IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CAUSE NO. 2010-CC-02024

CITY OF VICKSBURG **APPELLANT**

V. **CAUSE NO. 2010-CC-02024**

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND DENEKA TINNER **APPELLEES**

BRIEF OF APPELLEE, MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY
STATE OF MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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 disqualification or recusal.

1. Mississippi Department of Employment Security, Appellee
2. Albert Bozeman White, Assistant General Counsel for Appellee
3. LeAnne F. Brady, Senior Attorney for Appellee
4. Walterine Langford, Esq., Attorney for Appellant
5. Lee D. Thames, Jr., Esq., Attorney for Appellant
6. City of Vicksburg, Appellant
7. Deneka Tinner, Appellee
8. Honorable Isadore Patrick, Warren County Circuit Court Judge

This the 25th day of May, 2011.

Albert Bozeman White
Assistant General Counsel (MSB [redacted]
Mississippi Department of Employment Security

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STATEMENT OF ISSUE

1. Whether the Board of Review and Circuit Court decisions should be affirmed, finding the Employer, CITY OF VICKSBURG, failed to prove by substantial evidence that the Claimant, DENEKA TINNER, a police officer, committed disqualifying misconduct under Mississippi Code Annotated Section 71-5-513(A)(1)(b) (1972, as amended) when she failed the Defensive Tactics portion of the Police Academy certification test?

2. Whether the Board of Review and Circuit Court decisions, finding that Claimant's failure to pass the Police Academy Defensive Tactics exam was not due to misconduct, but failure in good performance as a result of inability or incapacity, were supported by the evidence, and should be affirmed?

STATEMENT OF THE CASE

DENEKA TINNER [hereinafter also "Claimant"] was employed as a police officer trainee by the CITY OF VICKSBURG [hereinafter also "Employer"] from December 16, 2008, until January 4, 2010. She was discharged after she failed to obtain certification by the Police Officer Training Academy. (R. Vol. 2, p. 25).

After her termination, Ms. Tinner filed for unemployment benefits with the Mississippi Department of Employment Security [hereinafter also referred to as "MDES"]. (R. Vol. 2, p.1). A Claims Examiner investigated by interviewing Ms. Carolyn Butler, Human Resources, and Ms. Tinner. (R. Vol. 2, p.10-13). Ms. Butler stated that Ms. Tinner was discharged on January 4, 2010, after she twice failed the Defensive Tactics portion of the Police Certification Test. Ms. Tinner failed the test on September 10, 2009, and again on December 7, 2009. (R. Vol. 2, p.11).

According to Ms. Butler, after Ms. Tinner first failed the test, she had ninety (90) days to re-take the test and pass. Ms. Tinner was warned by Walter Armstrong, Chief of Police, that she must pass, or she would be discharged. The City's policy required, and Law Enforcement Board requirements provided, that police officers must be certified. If the applicant failed the certification test, he/she had ninety (90) days in which to successfully pass the exam. (R. Vol. 2, p.11).

The Claims Examiner also interviewed Ms. Tinner. Ms. Tinner confirmed that she was discharged on January 4, 2010. She stated that she was required to take a comprehensive test at the Police Academy, and that she passed all of it, except the Defensive Tactics portion. She was originally told by the Academy that she had passed, but the Academy later informed her that she failed. However, she also thought she had one year from the date she first took the test to pass it, giving her until September 2010.

Ms. Tinner also stated that Chief Walter Armstrong discharged her after she again failed the test in December 2009. According to Ms. Tinnier, Chief Armstrong also commented that Chief

Armstrong did not care whether she re-took the test again, saying that she was not "police material." Ms. Tinner also stated that she tried to the best of her ability to pass the test in September 2009 and again in December 2009, but failed the Defensive Tactics portion both times. (R. Vol. 2, p.12).

The Claims Examiner obtained a rebuttal statement from Ms. Butler. She stated that the City's policy provided for ninety (90) days from the first test in which to re-test and pass, not one (1) year. (R. Vol. 2, p.13).

Based on the information obtained, the Claims Examiner determined that the Employer did not show that Ms. Tinner was discharged for misconduct connected with the work. Thus, she was eligible to receive unemployment benefits. (R. Vol. 2, p.14).

