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

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BRIEF OF APPELLANT

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V.

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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

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2. Whether the Chancellor abused his discretion when he remanded this case to the agency when the agency's decision had clear statutory authority and credible evidence upon which to base its decision;

STATEMENT OF THE CASE

A. Procedural Posture

On February 26, 1999, the Chief of Police for the Itta Bena Police Department terminated Officer Augustus Johnson (Appellee) because Johnson pled guilty to felony embezzlement in connection with his pawning of his city issued shotgun and using the proceeds for personal gain. (R. at 36, 37-44). Pursuant to the policies of the Mississippi Department of Public Safety Board on Law Enforcement Officer Standards and Training (the "Board"), on April 20, 1999, the Itta Bena Police Department returned Johnson's original law enforcement certificate the Department had held while Johnson was employed as an officer. (R. at 36).[1]

For the next nine years, Johnson remained out of law enforcement, and the certificate remained inactive and in the custody of the Board. It was not until 2008, that Johnson again sought work in the law enforcement field and his new employer, the Mississippi Valley State University Police Department, contacted the Board to request that Johnson's certificate be reactivated and assigned to them[2] (R. at 31). The Board denied the request to reactivate the certificate and proceeded to revoke the certification request based on Johnson's guilty plea to felony embezzlement. (R. at 9, 31). Johnson appealed the Board's decision and was granted a

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[1] The Board's "Termination/Reassignment Report" contains the following: "Is the officer certified? Yes__ No__. If yes, please return the original certificate." R. at 36; *See also* The Board of Law Enforcement Officers Standards and Training Professional Certification and Policy Procedures Manual Ch. 2, § 102.04 ("The employer should return the certificate to the Board Director, along with a complete 'Termination/Reassignment Report' form.").

[2] The Board's regulations state:

> "The law specifies that any certificate for a law enforcement officer issued as a result of the Law Enforcement Officers Training Program is the property of the Board. Although the certificate is issued in the name of the individual officer, the Board shall place the certificate in the stewardship of the employer and shall retain the right to require return of the certificate of the Board." *See* Sh. 2 § 101

hearing which was held on September 11, 2008. (R. at 33). At the conclusion of the full hearing, the Board voted unanimously to cancel Johnson's certificate. (R. at 19). Aggrieved by the decision of the Board, Johnson appealed to the Chancery Court of Leflore County. The Chancellor reversed the Board's decision and remanded the matter back to the Board with the instruction that the Board and Johnson "present evidence to support their respective positions." (R. at 73). The Board now appeals that Opinion and Order.

B. Statement of the Facts

Johnson was issued a Professional Certificate on October 10, 1990, which allowed him to serve as a police officer. (R. at 8). He was certified by the Board and worked for the Itta Bena Police Department. (R. at 9). By accepting certification as a law enforcement officer, an officer agrees to, among other responsibilities, uphold the Law Enforcement Code of Ethics. *See* The Board on Law Enforcement Officers Standards and Training Professional Certification and Policy Procedures Manual ("Board Regulations") at page 1.[3] Johnson's duty included to be "[h]onest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department." *Id.* Further, the Code of Ethics requires sworn law enforcement officers to "recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession. . . Law Enforcement." *Id.* Unfortunately for Johnson and for the city and citizens he served, Johnson violated this solemn Code of Ethics in the most

[3] The Board's Regulations can be found at: www.dps.state.ms.us/dps/dps.nsf /webpageedit/PulbicSafetyPlanning_bleost_Manual/$FILE/BLEOST_Policy_Procedures_ Manual.pdf?OpenElement

severe manner possible by committing a crime of dishonesty directly against the public.

Johnson was fired from the police department on February 26, 1999, because he pled guilty to felony embezzlement after he pawned a shotgun and a .38 caliber handgun that had been entrusted to him by the City. (R. at 9)[4] The Board received a termination/reassignment form from the Itta Bena Police Department stating Johnson had been discharged from the department with a comment that "Sergeant Johnson pawned a City shotgun that was entrusted to him for personal use." (R. at 11). Subsequently, Johnson, with his attorney, entered a plea of guilty to the crime of embezzlement in the Circuit Court of the Fourth Judicial District of Leflore County Mississippi, on December 6, 1999. (R. at 11). He was sentenced to a pre-trial diversion program and received a fine of Two Hundred and Fifty Dollars ($250.00). (R. at 9-11).

