

IN THE SUPREME COURT OF MISSISSIPPI  
2009-CA-00838

MICHAEL GRAZIOSI

APPELLANT

V.

CITY OF JACKSON, MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

ON APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY

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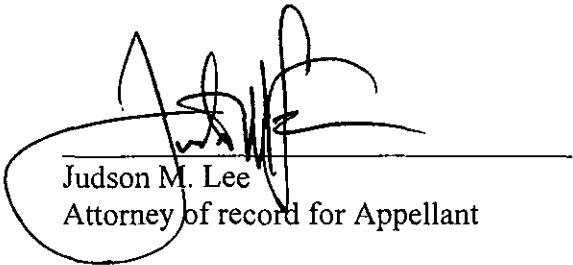
CITY OF JACKSON, MISSISSIPPI

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Michael Graziosi.....Appellant
2. Judson M. Lee, Esq. ....Attorney for Appellant
3. City of Jackson, Mississippi.....Appellee
4. Pieter Teeuwissen, Esq. ....Attorney for Appellee
5. Kimberly C. Banks, Esq. ....Attorney for Appellee



Judson M. Lee  
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## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES.....	i
TABLE OF CONTENTS .....	ii
TABLE OF CASES AND AUTHORITIES.....	iii
STATEMENT REGARDING ORAL ARGUMENT.....	iv
STATEMENT OF ISSUES .....	v
STATEMENT OF THE CASE .....	1
A.    Course of Proceedings.....	1
B.    Statement of the Facts.....	1
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT.....	7
I.    Standard of Review.....	7
II.   The termination of Graziosi’s employment could only be controlled by contract law .....	7
III.  The Chancellor incorrectly applied an “arbitrary and capricious” standard in place of good faith.....	9
IV.  The Chancellor abused her discretion in finding that the City of Jackson acted in good faith.....	10
A.    The Internal Affairs investigation was inconclusive.....	11
B.    The City did not rely on medical records.....	12
C.    The police report was inconclusive.....	13
D.    Applying the evidence under the standards of good faith would have yielded a different result.....	13
CONCLUSION .....	15

## TABLE OF CASES AND AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<i>Bailey v. Estate of Kemp</i> 955 So. 2d 777 (Miss. 2007).....	7
<i>Cenac v. Murry</i> 609 So. 2d 1257 (Miss. 1992).....	7, 8, 9
<i>McDerment v. Mississippi Real Estate Commission</i> 784 So. 2d 114 (Miss. 1999).....	10
<i>Mississippi Bureau of Narcotics v. Stacy</i> 817 So. 2d 523 (Miss. 2002).....	9, 10
<i>Morris v. Macione</i> 546 So. 2d 969 (Miss. 1989).....	7
 <u>AUTHORITIES</u>	
Farnsworth, Contracts § 7.17 at 526-27 (1982).....	8
Restatement (Second) of Contracts § 205 at 100 (1979).....	8, 9

**STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument.

## **STATEMENT OF ISSUES**

1. Whether the termination of Michael Graziosi's employment was controlled by Mississippi contract law.
2. Whether the Chancellor erred in applying an "arbitrary and capricious" standard to determine if the City of Jackson acted in good faith when it terminated Michael Graziosi's employment.
3. Whether the Chancellor abused her discretion when she found the City of Jackson acted in good faith when it terminated Michael Graziosi.

## STATEMENT OF THE CASE

### **A. Course of Proceedings**

The Petitioner/Appellant in this action is Michael Graziosi (hereinafter "Graziosi"). The Respondent/Appellee is the City of Jackson (sometimes referred to as "City"). On October 9, 2008, Graziosi initiated this action by filing a *Petition to Enforce Settlement Agreement* in the Chancery Court for the First Judicial District of Hinds County, Mississippi. (R. 1). On February 2-3, 2009, the Chancellor, the Honorable Denise Owens, held a hearing in this matter. On March 12, 2009, Judge Owens issued her *Opinion Denying Petition to Enforce Settlement*. (R. 32). On April 22, 2009, Judge Owens entered a *Final Judgment* consistent with her *Opinion Denying Petition to Enforce Settlement*. (R. 39). On May 22, 2009, Graziosi filed his *Notice of Appeal* and takes this appeal from the *Final Judgment* entered on April 22, 2009. (R. 41).

