

**IN THE SUPREME COURT 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

On Appeal from the Chancery Court of Leflore County, Mississippi

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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 disqualifications or recusal.

The Honorable Jon Barnwell, Chancellor, Chancery Court of Leflore County

Mississippi Department of Public Safety Board on Law Enforcement Officer Standards and Training, Appellant

Hon. Jim Hood, Mississippi Attorney General, Counsel for Appellant

S. Martin Millette, Esq., Counsel for Appellant

Lisa Colonias, Esq., Counsel for Appellant

Augustus Johnson, Appellee

Alsee McDaniel, Esq., Counsel for Appellee



S. MARTIN MILLETTE
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REGULATIONS

The Board on Law Enforcement Officer Standards and Training Professional Certification Policy
and Procedures Manual

http://www.dps.state.ms.us/dps/dps.nsf/webpages/PublicSafetyPlanning_bleost?OpenDocument

Statement Regarding Oral Argument

It is the position of the Board that the Court may benefit from a discussion of the facts and the law in this matter. Therefore, the Board requests that oral argument be granted.

I. Johnson Is Mischaracterizing The Nature of The Proceeding

Johnson states in his brief that the Board terminated or cancelled Johnson's professional certificate after receiving notice of his termination from the Itta Bena Police Department on February 26, 1999. This statement is simply not true. The Board received Johnson's certificate from the Itta Bena Police Department after Johnson had been terminated because he pled guilty to embezzlement in connection with his pawing of his city issued shotgun and using the proceeds for personal gain. All certificates issued from the Public Safety Board are issued in the names of the individual officers but remain the property of the Board. The certificates are to be returned to the Board once an officer leaves law enforcement, as was the case here. The Board deactivated Johnson's certificate because Johnson expressed no interest in returning to law enforcement and no law enforcement agency requested that the certificate be sent to their agency. In this instance, Johnson's certificate "lapsed" because Johnson voluntarily remained out of law enforcement for a period of two years or more. *See* Board Regulation Ch. 2 § 102.09. The Board did not terminate or cancel Johnson's certificate.

It was not until 2008 when Johnson applied for recertification that a case in controversy arose. Mississippi Valley State University Police Department contacted the Board to request that Johnson's certificate be reactivated and assigned to them. The Board denied the request and proceeded to revoke the certification request based on Johnson's guilty plea. This action was clearly within the Board's statutory discretion. The Board then sent a letter to Johnson notifying him of this action. The letter also stated Johnson was entitled to a hearing if he was aggrieved by the decision of the Board. Johnson appealed the Board's decision and was granted a hearing. During the hearing, the Board listened to all the evidence presented. At the conclusion of all the testimony, the Board entered an executive session and voted unanimously to cancel Johnson's

certificate. The Board concluded that there was substantial evidence to support canceling Johnson's certificate.

II. Johnson Was Accorded Due Process

Johnson alleges in his brief that the Board did not accord him procedural due process in denying his application by not adequately informing him of the nature of the proceeding and the review being conducted. Johnson further alleges that the notice provided to him did not indicate whether the hearing was for recall and cancellation or recertification. At the outset of the hearing requested by Johnson, Johnson was asked a series of questions to which he answered affirmatively. (R at 7). Johnson acknowledged he was aware he had the opportunity to have counsel present, have witnesses present to speak on his behalf, and submit documents and other related materials. (R at 7). Moreover, the letter Johnson received from the Board setting the hearing date included the same information. (R at 34). Johnson testified on his own behalf and had a witness to testify as well.

There is nothing in the record to indicate Johnson was not aware of the nature of the proceeding or the review being conducted. Johnson did not ask the Board for a continuance or for any clarification as to what type of hearing was being conducted. The Board took into consideration Johnson's testimony during the hearing as well as the subsequent behavior testimony of Morris and reviewed all the documents and materials presented. The hearing conducted by the Board did not prejudice Johnson in any way.

The argument that the Board did not accord Johnson due process is without merit. The Board provided notice and an opportunity to be heard to Johnson when the Board considered whether to issue Johnson's certificate. Johnson understood the nature of the proceeding and the review conducted. Johnson came prepared to testify and produced a witness to put on

rehabilitative testimony. Whether the hearing was for the denial of application for certification or revoke and cancel does not matter in this situation. Johnson remained out of law enforcement for more than two years, so his certificate lapsed by operation of the Board Regulations. *See* Board Regulation Ch. 2, § 102.09; Miss. Code Ann. § 45-6-11(1). The Board properly found that Johnson lacked the “good moral character” necessary to be a law enforcement officer. Ample evidence in the record supports this decision by the Board.

