IN THE SUPREME COURT OF MISSISSIPPI

CITY OF VICKSBURG — APPELLANT

VS. — CAUSE NO.2010-CC02024

MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY AND DENEKA TINNER — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENTS NOT REQUESTED

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TABLES OF CASES, STATUTES AND OTHER AUTHORITIES CITED

CASES PAGES

Counsel for City responds to the Brief of the Mississippi Department of Employment Security.

STATEMENT OF THE CASE:

Counsel for Mississippi Department of Employment Security, hereinafter referred to as Counsel for MDES, on page 2 of his brief states Appellee Deneka Tinner believed that she had one (1) year from the date she first took the test to pass it giving her until September 2010. This is clearly not true. Appellee Tinner received the document from the Department of Public Safety Mississippi Law Enforcement Officers Training Academy dated Tuesday, September 8, 2009. On this form, Appellee Tinner is advised that she failed the Defensive Tactics course and has sixty days to return and take the course over. (T.49)

On page three (3) of brief of Counsel for MDES, he states the following: "The Claims Examiner obtained a rebuttal statement from Ms. Butler. She stated that the City's policy provided for ninety (90) from the first test in which to re-test and pass, not one (1) year. (R. Vol.2, p.13)." Ms. Butler actually stated that "[t]he Policy states there is a 90 days period to re-test and pass, once a failure has occurred. There was no one year period, it was 90 days." (T.13) There is no City policy. The policy is that of the State of Mississippi and is so stated by Charlie Alexander, Assistant Director of the State of Mississippi Department of Public Safety Mississippi Law Enforcement Officers' Training Academy (T. 47) and found at section 45-6-11 (3)(a) of the Mississippi Code of 1972, as amended.

Also on page three (3) of Counsel for MDES brief, he states the following, [t]he ALJ held that her [Appellee Tinner] inability to pass a course involving physical tactics

and maneuvers was not considered misconduct, because she tried her best and believed that she had passed. (R Vol.2, p. 56-57). This argument is also advanced by Counsel for MDES on page 4 of his brief. As argued in her brief, Counsel for the City of Vicksburg states that because Defendant Tinner failed to participate in the hearing, ALJ has no personal information as to whether Defendant Tinner did her best or not. Employer was not able to cross examine her as to what she did to pass the course. Further, any statements Defendant Tinner made prior to her hearing were uncorroborated hearsay and not substantial evidence. Williams v. Mississippi Employment Security Commission and Anderson-Tully Company, 395 So.2d 964-965-966 (Miss. 1981)

If the law was where one could give a written statement and such would be substantial evidence, there would be no need to have a hearing. Rather, everybody could state in writing what his\her position was and let the decision be rendered from there. It was clear that Appellee Tinner believed that by not appearing for the hearing, she would not have to explain what she did in terms of her best provided the statements of the Claims Examiner were accurate.

On page four (4) of his brief, Counsel for the City of Vicksburg agrees with Counsel for MDES that the Mississippi Supreme Court set forth a definition of misconduct in the case of Wheeler v. Arriola, 408 So.2d 1381 (Miss.1982).

However, Counsel for the City of Vicksburg argues that although the case of Wheeler is the foundation for misconduct, the Court has expanded said decision in case law. Mississippi Employment Security Commission v. Bettie G. Bell, 584 So.2d 1270, 1271 (Miss.1991). See also Mississippi Employment Security Commission v. Bobbie F. Berry and Rose M. Berry, 811 So.2d 298 (Miss. 2001); City of Clarksdale v. Mississippi

Employment Security Commission, 699 So.2d 578 (Miss.1997); Shannon Engineering & Construction, Inc. v. Mississippi Employment Security Commission and Reginald Berry, 549 So.2d 446 (Miss. 1989); and Luke T. McClinton v. Mississippi Department of Employment Security, 949 S.2d 805 (Miss. 2006).

Counsel for MDES states on page five (5) of his brief that briefs were submitted by the City and his department and that the Circuit Court subsequently affirmed the decision of the Appellee MDES. (R. Vol.1, p. 11-12) However, the Circuit Court Judge actually rendered his decision on November 10, 2010. The Brief of Appellee MDES was not filed until November 16, 2010, which is some six (6) days after the Circuit Court Judge's decision. (R.E. 5-6)

In his discussion of the City of Clarksdale v. Mississippi Employment Security Commission, 699 So. 2d 578 (Miss. 1997), Counsel for MDES restates the following from the Circuit Court's decision:

> 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 nd 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. (Brief of Appellee MDES page 5)

The above statements of Counsel for MDES are not supported by substantial evidence and, therefore, are not supported by substantial evidence and should be reversed. As argued earlier in her brief, Counsel for City states that the Court has held

that substantial evidence means something more than a 'mere scintilla' of evidence. Johnson v. Ferguson, 435 So. 2d 1191 (Miss.1983) The Court stated that there was nothing in the record to indicate that Appellee Tinner intentionally did anything to inhibit her ability to pass the defensive tactics course. Likewise, there is nothing in the record that states she did all the things that she should have to pass the defensive tactics course. Further, the court stated that, "Presumably Ms. Tinner performed to the best of her ability." The court affirmed the decision of MDES and found that Appellee Deneka Tinner was not guilty of misconduct and awarded her unemployment benefits. However, in its ruling, the court failed to cite any case law that stated that a presumption, without evidence, rises to the level of substantial evidence.

