

IN THE SUPREME COURT OF MISSISSIPPI

MICHAEL GRAZIOSI

APPELLANT

VS.

CAUSE NO. 2009-CA-00838

CITY OF JACKSON, MISSISSIPPI

APPELLEE

**On Appeal From The Chancery Court
of Hinds County, Mississippi
Cause Number G2008-1824
Honorable Denise Owens**

Brief of Appellee City of Jackson

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), 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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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STATEMENT REGARDING ORAL ARGUMENT

The City of Jackson takes no position with respect to oral argument, and therefore defers to the Court on this issue.

STATEMENT OF THE ISSUES

1. The Chancellor's decision was not manifestly in error when she ruled that the City of Jackson did not violate the terms of the parties mutual agreement. This finding of fact by the Chancellor was based on substantial evidence in the record.
2. The Chancellor's ruling that the City of Jackson acted in good faith with respect to Graziosi's termination was a correct interpretation and application of law.
3. Whether Michael Graziosi's employment was controlled by Mississippi contract law is of no consequence because the City of Jackson did not violate the terms of the parties agreement, and the City of Jackson acted in good faith, and in accordance with the terms of the Settlement Agreement freely entered into and agreed upon by the parties.

STATEMENT OF THE CASE

Appellant Michael Graziosi (hereinafter "Graziosi") was employed as a City of Jackson firefighter. Appellee City of Jackson placed Graziosi on administrative leave without pay from November 22, 2002 to May 5, 2005 when he was terminated. T.T. at 16, lines 7-9. R. at 2. Shortly thereafter, Graziosi appealed his termination to the City of Jackson Civil Service Commission. R. at 32. The Civil Service Commission upheld the City of Jackson's decision to terminate Graziosi but awarded back wages for the period Graziosi was placed on administrative leave. *Id.*

Graziosi wanted to return to the Jackson Fire Department. Accordingly, Graziosi engaged in settlement negotiations with the City of Jackson and voluntarily agreed to accept \$45,000.00 for back wages, instead of what was ordered by the Civil Service Commission. T.T. at 5, line 24. In addition, Graziosi voluntarily agreed to the following:

- Reinstatement as a City of Jackson firefighter at his previous rank as Captain;
- Serve a probationary period of twelve (12) months in which Graziosi would not have the protection of the Civil Service Commission;
- That by entering into the Settlement Agreement with the City of Jackson, that that does not mean that he would not be subject to discipline for misconduct; and
- During the twelve (12) month probationary period, the City of Jackson would exercise good faith in the imposition of discipline and severe disciplinary action would be subject to approval by the Mayor.

R. at 10.

The Settlement Agreement (sometimes referred to as the "agreement") was voluntarily entered into by Graziosi and approved by his attorney, Judson Lee. R. at 8-11. Graziosi was reinstated effective September 15, 2007. R. at 10.

On November 13, 2007, Graziosi attended an International Association of Firefighters Local 87 meeting at the union hall located in Jackson, Mississippi. T.T. at 133. After the union meeting, Lieutenant Travis Frazier (hereinafter "Lt. Frazier") informed other union members Patrick Armon (hereinafter "Armon") and Brandon Falcon (hereinafter "Falcon") that Graziosi could not just pay his union dues and vote. *Id.* Lt. Frazier informed Falcon and Armon that because Graziosi had been out of the union, reinstatement consisted of more than paying dues. *Id.* Graziosi was sitting in the union hall and overheard Lt. Frazier stating this to Armon and Falcon. Graziosi got up from his seat in the union hall and began cursing at Lt. Frazier. T.T. at 133-134. Graziosi approached Lt. Frazier and punched Lt. Frazier on the left side of his head in the presence of Armon and Falcon. T.T. at 134. Graziosi admits that he was, "escorted out of the building by the union president." T.T. at 10, lines 15-16.

Lt. Frazier waited on Graziosi to leave the union hall and then went downstairs to call the police department to report the incident. T.T. at 134, lines 19-24. Officer Deidra Jefferson (hereinafter "Officer Jefferson") arrived on scene shortly after the incident and took a report. T.T. at 134, lines 25-27. In that report Officer Jefferson noted that Lt. Frazier's left temple was really red. T.T. at 85, line 8-10. Pursuant to standard police procedure, Officer Jefferson interviewed Lt. Frazier with respect to the facts of the incident. T.T. at 85. Officer Jefferson completed her report the same night before the end of her shift. T.T. at 86, line 1.

