

IN THE SUPREME COURT OF MISSISSIPPI

CAROLYN K. MCNEEL

APPELLANT

VS.

CIVIL ACTION NO.: 2010-CC-01399

**MISSISSIPPI DEPARTMENT
OF HUMAN SERVICES**

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
WINSTON COUNTY, MISSISSIPPI**

BRIEF OF THE APPELLEE

**KATHY CALDWELL, MSB [REDACTED]
ATTORNEY FOR APPELLEE
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-4269
Facsimile: (601) 359-4240**

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 Supreme Court may evaluate possible disqualifications or recusal.

1. Carolyn McNeel, Appellant
2. David Bane, Attorney for Appellant
3. Mississippi Department of Human Services, Appellee
4. Kathy Caldwell, Attorney for Appellant
5. Don Thompson, Executive Director for MDHS
6. Falton O. Mason, Jr., Hearing Officer, Mississippi Employee Appeals Board
7. Ingrid D. Williams, Hearing Officer, Mississippi Employee Appeals Board
8. Wesla Sullivan Leech, Hearing Officer, Mississippi Employee Appeals Board
9. Joseph H. Loper, Jr., Judge for the Circuit Court of Winston County, Mississippi



Kathy Caldwell, Attorney for Appellee

TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE OF INTERESTED PERSONS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF ISSUE.....	1
STATEMENT OF CASE.....	2
A. Nature of the Case.....	2
B. Course of Proceedings and Disposition in the Trial Court.....	2
C. Statement of Facts.....	3
D. Standard of Review.....	8
SUMMARY OF ARGUMENT.....	9
ARGUMENT OF THE APPELLEE.....	10
I. The Hearing Officer was correct in not awarding McNeel compound interest.....	10
II. Interest starting accruing when the Hearing Officer issued his opinion.....	10
III. McNeel’s request for an independent accounting firm to calculate her monies is res judicata.....	11
IV. McNeel should not have received a greater raise or additional benefits.....	12
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

STATUTES

Miss. Code Ann. § 75-17-7 (2004).....6, 10

CASES

Durr vs. Durr, 912 So. 2d 1033, 1037 (Ct. App. 2005).....12

Harris v. Mississippi Department of Corrections, 831 So. 2d 1105, 1107 (Miss. 2002).....8, 10

Little v. V & G Welding Supply, Inc., 704 So. 2d 1336 (Miss. 1997).....11

Miss. Dept. of Human Serv. v. McNeel, 869 So. 2d 1013 (Miss. 2004).....3

Miss. Dept. of Human Serv. v. McNeel, 10 So. 3d 444 (Miss. 2009).....3, 6, 7, 11, 12

STATEMENT OF ISSUES

The following issues are presented by Mississippi Department of Human Services as the Appellee:

- I. The Hearing Officer was correct in not awarding McNeel compound interest.
- II. Interest starting accruing when the Hearing Officer issued his opinion.
- III. McNeel's request for an independent accounting firm to calculate her monies is res judicata.
- IV. McNeel should not have received a greater raise or additional benefits.

STATEMENT OF THE CASE

A. Nature of the Case:

This case stems from an Order by the Supreme Court of Mississippi that affirmed in part and reversed and remanded in part the decision of the Hearing Officer from the Employees Appeal Board concerning the backpay that Mississippi Department of Human Services, hereinafter “MDHS”, gave Carolyn K. McNeel, hereinafter, “McNeel”, after a previous Order from the Supreme Court. At this time, McNeel is appealing the decision of the Hearing Officer for the part that was remanded.

B. Course of Proceedings and Disposition in the Court Below:

On August 16, 2005, Hearing Officer Falton O. Mason, Jr., entered an Order which granted and denied relief requested by McNeel. R. at Vol. II, 33. MDHS and McNeel appealed to the Full Board of the Mississippi Employee Appeals Board, hereinafter “EAB.” The Full Board affirmed the decision of the Hearing Officer on July 7, 2006. *Id.* at Vol. II, 33. MDHS sought review by filing a Petition for Writ of Certiorari with Supersedeas in the Circuit Court for the First Judicial District of Hinds County on July 14, 2006. *Id.* McNeel filed a Notice of Appeal with the Circuit Court of Winston County, Mississippi, on July 31, 2006. *Id.* McNeel also requested the Circuit Court for the First Judicial District of Hinds County to transfer MDHS’ Petition for Writ Certiorari with Supersedeas to the Circuit Court of Winston County. *Id.* On August 9, 2006, the Circuit Court for the First Judicial District of Hinds County, *sua sponte*, issued an Order transferring MDHS’ Petition for Writ of Certiorari with Supersedeas to the Circuit Court of Winston County. R. at Vol. II, 33-34. On November 20, 2007, the Circuit Court of Winston County entered an Opinion and Order which affirmed in part and reversed and remanded in part the decision of the Employee Appeals Board. R. at Vol. II, 34. On December 5, 2007, MDHS filed its Notice of Appeal with this

