

IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF
HUMAN SERVICES

APPELLANT

VS.

CAUSE NO.: 2008-SA-868

PAMELA W. MCDONALD

APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

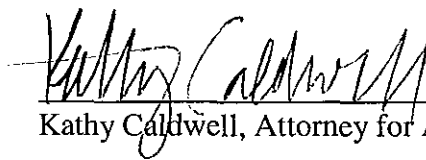
BRIEF OF THE APPELLANT

KATHY CALDWELL, [REDACTED]
ATTORNEY FOR APPELLANT
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-4269
Facsimile: (601) 359-4240

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 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 the Circuit Court of First Judicial District of Hinds County Mississippi

A handwritten signature in black ink, appearing to read "Kathy Caldwell", is written over a horizontal line.

Kathy Caldwell, Attorney for Appellee

TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUE.....	1
STATEMENT OF CASE.....	2
A. Course of Proceedings and Disposition in the Trial Court.....	2
B. Statement of Facts.....	2
C. Standard of Review.....	3
SUMMARY OF ARGUMENT.....	4
ARGUMENT OF THE APPELLANT.....	5
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.....	5
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.....	6
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.....	7
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

STATUTES

PAGE

Mississippi Code, Annotated §43-1-9 (2003).....5, 6

CASES

Harris v. Mississippi Department of Corrections,
831 So. 2d 1105, 1107 (Miss. 2002).....3

Mississippi Department of Wildlife Conservation v. Browning,
578 So. 2d 667, 668 (Miss. 1991).....7

Mississippi State Department of Health v. Natchez Community Hospital,
743 So. 2d 973, 973 (Miss. 1999).....7, 8

Public Employees' Retirement System v. Marquez,
774 So. 2d 421, 421 (Miss. 2000).....7, 8

Public Employees' Retirement System v. Dishmon,
797 So. 2d 888, 888 (Miss. 2001).....7

OTHER AUTHORITIES

Mississippi Rules of Evidence 1002 (2007).....6, 8, 10

Mississippi Employee Appeals Board Administrative Rules, Rule 2 (July 2007).....5

Mississippi Employee Appeals Board Administrative Rules,
Rule 14 (A)(5) (July 2007).....4, 6, 7, 10

Mississippi Employee Appeals Board Administrative Rules,
Rule 21 (B) (July 2007).....8

Mississippi Employee Appeals Board Administrative Rules, Rule 32 (July 2007).....6, 7

Mississippi Employee Appeals Board Administrative Rules, Appendix B (July 2007).....5

STATEMENT OF ISSUES

The following issues are presented by Mississippi Department of Human Services as the Appellant:

- 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:

The Mississippi Employee Appeals Board hearing took place on May 4, 2004, before the Honorable Falton O. Mason. On May 26, 2004, the Honorable Falton O. Mason entered his order in the case, ruling that Ms. McDonald was entitled to the relief she sought, that of receiving the appointment as MDHS County Director, Pontotoc County, Mississippi. R.E. at 39-41.

MDHS sought review by 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 appealed to the Circuit Court of the First Judicial District of Hinds County, Mississippi. R.E. at 13. The Circuit Court affirmed the decision of the Full Board. R.E. at 12. Therefore, MDHS appeals to this Court the decision of the Circuit Court which affirmed the Full Board and Hearing Officer's decision. R.E. at 3-4.

B. Statement of Facts:

On or about December 23, 2003, Pamella McDonald, appellee, received a letter from Thelma Britton, Executive Director of the Mississippi Department of Human Services (hereinafter "MDHS"), indicating that her recommendation for the position of MDHS County Director-Pontotoc County, had been approved by Governor Ronnie Musgrove. T. at 29. On January 9, 2004, Ms. McDonald received a letter from Gloria Jackson, Personnel Director, Division of Human Resources of MDHS, advising that all necessary paperwork has been processed to promote Ms. McDonald with an effective date of January 1, 2004. T. at 27 and 42. Gloria Jackson and Lorraine Eden testified, at the hearing held on May 4, 2004, that the promotion packet was processed without the approval letter, at the instruction of the former Executive Director, Thelma Britton, and her staff. *Id.* at 27 and 42. On or about January 22, 2004, Ms. McDonald

received a letter Donald R. Taylor, Executive Director of MDHS, advising that her appointment had been rescinded, because written approval from the former governor was not obtained prior to the appointment. T. at 74.