In April 1999, after Johnson was fired by Itta Bena, Johnson's law enforcement certificate, which always remained the property of the Board,[5] was returned to the Board by the Itta Bena Police Department. (R. at 36). The Board's regulations provide the following:

> **The staff** shall decide the disposition of a certificate within a reasonable time after receiving notice that a certificate has been returned **The Board** may decide to:
> 1. delay consideration of the return of the certificate;
> 2. inactivate the certificate;

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[4] the Itta Bena Police Department's Termination/Reassignment Report references that Johnson "pawned a city shot gun that was entrusted to him for personal use." (R. at 36). Johnson admitted to, and pled guilty to, this unlawful act. (R. at 9). However, the Criminal Investigation Bureau of the Mississippi Department of Public Safety's investigation found that:

> On 09-DEC-98, August Johnson pawned five guns to "Crazy Charlie's Pawn Shop" located on MS 7 in Greenwood, MS. the Taurus .38 caliber revolver had been seized by the Itta Bena Police Department on 16-JUN-98, and the Winchester 12 gauge shot gun had been purchased from Roper Supply and Shipped to Itta Bena Police Department in July of 1989. (R. at 37). Further, Johnson's letter to the Board of August 2008 acknowledges that more than one weapon was pawned. (R. at 45).

[5] *See* Miss. Code Ann. § 45-6-5(7).

3. assign stewardship of the certificate to new law enforcement employer or;
4. annul/revoke a certificate, if issued in error or through misrepresentation or fraud.

(Board Regulation Ch. 2, § 102.05 (emphasis supplied)). Furthermore, the Board's regulations provide:

> When the staff has inactivated a certificate because an officer is no longer in law enforcement employment as described in this Policy and Procedures Manual, is on indefinite leave or leave for more than one year, or for other reasons the Board director may reactivate the certificate when the certified officer resumes employment for the employer who returned the certificate or under a new law enforcement employer included under the Law enforcement Officers Training Program.

Board Regulation Ch. 2, § 102.08. Since Johnson expressed no interest in returning to law enforcement, and no law enforcement agency asked that the certificate be sent to them so that they could employ Johnson, Johnson's certificate was deactivated and remained in the possession of the Board.[6] Further, after Johnson was out of law enforcement for two years, his certification "lapsed." *See* Board Regulation Ch. 2, § 102.09 ("When an officer, certified by Mississippi statute, leaves law enforcement employment for a period of two years or more, his or her certificate will lapse."); Miss. Code Ann. § 45-6-5(1).

Johnson spent the next nine years out of law enforcement and without a certificate from the Board. Then on March 28, 2008, Johnson submitted an Order of Expungement to the Circuit Court of the Fourth Judicial District of Leflore County. (R. at 9). Shortly after the Order of Expungement was entered, Mississippi Valley State University Police Department asked the Board to activate Johnson's certificate and provide that certificate to the Department so that

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[6] Had the certificate not been deactiviated (for example, if Johnson had immediately sought reemployment in law enforcement), the Board would have still had the discretion to "delay consideration of the return of the certificate" under option 1 of the Regulations. Ch. 2, § 102.05

Johnson could be employed as a law enforcement officer. (R. at 9). The Board sent a letter dated May 1, 2008, to the Interim Chief Levi Ford notifying him that the Board would not approve the certification request. (R. at 31). The written policy conferring such authority on the Board was set forth in the letter and reads as follows:

> **II. Policy:** The Board may reject any unqualified applicant for certification by a classification of not eligible for certification. Further, the Board reserves the right to reprimand, suspend, or cancel and recall any certificate when: the certificate was issued by administrative error; the certificate was obtained through misrepresentation or fraud; the holder had been convicted, pled guilty, pled nolo contendere, fined, ordered into probation or pre-trial diversion in relation to a felony or a crime involving moral turpitude;

(R. at 31 (citing Board Regulation §§ 101-101.03)). The powers of the Board are set forth under Miss. Code Ann. § 45-6-7. Johnson requested a hearing as of right on May 15, 2008. (R. at 31).

A full hearing was held before the Board on September 11, 2008. (R. at 5). At the outset of the hearing, Johnson acknowledged that 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). Johnson received a letter from the Board setting his hearing date which also included this information. (R. at 34). At the hearing, Robert Davis, Director of the Office on Law Enforcement, Emergency Telecommunications, and Detention Officer Standards and Training, testified on behalf of the Public Safety Board. (R. at 7). Mr. Davis referenced a letter to the Board, dated August 29, 2008, from Johnson. In this letter, Johnson wrote, "[a]t my hearing, I intend to testify to the fact that any wrongdoings I have committed were the result of financial duress and lack of knowledge." (R. at 45). He also wrote that "[t]he factors leading to a decision on my part to pawn two weapons during 1998 the holiday season were based on a last ditch effort to avoid a major financial crisis." (Id.).