Court. *Id.* at Vol. II, 34. Likewise, McNeel filed her Notice of Cross-Appeal on December 17, 2007. *Id.*

On about June 4, 2009, the Supreme Court of Mississippi rendered a decision that affirmed in part and reversed and remanded in part. *Miss. Dept. of Human Serv. v. McNeel*, 10 So. 3d 444 (Miss. 2009). After reviewing the decision of the Supreme Court and documents provided by McNeel, the Hearing Officer and EAB rendered a decision. R. at Vol. II, 32-37. The decision was affirmed by the EAB. R. at Vol. II, 39. McNeel appealed the decision of the EAB to the Circuit Court of Winston County, Mississippi. R. at Vol. I, 11. On August 11, 2010, the Circuit Court of Winston County, Mississippi, entered an Order affirming the decision of the EAB. R. at Vol. I, 9-10. At this time, McNeel is appealing to the Supreme Court of Mississippi.

C. Statement of Facts:

McNeel, was employed by MDHS, as a Social Worker for Winston County Department of Human Services. *Miss. Dept. of Human Serv. v. McNeel*, 869 So. 2d 1013 (Miss. 2004). On November 10, 1999, McNeel was terminated by MDHS. *McNeel*, 869 So. 2d at 1013. McNeel appealed her termination to the EAB. *Id.* at 1013. On October 20, 2000, the Hearing Officer ordered her to be reinstated to her former position with back pay and all benefits as of the date of termination, subject to set off of any sums received from other sources. *Id.* MDHS appealed the decision which was affirmed by the Full Board of the EAB. *Id.* MDHS petitioned the Hinds County Circuit Court for a writ of certiorari to review the decision. *Id.* The Hinds County Circuit Court affirmed the decision of the Hearing Officer. *Id.* MDHS appealed to the Supreme Court of Mississippi. *Id.* On 29th day of April, 2004, the Supreme Court of Mississippi affirmed the decision of the Hearing Officer. *Id.*

On July 16, 2004, MDHS sent a check in the amount of ninety-two thousand two hundred fifty-one and 39/100 dollars (\$92,251.39) for back pay. T. at 114-115. MDHS calculated McNeel's back pay, from the time she was terminated to the ruling of the Supreme Court of Mississippi, to equal the amount of one hundred forty-seven thousand two hundred ninety-four and 10/100 dollars (\$147,294.10). *Id.* at 114-115. After taxes, social security, retirement and medicare were deducted the amount was ninety-two thousand two hundred fifty-one and 39/100 dollars (\$92,251.39). *Id.* McNeel appealed to the EAB requesting back pay to include raises and promotions that McNeel may have been eligible for during her termination, reimbursement of out of pocket medical expenses, interest on back pay, reimbursement for continuing professional education, social security taxes, the difference in income tax attributed to the lump sum payment of back pay, Court fees, attorney fees and out of pocket costs. R. at Vol. II, 33.

On the 16th day of August, 2005, the Hearing Officer entered an Order awarding back pay that included all possible advances and promotions during the time of termination to McNeel *Id.* at Vol. II, 33. She was also awarded reimbursement of out of pocket expenses for medical expenses. *Id.* McNeel was denied interest on back pay, reimbursement of continuing professional education, reimbursement of social security taxes, reimbursement of federal and state taxes on the back pay lump sum payment, Court costs, out of pocket costs and attorney fees. *Id.* McNeel and MDHS appealed to the Full Board of the Mississippi Employee Appeals Board which affirmed the decision of the Hearing Officer on July 7, 2006. *Id.*

MDHS sought review by filing a Petition for Writ of Certiorari with Supersedeas in the Circuit Court for the First Judicial District of Hinds County on July 14, 2006. *Id.* McNeel filed a Notice of Appeal with the Circuit Court of Winston County, Mississippi, on July 31, 2006. *Id.*

McNeel also requested the Circuit Court for the First Judicial District of Hinds County to transfer MDHS' Petition for Writ Certiorari with Supersedeas to the Circuit Court of Winston County. *Id.* On August 9, 2006, the Circuit Court for the First Judicial District of Hinds County, *sua sponte*, issued an order transferring MDHS' Petition for Writ of Certiorari with Supersedeas to the Circuit Court of Winston County. R. at Vol. II, 33-34.