### **B. Statement of the Facts**

On November 11, 1988, Graziosi began employment as a firefighter with the City of Jackson Fire Department. (R. 2). Approximately fourteen (14) years later, on November 22, 2002, Graziosi was placed on administrative leave without pay. (R. 2). The City of Jackson held Graziosi on leave without pay for over two and a half years until May 5, 2005, when the City terminated Graziosi's employment. (R. 2).

Shortly after he was terminated, Graziosi filed a "wrongful termination" claim with the Civil Service Commission for the City of Jackson. (R. 32). Although the Civil Service Commission affirmed Graziosi's termination, it awarded him a judgment in the amount of \$75,579.25 for back wages that should have been paid while he was on administrative leave. (R. 32).

Graziosi and the City of Jackson held settlement negotiations concerning the back wages owed to Graziosi. (T. 7-9, R. 32). On September 7, 2007, the parties entered into a Settlement Agreement which included the following terms and conditions:

- Graziosi would forgo \$30,579.25 of the amount of the judgment owed to him and instead accept only \$45,000.00;
- The City of Jackson would reinstate Graziosi as a firefighter at his previous rank and salary with retirement benefits and health insurance;
- Graziosi would serve a probationary period of twelve (12) months during which time he would not receive the protection of the Civil Service Commission; and
- During the 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 as the appointing authority.<sup>1</sup>

(R. 8-11, R.E. 61-62).

Pursuant to the Settlement Agreement, on September 15, 2007, Graziosi was reinstated as a firefighter with the City of Jackson. (R.E. 60). On November 13, 2007, Graziosi, while off-duty, attended a union meeting of the International Association of Firefighters Local 87 at the union hall located at 116 Claiborne Avenue, Jackson, Mississippi.<sup>2</sup> (T. 9). The purpose of the meeting was to hold elections for union officers for the upcoming year. After all of the votes had been cast, most of the members congregated outside of the union hall while the current officers

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<sup>1</sup> Given the contentious history between Graziosi and the City of Jackson, Graziosi was concerned that the City of Jackson's agreement to rehire him was merely an attempt to bring him back on the job only to terminate him within the probationary period and without the oversight of the Civil Service Commission. Representatives of the City of Jackson denied this was an ulterior motive for the settlement and agreed to exercise good faith in following established disciplinary procedures and that any discipline would be subject to the final approval of the Mayor. (R.E. 61).

<sup>2</sup> The union hall location is privately owned property and is not in any manner owned by or affiliated with the City of Jackson or the Jackson Fire Department. Further, the IAFF, Local 87 is not associated with the City of Jackson or the Jackson Fire Department.



counted the votes. The officers in charge of counting the votes were Lieutenant Travis Frazier ("Frazier"), Captain Brandon Falcon ("Falcon"), and Captain Patrick Armon ("Armon"). Although the other union members had stepped outside, Graziosi remained in the union hall. During the counting process, Frazier made a derogatory comment about Graziosi who then demanded an explanation from Frazier. (T. 10). In order to preserve order, Falcon, as IAFF Local 87 President, instructed Graziosi to leave the premises before any more words were exchanged and Graziosi complied. (T. 10, R. 3).

After Graziosi left, Frazier called the Jackson Police Department ("JPD") and filed a simple assault charge against Graziosi. Frazier told the responding police officer that Graziosi, in the presence of Falcon and Armon as witnesses, approached Frazier from behind and struck him on the *left* side of his head. (R.E. 14). The JPD Officer did not take statements from Falcon or Armon. (R.E. 14).

On November 17, 2007, Chief Investigator Gregory Travis ("Travis"), of the Jackson Fire Department Internal Affairs Division, performed a field release arrest of Graziosi and gave him a citation for the assault charge Frazier filed. (T. 11, R.E. 17). Thereafter, Jackson Fire Department Chief Vernon Hughes ("Hughes") instructed Investigator Travis to conduct an Internal Affairs investigation of the alleged incident.

Investigator Travis interviewed Falcon, Armon, Graziosi, and Frazier. (R.E. 8-9). Falcon stated that he did not know of any assault incident that occurred outside or inside the union that night. (R.E. 20). Armon stated that he was not aware of an assault incident between Frazier and Graziosi. (R.E. 10). Graziosi stated that he never assaulted Frazier. (R.E. 49).