The Employer appealed. (R. Vol. 2, p.16). A telephonic hearing was noticed and held. (R. Vol. 2, p.20-21, 25-44). The Employer was represented by Ms. Walterine Langford, Associate City Attorney and Human Resources Director. Mr. Walter Armstrong, Chief of Police, testified on behalf of the Employer. Ms. Langford also submitted several documents into evidence. (R. Vol. 2, p.46-53). The ALJ was unable to reach Ms. Tinner and, therefore, she did not participate in the hearing. (R. Vol. 2, p.25).

After the hearing, the ALJ affirmed the Claims Examiner's decision, finding that Ms. Tinner did not violate any employer policy or rule, but simply could not pass the physical tactics portion of a certification exam. The ALJ also found that the Employer did not prove that she was unable to pass the course in question due to misconduct. The ALJ held that her inability to pass a course involving physical tactics and maneuvers was not considered misconduct, because she tried her best and believed that she passed. (R. Vol. 2, p.56-57).

The Employer again appealed. (R. Vol. 2, p.58). After carefully reviewing the record, the Board of Review affirmed the ALJ's decision. (R. Vol. 2, p.62). The ALJ's fact findings and conclusion were as follows, in pertinent part, to-wit:

> Findings of Fact:
>
> The claimant was a full time police officer for the employer from December 16, 2008 until January 4, 2010 when she was discharged. The Chief of Police requested to the Board of Aldermen that the claimant be terminated after she failed to pass one course after attempting to pass it two times. **The course was a defensive tactics course which was a physical course and which the claimant believed she had passed since she had done her best**. The Board supported the Chief's recommendation to terminate the claimant and the Chief then terminated the claimant. (Emphasis added).
>
> Reasoning and Conclusion:
>
> Section 71-5-513 A (1) (b) of the *Mississippi Employment Security Law* provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the Department, and for each week thereafter until he had earned remuneration for personal services equal to not less than eight times his weekly benefit amount as determined in each case. **Section 71-5-513 A (1) (c) provides that in a discharge case, the employer had the burden to establish the claimant was discharged for misconduct connected to the employment.** (Emphasis added).
>
> In the Mississippi Supreme Court, in the case of Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982), the Court held that:
>
> "The meaning of the term 'misconduct', as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees.... Mere inefficiency, unsatisfactory conduct, **failure in good performance as a result of inability or incapacity**, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute. (Emphasis added).
>
> Decision

> The claimant did not violate any employer policy or rule not did the employer prove that the claimant was unable to pass the course in question due to misconduct. **The claimant attempted to pass a course involving physical activity and was unable to do so. This Judge does not consider that misconduct connected with the work**. Therefore, the decision is affirmed. (Emphasis added).

(R. Vol. 2 p.56-57).

The Employer then appealed to the Circuit Court of Warren County. (R. Vol. 1, p.4-8). MDES filed its Answer along with the Record Transcript on September 13, 2010. (R. Vol.1, p. 9-10). Briefs by the Appellant and Appellee were filed with the Circuit Court. Subsequently, the Circuit Court affirmed the decision of the Board of Review on November 10, 2010. (R. Vol. 1, p. 11-12). In so doing, citing City of Clarksdale v. Mississippi Employment Sec. Comm'n., 699 So. 2d 578 (Miss. 1997), the Circuit Court stated as follows, to-wit:

> While this Court agrees with the appellant and recognizes that the Supreme Court has decided that certain actions by an employee in regard to a prerequisite to employment may rise to the level of wanton and willful disregard, **we disagree with the appellant's application of the law**. While in both cases the prerequisite was the passing of a physical exam for the purposes of becoming a police officer, **they differ in that in Clarksdale ... there was evidence that the employee engaged in intentional conduct that was contrary to the employer's best interest.... In the present case there is no evidence that Ms. Tinner intentionally did anything to inhibit her ability to pass the defensive tactics exam**. Ms. Tinner, although frustrated, went to the academy and made good faith efforts to do well in practice and on the exam. Presumably Ms. Tinner performed to the best of her ability and there is no evidence to dispute that, therefore substantial evidence exists to support the Board of Review. (Emphasis added).

(R. Vol.1, p. 11-12). The Employer then appealed to this Honorable Court. (R. Vol. 1, p. 13-16).

