the Hearing Officer considered and found that it was. Rule 2(C)

simply does not apply in this situation and there was no grounds to dismiss on this basis. The Circuit Court was correct in affirming the decision of the Hearing Officer and Board to deny the Appellant's Motion to Dismiss.

II The Circuit Court was correct in affirming the Hearing Officer's decision refusing to dismiss the appeal for simple failure to comply completely with procedure set forth in Rule 14(A)(5) of the Administrative Rules of the Mississippi Employee Appeals Board.

An administrative agency is the best equipped to interpret its own rules and procedures. It is not for a higher court to second guess an administrative agency when that agency is ruling on its own rules and regulations. 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 action." *County Board of Education of Alcorn County v. Parents and Custodians of Students at Rienzi School Attendance Center*, 251 Miss. 195, 168 So.2d 814, 818 (1964)(See also *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir.1983)). "A presumption of validity attaches to agency action, and the burden of proof rests with the party challenging such action." *Id.*

Great deference is afforded an administrative agency's construction of its own rules and regulations and the statutes under which it operates. *Hinds County School District Board of Trustees v. R.B., a Minor*, 2006-CT-00326-SCT (Miss. 2008); *McDerment v. Miss. Real Estate Comm'n*, 748 So. 2d 114, 118 (Miss. 1999) (quoting *Miss. State Tax Comm'n v. Mask*, 667 So. 2d 1313, 1314 (Miss.1995)). "This duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." *Dunn v. Miss. State Dep't of Health*, 708 So. 2d 67, 72 (Miss. 1998) (quoting *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586,

593 (Miss. 1990)).

This Court has generally accorded great deference to an administrative agency's construction of its own rules and regulations and the statutes under which it operates, noting that "an agency's interpretation of a regulation it has been authorized to promulgate is entitled to great deference and must be upheld unless it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *MSDH v. Baptist Memorial Hosp. - DeSoto, Inc.*, 984 So.2d 967 (Miss. 2008)(Citing *Buelow v. Glidewell*, 757 So. 2d 216, 219 (Miss. 2000) (*Tower Loan of Miss., Inc. v. Miss. State Tax Comm'n*, 662 So. 2d 1077, 1081 (Miss. 1995)). An administrative agency is vested with the authority to interpret its own regulations. We have said that "[t]his Court affords great deference to an administrative agency in interpreting its own regulations." *Miss. Gaming Comm'n v. Bd. of Educ.*, 691 So.2d 452, 455 (Miss.1997).

The Mississippi Supreme Court held that statutory authority leading to administrative procedural rules is directory, not mandatory. *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 319 (Miss. 1992). Administrative agencies are not courts. Instead, they have broad discretionary authority to establish procedures for administration of claims. *Delta Drilling Co. v. Cannette*, 489 So.2d 1378 (Miss. 1986). They have authority to relax and be flexible with the procedures where, in the agency's judgment, it is necessary. *Id.* It is rare that the Court will reverse such agencies for actions taken in the implementation and enforcement of their own procedural rules. *Id.*

McDonald provided a witness list as required under Rule 14(A)(5) of the Administrative Rules of the Mississippi Employee Appeals Board. However, she failed to include a "brief summary

of each witnesses testimony.” This is a procedural rule and it is solely within the discretion of the Hearing Officer whether to excuse any deficiencies therein.

The witness testimony at issue is that of McDonald herself and that of William Renick, chief of staff to former governor, Ronnie Musgrove. It was known to the Appellant prior to the hearing exactly what the testimony of these two witnesses would be. The information in the testimony of McDonald and Renick had previously been set out in pleadings before the Board and was well known to the Appellant. It is ridiculous that Appellant would ask for McDonald’s entire case to be dismissed for a minor procedural deficiency which the Hearing Officer, in his discretion, decided to allow.

III Whether the Circuit Court erroneously found that the appellee had sustained her burden of proof, as the appellant produced evidence and testimony that the appellee had not been appointed with the approval of the Governor as required by statute.

