

**BEFORE THE MISSISSIPPI SUPREME COURT**  
**Cause No. 2010-CC-01057**

**CITY OF JACKSON, MISSISSIPPI**

**APPELLANT**

**v.**

**SLADE MOORE**

**APPELLEE**

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**BRIEF OF THE CITY OF JACKSON, MISSISSIPPI, APPELLANT**

(On Appeal from the Circuit Court for the First Judicial District of Hinds County, Mississippi)

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**ORAL ARGUMENT REQUESTED**

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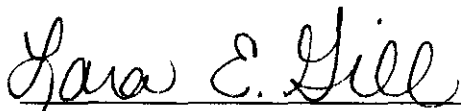
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**CERTIFICATE OF INTERESTED PARTIES**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case, and makes these representations in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. City of Jackson, Mississippi ("City"), Appellant
2. Slade Moore ("Moore"), Appellee
3. Pieter Teeuwissen, City Attorney and Lara E. Gill, Deputy City Attorney II, Attorneys for the City of Jackson, Mississippi, Appellant
4. Dennis C. Sweet, IV Esq. and Warren L. Martin, Jr. Esq., SWEET & ASSOCIATES, Attorneys for Slade Moore, Appellee



Pieter Teeuwissen, City Attorney

Mississippi Bar No. [REDACTED]

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*Attorneys of record for the Appellant,  
City of Jackson, Mississippi*

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### **STATEMENT OF THE ISSUE**

The sole issue for this Court to decide is whether or not the City of Jackson, Mississippi (“City”) had good cause for its termination of Slade Moore (“Moore”) as its employee. The termination of Moore’s employment as a Jackson Police Officer by the City was made in good faith and for cause, according to applicable Mississippi case and statutory authority. The Circuit Court for the First Judicial District of Hinds County, Mississippi, improperly found that the decision of the Jackson Civil Service Commission (“Commission”), was based on substantial evidence and not arbitrary and capricious. Therefore, the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, must be reversed.

### **STATEMENT OF THE CASE**

A. **Course of Proceedings.** Moore was terminated by the City on July 18, 2006, for use of excessive force in the arrest of Chad Calcote.<sup>1</sup> Moore requested and received a review hearing regarding his termination before the Jackson Civil Service Commission. [R. 8-11] The Commission entered its Opinion and Order reinstating Moore’s employment on March 13, 2008. [R. 5- 7] The City timely appealed the Commission’s Opinion and Order to the Circuit Court for the First Judicial District of Hinds County, Mississippi, on or about April 14, 2008. [R. 3-4] The Honorable W. Swan Yerger, on June 18, 2008, reassigned the matter to be heard by Circuit Court Judge Bobby DeLaughter [R. at 32], and then subsequently recused himself on July 8, 2008 [R. at 33] The matter was then assigned a special judge, Robert L. Goza, to preside over the proceedings on July 23, 2008, by this Court. [R. at 34] Judge Goza then recused himself from presiding over the proceedings on July 28, 2009. [R. at 35] By Order entered by this Court on August 3, 2009, the

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<sup>1</sup>See also *City of Jackson, Mississippi v. Calcote*, 910 So.2d 1103 (Miss. App. 2005), hereinafter referred to as *Calcote* case.

Honorable William J. Lutz was appointed Special Judge to hear the matter. [R. at 36].

After briefing of the issues by the City and Moore, a hearing was conducted on the City's appeal of the Civil Service Commission's Opinion and Order before Judge Lutz on May 24, 2010. [See Transcript 1-32] The Circuit Court for the First Judicial District of Hinds County, Mississippi, Special Judge William Lutz presiding, affirmed the Opinion and Order of the Jackson Civil Service Commission on June 3, 2010. [R. 37-38] On June 29, 2010, the City timely filed its Notice of Appeal of the decision by the Circuit Court for the First Judicial District of Hinds County, Mississippi. [R. 39-41;46-50]

**B. Statement of Facts.** As set forth above, this matter arises from the employment termination of former Jackson Police Officer Slade Moore. Moore, a Sergeant with the Jackson Police Department ("JPD"), was terminated on July 18, 2006, in part and as the result of numerous complaints lodged against him for excessive use of force, including, but not limited to, the *Calcote* case referenced hereinabove.<sup>2</sup> [R. 23-29] As evidenced in JPD's termination letter dated July 18, 2006 [R.27-29], the City particularly stated that, based on the charges and specifications, "federal law holds that City of Jackson accountable for any behavior that may be considered a common practice, pattern or procedure..." [R. 27]. Additionally, the City specified Moore's violations of JPD's General Orders<sup>3</sup> and Rules and Regulations<sup>4</sup>, as well as Moore's violations of the Civil

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<sup>2</sup>Appellee Moore has been the subject of a lawsuit filed against the City of Jackson in Federal Court. The City settled a claim alleging excessive use of force by Moore in the matter of *Nichols v. City of Jackson*, In the United States District Court for the Southern District of Mississippi, Jackson Division, Cause No. 3:06-cv-364 HTW-JCS.