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court adopted a general definition of "misconduct" in unemployment insurance cases in Wheeler v. Arriola, 408 So.2d 1381 (Miss. 1982). This definition provides in pertinent part as follows, to-wit:

> The meaning of the term "misconduct", as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees . . . . . **Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the statute.** (Emphasis added).

Id. at 1381. In Wheeler, the Court also rejected the Employer's argument that Ms. Wheeler was discharged due to misconduct, stating that Ms. Wheeler's inability to satisfactorily perform her bookkeeper duties was not due to misconduct, where she performed the work to the best of her ability, and did not willfully and wantonly disregard instructions. Id.

In applying the Wheeler v. Arriola, misconduct definition, the Mississippi Courts hold that the Employer's burden of proving misconduct is by **clear and convincing substantial evidence**. *See* Brandon v. Mississippi Employment Sec. Comm'n., 768 So. 2d 341 (Miss. 2000)(employer's burden of proof not met regarding alleged violation of policy); Mississippi Employment Sec. Comm'n. v. Hudson, 757 So. 2d 1010 (Miss. Ct. App. 2000)(an employee's conduct may be harmful to the employer's interest and justify discharge, but evokes disqualification from receiving unemployment benefits only if it is willful, wanton and equally culpable); Little v. Mississippi Employment Sec. Comm'n., 754 So. 2d 1258 (Miss. 2000)(employer bears the burden of proving misconduct by clear and convincing evidence, which burden may not be shifted to the claimant).

Further, based upon Little, supra, the Employer obviously is not entitled to any negative inference by the fact that Ms. Tinner did not participate in the hearing, particularly where the Claims Examiner's initial determination was in her favor. Little, supra at 1260. Further, to establish that a claimant's failure to maintain a certification is grounds for disqualifying the claimant, the employer must prove that the failure to pass a certification exam, or maintain the certification, was due to employee misconduct. City of Clarksdale v. Mississippi Employment Sec. Comm'n., 699 So.2d 578 (Miss. 1997).

In this case, considering the entire record, Ms. Tinner's failure to pass the Defensive Tactics course appears to be, at worst, a failure in good performance as the result of inability. There is no proof in the record that her failure was due to a willful or wanton disregard. Chief Armstrong could only testify that she was having difficulty at the Academy, and failed the Defensive Tactics test only. He could not testify as to any willful and wanton disregard of behavior expected to make good faith efforts to pass the test, on Ms. Tinner's part. His testimony also indicates that the take-down tactic and defensive maneuvers were difficult to master, and that she reportedly did well in defensive tactics training, but poorly during testing. (R. Vol. 2, p. 27-28). Thus, the record does not reflect a willful and wanton disregard of doing the things expected to pass the test. Conversely, the record reflects that Ms. Tinner made reasonable efforts to pass the tests, but simply was unable to so due to inability, which she also indicated in her statements to the Claims Examiner. (R. Vol. 2, p. 12).

Based on the facts and case precedents, this Honorable Court should affirm the decisions of the Board of Review and Circuit Court finding that the Employer failed to prove that Ms. Tinner's failure to complete one portion of her police officers' examination constituted misconduct, as defined under the Employment Security Law.

ARGUMENT

Standard of Review

The Employer's appeal is governed by Mississippi Code Annotated Section 71-5-531 (Rev. 2010), which provides for an appeal to the Circuit Court by any party aggrieved by the decision of the Board of Review. Section 71-5-531 states that the **appeals court shall consider the record made before the Board of Review and, absent fraud, shall accept the findings of fact if supported by substantial evidence, and the correct law has been applied.** (Emphasis added). Richardson v. Mississippi Employment Sec. Comm'n., 593 So. 2d 31 (Miss. 1992); Barnett v. Mississippi Employment Sec. Comm'n., 583 So. 2d 193 (Miss. 1991); Booth v. Mississippi Employment Sec. Comm'n., 588 So. 2d 422 (Miss. 1991).

Further, a rebuttal presumption exists in favor of the Board of Review's decision and the challenging party has the burden of proving otherwise. Allen v. Mississippi Employment Sec. Comm'n., 639 So. 2d 904 (Miss. 1994). The appeals court must not reweigh the facts nor insert its judgment for that of the agency. Id.

Further, misconduct imports conduct that reasonable and fair minded external observers would consider wanton disregard of the employer's legitimate interests. Mississippi Employment Sec. Comm'n. v. Phillips, 562 So.2d 115, 118 (Miss. 1990).