After Lt. Frazier filed a report with Officer Jefferson at the union hall, Lt. Frazier went to the Jackson Police Department the same night to swear out an affidavit against

Graziosi for assault. T.T. at 135, line 1. T.E. 6.¹ Lt. Frazier went to MEA on November 14, 2007, the day following the assault, for complaints of headaches, nausea, and dizziness. T.T. at 135, lines 13-16. The treating physician at MEA sent Lt. Frazier to get a CT scan to ensure there was no internal bruising. T.T. at 137, lines 23-25.

On November 17, 2007, Chief Investigator Gregory Travis (hereinafter "Chief Travis") issued a field release for Graziosi and gave Graziosi a citation for the assault charge filed by Lt. Frazier. T.T. at 11. In addition to being an Investigator, Chief Travis is also Chief of the Internal Affairs Division of the Jackson Fire Department. T.T. at 111, line 10-11. Shortly after Chief Travis issued the field release to Graziosi, City of Jackson Fire Chief Vernon Hughes (hereinafter "Chief Hughes") instructed Chief Travis to conduct an Internal Affairs Investigation into the incident. T.T. at 112, line 21-25. Chief Travis began interviewing for the Internal Affairs Investigation. T.T. at 113, lines 13-16. Chief Travis interviewed Graziosi, Frazier, Armon and Falcon during the course of the Internal Affairs Investigation. T.T. at 113, line 15-19. However, Armon and Falcon did not want to share any "union business" with Chief Travis. T.T. at 114, lines 7-8. T.T. at 115, lines 6-8.

Lt. Frazier informed investigators during the Internal Affairs Investigation that he was struck in the head by Graziosi.² T.E. 6. Graziosi told Investigators during the Internal Affairs Investigation that he did not strike Lt. Frazier. *Id.* In addition to the witnesses, Chief Travis reviewed the affidavit for assault filed by Lt. Frazier, the police

¹ T.E. denotes trial exhibits that are contained in the record.

² Although Plaintiff asserts that the Internal Investigation says right side of head, every other document and all other evidence in this matter states that Lt. Frazier was struck by Graziosi on the left side of his head. The side of the head on which the assault occurred is of no moment, rather it is the fact that an assault occurred that is probative.

report and learned that Lt. Frazier went to the medical doctor and that there were medical records, but he did not review them. T.T. at 118, lines 19-29. Chief Travis found that there was sufficient evidence to conclude that the assault did occur. T.T. at 119, lines 18-19. Chief Travis reported his findings to Chief Hughes. T.T. at 120, lines 26-27.

After receiving the results of the Internal Affairs Investigation, Chief Hughes reviewed the Internal Affairs Investigation, the police report, a medical record where Lt. Frazier went to the doctor, and the rules and regulations of the City of Jackson. T.T. at 92-93. After a review of the documents and applicable regulations, and after receiving approval by the Mayor, Chief Hughes terminated Graziosi. T.T. at 102, lines 28-29. On April 10, 2008, Chief Hughes wrote Graziosi a letter of termination. R. at 58. In that letter of termination, Chief Hughes stated to Graziosi that his employment was conditioned on a one (1) year probationary period which was mutually agreed upon by the parties. *Id.* In addition, Chief Hughes stated that the Internal Affairs Investigation concluded that there was sufficient evidence to support Frazier's allegation that Graziosi assaulted him, and that that behavior constituted offensive behavior and is grounds for discipline pursuant to Rule 11.2.7 of the City of Jackson Personnel Handbook. *Id.* In addition, Graziosi was a probationary employee and pursuant to Rule 4.5.6 he could be terminated, demoted or dismissed by the City of Jackson at any time with or without cause. T.T. at 94, line 18.

