IN THE SUPREME COURT OF MISSISSIPPI

JOSEPH MICHAEL UPCHURCH — APPELLANT

VERSUS — CAUSE NO.2011-cc-00226

CITY OF MOSS POINT, A BODY POLITIC
AND ITS CIVIL SERVICE COMMISSION — APPELLEE

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 Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. The City of Moss Point, Appellee
2. Moss Point Civil Service Commission, Appellee
3. Joseph Michael Upchurch, Appellant
4. Russell S. Gill and RUSSELL S. GILL, P.L.L.C., Attorney for Appellant
5. Amy Lassitter St. Pé, Attorney for Appellee and DOGAN & WILKINSON, P.L.L.C.
6. Nathan Bosio, Attorney for Appellee

Respectfully submitted, this the 23rd day of September, 2011.

CITY OF MOSS POINT AND ITS CIVIL SERVICE COMMISSION

By: _____
AMY LASSITTER ST. PÉ (MSB[redacted]
NATHAN A. BOSIO (MSB#[redacted]

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BRIEF OF APPELLEE

COMES NOW, the Appellee, City of Moss Point and its Civil Service Commission, in the above styled and numbered cause, by and through its attorneys of record, Dogan & Wilkinson, PLLC, and files their Appellee brief, and in support of same states as follows:

STATEMENT OF THE ISSUES

Based on Section 21-31-23 of the Mississippi Code, the only issue before this Court is:

(1) whether the Civil Service Commission's decision to uphold the termination of Appellant (hereinafter "Upchurch") was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such grounds.

In the event the issues stated by Upchurch exceed this limitation, Appellee (hereinafter "City") objects to said issues being decided by this Court.

STATEMENT OF THE CASE

The City agrees with the procedural history provided by Upchurch, but objects to the following facts as set forth in Upchurch's statement of the case: First, Upchurch was given a full opportunity to address the Commission and present his case that his termination was not made in good faith for cause. Upchurch's counsel represented to the Commission that he had been given full due process and "had his day in Court." Furthermore, during Upchurch's appeal to the Circuit Court, he failed to raise the argument that the Commission refused to allow him to fully present his case regarding constitutional violations by the City. This argument is being made for the first time on this Appeal, and therefore, should not be considered. Last, the Commission did not add a "new ground" for termination when it listed "lack of loyalty to Chief Smallman" as a ground for termination. The City heard of the "no confidence" letter at the termination hearing for the first time. This was brought to light by Upchurch, not the City. However, Upchurch, as well as many other witnesses, testified about the no confidence letter and other examples of

Upchurch's lack of loyalty to the Moss Point Police Department and Chief Smallman. Upchurch had a full opportunity to respond to the no confidence letter.

STATEMENT OF THE FACTS

(1) The Mayor and Board Made the Decision to Terminate

Throughout Upchurch's Brief, he focuses on the Police Chief's discriminatory acts and treatment toward him. Granted, the recommendation for termination was made by the Chief, but the Mayor and Board were the final resting authority on his termination. *Scott v. Stater*, 707 So. 2d 182 (Miss. 1997). The decision to terminate by the Mayor and Board was not made until **after** Upchurch and his attorney had an opportunity to address each fact presented by the Chief in favor of termination. Further, Upchurch was allowed to fully state his position before the Civil Service Commission, which upheld the Board's decision. At no time before the Commission or on this Appeal does Upchurch argue that the Mayor and Board acted for political or religious reasons or in bad faith, but rather focuses on the acts of the Chief alone. While the recommendation for termination was made by the Chief, it was not the only information considered by the Board. Further, for the purposes of this Appeal, the acts of the Chief are irrelevant because she lacked the authority to terminate Upchurch.

(2) Upchurch's Claims of Constitutional Violations under the 14th Amendment, Title VII, Section 1983 and the First Amendment are Irrelevant to this Appeal

Upchurch's termination, and the basis for this Appeal, is not about the alleged discrimination by the Chief, the City of Moss Point or the Civil Service Commission as Upchurch would have this Court believe. Rather, it is solely about **Upchurch's actions** while employed by the Moss Point Police Department. Upchurch has two federal lawsuits pending before the United States District Court for the Southern District of Mississippi where he will

have a full opportunity to litigate the issues raised in Upchurch's Brief, including his claims that the City violated his First Amendment rights, Fourteenth Amendment rights and violated his statutory rights under Title VII and Section 1981. This Appeal is not the proper avenue to argue these constitutional claims, therefore, the City will not respond to the legal arguments made by Upchurch in Sections III, IV, V and VI, except to the extent said arguments go toward the evidence as presented to and reviewed by the Commission and the lower court in reaching the decision to uphold Upchurch's termination.