<sup>3</sup>General Order Nos. 500.1, §II-A; 600-1, §III; 600-10, §A-1; 600-10,§A-6 and 600-10, §IV-A. [R.28]

<sup>4</sup>JPD Rules and Regulations, § 2, Attention to Duty, 2.6 Truthfulness, and §4, Restriction on Behavior,4.20 Use of Force. [R.28]



Service Rules for the City of Jackson<sup>5</sup>.

However, despite Moore's numerous complaints for excessive use of force and the subsequent Court of Appeals' determination of Moore's actions in the *Calcote* case, the Commission determined that the City's disciplinary action against Moore "was not supported by the evidence." [R. 45].<sup>6</sup> Specifically, the Commission concluded that "the liability of the City of Jackson for negligence of an officer *is not necessarily grounds*<sup>7</sup> for termination of the officer even when injury results to an arrested individual." [R. 45 (emphasis supplied)] The Commission further held that, despite the Court of Appeals' determination that Moore "shoved [Calcote's] face into a concrete floor, pressed his fingers into [Calcote's] eyes and rolled [Calcote's] face back and forth across the concrete floor,"<sup>8</sup> that the City's termination of Moore was not supported by the evidence.<sup>9</sup> [R. 37-38; 45]

### SUMMARY OF THE ARGUMENT

The decision of the Jackson Civil Service Commission ("Commission") reversing Slade Moore's termination is not supported by substantial evidence, is arbitrary and capricious, and beyond the scope or power granted to Commission under Mississippi law. The Commission attempted to

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<sup>5</sup>Civil Service Rule for the City of Jackson, Mississippi: Section XII, § 2(M), Conduct Unbecoming to a City Employee, and Civil Service Rule for the City of Jackson, Mississippi: Section XII, § 2(O), Willful and wanton brutality or cruelty to a prisoner or one detained or under arrest. [R. 29]

<sup>6</sup> Moore asserts that his termination was made for political reasons and because he is a Caucasian male. [Transcript, pp. 6-9]. As a result, Moore alleges that the City termination of him and was not made in good faith for cause.

<sup>7</sup>Notably, there is nothing in the record that states definitively that the City's termination of Moore for the resulting liability to the City for Moore's use of excessive force does not constitute a good faith basis and cause for disciplinary action.

<sup>8</sup>*Calcote*, 910 So.2d 1103, 1110 (Miss. App. 2005).

<sup>9</sup>Moore has also filed suit against the City alleging racial discrimination and retaliation in violation of 42 U.S.C. § 1981 and § 1983, alleging that he was racially discriminated against, starting on September 28, 2005, by being transferred to a desk job, and then his subsequent termination by the City on July 18, 2006. See *Slade Moore v. City of Jackson, Mississippi*, In the United States District Court for the Southern District of Mississippi, 3:10-cv-454 DPJ-FKB.

substitute its judgment in place of that of the City of Jackson, instead of determining whether the City of Jackson's actions in termination of Moore were made in good faith and for cause.<sup>10</sup> The City presented convincing substantial, credible evidence to the Commission, showing that its termination of Moore was in good faith and for cause, the nature of which adequately supports the City's termination of Moore. The City likewise submitted credible, substantial evidence showing that its termination of Moore was made on a substantial basis, being that federal law holds that City of Jackson accountable for any behavior that may be considered to be a common practice, pattern or procedure.<sup>11</sup> As a result, the Commission's decision and the Circuit Court's affirmation of the Commission's decision, forces the City into liability under both state and federal law.

Requiring the City to retain Moore as an employee, in light of Moore's persistent, continuous pattern and use of excessive force as a law enforcement officer, sets a dangerous precedence for the City and for the citizens of Jackson, Mississippi. Retention of Moore as an employee of the City, will most likely result in the City's further state tort and federal constitutional liability, and expose the citizens of Jackson to serious bodily injury. Because the decision of the Commission is unsupported and improper, the judgment affirming the Commission's decision by the Hinds County Circuit Court must also be reversed. The City respectfully requests that this Court reverse and render this matter in its favor.