On September 3, 2008, the assault charge against Graziosi was tried before the Hinds County Justice Court. R. at 34. At the Justice Court hearing, Armon and Falcon testified on behalf of Graziosi and Lt. Frazier was the only witness that testified for the prosecution. T.T. at 17. Inexplicably, Officer Jefferson did not testify at the Justice

Court criminal hearing, nor did Chief Travis testify at the Justice Court criminal trial. T.T. at, 101 lines 11-14. In addition, Lt. Frazier is unsure if any of his medical records were submitted to the Justice Court Judge. T.T. at 143, lines 11-13. The Hinds County Justice Court determined that Graziosi was not guilty beyond a reasonable doubt. T.E. 4.

On October 9, 2008, Graziosi filed a Petition to Enforce Settlement Agreement. R. at 1. A trial on Graziosi's Petition to Enforce Settlement Agreement was held February 2-3, 2009 before the Honorable Denise Owens. After the trial, both parties submitted proposed findings of fact and conclusions of law to Judge Owens. T.T. at 154-155. On March 12, 2009, Chancellor Owens issued an Opinion and Order, finding that the City of Jackson acted in good faith with respect to its termination of Graziosi and that the City of Jackson did not violate the terms of the Settlement Agreement. R. at 32-38.

SUMMARY OF THE ARGUMENT

The Chancellor was not manifestly in error when she ruled that the City of Jackson did not violate the terms of the Settlement Agreement. The City of Jackson and Graziosi voluntarily agreed upon the terms of the Settlement Agreement. T.T. at 10, lines 2-4.

The City of Jackson reinstated Graziosi to a Lieutenant, his previous rank in the Jackson Fire Department. In turn, Graziosi voluntarily agreed to serve a twelve (12) month probationary period, in fact Graziosi offered that term to the City of Jackson. T.T. at 31, lines 1-4. Less than two months after his return, Graziosi assaulted a fellow

fire fighter. The City of Jackson investigated the assault and acted in good faith with respect to the imposition of discipline; Graziosi's termination was approved by the Mayor. T.T. at 102, lines 28-29. Therefore, the Chancellor correctly determined that the City of Jackson did not violate the terms of the Settlement Agreement.

Moreover, the Chancellor correctly applied the law when she found that the City of Jackson acted in good faith with respect to Graziosi's termination. The Chancellor correctly held that the City of Jackson did not act with bad faith in the imposition of discipline and termination of Graziosi. Specifically, the City of Jackson:

- followed established procedures in its imposition of discipline;
- did not take any action against Graziosi until the November 13, 2007 incident occurred;
- initiated a voluntary Internal Affairs Investigation, to obtain more facts about the assault; and
- Graziosi's termination was approved by the Mayor.

R. at 32-38.

The Chancellor's interpretation and application of the law with respect to good faith is correctly applied in the case at bar.

The record on appeal and applicable law reflects that the Chancellor was not manifestly in error nor did she interpret and apply the law incorrectly. Moreover, the Chancellor's findings are supported by substantial evidence in the record. Therefore, this Court should affirm the Chancellor's decision.

STANDARD OF REVIEW

When reviewing a chancellor's decision, the reviewing court ***will accept*** the chancellor's findings of fact as long as the evidence in the record ***reasonably supports*** those findings (emphasis added). *Norton v. Norton*, 742 So.2d 126, 128-29 (Miss. 1999). The appellate court will apply a limited standard of review on appeals from chancery court. *Tucker v. Prisock*, 791 So.2d 190 (Miss.2001). Findings of the chancellor will not be disturbed or set aside on appeal unless the decision of the chancellor is ***manifestly in error***, the chancellor abused his/her discretion and the decision is not supported by substantial evidence, or an erroneous legal standard has been applied. *Hill v. SE. Floor Covering Co.*, 596 So.2d 874, 877 (Miss.1992). *See also*, *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss.1997), *Jacobs v. Jacobs*, 918 So.2d 795 (Miss.2005).

Because the Chancellor's Opinion denying Plaintiff's Petition to Enforce Settlement is based on substantial evidence placed before the Court and a correct application of the law, the Chancellor's ruling should not be disturbed on appeal. The Chancellor correctly held that the City of Jackson did not violate the terms of its agreement with Graziosi. Moreover, the Chancellor found that the City of Jackson acted in good faith with respect to Graziosi's termination. R. at 32-38. The Chancellor's interpretation and application of the law with respect to good faith is correctly applied and therefore Graziosi has no basis for this appeal.

