

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-CA-00330**

**MISSISSIPPI DEPARTMENT OF
PUBLIC SAFETY BOARD ON LAW
ENFORCEMENT OFFICER STANDARDS
AND TRAINING**

APPELLANT

V.

AUGUSTUS JOHNSON

APPELLEE

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Appellee hereby certifies that the following persons have or may have an interest in the outcome of this case. This certification is made in order that the Justices of the Supreme Court and the Judges of the Court of Appeals may evaluate possible disqualification or recusal and submit the following:

1. Honorable Jon Barnwell, Chancellor - Chancery Court of Leflore County
2. Mississippi Department of Public Safety Board on Law Enforcement
Officer Standards and Training - Appellant
3. Hon. Jim Hood, Attorney General of Mississippi - Attorney for Appellant
4. Hon. S. Martin Millette - Attorney for Appellant
5. Hon. Lisa Colonias - Attorney for Appellant
6. Augustus Johnson - Itta Bena, MS - Appellee
7. Alsee McDaniel, Esq. - Attorney for Appellee



ALSEE MCDANIEL
ATTORNEY FOR APPELLEE

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STATEMENT OF THE CASE

Appellee Augustus Johnson (Hereinafter "Johnson") was issued a Professional Certificate by the Appellant Mississippi Department of Public Safety Board on Law Enforcement Officer Standards and Training (Hereinafter "The Board") on October 10, 1990. (R. at 30) On February 26, 1999, the Chief of Police of the City of Itta Bena, Mississippi discharged Johnson from the Department based upon a charge that Johnson pawned a shotgun from the Department, and Johnson entered a plea of guilty to embezzlement. Acceptance of the plea was withheld by the Circuit Court of Leflore County, and Johnson entered a pretrial diversion program. (R. at 11, 38) Johnson completed the Program, and the charge filed against him was dismissed on August 20, 2001 and subsequently expunged on March 28, 2008. (R. at 43)

In 2008, Johnson sought employment with the Mississippi Valley State University Campus Police Department. The Interim Chief of said Department, Levi Ford, submitted an application to the Board for reinstatement of Johnson's certification. By letter dated May 1, 2008, the Board denied the application. (R. at 31) Johnson requested an appeal of said decision and submitted a letter to the Board setting forth the circumstances of the charge against him in 1999 and expressing his commitment to law enforcement and his desire to be recertified as a law enforcement officer. (R. at 45)

On September 11, 2008, the Board conducted an Eligibility Hearing on Johnson's request to appeal the denial of his certification. At said hearing, Johnson presented the testimony of Chief Isaac Morris of the Rosedale Police Department, who had formerly worked with Johnson at the Itta Bena Police Department. Morris testified that prior to Johnson's discharge

from the Department, he had been an excellent officer, and that the charge against him was not indicative of his character and reputation in the community. He further testified that since Johnson's plea on said charge, he had worked diligently to become an upstanding citizen in the community. (R. at 15-17)

After the eligibility hearing, the Board entered into executive session and voted to "Cancel and recall" Johnson's certification. (R. at 19) Johnson duly filed his notice of appeal of said decision to the Leflore County Chancery Court on October 8, 2008.(R. at 2) Upon review of the administrative decision by the Board, the Chancellor found that although the Board had authority to cancel, revoke and re-certify persons under the Mississippi statutes, the manner in which the Board exercised that authority would depend upon whether the hearing was one for recall or re-certification. Further, there was nothing in the record to indicate which type of hearing Johnson was given, and the case was remanded for further hearing by the Board. (R. at 70, 73) The Board thereafter appealed said Ruling for review by this Court.

SUMMARY OF ARGUMENT

The Board has set forth two issues for appeal herein : (1) Whether the Board provided Johnson procedural due process on his request to have a certificate issued; and (2) Whether the Chancellor abused his discretion when he remanded this case to the Board. Johnson hereby submits the Board did not accord him procedural due process in denying his application, and that the Chancellor was not err in remanding the case to the Board.

The Courts Mississippi have held that administrative proceedings should be conducted in a fair and impartial manner, and that litigants in such proceedings are entitled to due process, including, but not limited to, adequate notice of the issues to be decided. In the instant case, the Board's notice of hearing indicates that the issue for determination was the denial of "application for certification" . However, the Board's decision appears to be one to "revoke and cancel" certification. The Chancellor noted that there are different considerations and burdens of proof on these two issues, and the record is not clear on which issue the Board was proceeding. In these circumstances, there is a violation of Johnson's due process to the extent that the notice of hearing issued by the Board did not adequately inform him of the nature of the proceeding and review being conducted.

Although reviewing courts have a duty to accord deference to administrative agency decisions, no such deference is required if such decisions have applied an incorrect legal standard or if there are deficiencies in the record. In such circumstances, the reviewing court has authority to remand for further proceeding by the agency. Such was the finding by the Chancellor as related to the Board's proceeding on Johnson's application, and the case was properly remanded.