Frazier's statement to internal affairs, however, was inconsistent with the statement he gave to JPD. On four separate occasions during his interview with Internal Affairs, Frazier said that Graziosi struck him on the *right* side of his head contrary to the statement he gave to JPD in

which he said he was struck on the *left* side of his head. (R.E. 27, 28, and 32). Throughout his entire interview with Internal Affairs, Frazier *never* said that he was struck on the left side of his head. (R.E. 24-37).

Investigator Travis compiled an Internal Affairs Investigative File which contained the following documents: the citation filed against Graziosi; the JPD Incident Report; and the Internal Affairs statements taken from Falcon, Armon, Graziosi, and Frazier. (R.E. 13-15, 18-51). Additionally, Investigator Travis prepared a Summary Report of the Internal Affairs investigation in which he *incorrectly* reported that Frazier told Internal Affairs that he was struck on the left side of his head. (R.E. 11).

On April 10, 2008, Chief Hughes terminated Graziosi's employment by a letter that was hand-delivered to Graziosi while he was on duty. (R.E. 1). The termination letter advised that Graziosi was terminated because the Internal Affairs investigation concluded that there was sufficient evidence to support Frazier's allegation of assault against Graziosi. (R.E. 1).

As of April 10, 2008, the assault charge against Graziosi had *not* been brought to trial. Chief Hughes testified that he knew he terminated Graziosi before the criminal charge against Graziosi was brought to trial. (T. 54). On September 3, 2008, the criminal charge against Graziosi was tried before the Hinds County Justice Court, with the Honorable Don Palmer presiding. (R. 34). Frazier testified for the prosecution whereas Armon and Falcon testified for Graziosi. (T. 16). After hearing the evidence, the Hinds County Justice Court found Graziosi *not guilty* of the charge of assault. (T. 17, R. 34, R.E. 3).

Following his termination, Graziosi applied for unemployment benefits with the City of Jackson. (T. 15, R. 34). The City denied Graziosi's claim and Graziosi appealed the denial. (T. 15, 17, R. 34). On September 9, 2008, the Mississippi Department of Employment Security, Office of Administrative Hearings and Appeals, held a hearing on Graziosi's appeal. (R.E. 5).

Following the hearing, the Honorable Kim M. Jordan, Administrative Law Judge, issued her opinion finding that the City of Jackson did *not* offer any evidence to support a finding that Graziosi was guilty of misconduct. (R.E. 6).

On October 9, 2008, Graziosi filed a *Petition to Enforce Settlement Agreement* in the Chancery Court of Hinds County. (R. 1). Graziosi asked the Chancery Court to enforce his Settlement Agreement with the City of Jackson and return him to work as a firefighter with the Jackson Fire Department. (R. 5).

### SUMMARY OF THE ARGUMENT

The imposition of any discipline upon Graziosi, including termination of his employment, was controlled by the terms of his Settlement Agreement with the City of Jackson. Graziosi's termination, therefore, was subject to Mississippi contract law not the law of at-will employment. The Settlement Agreement and Mississippi contract law required the City of Jackson to exercise good faith when it terminated Graziosi.

The Chancellor, however, incorrectly applied the law of at-will employment to the circumstances of Graziosi's termination. As a result, when the Chancellor reviewed the City of Jackson's decision to terminate Graziosi, she incorrectly substituted an "arbitrary and capricious" standard in place of the contractual requirement of "good faith." Under the standards of good faith, the City of Jackson did not have sufficient evidence to terminate Graziosi's employment. Therefore, the Chancellor abused her discretion when she held that the City of Jackson acted in good faith because it did not act in an arbitrary and capricious manner.

For the reasons set forth herein, this Court should reverse the Final Judgment of the Hinds County Chancery Court.

## ARGUMENT

### **I. STANDARD OF REVIEW**

This appeal involves three issues of law. This Court has ruled that it will apply a *de novo* standard of review when examining questions of law decided by a Chancery Court. *See Bailey v. Estate of Kemp*, 955 So.2d 777, 781 (Miss. 2007).

### **II. THE TERMINATION OF GRAZIOSI'S EMPLOYMENT COULD ONLY BE CONTROLLED BY CONTRACT LAW**

In her *Opinion Denying Petition to Enforce Settlement*, the Chancellor found that Graziosi was an at-will employee and could be terminated at any time. (R. 37). This finding is incorrect and contrary to Mississippi law. For the purposes of termination, Graziosi was *not* an at-will employee, rather termination of his employment was controlled by contract.