C. Standard of Review:

In *Harris v. Mississippi Department of Corrections*, 831 So. 2d 1105, 1107 (Miss. 2002), the Court ruled that the de novo is not the standard of review when considering a decision of the Employee Appeals Board. The Court further stated that the standard of review is whether the Employee Appeals Board decision was unsupported by substantial evidence, arbitrary and capricious, beyond powers of the Employee Appeals Board to make, or violative of statutory or constitutional right of complaining party. *Harris*, 831 So. 2d at 1107.

SUMMARY OF ARGUMENT

The appellee's appeal to the Employee Appeals Board should have been dismissed as the issue presented was a non-greivable issue. Further, the appeal should have been dismissed as the appellee failed to comply with Rule 14(A)(5) of the Administrative Rules of the Mississippi Employee Appeals Board. Miss. Empl. App. Bd. Admin. R. 2 (July 2007). The appellee failed to provide a brief summary of each witnesses testimony as stated under Rule 14 (A)(5).

The decision of both the Circuit Court and the Hearing Officer were not supported by substantial evidence, as the appellee failed to prove that the action taken against her was arbitrary or capricious. Moreover, the appellee failed to show that the reasons stated in the January 22, 2005, letter rescinding the appointment were not true.

ARGUMENT

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.

Given that the decisions of the Circuit Court and Hearing Officer focus on whether Ms. McDonald was appointed to the position of County Director, the action taken against MDHS is non-grievable. Rule 2 of the Administrative Rules of the Mississippi Employee Appeals Board, indicates who may appeal and which actions may be appealed. Miss. Empl. App. Bd. Admin. R. 2 (July 2007). Under Rule 2 (C), no person may appeal a non-grievable action. Moreover, Appendix B lists all non-grievable issues. Miss. Empl. App. Bd. Admin. R. Appendix B (July 2007). Subsection E, of Appendix B, states "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 a State Personnel Board rule on filling vacancies."

The appellant, MDHS, objected to the Hearing Officer's refusal to take up the motion to dismiss prior to the hearing. T. at 6-7. The Hearing Officer erred in denying the motion to dismiss, as Pamela McDonald, the appellee, acknowledged that the action taken against her was considered non-grievable. T. at 76. Alternatively, though not specifically addressed by the Hearing Officer, Ms. McDonald contended that the action taken by MDHS affected her compensation. T. at 19. However, the testimony revealed that Ms. McDonald never received any compensation as county director. *Id.* at 19. The Circuit Court erred in affirming the decision of the Hearing Officer.

Ms. McDonald's appeal should have been dismissed pursuant to Rule 2 inasmuch as there is insufficient evidence to prove her appointment was approved by former Governor Ronnie Musgrove, as required by Mississippi Code, Annotated, § 43-1-9 (Supp. 2003). T. at 13.

Ms. McDonald presented the affidavit of former Governor Musgrove, as evidence of his approval of her appointment. However, the letter generated by former MDHS Executive Director, Thelma Britton, dated November 19, 2003, and stamped received in the MDHS human resources department on January 20, 2004, was not signed by the governor. T. at 7, 15. Apparently, this letter was generated for the purpose of serving as verification of the governor's approval, as it had space for his signature. In addition, Bill Renick, the chief of staff for former Governor Musgrove, testified that Governor Musgrove, signed the approval letter prepared by Ms. Britton. T. at 55. However, on cross-examination, Mr. Renick, testified that the Governor signed a letter, other than that generated by Thelma Bretton, dated November 19, 2003 and received on January 20, 2004. T. at 60-63. Mr. Renick was unable to provide an explanation for the discrepancy. Moreover, if a letter with the former Governor's signature existed, the document should have been produced as required by Rule 1002 of the Mississippi Rules of Evidence(2007).

Additionally, appellant, MDHS, introduced several approval letters signed by former Governor Musgrove, and approval letters signed by former Governors Fordice and Mabus. T. at 18. These letters, which are formatted in the same manner as the November 19,2003, letter generated by Ms. Britton, serve as proof that the Governor routinely signed such letters, in compliance with §43-1-9.