Facts

In the instant case, the issue is whether Ms. Tinner's failure to pass one section of her police officer's examination was due to disqualifying misconduct under Mississippi Employment Security Law. In determining whether Ms. Tinner's failure constituted misconduct, the Court should consider

whether Ms. Tinner's failure was the result of willful, wanton or deliberate disregard of the standards of behavior expected of police officer trainees, or simply inability to pass a physical Defensive Tactics exam after making the appropriate effort to do so.

In the instant case, the Employer was represented by Walterine Langford, Associate City Attorney and Human Resources Director. Walter Armstrong, Chief of Police, City of Vicksburg, testified on behalf of the Employer. (R. Vol. 2, p.25-43). The ALJ was unable to reach Ms. Tinner, and thus, she did not participate in the hearing. (R. Vol. 2, p.25). However, since the Employer had the burden of proof, testimony was taken in Ms. Tinner's absence. Miss. Code Ann. Section 71-5-513 (A) (1) (C) (Rev. 2010); Little, supra.

Chief Armstrong stated that Ms. Tinner was employed as a police officer from December 16, 2008, until January 4, 2010. (R. Vol. 2, p.25). He explained that Ms. Tinner was placed in a full-time "non-police" capacity. He recommended her termination to the Mayor and Board of Aldermen, for failing to meet police officer certification requirements. She did not complete the Defensive Tactics portion of her Police Academy training. (R. Vol. 2, p.26).

Chief Armstrong also stated that Ms. Tinner could not perform the required Defensive Tactics maneuvers after several tries. He explained that the course entailed performing different take-down techniques, and different maneuvers, related to restraining a person. She attended the Police Academy from July 22, 2009, through September 9, 2009; and after failing the test, was given another opportunity to re-take the class in November 2009. (R. Vol. 2, p.27).

Chief Armstrong stated that under normal circumstances, he would have recommended termination after Ms. Tinner failed to graduate with her class. However, since she passed all but the Defensive Tactics portion, he sent her back to the Academy to re-take that portion of the training.

Students failing to graduate were usually immediately terminated. However, he gave her another opportunity to pass because she only lacked one (1) portion.

He did not know why Ms. Tinner was unable to complete the class, but was told by one of the training officers that she would "probably not make it" because she was not doing well in the Academy. The training officer also stated that Ms. Tinner was having serious problems demonstrating [the maneuvers]. Although she had done well in the training, she did not do well demonstrating [the maneuvers] during regular training sessions. (R. Vol. 2, p.28).

Ms. Langford was then allowed to question Chief Armstrong. (R. Vol. 2, p.29-43). Chief Armstrong's employment with the City began on July 10, 2009. He was a Mississippi State Trooper from May 1984 until June 30, 2009. (R. Vol. 2, p.29).

Ms. Tinner was selected to become a future police officer prior to his employment as Chief of Police. She had met the necessary selection process criteria to become a police officer. This included taking an agility test, which consisted of physical training, passing a written test, and passing a background check and drug test. He confirmed that Ms. Tinner was sent to Mississippi Law Enforcement Training Academy in Pearl, Mississippi on July 22, 2009. She was aware that all police officers were required to graduate from the academy to become a police officer. (R.Vol. 2, p.30).

Chief Armstrong testified that the police officers training course lasted ten (10) weeks. Ms. Tinner finished in September 2009. However, a letter dated September 9, 2009, from the Academy stated that she failed Defensive Tactics. (R. Vol. 2, p.31). Chief Armstrong also confirmed that Ms. Tinner received a copy of her grades, and was aware in September that she did not pass Defensive Tactics. (R. Vol. 2, p.33).

Ms. Langford submitted a letter dated December 2, 2009 from Academy that stated Ms. Tinner was again unable to successfully complete the practical Defensive Tactics test. (R. Vol. 2, p.32). This letter was submitted as Exhibit 1-B. (R. Vol. 2, p.47). Although the ALJ did not have a copy of these documents, he allowed Ms. Langford to describe them, and admitted them as Exhibits 1-C and 1-D, respectfully. (R. Vol. 2, p.32, 48, 49).