On November 20, 2007, the Circuit Court of Winston County entered an Opinion and Order which affirmed the decision of the EAB that denied the request for reimbursement of travel and telephone expenses and comp time credited to her personal leave time; that awarded her reimbursement of personal funds expended on medical insurance while denying her the estimate value of the benefit of having medical insurance; that denied her reimbursement for continuing education expenses, attorney fees and related costs; that denied her reimbursement of additional federal income taxes; and that denied her request for an independent firm to calculate monies owed to her. R. at Vol. II, 34. The Circuit Court denied McNeel's request to clarify the language of the Hearing Officer of the EAB concerning her back pay and promotion but remanded the issue to the EAB to clarify what promotion and advancements she should be awarded, if any, by job title, and the specific pay rate from which her back pay should be calculated. *Id.* at Vol. II, 34. The Circuit Court reversed the decision that denied McNeel pre-judgment interest and remanded for the purpose of determining whether pre-judgment should be awarded and if so, at what rate. *Id.* The Circuit Court reversed the decision that denied McNeel post-judgment interest and remanded for a determination of the post-interest that McNeel was to receive on her award of back pay and benefits. *Id.* Also, the Circuit Court reversed the decision of the EAB that denied McNeel to have MDHS report her back pay to the Social Security Administration. *Id.*

On December 5, 2007, MDHS filed its Notice of Appeal with this Court. *Id.* Likewise, McNeel filed her Notice of Cross-Appeal on December 17, 2007. *Id.*

On June 25, 2009, the Mandate of the Mississippi Supreme Court affirmed the decision of the Hearing Officer to deny McNeel's request for travel reimbursement and personal-leave credit, continuing professional education expenses, reimbursement for additional income taxation, and an independent calculation of the monies owed. *McNeel*, 10 So. 3d at 444. The Court also affirmed the decision of the Hearing Officer to reimburse McNeel for personal funds expended on medical insurance during the period of her wrongful termination. *Id.* at 444.

The Court reversed the Hearing Officer's decision regarding reporting of McNeel's back pay to the Social Security Administration. *Id.* The Court ordered for MDHS to properly report McNeel's back pay to the SSA pursuant to IRS Publication 957. *Id.* The Court also reversed and remanded to the Hearing Officer the issue of post-judgment interest. *Id.* The Hearing Officer, acting pursuant to Mississippi Code Section § 75-17-7, shall determine post-judgment interest rate to which McNeel is entitled. As to pre-judgment interest, any such award by the Hearing Officer is foreclosed by McNeel's waiver of such claim and the mandate rule. *Id.* Additionally, on remand, the Hearing Officer shall clarify what pay increase(s) and/or advancement(s) were offered and granted to DHS-Social Workers similarly situated to McNeel but for her termination, and determine what, if any such pay increase(s) and/or advancement(s) McNeel would have been entitled to receive. *Id.* The Hearing Officer shall order MDHS to compensate McNeel if the Hearing Officer finds any pay increase(s) and/or advancement(s). *Id.* Finally, the Hearing Officer shall render a reimbursement determination regarding whether, but for her wrongful termination, any of McNeel's documented prescription drug and medical expenses would have been paid by "The State and School Employees'

Life and Health Insurance” plan. *Id.* If so, the Hearing Officer shall order MDHS to compensate McNeel. *Id.*

After reviewing the Mandate of the Supreme Court, the Hearing Officer of EAB ordered the following: (1) That MDHS shall place McNeel in the position that she would have been eligible for but for her wrongful termination which is Area Social Work Supervisor of Winston County.

(2) MDHS shall give McNeel all promotions and salary increases that she would have been entitled to but for her wrongful termination which include the following: Reclassification to Social Worker Advanced starting October 1, 1999; Promotion to Area Social Work Supervisor starting November 1, 1999; Legislative Pay Increase on November 1, 2003; Legislative Pay Increase on July 1, 2006; Legislative Pay Increase on January 1, 2007; Legislative Pay Increase on July 1, 2007. McNeel shall receive these promotions and increases minus any applicable tax deductions.

(3) MDHS shall pay McNeel all medical expenses during her wrongful termination, that have been provided to the Court, in the amount of \$7,470.37.