It is undisputed that Graziosi was re-employed with the Jackson Fire Department pursuant to his Settlement Agreement with the City of Jackson. Further, it is undisputed that the Settlement Agreement was a valid and binding contract. Under Mississippi contract law, "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) (further citations omitted). Therefore, Graziosi and the City of Jackson were required to exercise good faith in the performance of the terms of the Settlement Agreement.

To paraphrase the relevant terms of this contract, Graziosi gave up over \$30,000.00 in back wages and agreed to serve twelve (12) months as a probationary employee without the protection of the Civil Service Commission, and, in return, the City of Jackson agreed to exercise good faith in the imposition of any discipline upon Graziosi, including termination. (R. 8-11, R.E. 60-62, T. 5). Thus, the Settlement Agreement was insulated with two layers of obligation

for the City of Jackson to exercise good faith: (1) the inherent duty to ensure the fulfillment of all the terms of the contract as described in *Cenac*; and (2) the duty to exercise good faith in imposing discipline against Graziosi.

Regarding the first layer -- the inherent duty of good faith -- under Mississippi law, parties to a contract must not only refrain from preventing the fulfillment of the contract, but they must also take affirmative steps to ensure the expectations of the other party. *See Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). This Court defines this inherent duty as follows:

[T]his duty is based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement. Some conduct, such as subterfuge and evasion, clearly violates the duty. However, 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 the performance of the other party's duty, but also *to take some affirmative steps to cooperate in achieving these goals*.

*Cenac*, 609 So.2d at 1272 *citing* FARNSWORTH, *Contracts*, § 7.17, 526-27 (1982) (emphasis added). "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party." *Cenac*, 609 So.2d at 1272 *citing* Restatement (Second) of Contracts § 205, 100 (1979).

Graziosi's justified expectation was that he would be employed with the City of Jackson. To fulfill its inherent duty of good faith, the City of Jackson was contractually required to remain faithful to Graziosi's expectation of employment, and to take reasonable and necessary steps to ensure this expectation.

Regarding the second layer -- that the City of Jackson must exercise good faith in imposing discipline against Graziosi -- the Settlement Agreement prevented the City from terminating Graziosi unless it could do so in good faith. Under Mississippi law, "The breach of good faith is bad faith characterized by some *conduct which violates standards of decency*,

*fairness or reasonableness.”* *Cenac*, 609 So.2d at 1272 *citing* Restatement (Second) of Contracts § 205, 100 (1979) (emphasis added). Therefore, the City of Jackson was required to maintain a standard of fairness and reasonableness when imposing discipline against Graziosi.

By virtue of the City’s dual contractual obligations to exercise good faith in imposing discipline upon Graziosi, the ultimate decision of whether to terminate Graziosi was a matter controlled by Mississippi contract law. Moreover, as a result of the contractual restrictions upon the City of Jackson, Graziosi’s employment, at least for the purposes of termination, could not be considered at-will employment. The Chancellor, thus, ruled contrary to law when she found that Graziosi was an at-will employee who could be terminated at any time.

### **III. THE CHANCELLOR INCORRECTLY APPLIED AN “ARBITRARY AND CAPRICIOUS” STANDARD IN PLACE OF GOOD FAITH**

As a result of the erroneous determination that Graziosi was an at-will employee, the Chancellor incorrectly applied an “arbitrary and capricious” standard of review instead of the standards for good faith. Specifically, the Chancellor ruled, “Case law...supports that when a ‘decision is supported by substantial evidence, then it is not arbitrary or capricious.’” (R. 37) *citing* *Miss. Bureau of Narcotics v. Stacy*, 817 So.2d 523, 526 (Miss. 2002). The Chancellor misapplied the “arbitrary and capricious” standard of review for two reasons.

First, as set forth above, Mississippi contract law and the Settlement Agreement both required that the City of Jackson be held to standards of good faith in deciding to terminate Graziosi. The distinction between the “arbitrary and capricious” standard and the good faith standard is the City of Jackson’s contractual duty of faithfulness to Graziosi’s justified expectation of employment. To decide that the City of Jackson did not act arbitrarily or capriciously does not address whether the City acted with faithfulness to Graziosi’s justified expectation of employment.