The City of Jackson submits that the Chancellor's determinations as stated in the Order are supported by substantial evidence in the record and the Chancellor was not manifestly in error in her interpretation and application of the law.

ARGUMENT

- I. The Chancellor was not manifestly in error when she ruled that the City of Jackson did not violate the terms of the parties mutual agreement. This finding by the Chancellor was based on substantial evidence in the record.**

The Chancellor correctly held that the City of Jackson did not violate the terms of its agreement with Graziosi. A Chancellor's finding of fact will not be disturbed on appeal unless the finding is not supported by substantial evidence in the record. *Lee v. Lee*, 12 So.3d 548 (Ct.App.2009). On or about November 22, 2002, Graziosi was placed on administrative leave without pay. T.T. at 6, lines 7-9. R. at 2. Shortly after Graziosi's termination on May 5, 2005, Graziosi appealed his termination to the Civil Service Commission. The Civil Service Commission upheld Graziosi's termination but awarded Graziosi back wages. R. at 32. On September 7, 2007, the City of Jackson and Graziosi entered into a Settlement Agreement as a release of claims that arose out of Graziosi's termination on or about May 5, 2005. R. at 8-11. Pursuant to the September 7, 2007 Settlement Agreement voluntarily made between Graziosi and the City of Jackson³:

- Graziosi would be reinstated as a City of Jackson firefighter at his previous rank as Captain;
- Graziosi would serve a probationary period of twelve (12) months in which Graziosi would not have the protection of the Civil Service Commission; and
- The City of Jackson agreed that it would follow established procedure in its imposition of discipline; and
- Discipline which resulted in time loss and/or termination would be approved by the Mayor.

³ Graziosi not only voluntarily entered into the Settlement Agreement with the City of Jackson, his Attorney Judson Lee also approved the Settlement Agreement and Release. R. at 9.

R. at 10.

As outlined below, the City of Jackson complied with all terms of the Settlement Agreement.

A. Graziosi was reinstated to the City of Jackson Fire Department at his previous rank.

Pursuant to the agreement, Graziosi's reinstatement was effective September 15, 2007 and Graziosi returned to the City of Jackson on or about September 15, 2007. R. at 10. T.T. at 19-21. Moreover, Graziosi returned to the City of Jackson in September, 2007 as a Captain, the rank he had prior to his termination on or about May 5, 2005. T.T. at 27-28.

B. Graziosi agreed to serve a twelve (12) month probationary period without the protection of the Civil Service Commission.

Graziosi agreed in the Settlement Agreement to serve a twelve (12) month probationary period just like every new hire to the City of Jackson Fire Department. T.T. 96 line 24-26. In fact, ***Graziosi offered to serve*** a twelve (12) month probationary period (emphasis added). T.T. at 31, line 1-4. City of Jackson Department of Personnel Management Employee Handbook (hereinafter "employee handbook") Rule 4.5.1 provides that, "[a]ll initial appointments made to a vacant regular position ***shall be*** considered probationary for twelve (12) months from the date of the appointment (emphasis added). T.E. 8.

C. The City of Jackson followed established procedure in its imposition of discipline.

The City of Jackson and Graziosi further agreed that the City of Jackson would follow established procedure in its imposition of discipline. R. at 10. The City of

Jackson followed established procedure in imposition of discipline. R. at 32-38. Rule 11.2 of the employee handbook provides:

improper conduct may be cause for disciplinary action. The term "improper conduct" means not only any improper action by employees in their official capacity, **but also conduct by employees not connected with their official duties . . .**

T.E. 8.

Moreover, Employee Handbook Rule 11.2.21 provides that an employee may be disciplined for conduct unbecoming to employees of the City, either while on or off duty. *Id.* T.T. at 94, line 18. Accordingly, the City of Jackson followed established procedure in its imposition of discipline when Chief Hughes advised Graziosi that the assault on Lt. Frazier is behavior that constitutes offensive behavior or treatment of other employees and is therefore grounds for disciplinary action pursuant to Rule 11.2.21. R. at 32-38. Not only did the City of Jackson follow established procedure in its imposition of discipline on Graziosi, but the City of Jackson as discussed *infra* in the preceding afforded Graziosi extra deference by affording Graziosi the benefit of an Internal Affairs Investigation that is not mandated by the Settlement Agreement nor the rules in the City of Jackson Employee Handbook.