After Mr. Davis concluded his testimony, Johnson testified on his behalf. At the

conclusion of Johnson's testimony, Chief Isaac Morris (hereinafter "Morris") testified on Johnson's behalf (R. at 15). Morris was Johnson's supervisor when he worked for the Itta Bena Police Department during the time frame when Johnson was discharged for committing embezzlement. (R. at 45). Morris testified that Johnson was a good officer and that he simply exhibited bad judgment. (R. at 17). Morris further testified about Johnson's "rehabilitation" since his guilty plea in 1999. Specifically, Morris testified that he ". . .wouldn't have came [sic] down here if [he] didn't know the way he [Johnson] is, and the way he's carried hisself [sic] since then. . . ." (Id.) Morris testified that "[h]e's been the same upstanding citizen." (R..at 17). Furthermore, Morris asked the Board to give Johnson a second chance to regain his career. (R. at 15). Both sides rested and the Board entered into an executive session to consider the matter before this Court. (R. at 18). At the conclusion of the executive session, the Board voted unanimously to cancel and recall Johnson's certificate, finding that Johnson's conduct breached the Law Enforcement Code of Ethics. (R. at 19). Moreover, the Board found that Johnson's crime violated the minimum standards [of officer conduct] and diminished the public trust. (Id.)

SUMMARY OF THE ARGUMENT

This case is about a police officer seeking to reactivate his professional certificate after he was discharged from his job because he pawned a shotgun that had been entrusted to him and benefitted from the proceeds. The Board has a duty to ensure that certificates are only issued to fully qualified officers, denied when applicants are not qualified to be in law enforcement, and revoked when appropriate.

This Court, in hearing this matter, is limited to an appellate review of the record. A rebuttable presumption exists in favor of the Board's decision. Appellate courts provide great deference to an agency's interpretation and application of its own rules. The Record from the Public Safety Board contains ample evidence to support the Board's decision to deny Johnson's application for reactivation of his certificate.

The Board's decision to deny Johnson's application for certification was clearly within it's statutory discretion and provided Johnson with due process afforded him under the law. Johnson's application for reactivation of his certificate was received by the Board and given a thorough review. The Board then notified Johnson that the request had been denied. A full hearing was conducted by the Board. He was also given the opportunity to have witnesses speak and present evidence to support his case for certification. Johnson has been afforded all due process required under the law. Furthermore, the doctrine of laches does not apply in this situation. The passage of time did not prejudice Johnson in any way. The Board adhered to the regulations promulgated under the authority of the Mississippi Code.

The Chancellor opined that the Board did not have the authority to deny Johnson's application for a professional certificate without initiating action to determine whether to recall Johnson's certificate. However, the Chancellor offers no authority to support his contention.

Johnson presented additional information through the testimony of Morris. Morris' testimony served to show Johnson's purported rehabilitation. The Board reviewed all the evidence along with the subsequent behavior presented at the hearing but did not find the evidence persuasive enough to establish that Johnson met the minimum fitness to be certified as a law enforcement officer. Considering all the additional information, the Board acted within its authority in denying Johnson's application for certification, and the Chancellor abused his discretion by remanding the case for yet another subsequent hearing.

ARGUMENT

I. This Court Employs a Highly Deferential Standard of Review.

This Court is limited to an appellate review of the record from the hearing conducted by the Public Safety Board. *The Board of Law Enforcement Officers Standards and Training v. Butler*, 672 So. 2d 1196, 1199 (Miss. 1996) (reversed on the grounds that the chancellor had abused his discretion by substituting his judgment for that of the agency when there was ground for the agency's decision which negated a finding of arbitrary and capricious). Regarding the Board's factual conclusions, the standard of review is whether or not there was an evidentiary basis for its decision. *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)). 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). There is a rebuttable presumption in favor of the agency's decision. *Clark*, 964 So. 2d at 573. There can be no doubt that an officer who has pleaded guilty to the felony crime of embezzlement has violated the public trust. This fact alone supports the Public Safety board' s revocation and refusal to recertify Johnson.

With respect to whether the Board's actions were consistent with its governing statutes and rules, the Board is entitled to "great deference" in its "'construction of its own rules and regulations and the statutes under which it operates.'" *McDerment v. Miss. Real Estate Comm'n*, 748 So.2d 114, 118 (Miss.1999) (quoting *Miss. State Tax Comm'n v. Mask*, 667 So.2d 1313,

1314 (Miss.1995)). When reviewing an agency's interpretation of its governing statutes, courts determine whether the statute is "ambiguous or silent" on the precise question, and, if so, the agency's interpretation must be upheld if it is "based on a permissible construction of the statute." *Barbour v. State ex rel. Hood*, 974 So.2d 232, 240 (Miss. 2008)(citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984)). Further, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Mississippi Gaming Com'n v. Imperial Palace of Mississippi, Inc.*, 751 So.2d 1025, 1029 (Miss. 1999) (quoting *Chevron*, 467 U.S. at 843 n.11).