SUMMARY OF THE ARGUMENT

The evidence and testimony before the Civil Service Commission and the Jackson County Circuit Court supports the finding that Michael Upchurch's termination was not made for political or religious reasons and was made in good faith for cause. (Circuit Court Record Excerpt ("R.E.") 000029-000031 and 000134-000135). Upchurch provided no evidence that the Mayor and Board of Aldermen have ever discriminated against Upchurch in anyway, but rather provided evidence of alleged discrimination by the Chief of Police. *See* Civil Service Transcript ("C.S.T"). The Commission, as it is required to do, heard testimony from the City to support termination and from Upchurch against termination. (Circuit Court Transcript ("C.C.T."), 27). The Commission weighed all the evidence and testimony before it, and found the City's decision to terminate was justified. (R.E. 000029-000031). The Circuit Court agreed and upheld the termination. (R.E. 000134-000135). Upchurch's argument that his evidence against termination was somehow more "substantial" is irrelevant because the Commission, sitting as judge and jury, listened to all the testimony, reviewed the evidence presented, and found the City's evidence in favor of termination warranted termination and was made in good faith for cause.

There was substantial evidence to support the Commission's first basis for termination,

that being "insubordination, including disrespect for authority by refusing to carry out instructions from Chief Smallman to properly train Patrolman Cherry." Testimony was given in support of this basis for termination by Chief Smallman, Officer Cherry and even Upchurch.

The testimony and evidence before the Commission from Officers Clark, Upchurch and the Chief of Police support the second basis for termination, which was stated as "disregard for departmental policy by failing to notify Chief or Deputy Chief that Officer Shipman left work prior to the end of his shift and his failure to obtain authorization to work Officer Bond overtime." Although Upchurch stated he failed to get the Chief's approval for the overtime because of a "do not disturb" sign on her door, Upchurch later admitted that the "do not disturb" sign on the door was not the true basis for his failure to get overtime pre-approved, but rather he felt that it was his call as Supervisor to make the decision on overtime. The fact that Upchurch, when addressing the Mayor and Board about his termination and initially in his testimony before the Commission, felt the need to rely on the fact there was a "do not disturb" sign on the door as his basis for failing to get her approval, supports the City's position that Upchurch knew, and disregarded the policy that the Chief and/or Deputy Chief must approve overtime.

The third basis for termination was also supported by substantial evidence. Officers Clark, Upchurch and the Chief provided testimony in support of the Commission's decision to terminate Upchurch for his failure to call a detective or evidence technician to the scene of the Shell Station robbery.

Last, the testimony before the Commission also supports the fourth and final basis for termination, "lack of loyalty to the Moss Point Police Department and lack of respect for the Chief of Police." Officer Upchurch admitted being the co-author of the letter of no confidence, Upchurch admitted making the statement to former Chief Gager "now that is a Chief right here,"

and Upchurch admitted to making the statement "the Chief wouldn't be here in three months" to Officer Savage. Upchurch's testimony alone supports the Commission's finding of lack of respect for the Chief and lack of loyalty to the department.

While Upchurch did present evidence to refute the above allegations, the City likewise presented testimony and evidence to support the termination. The Civil Service Commission weighed all testimony and evidence and found that the City's decision to terminate Upchurch was NOT made for political reasons or religious reasons, and that the termination was made in good faith for cause. (R.E. 000029-000031 and 000134-000135).

Upchurch's argument that the Commission failed to comply with Mississippi Code Annotated Section 21-31-5, which requires there to be three (3) members on the Commission, is unsupported by the law. First, the Commission is allowed to operate with a quorum, which is the majority of the members present. (R.E. 000125-000126). This has been supported by the Attorney General on at least two occasions. (R.E. 000130-000133). Using the same reasoning as expressed by the Attorney General in Williams, 1981 WL 39995 (September 8, 1981), every form of municipal government in the State of Mississippi requires the Board/Council members "shall be" a certain number, and all state that a quorum "shall be" a certain number less than the full Board. Boards throughout the State operate with less than the full Board although the language states "shall." Practically speaking, to require all members present at each meeting would severely hamper city business.