(4) MDHS shall report and pay to the Social Security Administration McNeel’s back pay each year of McNeel’s wrongful termination pursuant to IRS Publication 957 minus McNeel’s contribution.

(5) MDHS shall pay 8% interest in Post Judgment from the overall lump sum of McNeel’s back pay.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that MDHS shall place McNeel in the position of Area Social Work Supervisor of Winston County, pay all advances and increases that would have been entitled to McNeel minus appropriate taxes, pay medical expenses to McNeel in the amount of \$7,470.37, report and pay to the Social Security Administration

McNeel's back pay each year of McNeel's wrongful termination pursuant to IRS Publication 957 minus McNeel's contribution, pay 8% interest in Post Judgment from the overall lump sum of McNeel's back pay which includes adjustment made by this Order. R. at Vol. II, 32-37.

The decision was affirmed by the EAB. R. at Vol. II, 39. McNeel appealed the decision of the EAB to the Circuit Court of Winston County, Mississippi. R. at Vol. I, 11. On August 11, 2010, the Circuit Court of Winston County, Mississippi, entered an Order affirming the decision of the EAB. R. at Vol. I, 9-10. At this time, McNeel is appealing to the Supreme Court of Mississippi.

D. Standard of Review:

In *Harris v. Mississippi Department of Corrections*, 831 So. 2d 1105, 1107 (Miss. 2002), the Court ruled that the de novo is not the standard of review when considering a decision of the Employee Appeals Board. The Court further stated that the standard of review is whether the Employee Appeals Board decision was unsupported by substantial evidence, arbitrary and capricious, beyond powers of the Employee Appeals Board to make, or violative of statutory or constitutional right of complaining party. *Harris*, 831 So. 2d at 1107.

SUMMARY OF ARGUMENT

The Hearing Officer correctly ordered MDHS to pay 8% interest on the lump sum of back pay due to McNeel according what the Supreme Court had mandated. The decision of the Hearing Officer was not arbitrary or capricious. By issuing the Opinion, the Hearing Officer was ordering for interest to start accruing. The decision of the Hearing Officer should not be reversed.

Also, McNeel's request to have an independent accounting firm to calculate her monies is res judicata. This issue was decided and discussed in the Supreme Court's mandate and should not be addressed again by the court.

Furthermore, McNeel should not be allowed to argue the issues that her raise should have been greater and received additional benefits. These issues were not brought up in her appeal to the EAB nor the Circuit Court of Winston County. Therefore, McNeel is barred from appealing these issues to this Court.

ARGUMENT

I. The Hearing Officer was correct in not awarding McNeel compound interest.

The Court ordered for that the issue of how much post-judgment interest to be awarded to McNeel should be decided by the Hearing Officer on remand. *McNeel*, 10 So. 3d 444. According to Mississippi Code, Annotated, § 75-17-7 “[a]ll other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.” By ordering MDHS to pay 8% interest on the lump sum of McNeel’s back pay, the Hearing Officer of the EAB properly applied § 75-17-7.

The Court has stated that the standard of review is whether the EAB decision was unsupported by substantial evidence, arbitrary and capricious, beyond powers of the Employee Appeals Board to make, or violative of statutory or constitutional right of complaining party. *Harris*, 831 So. 2d at 1107. The Mandate from the Supreme Court ordered for the Hearing Officer to decide the post judgment interest. By ordering MDHS to pay 8% interest of the lump sum from the back pay that is due to McNeel, the Hearing Officer did not act arbitrary or capricious but according to what was ordered by the Supreme Court. Therefore, the Hearing Officer was correct in not awarding McNeel compound interest.

II. Interest starting accruing when the Hearing Officer issued his opinion.

McNeel argues that the Hearing Officer should have specified when the post judgment interest would begin to accrue. MDHS contends that by issuing the Opinion for MDHS to pay 8% interest on the lump sum of McNeel’s back pay, that was when the interest started to accrue.

According to Mississippi Code, Annotated, § 75-17-7 “[a]ll other judgments or decrees

shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.” By issuing an Opinion that ordered MDHS to pay 8% interest on the lump sum of McNeel’s back pay, it was the intention of the Hearing Officer for interest to start accruing at that time. The Hearing Officer followed the Mandate of the Supreme Court in deciding the post judgment interest. It did not act arbitrary or capricious. Thus, the decision should stand.