Separately, courts provide even greater deference to an agency's interpretation and application of its own rules. Indeed, the "standard of review limits an appellate court to determining whether the agency's construction of its own rules rises to a level of being an arbitrary determination." *Mississippi Dep't of Human Services v. McDonald*, 24 So.3d 378, 381 (Miss.App. 2009); *Miss. State Tax Comm'n v. Mask*, 667 So.2d 1313, 1315 (Miss. 1995). Although firmly grounded in the separation of powers doctrine, the great deference afforded administrative agencies reflects the complexity of legal, policy, and public safety concerns with which boards like the appellant Mississippi Department of Public Safety Board on Law Enforcement Officer Standards and Training must balance when granting law enforcement certificates. As this Court has noted in similar circumstances,

> We have today a matter of statutory interpretation, committed initially to an agency within the executive department of the government, here the State Personnel Board and its alter ego, the Employees Appeal Board. Notwithstanding our ordinarily *de novo* review of questions of law, we have accepted an obligation of deference to agency interpretation and practice in areas of administration by

> law committed to their responsibility. This duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate. In today's context, that duty of deference is as well a function of EAB's unique administrative charge to blend and pursue pragmatically and at once fact finding, legal interpretation and promotion of legislatively established public policy.

Gill v. Mississippi Dept. of Wildlife Conservation, 574 So.2d 586, 593 (Miss. 1990) (citations omitted).

II. The Board's Decision Comported with Due Process and Was Not Inconsistent with Its Governing Statutes or Regulations.

A. The Board Provided Johnson With Due Process.

In the Opinion and Order issued by the Chancellor, the matter was remanded for another hearing so that both the Board and Johnson could have another opportunity to present additional evidence although there is no indication any additional evidence exists. The on-the-record hearing provided at Johnson's request fulfilled the Board's due process obligation. The due process required by the Federal Constitution is the same due process required by the Mississippi Constitution. *Mississippi Power Co. v. Goudy*, 459 So.2d 257, 275 (Miss.1984); *Secretary of State v. Wiesenberg* 633 So.2d 983, 996 (Miss. 1994). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). "The 'timing and nature of the required hearing will depend on appropriate accommodation of the competing interests involved.' " *Krimstock v. Kelly*, 306 F.3d 40, 51-52 (2d Cir.2002) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)). The essence of due process is that a deprivation of a property or liberty interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70

S.Ct. 652, 656, 94 L.Ed. 865 (1950); see also *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. The Board sent a letter to Johnson notifying him that Mississippi Valley State's request that his certificate be reactivated was denied. The letter also informed Johnson that he was entitled to request a hearing before the Board if he was aggrieved by the decision of the Board. *See* R. at 11-18. Johnson appealed the decision of the Board, and a full hearing was held before the Board. Johnson testified during the hearing and also offered the testimony of Itta Bena's Police Chief Isaac Morris. Morris testified regarding Johnson's actions since his guilty plea in 1999. *See* R. at 9-11. Clearly, the notice given was adequate, and Johnson's testimony, along with that of Morris, satisfy due process.

Importantly, any argument that due process required the Board to conduct a hearing in April 1999, when the Itta Bena Police Department returned Johnson's certificate is simply wrong. Due process, at its fullest protection, requires a hearing before the Board actually and affirmatively deprived Johnson of a property interest. *Mullane*, 339 U.S. at 313; *see also Loudermill*, 470 U.S. at 546. In April 1999, the Board took no action to deprive Johnson of his certificate. In April 1999, the Board received the certificate from Itta Bena and the certificate become inactive. The Board then awaited to see if there was any interest from Johnson in continuing his law enforcement career. Because Johnson was no longer using, or in need of his certificate, there was no need to hold a hearing from April 1999 until Mississippi Valley State contacted the Board in 2008. Once the Board proceeded to consider whether to issue Johnson' s certificate to Mississippi Valley State, the Board then provided Johnson notice and an opportunity to be heard as required by the due process guarantee. In short, there was no deprivation of Johnson's interest in his certificate until 2008 and, thus, there was no constitutional requirement for a hearing until that time.

B. The Board's Actions Were Consistent with Its Governing Statutes and Regulations.

The Board is a statutorily created agency entrusted with "provid[ing] for the coordination of training programs for law enforcement officers and to set standards therefore." Miss. Code. Ann. § 45-6-1. Under Miss. Code Ann. § 45-6-7, the Board "shall have the power to . . . certify persons as being qualified under the provisions of this chapter to be law enforcement officers" and to "revoke certification for cause." There is ample statutory authority that gives the Board discretion to determine whether or not to reactivate and/or revoke a certificate. . The Board's decision not to reactive Johnson's certificate in 2008 was consistent with, and in fact required by, Code Section 45-6-11(4) providing that "[n]o person shall be appointed or employed as a law enforcement officer . . . unless that person has been certified as being qualified . . . [including that the candidate has] good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibly of law enforcement officers. . . ."