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<sup>10</sup>See also Miss. Code Ann. § 21-31-21, and *City of Jackson v. Froshour*, 530 So.2d 1348,1355 (Miss. 1998), which prohibits the CSC Commissioners from substituting its judgment for that of the governing authorities of the City. A civil service commission's review of a city's decision to discipline is limited to whether the city's decision was made in good faith for cause. *Id.* Where a civil service commission exceeds its authority, or imposes its judgment in place of that of a city's governing authorities, such a decision is beyond the CSC's authority to make. *Grant v. City of Columbus*, 812 So. 2d 976 (Miss. 2002).

<sup>11</sup>See also 42 U.S.C.A. § 1983; *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) ;and *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 748 (5<sup>th</sup> Cir. 2005)(municipal liability attaches under § 1983 when there is (1) a policymaker who promulgates, approves or ratifies (2) an official policy or custom resulting in a (3) violation of an individual's constitutional rights, where the constitutional violation of the individual's right is causally linked to the policy or custom being the 'moving force' behind such constitutional violation.

## STANDARD OF REVIEW

Ultimately, this Court sits as the appellate court in its review of the Commission's decision reversing Moore's termination. *City of Gulfport, Mississippi v. Saxton*, 437 So. 2d 1215, 1217 (Miss. 1983); *see also* Miss. Code Ann. § 21-31-21 (1972). As this Court is aware, and pursuant to statute, a CSC reviews the employment decisions of a city when a city has removed, suspended, demoted or otherwise discharged a civil service employee. *Patterson v. City of Biloxi, Mississippi*, 965 So. 2d 765 (Miss. App. 2007), citing *City of Laurel v. Brewer*, 919 So.2d 217, 221 (Miss. App. 2005).

In reviewing a decision of an administrative body such as a civil service commission, a circuit court is confined to the determination of whether the Commission's decision was based on credible or substantial evidence<sup>12</sup>, which is such evidence as a reasonable mind might accept as adequate to support a conclusion, and that affords a substantial basis of fact from which a fact in issue can be reasonably inferred. *City of Laurel v. Brewer*, 919 So.2d at 222 (Miss. App. 2005). Therefore, it is upon the "substantial evidence" basis that this Court determines whether the Commission's decision was in good faith for cause. *See also City of Jackson v. Froshour*, 530 So.2d 1348 (Miss. 1988); *Grant v. City of Columbus*, 812 So. 2d 976 (Miss. 2002); *Martin v. City of Vicksburg*, 850 So.2d 191 (Miss. App. 2003). There is no credible evidence supporting the Jackson

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<sup>12</sup>In fact, the Jackson Civil Service Commission's Opinion and Order [R. 43-45], on the one hand, states that the Commission "is not bound by the previous findings of various Courts..." [R. 45] On the other hand, this same Opinion and Order relies on the City's purported legal position in the *Calcote* case, stating that the City "*in admitting that Sargent [sic] Moore's action were within the course and scope of his employment was also an admission that the officer's actions were not malicious...*" [R. 45 (emphasis supplied)] The Opinion and Order is completely inconsistent and contrary. Notably, Commissioner Hilburn only concurred in the Civil Service Commission's Order and Opinion. The City refers the Court to Judge Hilburn's decision in the case of *City of Jackson v. Froshour*, 530 So.2d 1348 (Miss. 1988). In *Froshour*, Commissioner Hilburn, sitting as Hinds County Circuit Court Judge, reversed the City's discharge of a police officer for insubordination and striking a handcuffed arrestee. This Court reversed and rendered Judge Hilburn's decision reinstating the subject police officer in *Froshour*, *supra*, and in the City's favor.

Civil Service Commission's Opinion and Order reinstating Moore. As a result, the judgment of the Hinds County Circuit Court affirming the Civil Service Commission's Opinion and Order must be reversed.

### **ARGUMENT AND AUTHORITIES**

This matter arises from the City's decision terminating one of its police officers, Slade Moore. As noted hereinabove, Moore appealed his termination to the Jackson Civil Service Commission. The Commission reversed the City's termination of Moore and ordered reinstatement. Accordingly, applicable Mississippi statutory and case authority regarding civil service coverage to a municipality and municipal employees is important. Further, because of the proof submitted by the City evidencing Moore's pattern of excessive use of force, municipal liability<sup>13</sup> is germane to resolving this matter as well. In this instance, and based on the authorities contained herein, the judgment of the Hinds County Circuit Court affirming the Civil Service Commission's Opinion and Order must be reversed.