The City's argument in favor of a quorum has also been supported by the United States Supreme Court as it relates to the Securities and Exchange Commission ("SEC") and the Federal Trade Commission ("FTC"). *Federal Trade Commission v. Flotill Products*, 88 S. Ct. 401 (1967), *Securities and Exchange Commission v. Feminella*, 947 F. Supp. 722 (U.S.D.C. NY

1996). Therefore, this ground for appeal has no merit.

ARGUMENT AND AUTHORITIES

The Civil Service Commission reviews the employment decisions of a city when a city has removed, suspended, demoted, or discharged a civil service employee. Miss. Code. Ann.§ 21-31-23 and (R.E. 000127-000128). The Commission can reverse a city's actions only if the termination was made for political reasons, religious reasons and/or the termination was not made in good faith for cause. *Id.* The Commission will affirm the disciplinary action taken against the employee only when the evidence is conclusive. *Id.* Thus, the Commission is to decide if the evidence is conclusive that the termination was for good cause. *Bowie v. City of Jackson Police Department*, 816 So. 2d 1012, 1019 (Ct. App. Miss, 2002). The conclusive language comes into the statute to show the degree to which the Commission must be convinced the termination was for good cause, not to act as a separate standard of review. *Id.*

An appeal from a decision made by the Civil Service Commission shall be reviewed by the Circuit Court based on the record which is made by the Commission and not *de novo*. Uniform Circuit and County Court Rule 5.01. The Circuit Court is prohibited from making credibility determinations on the evidence or testimony that was presented to the Civil Service Commission. *City of Jackson v. Froshour*, 530 So. 2d 1348, 1354-55 (Miss. 1988); *City of Laurel v. Brewer*, 919 So. 2d 217 (Ct. App. Miss. 2005). Instead, the Circuit Court is charged with determining whether the Commission acted in good faith in finding that the city did have cause to discharge. Within the context of reviewing a decision of an administrative agency, "substantial evidence has been defined as such evidence 'as a reasonable mind might accept as adequate to support a conclusion." *Id.* Substantial evidence means evidence which is substantial, that is affording a substantial basis of fact from which the fact in issue can be

reasonably inferred. *Id.* The Circuit Court is not to determine issues of fact regarding whether an employee was guilty of the charge or not, but should only determine whether the Commission acted in good faith based on the evidence before it. *City of Meridian v. Davidson*, 53 So. 2d 48, 60 (Miss. 1951); *City of Laurel v. Brewer*, 919 So. 2d at 222.

Just as the Circuit Court, the Supreme Court has the same very limited standard of review in examining appeals from the Civil Service Commission. *Bowie v. City of Jackson Police Department*, 816 So. 2d at 1018. On appeal to the Supreme Court, just as on appeal to the lower court, the question is whether or not the action of the Civil Service Commission was in good faith for cause. *Id.* Intertwined with this question is whether or not there was substantial evidence before the Commission to support its order and whether it is arbitrary, unreasonable, confiscatory, and capricious. *Id.*

The Civil Service Commission sits as judge and jury at a termination hearing. *Northington v. State of Mississippi*, 749 So. 2d 1099 (Ct. App. Miss. 1999). The Court of Appeals has stated "[w]hen presented with conflicting theories as to the actual events which transpired, the jury is the judge of the weight and credibility of the testimony and is free to accept or reject all or some of the testimony given by each witness." *Id.* at 1103-04. It further stated "[i]t is not the position of the [Court of Appeals] to act as a fact finder. It is the job of the Commission to determine which facts to believe and which not to believe." *Bowie*, 816 So. 2d at 1019, *citing Beasley v. City of Gulfport*, 724 So. 2d 883 (Miss. 1998).

The Moss Point Civil Service Commission, acting as the jury, heard conflicting evidence from Upchurch and the City for each reason listed by the City to support its decision to terminate. The Commission weighed this testimony and ultimately upheld the termination. (R.E. 000029-000031). The Commission was free to accept all or none of Upchurch's testimony and evidence,

just as it was free to accept all or none of the City's testimony and evidence. The fact it decided in favor of the City simply means the Commission (i.e., the jury) found the City's evidence in support of the termination conclusive.