Further, the Board's decision to revoke Johnson's certificate in 2008, rather than 1999, is consistent with its regulations. While Chapter 2 §102.05 of regulations provides that the **"staff** shall decide the disposition of a certificate within a reasonable time after receiving notice that a certificate has been returned", the regulations provide greater flexibility for the Board by providing that "the Board may decide to:

1. delay consideration of the return of the certificate;
2. inactivate the certificate;
3. assign stewardship of the certificate to new law enforcement employer or;
4. annul/revoke a certificate, if issued in error or through misrepresentation or

fraud."

Board Regulation Ch. 2, § 102.05. Further, Chapter 2 §102.08 provides:

> When the staff has inactivated a certificate because an officer is no longer in law enforcement employment as described in this Policy and Procedures Manual, is on indefinite leave or leave for more than one year, or for other reasons the Board director may reactivate the certificate when the certified officer resumes employment for the employer who returned the certificate or under a new law enforcement employer included under the Law Enforcement Officers Training Program.

Johnson's certificate became inactive and remained in the possession of the Board after it was returned by the Itta Bena Police Department and Johnson expressed no interest in returning to law enforcement, and no law enforcement agency asked that the certificate be sent to them so that they could employ Johnson.[7] Further, once an officer is out of law enforcement for two years, his certification "lapses" by operation of the Board's regulation. *See* Board Regulation Ch. 2, § 102.09 ("When an officer, certified by Mississippi statute, leaves law enforcement employment for a period of two years or more, his or her certificate will lapse."); Miss. Code Ann. § 45-6-11(1). After 2001 (two years after Johnson left law enforcement), his certificate lapsed by operation of the regulation and there was no reason for the Board to take any action regarding the returned and now lapsed certificate unless and until Johnson desired to re-enter the field of law enforcement. Thus, the Board's decision to conduct a hearing in 2008 regarding whether to reactivate and/or to revoke Johnson's license was not an "arbitrary" construction of its rules lacking any basis and made on a whim, but was, in fact, consistent with their common sense

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[7] Indeed, a hearing in 1999 to revoke the certificate, in light of the fact that Johnson was not seeking re-employment in law enforcement at that time, would have been a pointless act. There was no need to revoke a certificate that was voluntarily surrendered to the Board. Further, there was, in all likelihood, little chance that Johnson, who had pled guilty to a felony charge stemming from his pawning of his city issued weapon, would ever seek re-employment in law enforcement for if he did seek it, that any law enforcement agency would ever offer to hire him.

application. *See Mississippi Dep't of Human Services v. McDonald*, 24 So.3d 378, 381 (Miss.App. 2009); *Miss. State Tax Comm'n v. Mask*, 667 So.2d 1313, 1315 (Miss. 1995); *State Tax Commission v. Earnest*, 627 So. 2d 313, 320 (Miss. 1993) ("An act is [considered] arbitrary when it is done without adequately determining principle; [or when] not done according to reason or judgment . . .")

C. Laches Does Not Apply to the Board, Who is Acting in the Public Interest.

Further, even if Johnson were to contend that the doctrine of laches bars the Board from revoking his license in 2008 (even though Johnson himself took no action regarding his license from 1999 through 2008), such a contention would be wrong. The passage of time alone is not sufficient for the application of the doctrine of laches. *Bauer v. New York State Office Of Children and Family Services,* 55 A.D.3d 421 (2008). When determining when laches is asserted "all of the circumstances of the case, one of which must be the existence of harm occasioned by the delay" must be considered. *In Re Tenenbaum,* 918 A.2d 1109, 1114 (2007). "As a general rule, an individual's due process rights are not violated, and will not affect the validity of an administrative determination, unless actual prejudice is shown." *Id.* at 1122 (quoting *Sandifur v. Unemployment Insurance Appeals Board,* 1993 WL 389217 (Del.Super) (check the format of this cite with the blue book). There was no prejudice to Johnson. Johnson was given a hearing when he requested one. When Johnson was fired from the Itta Bena Police Department, his certificate was returned to the Board. Johnson essentially gave his certificate up voluntarily when he committed acts that resulted in him losing his job. Had Johnson applied for another job, he would have been given a hearing at that time. Otherwise, there was no need to hold a hearing. Johnson stayed out of law enforcement for nine years. Johnson had his record expunged shortly before the hearing at issue. When Johnson decided to attempt to return to law

enforcement, the hearing process began. Consequently, no prejudice was shown to Johnson.