D. Chief Hughes received approval by the mayor before terminating Graziosi.

Lastly, the terms of the Settlement Agreement provide that any disciplinary action resulting in loss of time or termination will be subject to the approval of the Mayor. R. at 10. As required by the terms in the Settlement Agreement, Chief Hughes sought and received approval of the Mayor of the City of Jackson before terminating Graziosi. T.T. at 102, lines 28-29. This is not disputed by Graziosi. Accordingly, the

Chancellor's finding that the City of Jackson did not violate the terms of the Settlement Agreement is not manifestly in error and should not be disturbed on appeal.

II. The Chancellor applied a correct interpretation and application of the law with respect to its ruling that the City of Jackson acted in good faith.

Graziosi argued that the City of Jackson breached its duty of good faith. The Chancellor correctly held that the City of Jackson did act in good faith with respect to its duty to Graziosi. R. at 32-38. The Chancellor held that all contracts contain an implied covenant of good faith and fair dealing in performance and enforcement. *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss.1992) (citing *Morris v. Macione*, 546 So.2d 969, 971 (Miss.1989)) R. at 36. In addition, the Chancellor stated that, "[t]he breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness." *Id.* (citing Restatement (Second) of Contracts § 205, 100(1979)). However, in performing a contract, the parties are not prevented from "protecting their respective economic interests" or from asserting their rights in the event of a default. *Merchants & Planters Bank of Raymond v. Williamson*, 691 So.2d 398, 405 (Miss.1997). *Id.* Graziosi makes no argument as to how this is an incorrect application of law, and thus this issue is waived on appeal.

Graziosi claims that the City of Jackson terminated him with no credible or verifiable evidence to support the City's decision thereby rendering Graziosi's termination arbitrary and capricious. *Id.* The City's decision to terminate Graziosi was done in good faith and based on substantial evidence placed before the Court. Graziosi returned to the City of Jackson Fire Department on or about September 15, 2007. R. at

10. The City of Jackson did not terminate Graziosi until April 10, 2008, some five (5) months after the incident, and only after an Internal Affairs Investigation. T.E. 3.

A. The City of Jackson performed a voluntary Internal Affairs Investigation not required by the Settlement Agreement nor the rules in the City of Jackson Employee Handbook.

After the November 13, 2007 incident, the City of Jackson voluntarily conducted an Internal Affairs Investigation into the alleged assault of Lt. Frazier. T.T. at 110, lines 1-6. Moreover, there is nothing in the City of Jackson Employee Handbook that requires that an Internal Affairs Investigation be done, nor is there anything in the Settlement Agreement that requires that an Internal Affairs Investigation be done. *Id.* Graziosi does not dispute this fact. The City could have terminated Graziosi without an investigation because as Graziosi offered, he was a probationary employee. Nevertheless, Graziosi was afforded an extra measure of due process, an Internal Affairs Investigation.

B. There was substantial evidence placed in the record to support the Chancellor's conclusion that the City of Jackson did not terminate Graziosi without ascertaining sufficient evidence.

The Chancellor ruled that the City of Jackson did not simply terminate Graziosi without ascertaining sufficient evidence. R. at 37. Chief Travis conducted an Internal Affairs Investigation and interviewed Graziosi, Lt. Frazier, Falcon and Armon as part of the Internal Affairs Investigation. T.T. at 113, lines 15-19. Chief Travis gathered the following information from the witnesses during the course of the Internal Affairs Investigation:

- Lt. Frazier informed Chief Travis that Graziosi struck him on his head; T.E. 6.

- Graziosi informed Chief Travis that he did not strike Graziosi on the head; T.E. 6.; and
- Falcon and Armon provided no pertinent information either way and stated that they did not want to discuss “union business” with the Internal Affairs division. T.T. at 114, line 9-12. T.T. at 115, lines 9-12.