Chief Armstrong testified that he did not terminate Ms. Tinner in September 2009, but instead instructed her to return to the Police Department in Vicksburg. Shortly thereafter, he received a letter from the Board of Minimum Standards informing him that Ms. Tinner could not function in a law enforcement capacity. He then assigned her to another position in the Records department. However, she maintained her salary as a police officer. (R. Vol. 2, p.34). Ms. Tinner understood that the position was temporary, and only if she was re-admitted to the Police Academy, and re-took the Defensive Tactics exam. (R. Vol. 2, p.35).

Chief Armstrong stated that the Academy sets the policy allowing those who fail a course ninety (90) days in which to re-take the course. Chief Armstrong stated that he received a letter from the Minimum Standards Board, which oversees the certification of police officers, stating that Ms. Tinner failed the Defensive Tactics portion of the basic class. (R. Vol. 2, p.35). The Board's policy also prohibited working in law enforcement until successfully completing the failed portion and/or class. (R. Vol. 2, p.36).

Chief Armstrong again testified that he sent Ms. Tinner back to the Academy at the end of November/beginning of December to re-take the class, but that she again did not pass. He stated that he received correspondence from Mr. Charlie Alexander, Assistant Director, advising him that Ms. Tinner had again failed. (R. Vol. 2, p.36). The letter was submitted into evidence as "Exhibit 1-B."

(R. Vol. 2, p.36, 47). The letter stated that Ms. Tinner "failed to successfully complete Defensive Tactics with Basic Class 227, making her ineligible to graduate with her class. . . ." (R. Vol. 2, p.37). When Ms. Tinner also again failed the course, her training at the Academy ended.

Chief Armstrong also stated that he received phone calls from the training instructors on at least three (3) occasions complaining about Ms. Tinner, and the problems they were having with her. (R. Vol. 2, p.37). Ms. Tinner was written up twice. The instructors informed him that if she received a third write-up, they would dismiss her. According to Chief Armstrong, the instructors told him that she did not receive a third write-up because they spoke with Ms. Tinner, and rectified some of the problems she was having. (R. Vol. 2, p.38). An Academy Student Contact Form describing the reason for the two write-ups, and signed by one of the training officers and Ms. Tinner, was submitted into evidence. (R. Vol. 2, p.38, 50-51).

Chief Armstrong stated that he spoke with Ms. Tinner after receiving the first test results, and she knew and understood the ninety (90) day rule. She also inquired as to whether she passed the second attempt at training. After this conversation, he told Ms. Tinner he was recommending her termination to the Board of Aldermen. (R. Vol. 2, p.39).

According to Chief Armstrong, Ms. Tinner did not do anything after this conversation, but expressed that she thought she had completed Defensive Tactics the second time, and could not understand why she did not pass. Chief Armstrong stated that if she had passed Defensive Tactics, she would have received her diploma of completion from the Academy. He stated that it is a state requirement that all police officers must complete and pass all aspects of the training academy and receive a diploma, that no one could work as a police officer without passing the Academy, and that Defensive Tactics is a required course. (R. Vol. 2, p.40).

Chief Armstrong testified that he and Ms. Tinner appeared in a hearing before the Mayor and Board of Aldermen on January 4, 2010. He stated that he presented evidence similar to what had been presented in the ALJ hearing, and Ms. Tinner was also allowed to present evidence. After the hearing, the Board upheld his decision to terminate Ms. Tinner. (R. Vol. 2, p.41).

Following the hearing, a Personnel Action Form, signed by the Mayor and Board of Aldermen was sent to Ms. Tinner, along with a letter from Ms. Langford stating that she was terminated for failure to successfully complete the Defensive Tactics course after two (2) attempts. She failed to receive certification through law enforcement officers training, which is a requirement by the State of Mississippi to be a police officer. (R. Vol. 2, p.41-42). These documents were submitted into evidence as "Exhibit 2-A" and "Exhibit 2-B," respectively. (R. Vol. 2, p.42, 52, 53).

In closing, Chief Armstrong stated that to his knowledge, Ms. Tinner had never been certificated as a police officer, and is not currently working as a police officer. (R. Vol. 2, p. 43). The hearing was the concluded. (R. Vol. 2, p. 44).

Argument and Authorities

Based upon this testimony, the Employer has not established by clear and convincing evidence that Ms. Tinner willfully and wantonly disregarded the Employer's interest.