Furthermore, this Court has already held that laches does not run against the state. "Article 4, §104 of the Mississippi Constitution of 1890 reads as follows: [s]tatutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof." *Mississippi State Highway Commission v. New Albany Gas Systems*, 534 So. 2d 204, 207 (Miss. 1988). "[L]aches will not be attributed to the State, especially when it is action in its sovereign capacity or exercising rights on behalf of the general public; and most of the courts seem to have generally acted upon this theory in administering its last in suits by the State . . . ." *Id.* at 208. In the case at bar, the Board was exercising rights on behalf of the State of Mississippi. "Although courts generally apply general Statutes of Limitation to administrative proceedings, the opposite is true with respect to proceedings which are in the public interest." *In Re Tenenbaum,* 918 A.2d 1109, 1126 (2007). It is the responsibility of the Board to certify law enforcement officers to protect the citizens of Mississippi. The doctrine of laches does not save Johnson from the Board's decision. Indeed, especially in light of the uncontested fact that Johnson pled guilty to his felony offense, the public interest and public safety would be harmed by certifying Johnson to return to law enforcement under these circumstances. Johnson's act of pawning his city issued weapon and using the funds for personal gain is a severe breach of the trust placed in him as a law enforcement officer.

Assuming arguendo, laches were to be applied, the court in *Tenenbaum* set forth a three-prong test "for determining whether an affirmative defense of laches is met." 918 A.2d 1109, 1124 (2007). The criteria are: "(1) knowledge by the claimant; (2) unreasonable delay in bringing the claim; and (3) prejudice to the defendant." *Id.* In order to defeat the defense of laches, a showing of a lack of "any one of the elements is missing" is required. *Id.* (quoting

Gotham Partners v. Millwood Realty Partners, 714 A.2d 96, 104-105) (Del.Ch.1998). In the case at bar, two of the three elements can be defeated. The Board did have knowledge that Johnson had been fired from his job for embezzlement. However, there was no need to hold a hearing to revoke Johnson 's certificate because he was not employed as a law enforcement officer. Johnson did not apply for a job in which a certificate was necessary to complete his duties. He voluntarily remained out of law enforcement for nine years. Only when Johnson applied for the law enforcement position at MVSU did the Board take action. The second element is not met. As previously discussed, there was no prejudice to Johnson. For example, Johnson was not hampered in his presentation by the faded memory of witnesses when the only operative fact was his admitted plea of guilty to a felony and his further admission to the Board that he did indeed pawn his city issued weapon. In fact, the fact that the Board did not consider the revocation of Johnson's certificate until 2008 actually **benefitted** Johnson. Because the Board did not consider Johnson 's 1998 actions of pawning and embezzling funds until 2008, Johnson was able to present to the Board "rehabilitation" testimony of his actions between 1998 and 2008 in support of his certification. *See* R. at 11-18. Had the hearing been held in 1998, no such testimony would have been available to act as a counterweight to his guilty plea. Johnson had time to attempt to rehabilitate his character and show he could abide by the regulations and statutes necessary in order to obtain a professional certificate. The Board can defeat two of the three elements. Furthermore, laches does not apply to the Board, who is acting in the public interest.

Johnson's constitutional and statutory rights were not violated during the hearing or through the final order from the Board. As such, the Chancellor did not have the authority to reverse the Board's holding and remand the matter for a subsequent hearing.

III. The Chancellor, Sitting as an Appellate Court, Abused his Discretion by Remanding the Matter for a Subsequent Hearing.

A. The Chancellor, Sitting as an Appellate Court, is Limited to a Review of the Record.

The Chancery Court, sitting as an appellate court, "is limited to a review of the record made before the administrative agency" when hearing a case that is on appeal from an administrative agency. (*Tucker v. Prisock, Sr.*, 791 So. 2d 190, 192 (Miss.2001) (citing *Board of Trustees v. Acker,* 326 So. 2d. 799, 801 (Miss 1976)). This limitation is set forth in our Constitution. *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969) (See *Lofton v. George County Board of Education*, 183 So. 2d 624, (Miss. 1966)). "Our courts are not permitted to make administrative decisions and perform functions of an administrative agency." *Id.* These functions must be performed by the administrative agencies as required "of them by law." *Id.* Once the administrative agency has made a final decision, the party aggrieved by the final decision "may appeal to the judicial tribunal designated to hear the appeal." *Id.* However, "since the courts cannot enter the field of an administrative agency," the appeal will be limited. *Id.*

> The decision of any administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party.

The Board of Law Enforcement Officers Standards and Training v. Butler, 672 So. 2d 1196, 1199 (Miss. 1996). The Chancellor did not mention, much less discuss, these factors as a basis for remanding the case for a subsequent hearing.

This Court opined in *Tucker* that the definition of substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion . . . ." 791 So. 2d

190, 192 (Miss. 2001) (internal quotations omitted). The Board reviewed all the evidence presented. Johnson's application, his testimony, and the testimony of Morris were all considered before deciding to deny Johnson's application for certification. The Board is vested with statutory authority in clear language to make the decision to deny Johnson's application, and there was more than ample evidence in the record to support such a decision. Johnson did not deny pawning the weapons at the pawn shop. In fact, he admitted it during the hearing and in a letter he sent to the Board. (R. at 45). Clearly, the Public Safety Board's decision was supported by substantial evidence to deny Johnson's application.