II. Whether the Circuit Court erred affirming the Hearing Office 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.

Rule 14(A)(5) of the Administrative Rules of the Employee Appeals Board states that "each party, no later than ten (10) calendar days prior to the hearing date, shall file with the Employee Appeals Board a list of witnesses such party will call to testify at the hearing. The list shall contain for each witness: (5) brief summary of testimony to be given." Moreover, Rule 32 (C) of the Administrative Rules of the Employee Appeals Board states that "the Employee Appeals Board shall have the authority, duty and responsibility to abide by and enforce these

rules." Miss. Empl. App. Bd. Admin. R. 32 (July 2007).

Appellant, MDHS, objected to the appellee's failure to produce the witness list in accordance with Rule 14(A)(5) of the Administrative Rules of the Employee Appeals Board. T. at 6-7. Although, the appellee submitted the affidavits of former Governor Musgrove and former MDHS Executive Director, Thelma Britton, the appellee failed to provide the summaries of Mr. Renick's and Ms. McDonald's testimony, as a part of her witness list. Thelma Britton's affidavit was not made a part of the record. The language utilized in Rule 14 (A)(5) clearly indicates that the witness list had to be filed within ten (10) calendar days of the hearing. Further, the language of Rule 14 (A)(5) also indicates that summaries of the witnesses' testimony had to be provided simultaneously. Therefore, the appeal should be dismissed.

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.

The Mississippi Supreme court has stated that "any decision of any administrative agency must be based upon substantial evidence appearing in the record." *Department of Wildlife Conservation v. Browning*, 578 So.2d 667, 668 (Miss. 1991). The Court also has stated "[t]his is applicable to the Mississippi Employee Appeals Board." *Dept. of Wildlife Cons.*, 578 So.2d at 667. The Mississippi Supreme Court has defined "substantial evidence as something more than a 'mere scintilla' or suspicion." *Pub. Employees'Ret. Sys. v. Marquez*, 774 So.2d 421, 425 (Miss. 2000). Evidence is substantial if it "provides an adequate basis of fact from which the fact in issue can be reasonably inferred." *Pub. Employees'Ret. Sys. v. Dishmon*, 797 So.2d 888, 893 (Miss. 2001). An agency decision is arbitrary "when it is not done according to reason and judgment, but depending on the will alone." *Miss. State Dept. of Health v. Natchez Cmty. Hosp.*, 743 So.2d 973, 977 (Miss. 1999). "An action is capricious if done without reason, in a whimsical manner, implying either a

lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Miss. State Dept. of Health*, 743 So.2d at 977. An agency decision that is not based on substantial evidence is necessarily arbitrary and capricious. *Marquez*, 774 So.2d at 430. Moreover, Rule 21 (B) of the Administrative Rules of the Employee Appeals Board, states "the appealing party shall have the burden of proving that the action taken against the employee is arbitrary, capricious, against the overwhelming weight of the evidence and merits the relief requested." *Miss. Empl. App. Bd. Admin. R. 21 (B)* (July 2007).

Here, the appellee, Ms. McDonald, presented the affidavit of former Governor Musgrove, indicating that he signed the approval letter, appointing her to the position of county director. Ms. McDonald failed to produce the letter, in accordance with Rule 1002 of the Mississippi Rules of Evidence. The appellant, MDHS, contradicted that testimony with a letter generated on November 19, 2003, and received by MDHS' human resources on January 20, 2004, as evidence that the Governor's approval had not been obtained. T. at 15. In addition, Bill Renick, the former chief of staff, testified that the Governor signed a letter, other than the November 19, 2003, letter generated by Thelma Britton, former executive director of MDHS, and intended to serve as verification that the Governor's approval had been obtained. T. at 60-63. However, Ms. McDonald failed to produce that letter as well.