III. McNeel’s request for an independent accounting firm to calculate her monies is res judicata.

The Supreme Court affirmed the Circuit Court and EAB that McNeel was not entitled to have monies owed to her calculated by an accounting firm or the Mississippi State Auditor’s office. *McNeel*, 10 So. 3d 444. By requesting an independent accounting firm to calculate her monies, McNeel’s request should not be allowed because it fall under the Doctrine of Res Judicata.

According to *Little v. V & G Welding Supply, Inc.*, 704 So. 2d 1336 (Miss. 1997), “Doctrine of res judicata bars relitigation of matter, four identities must be present: (1) identity of subject matter of action, (2) identity of cause of action (3) identity of parties to cause of action, and (4) identity of quality or character of person against whom claim is made.” First of all, the subject matter in *McNeel* and this matter is the same that McNeel as the Appellant is requesting her back pay to be calculated by an independent accounting firm. Secondly, the cause of action is McNeel contending that MDHS is not calculating her back pay correctly. Thirdly, the parties are the same as before in *McNeel*. Finally, the fourth factor is met that McNeel has the same claim and request against MDHS. Ergo, all four factors of the Doctrine have been met. To allow McNeel to have an independent accounting firm to calculate her monies is res judicata because the Supreme Court

decided previously that she is not entitled to this.

McNeel contends that by MDHS using the SPARHS system, it will not be able to be to calculate her back pay correctly. She also argues that the accounting firm she employed, Billy Gene McNeel, C.P.A., found several errors by MDHS. However, this is a conflict of interest. Billy Gene McNeel is McNeel's husband. He has his own interest in how much she receives. His opinion is self-serving. MDHS has to go by the rules and regulations of the Mississippi State Personnel Board by using the SPARHS system. The Supreme Court said in *McNeel*, that MDHS was acting correctly in its requirements and procedures. Thus, McNeel's argument is unfounded.

IV. McNeel should not have received a greater raise or additional benefits.

McNeel has argued in her brief the issues that her raise should have been greater and received additional benefits. However, these issues were not raised before the Employee's Appeal Board nor the Circuit Court of Winston County. McNeel has not brought these issue on appeal until now, thus, she has waived the right to appeal the issues before this Court. *Durr vs. Durr*, 912 So. 2d 1033, 1037 (Crt. App. 2005). Therefore, McNeel is barred from appealing these issues to this Court.

CONCLUSION

The Hearing Officer correctly ordered MDHS to pay 8% interest on the lump sum of back pay due to McNeel according what the Supreme Court had mandated. The decision of the Hearing Officer was not arbitrary or capricious. By issuing the Opinion, Hearing Officer was ordering for interest to start accruing. The decision of the Hearing Officer should not be reversed.

Furthermore, McNeel's request to have an independent accounting firm to calculate her monies is res judicata. This issue was decided and discussed in the Supreme Court's mandate and should not be addressed again by the court. Also, McNeel did not appeal the issues of her raise or

additional benefits to the EAB nor the Circuit Court. Ergo, she is barred from appealing said issues to this Court.

RESPECTFULLY SUBMITTED,

**MISSISSIPPI DEPARTMENT OF
HUMAN SERVICES**

BY: 
Kathy Caldwell, Attorney for MDHS

OF COUNSEL:

KATHY CALDWELL, MSB 
ATTORNEY FOR APPELLEE
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-4269
Facsimile: (601) 359-4240

AMENDED CERTIFICATE OF SERVICE

I, Kathy Caldwell, Attorney for the Appellee, Mississippi Department of Human Services, hereby certify that I have this date mailed a true and correct copy of the foregoing *Brief of the Appellee* to the following at their usual business address:

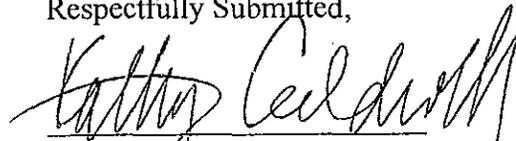
Honorable David Bane
Attorney for Appellant
Post Office Box 833
Louisville, Mississippi 39339

Kathy Gillis, Supreme Court Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

Honorable Judge Joseph H. Loper, Jr.
Winston County Circuit Court
Post Office Box 616
Ackerman, Mississippi 39735

This the 11th day of February, 2011.

Respectfully Submitted,


Kathy Caldwell, Attorney for MDHS

KATHY CALDWELL, MSB [REDACTED]
ATTORNEY FOR APPELLEE
SPECIAL ASSISTANT ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-4269
Facsimile: (601) 359-4240