In addition, to gathering information from witnesses, Chief Travis also reviewed the police report, the affidavit for assault filed by Lt. Frazier, and had knowledge of Lt. Frazier’s medical records. T.T. at 119. Based on all the factual information gathered by Chief Travis, he reached the reasonable conclusion that more likely than not, the assault did occur. Chief Travis reported his findings to Chief Hughes. T.T. at 119-120.

Graziosi’s contention that the Internal Affairs Investigation was inconclusive and inaccurate because the transcription of the Internal Affairs Investigation was transcribed to read that Lt. Frazier was hit in the right side of his head instead of the left side of the head is of no consequence. Lt. Frazier gave an interview to the Internal Affairs Division, but did not read his statement for accuracy after giving it to Internal Affairs, and Lt. Frazier did not sign his statement. T.T. at 141, lines 1-11. Moreover, Lt. Frazier had not seen a copy of the typed interview until trial. *Id.* In addition, all other documents relevant to this matter state that Lt. Frazier was struck by Graziosi on the left side of his head. The incident report states that Lt. Frazier had visible redness to the left side of his temple area. T.E. 6. Moreover, Lt. Frazier’s affidavit for assault against Graziosi, that was sworn to and signed by Lt. Frazier, states that Graziosi struck Lt. Frazier on the left side of his head. *Id.* Moreover, Lt. Frazier testified at the Justice Court criminal trial that he was hit in the left side of his head. T. T. at 142, lines 5-9. Again, this fact was not contested by Graziosi; hence a **scriveners error** is not enough to place the Chancellor manifestly in error (emphasis added).

While Graziosi finds the mere fact that the Internal Affairs transcription that reads that Lt. Frazier was struck on the right side on his head instead of the left side of his head is enough to reach a conclusion that the Internal Affairs Investigation is inconclusive and inaccurate. This assertion is not supported by any case law, statute, or other authority.

C. The City of Jackson acted in good faith in dealing with Graziosi.

The Chancellor also found that discipline against Graziosi had not been threatened, hinted to, or mentioned until this incident. On November 13, 2007, the date of the alleged assault, Graziosi had been employed with the City of Jackson Fire Department since September 15, 2007 and had not had any indication or threat of discipline. R. at 36. Graziosi was only disciplined after the November 13, 2007 incident with Lt. Frazier, and Graziosi was not terminated until April 10, 2008, some five (5) months after the incident. *Id.* Graziosi was not terminated until April 10, 2008, some five (5) months after the incident because the City of Jackson was performing a voluntary Internal Affairs Investigation to determine more information on the alleged assault. T.T. at 110, line 1-6.

In addition, the Chancellor made a finding of fact based on the evidence that the City of Jackson did not simply terminate Graziosi without ascertaining sufficient evidence and following proper procedures. R. at 36. The Chancellor made this fact determination based on sufficient evidence presented at trial. *Id.* The fact that Graziosi was not threatened with discipline prior to the rise of a legitimate incident, along with the fact that Graziosi was afforded a voluntary Internal Affairs Investigation is evidence of the City's good faith dealing with Graziosi. Based on the substantial evidence in the

record as outlined above, the Chancellor correctly held that the City of Jackson had **sufficient evidence** and an **objective reason** to terminate Graziosi (emphasis added).

In fact, it is disingenuous for Graziosi to assert that the City of Jackson did not follow proper procedure and/or did not act in good faith with respect to his termination when Graziosi was afforded the benefit of a voluntary Internal Affairs Investigation before the imposition of discipline, not required by the Settlement Agreement nor required by the rules of the City of Jackson employee handbook. Moreover, Graziosi has asserted his opinions publicly about the imposition of discipline in the Jackson Fire Department and its importance. T.T. at 29, lines 8-11. Graziosi has publicly stated to the Clarion Ledger, Letter to the Editor, that a firefighter **should be terminated** for lying, and that the act of lying constitutes conduct unbecoming and is grounds for termination (emphasis added). T.T. at 29, lines 26-29. T.T. at 30, lines 8-11.

Not only is Graziosi selective and disingenuous in his application and imposition of discipline, but Graziosi voluntarily agreed to all terms in the parties Settlement Agreement. The Settlement Agreement was not only agreed to by Graziosi, but approved by his attorney, Judson Lee. R. at 8-11. In that agreement, Graziosi **agreed** that his return to work **did not mean that he would not be subject to discipline for misconduct** (emphasis added). R. at 10. Graziosi was aware that termination is a form of discipline, and that Graziosi would still be subject to discipline including termination for misconduct. T.T. at 30, lines 15-17. Moreover, the plan language of the Settlement Agreement states, that Graziosi may be disciplined with *loss of time or termination*, as long as it is approved by the Mayor. R. at 10.