> It appears that the Circuit Court Judge was upholding the decision of Appellee MDES. However, Counsel for City of Vicksburg acknowledges that the Supreme Court has held that
>
> > An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or violates one's constitutional rights. Sprouse v. Mississippi Employment Security Commission, 639 So. 2d 901 (Miss.1994) See also Mississippi Commission on Environmental Quality v. Chickasaw County Board of Supervisors, 621 So. 2d 1211 (Miss.1993); Mississippi Employment Security Commission v. PDN, Inc., 586 So. 2d 838 (Miss.1991) The court, in the case of Farrish Gravel Co., Inc. v. Mississippi State Highway Commission, 458 So. 2d 1066, 1068 (Miss.1984) stated that [i]f an administrative agency exercises power that is not expressly granted or necessarily implied, then the agency's decision is void.

Since Counsel for City argues that the Circuit Court Judge's decision is not supported by substantial evidence, it is reasonable that his decision must be reversed.

On page 6 of the brief of Counsel for MDES, he argues that the Employer has the burden of proving misconduct by clear and convincing substantial evidence. The City

has accepted that responsibility and more than proved its case that Appellee Tinner was guilty of misconduct under the law and not entitled to unemployment benefits. Cases cited by Counsel for MDES are not relevant to the case at point. For example, in the case of Barbara Brandon v. Mississippi Employment Security Commission and Baptist Memorial Hospital-Golden Triange, 768 So.2d 341, 343 (Miss. 2000), claimant was found not to have committed misconduct because she supplied a patient, at the patient's request, an application for an absentee ballot.

In the case of Debra D. Little v. Mississippi Employment Security Commission, 754 So.2d 1258, 1260 (Miss. 2000), which is also cited by Counsel for MDES in support of his statement that employer bears the burden of proving misconduct by clear and convincing evidence, Counsel argues that the burden of proof does not shift to the claimant. This is not the exact holding of the court. Rather, the Court actually held that

> [i]n the absence of evidence of misconduct established by KFC, Little was not required to offer rebuttal evidence or an explanation. The requirement by the referee that Little offer evidence to rebut KFC's allegation of misconduct, when no evidence of misconduct had been offered, was an improper shifting of the burden of proof.

Counsel for City argues that the case at bar is analgous of the Little case and Appellee Deneka Tinner's statements to the claims Examiner are not substantial evidence. Counsel for MDES makes the following statement on page 7 of his brief:

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. Counsel for City argues that Counsel for MDES seems misplaced in light of the holding in Little. This is the same exact factual pattern in case at bar. In Little the court held that the written statements of

the Employer, KFC, were not substantial evidence. We agree. The written statements by the Claims Examiner of Appellee Deneka Tinner are not substantial evidence and also raise an issue of reliability.

Counsel for MDES believes that the case of City of Clarksdale vs. Mississippi Employment Security Commission, 699 So. 2d 578 (Miss. 1997) supports its position that Appellee Tinner is not guilty of misconduct. Counsel for MDES cites the following from the Clarksdale case:

> 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 vs. Mississippi Employment Security Commission, 699 So. 2d 578 (Miss. 1997) (page 7 of MDES brief)

A brief review of the facts in the Clarksdale case is that Hawkins, the employee, failed to pass the physical fitness test required to receive certification as a police officer. The Court found his failure to obtain his certification misconduct. The Court stated as follows:

> "we find that the case of Richardson vs. Miss. Employment Sec. Comm'n, 593 So. 2d 31 (Miss. 1992), is controlling. In Richardson, we found that an employee's failure to maintain a valid driving license, where possession of a driver license is a condition of continued employment, constituted employee misconduct. Richardson, 593 So. 2d at 35. The Commission contends that Richardson is factually distinguished. In its brief, the Commission states that Richardson was at fault and to blame for his driver's license suspension, and in the case sub judice, Hawkins's had a "mere inability to run fast enough." Thus, Hawkins was not in control of the condition precedent to his employment. We disagree, in that an individual's physical fitness can be uniquely within that person's control. Clarksdale at 578.

As stated earlier in our brief, there is nothing in the record that indicates Appellee Tinner did anything to improve her chances of passing the defensive tactics class. Nor did she establish that the City of Vicksburg did anything to interfere with her chances of passing

the required class. She was allowed to return ninety (90) days after she failed the class. (T. 30,35,47)

Counsel for MDES states that

> ...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) (Brief of Mississippi Department of Employment Security, p. 7)

There is nothing in this conversation with the Claims Examiner where there was any information obtained from Appellee Tinner as to what she did that would show that she did her best. Further, even if the Claims Examiner had obtained this information and Appellee failed to appear for her hearing, it is still uncorroborated hearsay and not substantial evidence. Little at 1260. See also Williams v. Mississippi Employment Security Commission and Anderson Tully-Company, 395 So.2d 964 (Miss.1981) and Mississippi Employment Security Commission v. McLane-Southern, Inc., 583 So. 2d 626 (Miss. 1991).