Additionally, the Hearing Officer's ruling indicated that Gloria Jackson, responded to an inquiry by the State Personnel Board regarding the approval letter, by stating that "they had the letter, but could not put their hands on it". Ms. Jackson testified that the Executive Director's office advised that they had the approval letter signed by the Governor, and that "they just needed to put their hands on the letter", in response to the MDHS human resource department's inquiry about the approval letter. T. at 16. Gloria Jackson and Lorraine Eden testified that the promotion packet

was processed without the approval letter, at the instruction of the former Executive Director, Thelma Britton, and her staff. T. at 27, 42. This testimony was not contradicted or impeached. Further, the appellant, MDHS, presented proof that former Governor Musgrove signed similar letters for two other county director appointees, along with approval letters signed by former Governors Fordice and Mabus, as evidence that the Governor routinely indicated his approval of a county director in writing. T. at 18. In the instant cause, the evidence to support the decision is insubstantial. The Hearing Officer concluded that the promotion was short circuited within the agency, but that conclusion is unsupported by substantial evidence in the record. The Circuit Board erroneously found that the appellant met her burden of proof by credible testimony that the outgoing Governor had signed all necessary documents approving her appointment as County Director. Although the testimony and the evidence presented revealed that the letter which was to be signed by both the Executive Director and the Governor, only contained the signature of the Executive Director.

Additionally, Ms. McDonald failed to provide any evidence that MDHS acted in a manner that could be construed as arbitrary or capricious, inasmuch as MDHS took the same action with regard to the other appointments, where the approval letter had not been signed by the Governor. T. at 81-82. The Hearing Officer questioned MDHS regarding the other appointees, and Ms. Jackson advised that none of the other appointees had a signed approval letter, so the appointments were rescinded. T. at 81-82.

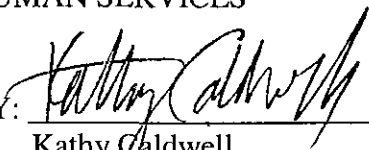
CONCLUSION

Ergo, testimony that is unimpeached and supported by the circumstances should not be arbitrarily disregarded. Here, both the Circuit Court and the Hearing Officer disregarded the surrounding facts and settled controlling principles and ruled favor of the appellee, Ms. McDonald. Ms. McDonald is appealing a non-grievable action, inasmuch she was never officially appointed, and her promotion would have never been processed had the former Executive Director of MDHS not instructed the human resource department to do so. Further, Ms. McDonald failed to comply with Rule 14 (A)(5) of the Administrative Rules of the Mississippi Employee Appeals Board, thus, her appeal should have been dismissed.

Additionally, there was insufficient evidence to support the Circuit Court and Hearing Officer's decision, as there was no evidence that the actions taken by MDHS were arbitrary or capricious, or wholly unsupported by the evidence. Moreover, if the former Governor had signed all the necessary paperwork prior to leaving office, there should have been a letter that he signed and produced in accordance with Rule 1002 of the Mississippi Rules of Evidence at the hearing. Ms. McDonald like the other appointees was unable to produce such a letter. Therefore, for the reasons set forth herein, the Circuit Court and the Hearing Officer's ruling should be reversed.

RESPECTFULLY SUBMITTED, this 18TH day of May, 2009.

MISSISSIPPI DEPARTMENT OF
HUMAN SERVICES

BY: 
Kathy Caldwell
Attorney for MDHS

OF COUNSEL:

KATHY CALDWELL [REDACTED]
ATTORNEY FOR APPELLANT
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-4269
Facsimile: (601) 359-4240

CERTIFICATE OF SERVICE

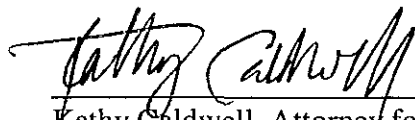
I, Kathy Caldwell, Attorney for the Appellant, Mississippi Department of Human Services, hereby certify that I have this date mailed a true and correct copy of the foregoing *Brief of the Appellant* to the following at their usual business address:

Honorable Matthew Y. Harris
Attorney for Appellee, Pamela McDonald
Rutledge & Davis, P.L.L.C.
Post Office Drawer 29
New Albany, Mississippi 38652

Honorable Judge W. Swan Yerger
Hinds County Circuit Court
Post Office Box 327
Jackson, Mississippi 39205

This the 18th day of May, 2009.

Respectfully Submitted,


Kathy Caldwell, Attorney for
MDHS

KATHY CALDWELL, [REDACTED]
ATTORNEY FOR APPELLANT
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-4269
Facsimile: (601) 359-4240