Second, the Chancellor's reliance upon *Miss. Bureau of Narcotics v. Stacy*, 817 So.2d 523 (Miss. 2002), for the standard of review of an employee termination was misplaced. In *Stacy*, the plaintiff was terminated from the Mississippi Bureau of Narcotics. *Id.* at 526. The plaintiff appealed his termination to the Mississippi Employee Appeals Board ("MEAB"), which upheld his termination after a hearing. *Id.* Upon request for a review of that decision, the MEAB affirmed its decision. *Id.* The plaintiff then appealed the MEAB's decision to the Circuit Court of Alcorn County, which reversed the decision finding it was arbitrary and capricious. *Id.* On appeal from the circuit court, this Court held, "In reviewing an administrative agency's findings, 'the circuit court's and this Court's appellate authorities are limited by the arbitrary and capricious standard of review.'" *Id.* at 526 citing *McDerment v. Mississippi Real Estate Comm'n.*, 748 So.2d 114, 117 (Miss. 1999).

This Court in *Stacy* specifically held that the "arbitrary and capricious" standard applied only to reviewing an *administrative agency's findings*. In the case at hand, the Chancellor was not asked to review an administrative agency's findings therefore, the arbitrary and capricious standard of review was not applicable. Instead, the Chancellor should have applied the standards of good faith as discussed above.

#### **IV. THE CHANCELLOR ABUSED HER DISCRETION IN FINDING THAT THE CITY OF JACKSON ACTED IN GOOD FAITH**

In her *Opinion Denying Petition to Enforce Settlement*, the Chancellor stated, "The City of Jackson's decision to terminate Graziosi was based on several key factors: 1) the conclusion of the Internal Affairs Investigation; 2) medical records of the alleged victim from the November 13, 2007, incident; and 3) a police report following the alleged incident on November 13, 2007." (R. 36). These reasons do not support a finding of good faith under Mississippi law.



**A. The Internal Affairs Investigation was Inconclusive**

The Internal Affairs Investigation relied on the following documents: the citation filed against Graziosi; the JPD Incident Report; the Internal Affairs statements taken from Falcon, Armon, Graziosi, and Frazier; and Chief Investigator Travis's Summary Report. Based upon review of these documents, the Internal Affairs Investigation was inconclusive at best.

First, the citation filed against Graziosi was a form citation that served only to put Graziosi on notice of the charge Frazier filed against him. (R.E. 17). That document offered no substantive evidence as to the validity of the charge against Graziosi.

Second, the JPD Incident Report contained only one statement from one witness -- Frazier, the complaining witness. (R.E. 13-14). There was no statement taken from Graziosi, Falcon, or Armon. Further, the JPD Incident Report reflects that Frazier told the responding officer that Graziosi hit him on the *left* side of his head. (R.E. 14).

Third, in his statement given to Internal Affairs, Frazier contradicted the statement he gave to JPD. On *four* occasions, Frazier told Internal Affairs investigators that he was hit on the *right* side of his head. (R.E. 27, 28, 32). At no time in his statement did Frazier ever advise Internal Affairs that he was hit on the left side of his head, even when pressed about the certainty of his statement. (R.E. 24-37). In their statements to Internal Affairs, Falcon and Armon both testified that they were not aware of any assault, and Graziosi emphatically testified that he did not hit Frazier. (R.E. 10, 20, 49). At most, the Internal Affairs statements revealed that Frazier was inconsistent.

Finally, Investigator Travis's Summary Report was inaccurate because it stated that Frazier told Internal Affairs that Graziosi hit him on the left side of his head, which was not true -- Frazier told Internal Affairs he was hit on the right side of his head. (R.E. 11, 27, 28, 32).

Furthermore, Investigator Travis's Summary Report failed to acknowledge that Frazier gave inconsistent statements to JPD and Internal Affairs. (R.E. 8-12).

In light of Frazier's inconsistencies and the lack of any corroborating witnesses, the Internal Affairs investigation was, at most, inconclusive. As a result, the Internal Affairs investigation was not sufficient evidence upon which the City could decide whether to terminate Graziosi.

**B. The City did Not Rely on Medical Records**

The Chancellor erred when she found that the City relied on medical records from Frazier to base its decision to terminate Graziosi. That is incorrect; the City did not have any medical records from Frazier when it terminated Graziosi. (R.E. 5, 12).