#### **I. Forcing City's Reinstatement of Moore as employee violates clear Mississippi statutory and case authority.**

The Civil Service Statutes, Miss. Code Ann. §§ 21-31-1 *et seq.* (Rev.2001), cover civil service employees who have been permanently appointed or inducted into a municipality's civil service. It is uncontested that Moore is such a covered employee. Mississippi Code Ann. § 21-31-23 provides that, "no person in the classified civil service who shall have been permanently appointed or inducted into civil service ... shall be removed, suspended, demoted or discharged, or any combination thereof, except for cause, and only upon written accusation of the appointing power,

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<sup>13</sup>Municipal liability, as evidenced by the *Calcote* case and other federal authority, is addressed with particularity by the City further herein.

or any citizen or taxpayer....” Miss. Code Ann. § 21-31-23.

However, neither the Courts nor the Commission may substitute their judgment for that of the members of the governing authorities of the City of Jackson. *See City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1988)(no empowerment to supervise the intelligence, wisdom or fairness of municipality’s governing authorities). A substitution of a Commission’s judgment for that of the municipality’s governing authorities makes a Commission’s decision arbitrary and capricious, and beyond the power of the Commission to make. *Grant v. City of Columbus*, 812 So. 2d 976,979 (Miss. 2002)(incumbent upon the Court to determine whether the order in question was within the power of the Commission to make); *Martin v. City of Vicksburg* 850 So. 2d 191, 193 (Miss. App. 2003). In this matter, that is exactly what occurred. The Commission did not have authority to reinstate Moore where it is undisputed that Moore violated the City’s policies in assaulting Calcote. Thus, the decision of the Hinds County Circuit Court affirming the unsupported determination of the Jackson Civil Service Commission that is contrary to law must be reversed.

**A. The Civil Service Commission’s decision was not in good faith and for cause as required.**

At the onset, the Commission and the City are bound by the rules adopted by the Commission and duly- approved by the City. *See City of Meridian v. Johnson*, 593 So. 2d 35, 37 (Miss. 1992), citing *Bulloch v. City of Pascagoula*, 577 So. 2d 1234 (Miss. 1991). The scope of appellate review is limited to an examination of the record to determine whether there exists credible evidence substantiating the Commission’s action. *Id.* at 38 (Miss. 1992). In other words, the Court must ask if the Commission’s decision was made in good faith for cause. *Id.* The City submits that the Commission’s decision was not made in good faith for cause, as the decision is an impermissible

exercise and attempt by the Commission to supervise or replace the intelligence, wisdom or fairness of City's governing authorities. *See also* Transcript, pp. 3-5.<sup>14</sup> The City further submits that the decision of the Commission is arbitrary and capricious. *See City of Meridian v. Johnson*, 593 So. 2d at 38 (Miss. 1992)(intertwined with the question of the Commission's decision being made in good faith for cause is whether the Commission's decision is arbitrary and capricious). The arbitrariness and capriciousness of the Commission's decision is clearly evidenced by a reading of the Commission's Opinion and Order itself [R. 43-45], and by contrasting same with applicable Mississippi law, and the evidence submitted by the City.

The Commission, in making a determination, must consider factors and articulate a rational relationship between the facts found and the choice made, in order for its decision not to be arbitrary and capricious. *State of La., ex rel. Guste v. Verity*, 853 F.2d 322, 327 (CA 5<sup>th</sup> 1988); *see also Mississippi Dept. of Environmental Quality v. Chickasaw County Bd. of Supervisors*, 621 So.2d 1211,1217 (Miss. 1993). In this case, the Commission's Opinion and Order does not articulate any relevant factors it considered in reversing the City's termination of Moore - instead, the Opinion and Order cites partial facts of the *Calcote* case and relies on the "judicial trail [sic]" of *Calcote* and its treatment by various judges, stating that the judicial trail is "fraught with sharp turns." [R.43-44] The Commission's Opinion and Order then contrarily states that the Commission "is not bound by the previous findings of various Courts..." [R. 45] In the subject Opinion and Order, the Commission fails to identify or articulate any factors indicating or showing that the City's

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<sup>14</sup>As set forth by the City Attorney, Pieter Teeuwissen, at the hearing before the Hinds County Circuit Court, the Jackson Civil Service Commission's investigation is "...confined to the determination of the question of whether such disciplinary action was...made in good faith for cause...[i]n other words, [Commission's] own order fails to follow the standard that they cite in their own order and fails to follow the standard that's in the statute" (emphasis supplied).

termination of Moore was made with or without good faith or with or without cause. Meanwhile, the facts of the *Calcote* matter are unrefuted.