Unless a Chancellor finds that the decision of the administrative agency is arbitrary and capricious, the decision is not to be disturbed. "An act is [considered] arbitrary when it is done without adequately determining principle; [or when] not done according to reason or judgment . . ." *State Tax Commission v. Earnest*, 627 So. 2d 313, 320 (Miss. 1993) (quoting *Mississippi Department of Health v. Southwest Mississippi Regional Medical Center,* 580 So. 2d 1238, 1239 (Miss. 1991)). "An act is capricious when it is done without reason, in a whimsical manner, implying that either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles . . . ." *Id.* The Board has discretion when making a determination about whether an applicant can obtain the requisite certification to become a law enforcement officer. Miss. Code Ann. § 45-6-11(3) states that the "no person shall be appointed or employed as a law enforcement officer . . . unless that person has been certified as being qualified . . . ." Subsection (4) of Miss. Code Ann. § 45-6-11 lists other "qualifications for the employment of law enforcement officers, including minimum age, education, physical and mental standards, citizenship, **good moral character**, experience, and **other such matters** as relate to the competence and reliability of persons" that would like to become law enforcement officers.

(emphasis added). The Board exercised that authority in denying Johnson's application. All of the facts were reviewed in the Johnson case. The applicable regulations and statutes were applied in reaching the final decision to deny Johnson's application for certification as an officer. The action taken by the Board can not be characterized as arbitrary or capricious. In a case directly on point, this Court upheld the agency's decision to deny an officer certification when he had embezzled a gun from the police department. *Board of Law Enforcement Officer Standards and Training v. Rushing*, 752 So. 2d 1085, 1091-92 (Miss. 2000). The Supreme Court held that evidence in the record that the officer had entered a guilty plea to a felony constituted substantial evidence to support the Board's denial. *Id.*

The Board is responsible for certifying law enforcement officers to protect the citizens of Mississippi. The Board is a statutorily created agency entrusted with "provid[ing] for the coordination of training programs for law enforcement officers and to set standards therefore." Miss. Code. Ann. § 45-6-1. Under Miss. Code Ann. § 45-6-7, the Board "shall have the power to . . . certify persons as being qualified under the provisions of this chapter to be law enforcement officers" and to "revoke certification for cause." There is ample statutory authority that gives the Board discretion to determine whether or not to recall or recertify an applicant. The Board did not exceed the scope of the agency's power.

B. The Public Safety Board's Holding is Unassailably Correct.

The Board's decision to deny Johnson a professional certificate is unassailably correct. Johnson's actions while employed as a police officer by the Itta Bena Police Department should not be, and were not, taken lightly when determining whether Johnson should be allowed to become a police officer once again. The decision of the Board to deny Johnson's application is fundamentally fair and well within the statutory scope of its authority.

Johnson's decision to pawn a shotgun that was entrusted to him diminished the public trust in his trustworthiness and competence to enforce and uphold the law. Every police officer operates under the Law Enforcement Code of Ethics. Johnson did not abide by the objectives and ideals contained in the Law Enforcement Code of Ethics. In fact, Johnson's actions violated several primary objectives in the Code. One of the more pertinent objectives states that a law enforcement officer will be "[h]onest in thought and deed in both my personal and official life. . . [and] will be exemplary in obeying the laws of the land and the regulations of my department." (Board Regulations at page 1.)

The crime of embezzlement Johnson committed was a serious felony. Police officers are charged with arresting citizens who commit the very same acts. The public must have faith that law enforcement officers will obey the law, or the justice system becomes less effective. An attorney who borrows a client' s funds with no intent of stealing the funds can nonetheless be disbarred for the act. This is analogous to the act Johnson committed. Johnson stated he did not intend to embezzle money from the police department. He stated he planned to retrieve the shotgun from the pawn shop once he received his tax return (R. at 12). However, the act is all that is pertinent when considering whether Johnson should be allowed to receive his professional certificate. A Mississippi Supreme Court case held "it is not the formal judgment of conviction and any ensuing punishment that warrants withdrawal of [an] officer's law enforcement certificate, except to [the] extent that judgement establishes unlawful activity; it is, rather, fact of illegal behavior itself that raises questions concerning individual's fitness." *The Board of Law Enforcement Officers Standards and Training v. Rushing,* 752 So. 2d. 1085, 1091. The felonious acts Johnson committed are sufficient to deny his certificate even though Johnson entered a pre-trial diversion program, and the guilty plea was withheld.