Further, there was no evidence in the record that the City of Jackson did not act in good faith when both parties **agreed** and Graziosi offered to serve a probationary twelve (12) month period as terms of his re-employment. Every new hire is required to serve a twelve (12) month probationary period without the protection of the Civil Service Commission. T.E. 8. T.T. at 96, lines 27-29. Graziosi did not dispute this fact.

In Graziosi's brief, he cites to the same case law as the Chancellor, with respect to good faith and fair dealing. Graziosi cites to *Cenac v. Murray*, 609 So.2d 1257, 1272 (Miss.1992) and *Cenac* citing Restatement (Second) of Contracts § 205, 100 (1979). Graziosi's Brief, P. 7-8. Graziosi cites to the same case law the Chancellor did to stand for the proposition that all contracts contain an implied covenant of good faith and fair dealing in performance and enforcement, and that the breach of good faith is bad faith. *Id.*

Further, Graziosi asserts that the City of Jackson must take affirmative steps to ensure the expectations of the other party and cites *Cenac* as its basis for that assertion. Graziosi's Brief P. 8. This basis is misapplied because in the next sentence Graziosi cites the exact language from *Cenac* which states:

“ . . .The duty may not only proscribe undesirable conduct, but **may require** affirmative action as well. A party **may thus** be under a duty not only to refrain from hindering or preventing the occurrence of conditions of his own duty or performance of the other party's duty . . .”

Graziosi's Brief P. 8. *Cenac*, 609 So. 2d 1257 at 1272.

It is non-sensical for Graziosi to make a statement that the City of Jackson **must take** affirmative steps to ensure the expectation of the other party, when the case law cited **clearly states** that a party **may be** required to take affirmative steps in achieving

the performance of the contract (emphasis added). Not only does the plain language in the case state a party may be required to assume this heightened duty, but Graziosi does not explain how this case is one in which that heightened duty is mandated, in that the City of Jackson must take affirmative steps to ensure Graziosi's expectation. Further, the City of Jackson did not prevent fulfillment of the contract, Graziosi did. Graziosi argues that less severe measures of discipline could have been taken. Graziosi appears to argue that he could only be subject to the discipline that he chooses. This position, while creative, ultimately carries no weight where the record contains substantial evidence supporting the chosen discipline.

Graziosi makes a circular argument that the Chancellor applied an arbitrary and capricious standard in place of good faith, in an attempt to assert his position that the Chancellor misapplied the law and/or used an erroneous legal standard. This is simply not correct. The Chancellor stated in her order that the City of Jackson acted in good faith based on her analysis of the facts, and the same case law that Graziosi cited in his brief. R. at 32-38. Graziosi's Brief, P. 7-8. The Chancellor specifically held that the City did not act in bad faith, which case law defines as violating standards of decency, fairness or reasonableness. *Cenac*, 609 So.2d, 1257. Based on the facts in the record, the Chancellor found that the City of Jackson did not violate the standards of decency, fairness or reasonableness. Moreover, Graziosi states that there is a distinction between the arbitrary and capricious standard and the good faith standard, but cites to no case law, statute or other authority to prove that position.

Moreover, Graziosi states that the Chancellor's reliance on *Miss. Bureau of Narcotics v. Stacy* is misplaced in that it relies on an arbitrary and capricious standard

of review of an employee termination. However, the Chancellor's Order does not provide that she is applying an arbitrary and capricious standard of review for employee terminations. In contrast, the Chancellor's Order states that she ruled on a Petition to Enforce Settlement Agreement. R. at 32-38. It is disingenuous for Graziosi to assert that the Chancellor is incorrect in stating that the City did not act arbitrarily or capriciously when Graziosi placed this language before the court. R. at 36. The Order states that, "Graziosi claims that the City of Jackson terminated him with no credible evidence or verifiable evidence to support its decision thereby rendering his termination arbitrary and capricious." *Id.* Moreover, the Court did not use an arbitrary and capricious standard to review the Petition to Enforce Settlement, but applied the standards of good faith and fair dealing in making the ruling that the City of Jackson acted in good faith, and that they complied with the terms of the Settlement Agreement. R. at 32-38. Again, Graziosi cites to nothing in the record or the Chancellor's order where it states that an arbitrary and capricious standard of review was applied in this matter.