The Opinion and Order attempts to justify reversal of Moore's termination by reliance on the City's legal position in the *Calcote* case, stating that the City "*in admitting that Sargent [sic] Moore's action were within the course and scope of his employment was also an admission that the officer's actions were not malicious....*" [R. 45 (emphasis supplied)] However, the power to resolve a legal issue such as the City's purported admission during litigation or Moore's actions being within in the scope of employment with JPD, does not lie with the Commission. The Commission "is a creature of the legislature vested with limited authority to investigate, conduct hearings, make decisions, and promulgate and adopt its own rules and regulations." *City of Meridian v. Johnson*, 593 So. 2d at 38 (Miss. 1992), citing Miss. Code Ann. § 21-31-1 *et seq.* Stated alternatively, the Commission is without authority or power to make decisions or determinations belonging solely to the judicial branch of the government and/or to the governing authorities of the City. This Opinion and Order is therefore an encroachment upon the judiciary branch<sup>15</sup>, as well as that power vested to the City of Jackson as a municipality. Additionally, the legal gymnastics<sup>16</sup> of the Commission are an attempt to mask a glaring omission: that the undisputed facts in *Calcote* reflect that Moore maliciously and intentionally assaulted an unarmed, non-threatening individual.

To illustrate this point, the City refers the Court to the case of *In Re Fiscal Year 2010*

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<sup>15</sup>See also Miss. Const., Art. 1, Sec. 1.

<sup>16</sup>See also *City of Vicksburg v. Lane*, 11 So.3d 162 (Miss. App. 2009), holding that, pursuant to Miss. Code Ann. § 21-31-23, circuit court was confined strictly to a determination of whether suspension was in good faith for cause, and where police department employee never appealed his previous suspensions, the Commission could not implicitly affirm police department employee's previous suspensions or anything flowing from it. As a result, the Circuit Court was without jurisdiction to consider anything other than the police department employee's suspension that he appealed, and could not conclude that police department employee's subsequent acquittal of criminal charges meant employee's suspension lacked merit.

*Judicial Branch Appropriations*, 27 So.3d 392 (Miss. 2010). In that case, the State of Mississippi's fiscal officer proceeded to make budget cuts purportedly pursuant to Miss. Code Ann. § 27-104-13. *In Re Fiscal Year 2010 Judicial Branch Appropriations*, 27 So.3d at 395 (Miss. 2010). In so doing, the fiscal officer made reductions to the judicial branch budget, despite the judicial branch voluntarily reducing its budget in the amount of \$950,714.00. *Id.* This Court determined that Miss. Code Ann. § 27-104-13 was applicable only to "agencies," and the Mississippi Department of Transportation. *Id.* This Court ultimately found that § 27-104-13 did not vest the State's fiscal officer with authority to reduce the judiciary's budget.

It is the same here. There is no authority, no statute and no Civil Service Rule that empowers the Commission to review or reverse the City's termination of Moore because of the City's legal position in *Calcote*. Instead, the Commission should have reviewed Moore's termination by the City on the facts presented, including but not limited to, JPD General Orders, the Civil Service Rules and JPD Rules and Regulations, and confined to the determination to the question of whether the disciplinary action against Moore by the City was made by the City in good faith for cause. The Commission's Opinion and Order is therefore inconsistent and contrary on its face and devoid of any finding whatsoever that the City's termination of Moore was *made without good faith and with no cause*. [R. 43-45]

A cursory reading of the Commission's Opinion and Order evidences the fact that the Commission made no investigation into the facts or articulated a rational relationship between the facts found and the choice made by the City to discipline Moore. This Court has previously stated that "[w]e agree ...that the Commission is under the duty to set forth with sufficient clarity and specificity the reason" for the action it is taking. *City of Jackson v. Froshour*, 530 So. 2d at 1355