Mississippi Code Section 21-31-23 states that "[a]fter such investigation the Commission may, if in its estimation the evidence is conclusive, affirm the disciplinary actions.. . ." This language stresses that if the Commission, acting as a finder of fact, finds the evidence conclusive, then it can affirm the City. *Bowie*, 816 So. 2d at 1019. That is exactly what the Commission did in this case; it found the facts conclusive and affirmed the termination. It is not the role of this honorable Court to act as a fact finder, but rather it is the Commission's job to determine which facts to believe and which not to believe. *Id.* In this case, the Commission believed the facts conclusively proved Upchurch's termination was for good cause. (R.E. 000029-000031). The Commission followed the statute, and therefore, the City requests this Court to find Upchurch's termination was for good cause and supported by substantial evidence.

I. The Commission Weighed All Evidence and Found in Favor of the City. The Commission's Decision was Based on Substantial Evidence and was not Arbitrary and Capricious. Upchurch Did not Satisfy his Burden of Proof.

In reviewing the record, it is clear that there is substantial evidence to support the Commission's decision to uphold the City's termination of Upchurch. Further, the evidence and testimony demonstrate the Commission's decision to terminate based on the reasons discussed in full below, was made in good faith for cause and not based on any political or religious reasons.

A. Insubordination, Including Disrespect for Authority by Refusing to Carry Out Instructions From Chief Smallman to Properly Train Patrolman Cherry

Officer James Cherry and the Chief provided strong testimony to support the Commission's finding of insubordination in Upchurch's failure to train Officer Cherry.

Q: What training did Officer Upchurch provide you [Cherry]?
A: None. Not any that would- - after being out here on the streets, none. But what I've learned so far since he's been gone, he didn't train me in anything.

. . .

Q: After you lodged your complaint with the Chief about the training you were receiving, did anything improve with Officer Upchurch?
A: No, Ma'am. It actually got worse. . . .
(C.S.T. 196-197).

Chief Smallman refuted Upchurch's testimony that Officer Cherry needed more training in dispatch and the jail. When asked if jail and dispatch were required training for new patrolmen, she stated "[n]o, they are not. That is not a requirement for patrolmen. They are simply put in those two areas to basically observe so they can learn what all the dispatcher is going through. . . ." (C.S.T. 217). The Chief also testified that she did not request, nor was it normal police protocol, to have an assessment performed on new patrolmen by a dispatcher and a jailer as Upchurch did to Cherry. (C.S.T. 217-218). The Chief knew of no prior instances where an Officer in Charge (OIC) had asked for a report on an officer's performance from dispatch and the jail. (C.S.T. 218).

Chief Smallman offered the following with regard to Upchurch's refusal to train Officer Cherry:

Q: Did you speak to [Cherry] about what his concerns were?
A: Yes

Q: After that did you have a conversation with Officer Upchurch [about his training]?
A: Yes, I did.

Q: What did you tell Upchurch?
A: I asked him to train both Cherry and Reynolds, that they had

started together; they both needed adequate training. I told him that there would be no discrimination between the two, that they should be adequately trained.

Q: Did you elaborate on the training? Did you say in the field or patrol?

A: In the field. Well, according to Cherry he spent his full shift, I think, in the jail and in the dispatch room. And I tried to reason with Lieutenant Upchurch and I told him, you know, you've got two new candidates here that need training, split the hours up. If you have three people, split it four hours a piece.

Q: Now, after you had this original conversation with Officer Upchurch, it's my understanding that you came to the Department and Officer Cherry was in dispatch?

A: That's correct.

Q: This is following your conversation with Officer Upchurch?

A: That is correct.

Q: Did he disobey your order--[to train Officer Cherry]?

A: He did. He disobeyed the order.

(C.S.T. 218-219).

Based on the testimony of Chief Smallman and Officer Cherry, there was substantial evidence before the Commission to support its finding that Upchurch was insubordinate with regard to Officer Cherry's training.

B. Disregard for Departmental Policy

The Commission's finding that Upchurch "disregard[ed] departmental policy by failing to notify Chief or Deputy Chief that Officer Shipman left work prior to the end of the shift and his; failure to obtain authorization to work Officer Bond overtime" was fully supported by the evidence and testimony before them. (R.E. 00030).

Upchurch originally claimed that he did not seek approval for Shipman leaving and overtime for Bond because there was a "do not disturb" sign on the Chief's door. (C.S.T. 119).