In Graziosi's brief, he provides no case law, statute or other authority that the Chancellor applied an incorrect interpretation and application of the law with respect to "good faith and fair dealing". The Chancellor applied the correct interpretation and application of the law, and moreover she made a fact finding based on substantial evidence in the record, that the City of Jackson had substantial evidence and an objective reason to terminate Graziosi, and therefore the Chancellor was not manifestly in error and this finding should not be disturbed on appeal.

III. Whether Michael Graziosi's employment was controlled by Mississippi contract law is of no consequence because the City of Jackson did not violate the terms of the parties agreement, and the City of Jackson acted in good faith, and in accordance with the terms of the Settlement Agreement freely entered into by the parties.

Graziosi states in his brief, that the Chancellor found Graziosi was an at-will employee and could be terminated at any time. Graziosi's Brief P. 7. The fact that the Chancellor stated this in her opinion is of no consequence, because the Chancellor made this statement in the Order **after finding** that the City of Jackson acted in good faith with respect to its termination of Graziosi (emphasis added). The Chancellor held that the City of Jackson did not terminate Graziosi without ascertaining sufficient evidence and followed the proper procedure. R. at. 36-37. Specifically the Chancellor stated,

"Thus, the City of Jackson did not simply terminate Graziosi without ascertaining sufficient evidence and following proper procedure. The City of Jackson conducted a full Internal Affairs Investigation which it was not required to do. **Even still**, Graziosi was an at will employee and could have been terminated for any reason and at any time."

Id.

The basis for the Chancellor's decision is included in the last paragraph of her opinion and states:

"The agreement relevant to this case stated that the City of Jackson was to 1) follow established procedure in its imposition of disciplinary action that resulted in time loss or termination; and 2) ascertain approval of such from the Mayor. Chief Hughes testified that he did seek approval from the Mayor, prior to terminating Graziosi. Moreover, this Court is persuaded that the City of Jackson followed established procedures in its termination of Graziosi. This Court is also **persuaded that the City of Jackson acted with substantial evidence** and thus its actions were not arbitrary and capricious. **The City of Jackson acted in good faith and fair dealing.**"

R. at 38.

The basis for the Chancellor's decision is that the City of Jackson complied with the terms of the Settlement Agreement and acted in good faith and fair dealing. Therefore, the mere statement in the Order that Graziosi could be terminated at any time does not make the Chancellor manifestly in error, absent some other mistake.

Moreover, the fact that the Justice Court Judge found Graziosi not guilty is also of no consequence. There is no rule in the City of Jackson rules and regulations that mandate that a finding of guilt or innocence must be made before disciplinary action is taken. T.T. at 101, line 16. In addition, the Chancellor correctly states that the City of Jackson was not bound by the outcome of the criminal trial. R. at 37.



CONCLUSION

Graziosi has not met his burden on appeal to demonstrate that the Chancellor was manifestly in error, clearly erroneous and misapplied the law. The City of Jackson has further shown that the Chancellor's findings were based on substantial evidence in the record. Accordingly, the City of Jackson respectfully requests that this Court affirm the Judgment entered by the Hinds County Chancery Court in favor of the City of Jackson. The City of Jackson further requests any and all relief which it may be entitled to.

RESPECTFULLY submitted, this the 13th day of November, 2009.

CITY OF JACKSON, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Kimberly Banks, one of the attorneys for the Defendant do hereby certify that I have served this day via United States Mail, postage prepaid, a true and correct copy of the aforementioned document on the following:

Judson Lee, Esq.
Attorney at Law
Post Office Box 2629
Madison, Mississippi 39110

Honorable Denise Owens
Hinds County Chancery Court
407 East Pascagoula Street
Jackson, Mississippi 39201

So certified, this the 13th day of November, 2009.



KIMBERLY BANKS