(Miss. 1988) Here, there is no sufficiently clear analysis or reasons provided by the Commission indicated supporting its reversal of the City's decision to terminate Moore. *See also City of Jackson v. Little*, 248 So. 2d 795 (Miss. 1971). There are only conclusory statements, without articulated facts, from the Commission that allegedly support the Commission's determination that "the liability of the City of Jackson for negligence of an officer *is not necessarily grounds*<sup>17</sup> for termination of the officer even when injury results to an arrested individual." [R. 45 (emphasis supplied)] And, this unsupported conclusion was reached by the Commission despite the Court of Appeals' determination that Moore "shoved [Calcote's] face into a concrete floor, pressed his fingers into [Calcote's] eyes and rolled [Calcote's] face back and forth across the concrete floor."<sup>18</sup> [R. 37-38; 45]

**B. The City's termination of Moore was in good faith and for cause.**

In addition to the Commission's Opinion and Order being devoid of identified factors and an articulated rational relationship between the identified factors found and the Commission's reversal of the City's termination of Moore, is the controlling Mississippi law that permits the City's decision of Moore's termination. Mississippi statutory authority provides that any person holding an office, place, position or employment under the provisions of Miss. Code Ann. §§ 21-31-1 to 21-31-27, may be terminated, for certain reasons, or for a *combination* of certain reasons, including, but not limited to: incompetency; inefficiency, inattention to duty, dishonesty, discourteous treatment of the public or fellow employee, or any other act or omission tending to injure public service. *See*

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<sup>17</sup>The Commission did not even conclude that the City's termination of Moore could not be for the resulting liability to the City for Moore's use of excessive force, or that the City's disciplinary decision was not made in good faith for cause.

<sup>18</sup>*Calcote*, 910 So.2d 1103, 1110 (Miss. App. 2005).

Miss. Code Ann. § 21-31-21; *City of Jackson v. Froshour*, 530 So. 2d 1348, 1352-53 (Miss. 1988), and **R. 23-29**<sup>19</sup>.

There is controlling Mississippi case law permitting the City to discipline sworn law enforcement and/or emergency personnel for use of excessive force or for conduct unbecoming a City employee (or a combination thereof), almost identical to that of the City's decision in the instant matter.<sup>20</sup> For example, in the case of *Young v. City of Biloxi*, 22 So.3d 1269 (Miss. App. 2009), the Mississippi Court of Appeals found that there was sufficient evidence justifying Biloxi's discipline of its code enforcement administrator. *Id.* Young, like Moore in this instance, asserted that his discipline of suspension for use of profanity, was not made in good faith for cause by the City of Biloxi, but rather because of Young's pattern of behavior towards Creel, Biloxi's Director of Community Development. *Young*, 22 So. 3d at 1271. Young alleged that his evidence, consisting of a memorandum exchanged between himself and the testimony of two fellow employees<sup>21</sup>, constituted substantial evidence that Young's discipline was not made in good faith for cause, and was based on political/religious reasons. Of course, the Mississippi Court of Appeals disagreed, finding that, "[d]espite the evidence presented by Young," there was nothing substantial to indicate that Young's discipline was the result of prohibited political and/or religious reasons. *Young*, 22

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<sup>19</sup>The City complied with Miss. Code Ann. §21-31-21, and set forth same by referencing Moore's violations of JPD General Order Nos. 500.1, §II-A; 600-1, §III; 600-10, §A-1; 600-10, §A-6 and 600-10, §IV-A; JPD Rules and Regulations, § 2, Attention to Duty, 2.6 Truthfulness, and §4, Restriction on Behavior, 4.20 Use of Force and Civil Service Rules for the City of Jackson, Mississippi: Section XII, § 2(M), Conduct Unbecoming to a City Employee, and Civil Service Rule for the City of Jackson, Mississippi: Section XII, § 2(O), Willful and wanton brutality or cruelty to a prisoner or one detained or under arrest.

<sup>20</sup>See *Young v. City of Biloxi*, 22 So.3d 1269 (Miss. App. 2009); *Patterson v. City of Biloxi*, 965 So.2d 765 (Miss. 2007), *Martin v. City of Vicksburg*, 850 So.2d 191 (Miss. App. 2003) and *City of Jackson v. Froshour*, 530 So. 2d 1348 (Miss. 1988).

<sup>21</sup>Young's fellow employees that testified on behalf stated that they, unlike Young, had never received any "conditions on their request for leave forms.

So.3d at 1272-1273. The same analysis applies here.