He also testified that he believed it was an "emergency" and that he had to take action because otherwise the officers' safety would be in jeopardy because only two (2) officers would be on the street. (C.S.T. 117). Specifically, when asked by the City "did you believe it was important to have more than two officers on patrol," he responded "Oh yea, definitely." (C.S.T. 135). When asked if it was a serious situation, Upchurch responded "Yes, it was important, which is why I made the decision to have Bond stay over until I could contact the Chief or Deputy Chief." *Id.* His testimony, changed, however, when cross examined by the City:

> **Q:** Well, what about knocking on the Chief's door? Why didn't you do that?
> **A:** It had a do-not-disturb sign on the door.
>
> **Q:** What's wrong with knocking on the door of the Chief with the sign up?
> **A:** Because it says do not disturb.
>
> **Q** (Commission attorney): Did you decide not to knock on it because of a sign? Or are you telling me you've been ordered not to knock on it if the sign's up?
> **A:** The sign is pretty self-explanatory, I mean to me.

(C.S.T. 119).

. . . .

> **Q**: Did you consider this an emergency?
> **A**: No (this is in contrast to the testimony cited *supra*)
>
> **Q:** It wasn't an emergency?
> **A:** No, Ma'am, I would not say it was an emergency.
>
> **Q:** But it was important enough to try to talk to Chief Smallman before you did anything, correct?
> **A:** No, I did what every other supervisor would have done.
>
> . . .
>
> **Q:** So, you wanted to talk to her?
> **A:** Yea, when she came out of her meeting I was going to talk to her, mostly due to the fact the Deputy Chief

didn't schedule anybody to come in and work the jail. It's like everything I do, I get in trouble because he is not. . .you know, he fails on his part of his job.

Q: You originally said the only reason you didn't talk to her was because she was in a meeting with a do not disturb sign?

A: I just said I was going to talk to her, yes, sir. But for the main reason due to the Deputy Chief.

(C.S.T. 136-137).

Upchurch's change in testimony demonstrates that he "knew" he should have gotten permission and in fact testified that the "only" reason he did not was because of the sign on the door. (C.S.T 119). However, Upchurch eventually testified the sign had nothing to do with his decision not to get pre-approval from the Chief, but rather he felt entitled to make that call. (C.S.T. 137). Written policy or not, he knew that pre-approval was needed, but chose to disregard this policy and unilaterally make the call on overtime and early departure.

C. Failure to Call a Detective or Evidence Technician to the Scene of the Shell Station Robbery.

Upchurch's failure to call an evidence technician or a detective to the scene of the Shell Station robbery potentially caused the destruction of evidence to solve the crime. The Chief was alerted to this situation by Officer Savage on January 13, 2010. (C.S.T., City's Exh. 5). In a memo prepared by the Chief after meeting with Officers Savage and Clark, she states:

> Officer Savage informed me that the robbery at the Shell Station could have been handled better than what it was. He explained that after they reviewed the video footage at the store, (Officers Savage and Clark), they requested that the Evidence Tech and/or the detective be called out [because the video showed the suspect picking up the cash drawer and placing it on the counter, and then showed him taking the money out of the drawer]. Lt. Upchurch came across the radio and made the statement no that he was in route to the store and **he would make that decision**. Once Lt. Upchurch arrived at the store he still would not call out either party and made the statement that the Evidence Tech does not have enough experience. He then told Cpl

Shipman to do the fingerprinting. . . .
(C.S.T., City's Exh. 5).

Officer Barry Clark testified before the Commission as follows with regard to the Shell Station robbery:

> **A:** . . . [a]nd I got on the radio to call for CID. And whenever I was- - whenever I called for CID, I was told by Officer Upchurch that he would make that decision and CID wasn't to be called at that time.
> (C.S.T. 182)
>
> . . .
>
> **Q:** Why did you recommend to Officer Upchurch that an evidence technician be called to the scene?
> **A:** Due to the fact there was evidence laying out in the floor. And there was a possibility of a videotape, and to cut down on chain, you know, of custody. And the till could have also been taken and logged cause it did have fingerprints on it. And after we reviewed the videotape the person could have reached–you know, the way they reached in and grabbed the till was a perfect grasp. And possibly, I'm not saying that you could have, I'm saying possibly you could have gotten fingerprints off of it.
>
> . . .
>
> **A:** I said CID. I actually radioed it in that CID needed to be notified, get them on the way. And then he come in and said you don't have the authority. I'm–I will make that decision if it's needed.
> (C.S.T. 182-183).