This case is distinguishable from City of Clarksdale v. Mississippi Employment Sec. Comm'n., 699 So. 2d 578 (Miss. 1997), which is cited by the Appellants. In City of Clarksdale, the Supreme Court reversed the Circuit Court of Coahoma County, holding that Theodore Hawkins' failure to pass the physical fitness test required for re-certification as a police officer was misconduct, and disqualifying him from receiving benefits. However, in this case, Mr. Hawkins refused to participate in physical conditioning training with other members of the police department. Id. at 580-581. Additionally, while at the Academy, Mr. Hawkins displayed a lack of interest and made little effort to perform to the best of his physical ability. He also refused to participate in extra conditioning sessions with other Clarksdale officers who were attending the Academy. The Academy's physical fitness instructor also noted that he never witnessed Mr. Hawkins do any extra work to improve his physical conditioning. Id. at 581. No such testimony was presented by the Employer in this case.

Additionally, in its ruling, the Court in City of Clarksdale stated that, "there was evidence that [Mr.] Hawkins did not attempt to keep his physical fitness up to the standards required in order to pass the test at the Academy," and that he "had the ability to 'run fast enough' a year prior to entering the Academy to meet the physical requirements." Additionally, the Court pointed out that "two months prior to starting the Academy, Hawkins was given the opportunity and encouraged to participate in physical conditioning with other members of the police department . . ." but that he "refused to participate." The Court also pointed out that "an instructor at the Academy also testified

that Hawkins displayed a lack of interest and made little effort to perform to the best of his physical ability. Thus, Hawkins failed to do what was in his control – maintain his physical condition in order to pass the required physical test." Id. at 583. Again, no such proof was presented by the Employer in the case at bar.

The facts in City of Clarksdale are obviously distinguishable from the case at bar. The Employer put forth no evidence whatsoever that Ms. Tinner failed to complete the Defensive Tactics portion of her training due to lack of interest, or refusal to participate in training. On the contrary, the Employer's testimony reveals that Ms. Tinner participated to the best of her ability, but unfortunately was not physically able to adequately perform various take-down and restraint techniques. It goes without saying that performing such maneuvers are difficult to master, as opposed to simply achieving physical fitness, such that some people may simply be unable to do so, no matter how much or how hard they try. Further, Chief Armstrong's testimony also reflects that Academy representatives indicated that Ms. Tinner did well in training, meaning she obviously tried. However, she simply could not perform well during testing. (R. Vol. 2, p. 28). Further, Chief Armstrong stated that when he informed Ms. Tinner that she again failed the test, Ms. Tinner stated that she thought that she passed, and could not understand why she did not. (R. Vol. 2, p. 40).

Regarding the documents submitted by the Employer concerning the two write-ups of Ms. Tinner, the reasons for the write-ups were not related to her efforts to pass the Defensive Tactics exam. (R. Vol. 2, p. 50-51). Further, based upon the testimony, those write-ups were rectified after she was counseled. (R. Vol. 2, p.38).

Counsel for the Employer argued that there was no evidence that Ms. Tinner made a good faith effort to pass the exam, or did her best, as found by the Circuit Court and Board of Review.

However, although Ms. Tinner has no burden to prove that she made a good faith effort to pass the exam, or did her best, in making this argument Counsel fails to consider all of the testimony and evidence.

In that regard, once again, Chief Armstrong testified that he was told by one of the training officers that although she had done well in the training, she did not do well demonstrating [the maneuvers]. (R. Vol. 2, p.28). Further, since Ms. Tinner passed all of the other portions of her Police Academy course, she apparently made the appropriate efforts to pass all of her training. Chief Armstrong even acknowledged that she was surprised when he informed her that she did not pass the Defensive Tactics exam. (R. Vol. 2, p. 40). Further, Ms. Tanner stated to the Claims Examiner that she tried to the best of her ability. (R. Vol. 2, p. 12).

Counsel for the Employer also argues that the Circuit Court and Board of Review should not be entitled to rely on Ms. Tinner's statement to the Claims Examiner. However, as stated herein above, the Employer is not entitled to rely upon any purported negative inference by Ms. Tinner's non-participation in the hearing in this matter. Little, supra at 1260. Further, by statute, the entire record made before the MDES is part of the record relative to any appeals, shall be considered as evidence, and thus, is relevant to the Court's determination on appeal. Miss. Code Ann. Section 71-5-525 (Rev. 2010). Additionally, hearsay is admissible in proceedings before the MDES, and may be relied upon in making its decisions, particularly where it is part of a business record. Id.; *Unemployment Insurance Regulations*, Section 200.04, p. 10-12 (December 1, 2007); McClendon v. Mississippi Department of Employment Security, 949 So. 2d 805 (Miss. Ct. App. 2006). Thus, both the Board of Review and Circuit Court are entitled to rely on Ms. Tinner's statement to the Claims Examiner.