In administrative matters, the agency, not the reviewing court, sits as finder of fact. The fact finding duty includes assessing credibility of witnesses and determining the proper weight to give a particular witness’s testimony. *Public Employees’ Retirement System v. Cobb*, 839 So.2d 605, 609 (Miss. App. 2003). The appellate court is obligated to give substantial deference when reviewing an administrative determination on appeal, and the court exceeds its authority when it re-evaluates evidence and makes its own determination of trustworthiness of particular testimony. *PERS v. Cobb*, 839 So.2d 605, 609 (Miss. App. 2003). The findings of fact by the Mississippi Employee Appeals Board must not be disturbed on appeal where sustained by substantial evidence. *City of Meridian v. Davidson*, 211 Miss. 683, 53 So.2d 48, 57 (1951); *Harris v. Canton Separate Public School Board of Education*, 655 So.2d 898, 902 (Miss. 1995).

Miss. Code Ann. § 43-1-9 does not require various signatures on MDHS documents. What it does say is that the promotion to a county Director position must be with the approval of the Governor.

...[t]he commissioner shall designate, in accordance with the approval of the Governor, a county director of public welfare who shall serve as the executive and administrative officer of the county department and shall be responsible to the state department for its management

Miss. Code Ann. § 43-1-9 (Supp. 2003)(Emphasis added).

In the case *sub judice*, the Hearing Officer's findings include the following facts:

Before Christmas, 2003, William Renick, Chief of Staff for the former governor, Ronnie Musgrove, met with Governor Musgrove and Thelma Brittain to discuss DHS vacancies, including one in Pontotoc County. He remembered specifically the governor choosing McDonald for the position of County Director. (R.E. at 39-40). An affidavit from Governor Musgrove also stated that he appointed McDonald to the position prior to leaving office. MDHS did not object to the admission or the accuracy of the affidavit. (R.E. at 40). Furthermore, witness for MDHS, Gloria Jackson, MDHS Personnel Director, testified that MDHS had the letter signed by the governor but just "couldn't place their hands on it." (Id.). Gloria Jackson also testified that the Governor's testimony that he did approve McDonald's promotion would comply with Miss. Code Ann. § 43-1-9. (R.E. 30).

The Hearing Officer considered all evidence, testimony, and argument of counsel and found that McDonald sustained her burden of proof. The Hearing Officer found that Governor Musgrove had approved the appointment of McDonald to be DHS County Director of Pontotoc County DHS. He found that "the process was short-circuited within the Agency" and that McDonald was entitled

to receive the appointment. (R.E. at 40-41). Absolutely no evidence has ever been presented to contradict either Governor Musgrove or William Renick's testimony concerning McDonald's approval.

On appeal, the Full Board found the Hearing Officer's Order to be appropriate, stating that McDonald met her burden of proof by credible testimony. (R.E. at 38). The Circuit Court upheld the Board's determination that McDonald met her required burden of proof and that their decision was supported by substantial evidence, was not arbitrary or capricious, and did not violate any statutory or constitutional rights. (R.E. at 12).

CONCLUSION

The case currently before this Honorable Court does not fall under the listed "non-grievable" actions as it does not concern the selection of an employee. Therefore, there are no grounds for dismissal under Rule 2(C) of the Administrative Rules of the Mississippi Employee Appeals Board, and the Hearing Officer had a substantial basis for denying the Appellee's Motion to Dismiss.

There are also no grounds for a dismissal under Rule 14(A)(5) of the Administrative Rules of the Mississippi Employee Appeals Board as interpreting the rules and required procedure under these rules is a matter completely within the discretion of the administrative agency. Therefore, even had any procedural deficiencies before the Board have been serious, which they were not, it was within the Hearing Officer's discretion to determine how to handle that matter.

Finally, there is no ground at all to show that the Hearing Officer, the Full Board of the Mississippi Employee Appeals Board, and the Circuit Court acted inappropriately in finding that McDonald was entitled to the relief she requested. The decision was based on substantial evidence and not arbitrary or capricious. Testimony clearly showed McDonald had the gubernatorial

to receive the appointment. (R.E. at 40-41). Absolutely no evidence has ever been presented to contradict either Governor Musgrove or William Renick's testimony concerning McDonald's approval.

On appeal, the Full Board found the Hearing Officer's Order to be appropriate, stating that McDonald met her burden of proof by credible testimony. (R.E. at 38). The Circuit Court upheld the Board's determination that McDonald met her required burden of proof and that their decision was supported by substantial evidence, was not arbitrary or capricious, and did not violate any statutory or constitutional rights. (R.E. at 12).

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