There is nothing in the record in this instance that shows that the City's termination of Moore was not made in good faith for cause but was rather intended to serve as retaliation for Moore's purported political activities. This is especially true in light of the Mississippi Court of Appeals' findings in *Calcote*, that Moore's actions **were not reasonable or in good faith**. *Calcote*, 919 So.2d at 1106; *see also Alias v. City of Oxford*, - - So. 3d. - -, 2010 WL 3554352, \*3, ¶13 (emphasis supplied). Instead, the evidence presented by the City shows that Moore is a menace to the citizens of Jackson, and has a history and consistent pattern of use of excessive force that has resulted in culpable liability to the City. Forcing the City to retain Moore will continue to place the City in dangerous and precarious a position. Mississippi Courts have recognized this fact previously, in the cases of *Patterson v. City of Biloxi*, 965 So.2d 765 (Miss. 2007) and *City of Jackson v. Froshour*, 530 So. 2d 1348 (Miss. 1988).

In the case of *Patterson v. City of Biloxi*, 965 So.2d 765 (Miss. 2007), the Court found that a police officer's discipline by Biloxi was warranted and not improperly retaliatory, where the police officer refused to comply with inspection of his person and his equipment, and had a history of reprimands and discipline related to conflicts with supervisors and other officers. Nineteen years prior to *Patterson*, the Supreme Court found similarly in the case of *City of Jackson v. Froshour*, 530 So. 2d 1348 (Miss. 1988). In *Froshour*, a Jackson Police Officer, Froshour, sought review of an order of the Commission that affirmed the City's discharge of him for insubordination and for striking a handcuffed arrestee. *City of Jackson v. Froshour*, 530 So. 2d 1348 (Miss. 1988). Froshour appealed the Commission's order affirming the City's termination of him for use of excessive force to the Hinds County Circuit Court for the First Judicial District of Hinds County, Mississippi, the

Honorable Breland Hilburn<sup>22</sup>, presiding. *City of Jackson v. Froshour*, 530 So. 2d 1348 (Miss. 1988) The Hinds County Circuit Court reversed the Commission's order, in part, due to the lack of sufficient clarity and specificity of the Commission's findings. *Id.* at 1352. This Court, however, did not agree with Judge Hilburn's decision, and reversed and rendered the Circuit Court's decision, thereby affirming the City's decision to terminate Froshour for use of excessive force. *Id.* at 1354-55.

Based on the foregoing controlling case authority, it is clear that a municipality's termination of a police officer for excessive use of force, combined with conduct that is unbecoming to a municipal employee, constitutes a decision by City governing authorities made in good faith with cause. The fact is, in this instance, the weight of the evidence presented by the City to the Commission shows that the City's decision to terminate Moore was made in good faith for cause. However, reversal is likewise required because the Commission failed to execute its statutory duty and set forth with sufficient clarity and specificity the reason for its reversal of the City's decision to terminate Moore. Accordingly, the judgment of the Hinds County Circuit Court affirming the Commission's erroneous, unsubstantiated decision must be reversed.

## **II. Retention of Moore guarantees liability for the City of Jackson.**

As set forth previously hereinabove, forcing the City to retain Moore as an employee, considering Moore's pattern of excessive force use, the resulting litigation and cost to the City as a result of Moore's use of excessive force, and the *Calcote* case, virtually guarantees the liability of the City. And, it is not just the liability of the City in Mississippi state courts that the City will be

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<sup>22</sup>Hilburn concurred in the Commission's Opinion and Order in this case that reversed the City's termination of Moore. [R.45]

forced to contend with. The City will, and already has, been forced to litigate and defend itself in litigation other than *Calcote*, in the federal court system, arising from liability under 42 U.S.C.A. § 1983.<sup>23</sup>

The United States Supreme Court has expressly held that local governmental entities may be sued directly under § 1983 where “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by these officers.” *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978)(“*Monell*”). This is exactly what the City stated with particularity as part of the combination of reasons for reaching its decision to terminate Moore. In fact, the City enumerated that, in addition to Moore’s other violations of JPD General Orders, JPD Rules and Regulations and Civil Service Rules, that **“federal law holds that City of Jackson accountable for any behavior that may be considered a common practice, pattern or procedure...”** [R. 27 (emphasis added)]. Thus, if Moore’s reinstatement is permitted, then the City is the responsible party that will be held accountable for Moore’s common pattern and practice of use of excessive force under federal law. *See also Webster v. City of Houston*, 735 F. 2d 838 (C.A. 5<sup>th</sup> 1984)(holding municipal liability under 42 U.S.C.A. § 1983 where government officials have actual or constructive knowledge of custom and/or widespread practice of use of excessive force by municipal law enforcement).