In this case, Chief Armstrong's testimony also actually corroborates Ms. Tinner's statement to the Claims Examiner that she tried to the best of her ability to pass the test; or at least does not refute that statement. Again, no evidence is found in the record from any Academy representative, or even from Chief Armstrong, that Ms. Tinner did not pass the test due to any lack of effort while at the Academy, or willful and wanton disregard. Since there is no evidence that her failure was due to willful and wanton disregard, there is no requirement that Ms. Tinner rebut. Thus, even without relying upon Ms. Tinner's statement to the Claims Examiner, the Board of Review and Circuit Court made the right decision in this case that the Employer failed to meet its burden of proof in this case.

In Wheeler v. Arriola, supra., at 1381, the Supreme Court refused to find misconduct where the employee was dismissed because the employer was dissatisfied with her work performance. Id. at 1381. The Court noted that there was no evidence that the employee's failure was due to any willful or intentional neglect, or that she willfully failed to perform to the best of her ability, or to follow any instructions given by her employer. Id. at 1383; Foster v. Mississippi Employment Security Commission, 632 So. 2d 926 (Miss. 1994). Likewise, in this case, there is insufficient evidence of misconduct under this definition for this Honorable Court to reverse.

The Supreme Court has also had several opportunities to address whether an employee's acts rose to the level of disqualifying misconduct. In that regard, it appears that Ms. Tinner's conduct did not rise to the level of misconduct. *See e.g.* Allen v. Mississippi Employment Security Comm'n, 639 So. 2d 904 (Miss. 1994) (employee's grinding of 108 parts and failure to send parts to a proper station after warnings was not misconduct); Sprouse v. Mississippi Employment Security Comm'n, 639 So. 2d 901 (Miss. 1994) (continued accidents by a forklift operator, after warnings, was not misconduct); Brandon v. Mississippi Employment Security Comm'n, 768 So. 2d 341 (Miss. 2000)

(Employer's burden of proof not met regarding alleged violation of policy); Kemper County School District v. Mississippi Employment Security Commission, 832 So. 2d 548 (Miss. 2002)(failure to follow policies and accomplish numerous tasks, including depositing money daily, properly documenting records, and managing employees, did not constitute misconduct when those failures apparently resulted from ordinary negligence in isolated incidents); Mississippi Employment Security Comm'n. v. Johnson, 9 So. 3d 1170 (Miss Ct. App. 2009)(employee did not commit misconduct although she failed to complete work projects, was given warnings, and did not meet expectations, as her failure was due to simple inability, inefficiency and inexperience).

The facts of this case are similar to the above cases, in that there is no evidence indicating that Ms. Tinner's failure to perform sufficiently to pass her Defensive Tactics exam was due to willful and wanton disregard of its standards of behavior, but conversely, it was due to inability or incapacity on her part. City of Clarksdale, supra.

CONCLUSION

The testimony does not support a finding that the Employer proved Ms. Tinner's failure to pass the Defensive Tactics portion of her police officers' training course constituted misconduct, by clear and convincing substantial evidence. Conversely, the testimony supports the Circuit Court and Department's decisions that the Employer failed to prove Ms. Tinner's inability to pass the Defensive Tactics exam was due to willfully and wantonly disregard of the standards of behavior expected of her. In that regard, it is not necessary that the Claimant, Ms. Tinner, put on any proof to succeed, where the Employer's proof is insufficient to prove misconduct, as it is in this case. Little, supra. Thus, since the Board of Review and Circuit Court decisions are supported by the evidence, and follow the case authorities, this Honorable Court should affirm.

Respectfully submitted, this the 25th day of May, 2011.

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY

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CERTIFICATE OF SERVICE

I, Albert Bozeman White, Attorney for Appellee, Mississippi Department of Employment Security, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to the following:

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THIS, the 25th day of May, 2011.

Albert Bozeman White
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