C. The Chancellor's Opinion is Incorrect.

The Board's final decision to deny Johnson's application for certification was correct. After reviewing all of the pertinent information submitted by Johnson, in addition to the full hearing testimony, the Board decided that Johnson's certificate should not be reactivated and should be revoked because he was not fit to be employed as a law enforcement officer. The Board interpreted Miss. Code Ann. § 45-6-11(7) within its discretion. Miss. Code Ann. § 45-6-11(7) states that the "board reserves the right. . . to cancel and recall any certificate when. . . (c) the holder has been convicted of any crime of moral turpitude; (d) the holder has been convicted of a felony; . . . or (f) other due cause as determined by the board." The Board utilized this discretion in the case at bar. Action was not required by the Board at the time Johnson was fired from his job for committing the act of embezzlement. Johnson's certificate was returned to the Board. Until Johnson submitted an application to MVSU seeking employment as a law enforcement officer, the Board had no responsibility to hold a hearing for Johnson. The Chancellor does state in the Opinion and Order that a "valid presumption exists that there was a defacto recall of Johnson's certificate." The Chancellor's presumption is wrong. Anytime a certified officer changes employers, his certificate is returned to the Board pending re-employment. No administrative hearing is required when the certificate is returned. Further, the return of Johnson's certificate by the Itta Bena Police Department was an administrative action. It was only after Johnson desired that his certificate be reactivated that Johnson sought and was granted a hearing.

The Chancellor further opined that the Board "[did] not have the authority to remain idle for nine years before instituting action to recall." (R. at 71). This statement by the Chancellor is incorrect. Once a certificate is returned to the Board and remains with the Board, the certificate

became inactive, *i.e.*, it was not in the possession of a law enforcement agency, no agency was requesting the certification, and Johnson was not seeking employment as a law enforcement officer. *See* Board Regulation Ch. 2, § 102.05. "The Board may decide to: . . . inactivate the certificate. . . ." *Id.* Further, the Board also had the express authority under Section 102.05(2) to delay consideration of any return of certificate. Thus, the staff and the board do have the authority to inactivate a certificate, which is what happened in Johnson's case.

The Chancellor fundamentally misunderstood the decision by Johnson to remain out of law enforcement for nine years. Johnson remained out of law enforcement voluntarily. Once Johnson remained out of law enforcement for two years, his certificate lapsed. *See* Board Regulation Ch. 2, § 102.09. The Board simply inactivated Johnson's certificate.

The full hearing to determine whether Johnson was qualified to become a law enforcement officer was held when the time was appropriate. Johnson remained out of law enforcement for nine years. The Chancellor also points out that a "logical assumption [exists] that Mr. Johnson did not work as a law enforcement officer for those nine years because he believed he lacked certification or potential employers were unable to obtain proof of his certification from the Board." Johnson had not gotten his record expunged. It is not a mystery why Johnson waited nine years to seek certification. Johnson was aware, or should have been aware of the fact that he would lose his certification if he engaged in criminal activity, especially felonious acts. A reasonable explanation why Johnson remained out of law enforcement is because he knew that reactivitation of his certificate would be problematic.

Finally, the Chancellor reversed the Board because he believed the hearing provided by the Board should have been considered to be for "recertification rather than an initial decertification" (R. at 72). The Chancellor finds no legal authority for this conclusion. More

importantly, there is no distinction between "recertification" or "decertification" in this context, especially given that the certificate became unquestionably inactive after Johnson was out of law enforcement for two years. *See* Board Regulation § 102.08. In the Chancellor's view, a "recertification" hearing would permit Johnson to present evidence that he has been rehabilitated since his 1999 guilty plea. In fact, This was already done as clearly reflected in the record. Johnson had his opportunity to rehabilitate himself and did in fact make an attempt to do such. Morris states in the hearing that "the district attorney and the court knew his [Johnson's] reputation of how he worked and he had been all these years." (R. at 16). "And that's how his record when [sic] ahead and got expunged." (Id.) Moreover, Morris testified that he ". . .wouldn't have came [sic] down here if [he] didn't know the way he [Johnson] is, and the way he's carried hisself [sic] since then. . . ." (Id.) Morris goes on to say that "[h]e's been the same upstanding citizen." (R. at 17). Further, the criteria for deciding whether to "recertify" or "decertify", as those terms are used by the Chancellor, are the same. Code Section 45-6-11(4) provides that a law enforcement officer must be of "good moral character." Further, Code Section 45-6-11(7) states that the "board reserves the right. . . to cancel and recall any certificate when. . . (c) the holder has been convicted of any crime of moral turpitude; (d) the holder has been convicted of a felony. . . ." Whether considered recertification or decertification, the Board properly found that Johnson, as of 2008, lacked the "good moral character" necessary to be a law enforcement officer. Ample evidence in the record supports the Board's decision.

This Court opined that "great deference is accorded to an administrative agency's construction of its own rules and regulations and the statutes under which it operates." *Melody Manor Convalescent Center v. Mississippi State Department of Health,* 546 So.2d 972, 974 (1989). "The burden of proof rests with the party challenging the actions of an administrative

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 ***Brief of Appellant*** to the following:

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This the 10th day of September, 2010.

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