Moreover, the Mississippi Court of Appeals, by its decision in *Calcote*, has established that Moore’s conduct in “shov[ing] [Calcote’s] face into a concrete floor, press[ing] his fingers into [Calcote’s] eyes and rolling [Calcote’s] face back and forth across the concrete floor”<sup>24</sup> were

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<sup>23</sup> See *Nichols v. City of Jackson*, In the United States District Court for the Southern District of Mississippi, Jackson Division, Cause No. 3:06-cv-364 HTW-JCS.

<sup>24</sup>*Calcote*, 910 So.2d 1103, 1110 (Miss. App. 2005).

objectively unreasonable, i.e., “were not reasonable or in good faith.”<sup>25</sup> Therefore, according to federal law, the City will unquestionably be liable as municipal liability attaches under 42 U.S.C.A. § 1983 where there is a (1) a policymaker; (2) an official policy and a (3) violation of constitutional rights whose ‘moving force’ is the policy or custom.” *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 748 (5<sup>th</sup> Cir. 2005); *see also McClendon v. City of Columbia*, 305 F.3d 314, 312 (5<sup>th</sup> Cir. 2002), *en banc, per curiam*; *McIntosh v. Partridge*, 540 F.3d 315, 323 (5<sup>th</sup> Cir. 2008), citing *Bolton v. City of Dallas*, 472 F.3d 262, 265-66 (5<sup>th</sup> Cir. 2006).

Specifically, in the case of *City of Oklahoma City v. Tuttle* 471 U.S. 808 (1985), the United States Supreme Court addressed municipal liability in light of its prior holding in *Monell*, stating that **“*Monell* teaches that the city may... be held accountable if the deprivation [of constitutional right] was the result of municipal ‘custom or policy.’”** *Id.* at 816-817 (emphasis supplied). This is of further import in this matter, as this matter involves Moore’s pattern of use of excessive force that has been previously adjudicated by the Courts in the State of Mississippi. This precedence, coupled with that of the Fifth Circuit, virtually guarantees City culpability if Moore remains employed as a Jackson Police Officer and again engages in behavior that violates constitutional rights.

A review of the decisions by the Fifth Circuit Court of Appeals addresses the issue of Section 1983 liability for use of excessive force evidences the veracity of such a conclusion. One such recent example is the case of *Giardina v. Lawrence*, 354 Fed. Appx. 914 (C.A. 5<sup>th</sup> 2009). In *Giardina*, the Plaintiff, Giardina, brought suit pursuant to §1983, alleging that his constitutional rights to be free from excessive force pursuant to the Fourth and Fourteenth Amendments had been violated by the

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<sup>25</sup>*Calcote*, 919 So.2d at 1106; *see also Alias v. City of Oxford*, -- So. 3d. --, 2010 WL 3554352, \*3, ¶13

certain New Orleans police officers and others. *Id.* The Fifth Circuit Court of Appeals, in denying the Defendants' 12(c) Motion, held that although Giardina's complaint did not make specific allegations regarding the Defendants' use of excessive force, Giardina "*may be able to prove excessive force* in violation of the Fourth and Fourteen Amendments," and allowed Giardina to proceed. *Giardina v. Lawrence*, 354 Fed. Appx. at 915 (C.A. 5<sup>th</sup> 2009)(emphasis supplied). Obviously, there is great latitude provided to plaintiffs seeking recovery for use of excessive force by law enforcement, which the City faces. However, there is no rationale for exponentially and purposely making the City liable for such claims by forcing it to retain an officer who intentionally and maliciously assaulted an unarmed, non-threatening individual.<sup>26</sup>

### CONCLUSION

Based on the foregoing, including, but not limited to, controlling Mississippi and Federal statutory and case authority, the judgment of the Circuit Court for the First Judicial District of Hinds County, Mississippi, must be reversed. The Hinds County Circuit Court's decision erroneously affirms a Civil Service Commission Opinion and Order that is contrary to controlling Mississippi statutory and case precedence. Accordingly, the City respectfully requests that this Court reverse and render the Hinds County Circuit Court's judgment in the City's favor. Finally, the City requests any and all other relief that this Court deems fit.

THIS the 26<sup>th</sup> day of April, 2011.

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<sup>26</sup>Chad Calcote.

Respectfully submitted,

**CITY OF JACKSON, MISSISSIPPI**

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**CERTIFICATE OF SERVICE**

I, Lara E. Gill, one of the attorneys for the Appellant, the City of Jackson, Mississippi, do hereby certify that I have this day delivered, via hand delivery and/or United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the following:

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THIS the 26<sup>th</sup> day of April, 2011.

  
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Lara E. Gill