ARGUMENT

Standard of Review

Counsel for MDES states that 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). Counsel for the City of Vicksburg agrees that the above is a correct statement of 71-5-531. However, Counsel for the City of Vicksburg maintains that the decision of the Agency and the Circuit Court Judge was not supported by substantial evidence. This is true because the court has held that uncorroborated

hearsay testimony is insufficient to raise to the level of substantial evidence. Mississippi Employment Security Commission v. McLane-Southern Inc., 583 So. 2d 626, 628 (Miss. 1991); Williams v. Mississippi Employment Security Commission and Anderson-Tully Company, 395 So. 2d 964 (Miss. 1981).

On page 11 of his brief, Counsel for MDES stated the following,

> 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. (Vol. 2, p. 32, 48, 49)

In response to this comment, Counsel for City argues that it was not her responsibility to ensure that documents forwarded to MDES were forwarded to Appellee MDES' ALJ. This was noted in the brief Counsel for the City of Vicksburg filed with the Circuit Court. Counsel for MDES did not challenge same and therefore such cannot be an issue at this point. (Vol. 1). See Richard Earl Birkhead v. State of Mississippi, 57 So. 3rd 1223 (Miss. 2011); Derrick Demond Walker v. State of Mississippi, 913 So. 2d 198 (Miss. 2005); and Barbara Douglas v. Ricky Blackmon et.al., 759 So. 2d 1217 (Miss. 2000)

On page fifteen (15) of his brief, Counsel for MDES argues the following:

> 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.

This argument is not understood by Counsel for City. If a part of the requirement of a job is to obtain and maintain a certification and the applicant fails to do so, this is misconduct which should prevent the claimant from receiving unemployment benefits. In this case, Appellee Tinner was aware that she had to be certified to be a police officer and that certification was through the State of Mississippi. Thus, when she failed to

obtain that certification, for whatever reason, she could not maintain her job. See Richardson v. Mississippi Employment Security Commission and Community Counseling Service., 593 So.2d 31 (Miss.1992)

Also on page 15 of his brief, Counsel for MDES argues the following:

> 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.

Interestingly enough, Counsel for MDES did not state what the evidence and testimony is that support the above statements. Further, once the City established misconduct, the burden shifted back to Appellee Tinner. Appellee Tinner could not meet her burden because she did not appear for the hearing. Little 1260-1261.

And on page 17, Counsel for MDES states that 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 this statement. Counsel for City of Vicksburg does not find this in the record anywhere and notes that Counsel for MDES does not show a record page number that supports this statement. Rather, Chief Armstrong stated the following as follows:

ALJ: Why do you think she was unable to complete it?

Armstrong: I have no idea. I didn't speak to the training officers as far as any particular problems that she was having. (T.28)

Lastly, Counsel for MDES argues on page 16 of his brief that "..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." Counsel for City of Vicksburg finds no creditable evidence that a statement to a Claims Examiner in an unemployment proceeding is a business record. In fact, M.R.E. Rule 803, which is the business record exemption to the hearsay rule, states the following:

> A Memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902 (11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In the addendum, the case of Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930) was cited. In this case, a police report contained information from a bystander as well as the police officer. The information of the police officer was information that was done in the regular scope or course of his job. Although the court held the statements of the police officer met the business record exemption, the statements by the bystander were inadmissible.

CONCLUSION

In short, this is a case that would appear to be quite simple. There is a hearing that is scheduled. The claimant failed to appear for the hearing. The only information provided by the claimant was what was written by a Claims Examiner which was not verified by claimant in any form. Yet, the MDES and Circuit Court Judge found same to meet the substantial evidence test. The City argues that case law clearly states that such is uncorroborated hearsay and as such is not substantial evidence. City argues that this point alone was sufficient to find that Appellee Deneka Tinner was not entitled to a favorable ruling in this case.

Further, we look at the Clarksdale case in which the court found that failure to

obtain a certification was misconduct. The Claimant was aware that she had to become certified to remain in a position as a police officer. This is clear from the fact that she went to the Academy not once, but twice. The State, not the City, certified police officers and made the decision as to what courses were required to obtain certification. City argues that Appellee Tinner had to met those qualifications to be certified, which was a condition of her employment and that failing to obtain this certification, she was guilty of misconduct to the extent that she should not be rewarded for failure by receiving unemployment benefits. The court in Richardson found that a claimant's failure to maintain his driver's license was misconduct when the license was a requirement of his employment.

The City of Vicksburg requests that this court find that the decision of the Circuit Court Judge and MDES should be reversed and Appellee Deneka Tinner be denied unemployment benefits.

RESPECTFULLY SUBMITTED,

BY: _____

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CERTIFICATE OF SERVICE

I, Walterine Langford, Attorney for the City of Vicksburg, do hereby certify that I have this date mailed, by United States mail, a true and correct copy of the Appellant's Reply brief to the following persons at their last known address:

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Honorable Isadore W. Patrick
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This, the 8th day of June 2011.

WALTERINE LANGFORD