ARGUMENT

I. WHETHER THE BOARD PROVIDED JOHNSON DUE PROCESS ON HIS APPLICATION FOR CERTIFICATION

The Mississippi Supreme Court has held that “ the right to a hearing in a licensing proceeding embraces not only right to present evidence but also reasonable opportunity to know claims of opposing party and to meet them.” *Love v. Miss. Bd. Veterinary Examiners*, 230 Miss. 222 (Miss. 1957) In subsequent cases, the Court has made clear that constitutional due process is required in administrative proceedings. *Dean v. Public Emp. Retirement System*, 797 So.2d 830 (Miss. 2000)-

The Mississippi statutes relating to certification of law enforcement officers set forth various standards for certification, recertification, recall, cancellation or revocation. Miss. Code Ann. 45-6-7, 45-6-11. Section 45-6-11(7) provides that professional certificates may be recalled and cancelled when the holder has been convicted of any crime involving moral turpitude. However, Section 45-6-11(10) provides that a law enforcement officer whose certification has been cancelled pursuant to this chapter may reapply for certification after two years of such cancellation.

In the instant case, the Board terminated or cancelled Johnson’s law enforcement professional certification in or about April 1999 after receiving notice of his termination from the Itta Bena Police Department on February 26, 1999. (Appellant’s Record Excerpts, at 36) Johnson applied for recertification of his professional certificate in 2008 upon seeking employment with the MVSU Campus Police Department, and the Board denied said application by letter of May 1, 2008. (R. at 31).

Upon receiving Johnson's request for appeal of the denial of certification, the Board issued a notice of hearing on August 8, 2008 which cited the aforementioned Mississippi statutes relating certification, recertification, recall and cancellation of certificates. However, the notice did not specifically state which of these actions was being considered by the Board. (R. at 33) After the hearing, the Board went into executive session and returned with the following decision (R. at 19) :

“The Board has voted to cancel and recall your certificate as your conduct is a breach of Law Enforcement Code of Ethics.”

The notice provided to Johnson certainly did not indicate that the hearing was for recall and cancellation of his certificate, rather than recertification, as the Chancellor so noted in his ruling. (R. at 70-71) To the extent that recertification was the issue, review of the Board's decision may properly have considered evidence other than Johnson's plea on the criminal charge nine(9) years prior to his application , including evidence of rehabilitation.

II. WHETHER THE CHANCELLOR ABUSED HIS DISCRETION WHEN HE REMANDED THIS CASE TO THE BOARD

Prior Mississippi appeals court rulings have made clear that while reviewing courts should accord deference to administrative agency rulings, no such deference is required concerning questions of law or the application of the correct legal standard, and remand may properly be ordered by the court. *Ms Valley Gas Co. V. City of Pontotoc*, 795 So.2d 519 (Miss. 2001); *Miss. Dept of Corr. V. McClee*, 677 So.2d 732 (Miss. 1996). The Court in the early case of *Love v. Miss Bd. Of Veterinary Examiners*, *supra*, 230 Miss. at 232 states the

principle as follows:

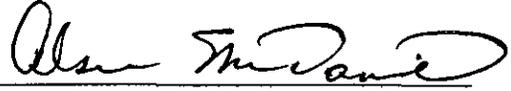
“ There is nothing in the principles governing judicial review of administrative acts which precludes the court from giving an administrative body an opportunity to meet objections to Order by correcting irregularities in procedure, or supplying deficiencies in its record, or seeking additional findings where these are necessary, or applying findings validly made in the place of those attacked as invalid...The court may remand for further proceedings in order that the administrative agency may proceed according to law, or in order that some defect in the record may be supplied, by taking further evidence, clarifying ambiguous findings, or making additional findings.”

In the instant case, the Chancellor found that while the Board has the authority to cancel and recall certificates, as well as, to order recertification, the nature of the action being considered by the Board must be clearly stated and communicated in making its determination based upon the legal standards for such actions. The Chancellor further found that there was nothing in the record which indicated the type of hearing to which Johnson was entitled, whether recertification, recall and cancellation. The case was, therefore, remanded to the Board to clarify these issues and for further hearing. The Chancellor did not abuse his discretion in so ruling.

CONCLUSION

For the foregoing reasons, and based upon the authorities cited herein, Appellee prays that Court will affirm the Ruling of the Leflore County Chancery Court remanding the case for further proceedings by the Appellant consistent with said Ruling.

Respectfully Submitted this 12th day of November, 2010.


ALSEE MCDANIEL
ATTORNEY FOR APPELLEE

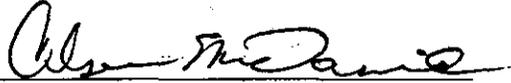
CERTIFICATE OF SERVICE

I, Alsee McDaniel, certify that a copy of the foregoing Appellee's Brief was served by U.S. Mail, postage prepaid, addressed to the following:

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This the 12th day of November, 2010.


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