In his Summary Report, Investigator Travis stated, "Internal Affairs Investigation has not received any medical documents to support Lt. Frazier's injury." (R.E. 12). Further, Investigator Travis testified that he never saw any medical records from Frazier. (T. 118). Although Chief Hughes testified that he reviewed a "medical record" from Frazier, there are significant doubts about his testimony, specifically, because when Chief Hughes testified at Graziosi's hearing for unemployment benefits, he stated he did not review any medical records. (T. 59, R.E. 5).

On September 8, 2008, the Mississippi Department of Employment Security held a hearing on Graziosi's claim for unemployment benefits. The Administrative Law Judge found that the City did *not* offer any evidence to support a finding that Graziosi was guilty of misconduct. (R.E. 6). Further, in her Findings of Fact, the Administrative Law Judge stated: "The fire chief [Chief Hughes] indicated he did not witness the claimant striking the employee *nor did he see any medical documentation from the employee who pressed the charges.*" (R.E. 5). Therefore, as of September 8, 2008, five months *after* Graziosi was terminated, Chief

Hughes had not reviewed any medical records from Frazier. As a result, the City could not have relied upon medical records to decide whether to terminate Graziosi.

**C. The Police Report was Inconclusive**

For two reasons, the JPD Incident Report was not sufficient evidence upon which to terminate Graziosi. First, the report contained only Frazier's uncorroborated statement; it did not contain any statements from Falcon or Armon, the witnesses to the alleged incident. Second, when reviewed in conjunction with Frazier's statement given to Internal Affairs, the report casts doubt on Frazier's credibility. At most, the JPD Incident Report was inconclusive.

**D. Applying the Evidence Under the Standards of Good Faith Would Have Yielded a Different Result**

Because the Chancellor erroneously applied the arbitrary and capricious standard of review to the evidence, she incorrectly concluded that the City of Jackson acted in good faith in terminating Graziosi. (R. 38). The Chancellor abused her discretion because the evidence, when applied to the standards of good faith, does not support this finding. The City of Jackson's good faith obligation to Graziosi can be distilled into the following standards: (1) the City had to remain loyal to Graziosi's justified expectation of employment; (2) the City had to take affirmative steps to achieve Graziosi's justified expectations; (3) the City had to uphold the standards of fairness and reasonableness. Based upon the evidence submitted at the hearing of this matter, the City of Jackson failed to uphold these standards.

With respect to Graziosi's contractual expectation of employment, the City should have given Graziosi the benefit of the doubt regarding Frazier's inconsistent statements. Given the inconclusive evidence, good faith required that the City refrain from terminating Graziosi until

the Hinds County Justice Court could rule on the criminal charge.<sup>3</sup> By terminating Graziosi before the criminal trial, the City was able to avoid its contractual obligation on nothing more than an uncorroborated criminal charge unilaterally filed by a disgruntled co-worker. Finally, the City had other less severe measures it could have taken that would have satisfied its good faith obligation. For instance, the City could have placed Graziosi on leave with or without pay pending the outcome of the criminal charge. (T. 105). Instead, the City terminated Graziosi on the basis of an unsubstantiated criminal allegation that turned out to be false. The good faith that Graziosi bargained for demanded a more measured response from the City.

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<sup>3</sup> It is telling that two different tribunals (Justice Court and the MDES Administrative Court) heard essentially the same evidence gathered in the Internal Affairs investigation and both separately ruled in favor of Graziosi. (R.E. 3, 6).

## CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the decision of the Hinds County Chancery Court and, further, to order the City of Jackson to reinstate Michael Graziosi to his pre-termination position and assignment with the full protections and safeguards of the City of Jackson Civil Service Commission. The Appellant additionally requests that this matter be remanded to the Chancery Court of Hinds County, Mississippi, First Judicial District, for a determination of the Appellant's damages and attorney's fees.

This the 11<sup>th</sup> day of September, 2009.

Respectfully submitted:

  
\_\_\_\_\_  
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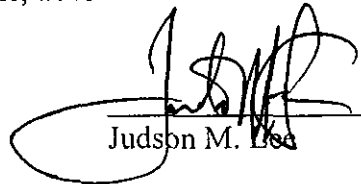
**CERTIFICATE OF SERVICE**

I, the undersigned counsel of record for the Appellant, have this day served a copy of the above and foregoing via United States Mail, postage pre-paid and addressed to the following:

Honorable Denise Owens  
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This the 11<sup>th</sup> day of September, 2009

  
Judson M. Lee