Assuming *arguendo*, that the Court remands this matter for further proceedings, how would the subsequent proceeding benefit Johnson? How would the hearing be different? Both Johnson and the Chancellor state that there are different burdens of proof and different considerations. Any argument that there are different burdens of proof or different considerations is just wrong. There is nothing contained in the statutes or the Board regulations that would lead one to believe the burden is different as is argued by Johnson. Procedurally, there is not a different burden of proof between recall and re-certification. Johnson seems to argue that if the Board had properly considered the hearing to be one for “recertification,” then Johnson would have presented, and the Board would have considered, information regarding the nature of Johnson’s crime, mitigating facts presented by Johnson, and any evidence of Johnson’s rehabilitation since his guilty plea. However, according to Johnson’s own brief, Johnson presented, and the Board considered, just such evidence. In his brief, Johnson concedes that the following information was considered by the Board:

- Johnson’s testimony regarding the circumstances of his guilty plea in 1999
- Johnson’s testimony regarding his commitment to law enforcement and his desire to be re-certified as a law enforcement officer
- The testimony of Officer Morris that prior to Johnson’s guilty plea, he had been an excellent officer

- The testimony of Officer Morris that the charge against him was not indicative of his character and reputation in the community
- The testimony of Officer Morris that Johnson has worked diligently to become an upstanding citizen in the community after his guilty plea for embezzlement

(Johnson's Brief at 1-2) The Board does not see a difference in the hearing that was held at Johnson's request and a subsequent hearing reconsidering all the same evidence. The Board considered all of the above mentioned points at the hearing that Johnson requested. The application, the testimony of Johnson, the testimony of Morris and any other pertinent information was considered by the Board in making a final determination that Johnson "lacked the good moral character" necessary to become a law enforcement officer.

Another point raised by Johnson in his brief is that while 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. (Johnson's Brief at 3). The Board acted well within its statutory authority and did not exceed the scope of the agency's authority. The key here is whether the Board had an evidentiary basis to support denying Johnson's certificate. *Mississippi Board on Law Enforcement Officer Standards and Training v. Clark*, 964 So. 2d 570, 573 (Miss. Ct. App. 2007) (citing *Mississippi Board on Law Enforcement Officer Standards and Training v. Voyles*, 732 So. 2d 216, 218 (Miss. 1999)). Johnson readily admits taking and pawning the gun. He submitted a letter to the Board admitting this act and testified during the hearing he requested and offered the same testimony. (R. at 45). He offered rehabilitative evidence to support his position that he should be granted a certificate. Clearly, ample evidence existed in the record to support the Board's decision not to grant Johnson his certificate.

The last point raised by Johnson is that the record was deficient and that the matter should

be remanded for further proceedings to clarify the those deficiencies. An appellate court will reverse the decision of an administrative agency only if the decision (1) was unsupported by substantial evidence; (2) was arbitrary and capricious; (3) was beyond the power of the administrative agency to make; or (4) violated the complaining party's statutory or constitutional right. *Hinds County Sch. Dist. Bd. of Trs. v. R.B. ex rel. D.L.B.*, 10 So.3d 387, 394-95 (Miss.2008). The standard of review was discussed in the Board's initial brief so there is no need to fully address again. The decision of the Board was supported by substantial evidence. The decision was not arbitrary or capricious, nor was the decision beyond the power of the Board. The on-the-record hearing provided Johnson his due process guarantee and the decision was not inconsistent with the Board's governing statutes or regulations. The Chancellor abused his authority when he remanded the matter for a subsequent hearing. There is no basis to remand the matter for a subsequent hearing because the record contained the requisite substantial information to support the Board's decision to deny Johnson's application for a certificate.

III. Johnson is Now Able to Reapply For a Certificate

It should be brought to the Court's attention that Johnson is now eligible to re-apply for his certificate. Miss. Code Ann. § 45-6-11(10) states that a "law enforcement officer whose certification has be cancelled pursuant to this chapter may reapply for certification. . .two years after the date on which the order of the board cancelling such certification becomes final." Johnson's full hearing was held September 11, 2008. The Board made its final decision that day. Regardless of the disposition of this appeal, Johnson is entitled to reapply for a certificate, and present any additional rehabilitative evidence in support of his application. At this point, he is entitled to, under the statute, the very relief he has asked this court for, and that is a new hearing. Therefore, the issue is now moot.

For the foregoing reasons, along with the arguments presented in the Board's initial brief, the Board prays that this Court reverse and render, affirming the Agency's denial of Johnson's certificate.

Respectfully submitted, this the 29th day of November, 2010,

JIM HOOD, ATTORNEY GENERAL
BY: MISSISSIPPI DEPARTMENT OF
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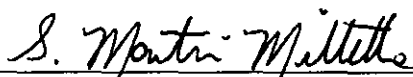
CERTIFICATE OF SERVICE

This is to certify that I, S. Martin Millette, Special Assistant Attorney General for the State of Mississippi, have this date mailed via United States mail, postage prepaid, a true and correct copy of the foregoing ***Reply Brief of Appellant*** to the following:

Honorable Jon Barnwell
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This the 29th day of November, 2010.



S. Martin Millette
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