Chief Smallman testified that she had not been informed of Upchurch's alleged phone call to the Deputy Chief on the night of the Shell Station robbery until the night of the hearing. (C.S.T. 215). The Chief explained, however, that even if Upchurch did make the phone call to the Deputy Chief that he should have "explain[ed] what they [had] and why they need[ed] the evidence tech out or the investigator out." (C.S.T.215). It was the Chief's testimony that

Upchurch, assuming he did make the call, should have given more details to the Deputy Chief about the robbery and the potential evidence. *Id.* She further testified that an evidence technician would have been better qualified to lift prints because of the evidence kit they have compared to those officers present at the scene. *Id.*. With regard to Upchurch's statement on the evidence technician's qualifications, the Chief stated that it was not Upchurch's decision to determine who was or was not qualified after the City made the decision to hire an individual for a specific position. *Id.*

While Upchurch claims he was following departmental policy by refusing to call out the evidence technician, there was substantial evidence presented, including the testimony from Officer Clark and Chief Smallman and the Memorandum summarizing Officer Savage's statement, which clearly shows that Upchurch did not adequately perform his duties and that his failure to act potentially interfered with the proper collection of evidence at the Shell Station robbery.

D. Lack of Loyalty to the Moss Point Police Department and Lack of Respect for the Chief of Police

Upchurch testified that he meant no disrespect when he said the Chief would not be around in three (3) months. He further testified that he meant no disrespect when he made the comment to Chief Gager "now that is a Chief right there" or when he co-authored the "no confidence" letter against the Chief and her administration. (C.S.T. 108-109). The Commission, however, after hearing from Upchurch and all witnesses, determined that said statements were disrespectful and that he had an overall lack of loyalty for the City of Moss Point Police Department. (R.E. 000029-000031). The Commission was well within its right to listen to Upchurch's explanation of his intent when making the statements and then weigh it against all

other evidence, and ultimately reach the decision that the statements were disrespectful. The testimony from Officer Savage regarding Upchurch's disrespectful statements went as follows:

> **Q:** Can you tell me–just in your own words, about the memo?
> **A:** [Officer Savage]With that incident I was in there and basically the comment was that they were discussing about how in three months the Chief was going to be out.
>
> **Q:** Can you read the exact statements?
> **A:** Basically the way he stated it was that's okay, though, they are going down; they are digging their hole deeper; mark my words, in three months they will be out of here.
>
> **Q:** Officer Upchurch testified earlier that he meant no disrespect by that statement. Did you perceive that as disrespectful.
>
> . . .
>
> **Q:** Did you perceive that as disrespectful?
> **A:** I perceived it as being insubordinate due to the simple fact that, you know, I'm in there trying to do my job and throughout this whole time, you know, I was tired of hearing about how the Chief was going down. That was the second time that I'd heard it.
> **Q:** It personally offended you?
> **A:** Yea, it upset me.

(C.S.T. 208-209).

With regard to the statements made to Chief Gager, the Chief testified that the statements made her feel bad and belittled. (C.S.T. 216-217). Two witnesses to the statement also testified that they felt it was disrespectful and a criticism to the current Chief. (C.S.T., City's Exh. 5 and C.S.T. 188 and 191).

The final reasons stated by the Commission for lack of loyalty to the police department is the letter of no confidence co-authored by Upchurch. As stated by Upchurch in his Brief to this Court, the letter of no confidence was not presented to the Mayor and Board when it made its decision to terminate Officer Upchurch. What Upchurch fails to point out, however, is that

Upchurch raised the "no confidence" letter at the hearing for the first time in an effort to prove that he was retaliated against. (C.S.T 104). It was Upchurch that raised the issue and that is now complaining that said issue was considered.

While the City agrees with the Commission's finding that the letter shows lack of loyalty to the City of Moss Point, there are many other examples of Upchurch's performance and attitude that was made part of the record by the City to support a finding of lack of respect. (C.S.T., City's Exh. 5). Upchurch testified that he had made the comment to other officers that he did not have any confidence in the Chief of Police. (C.S.T. 126). Upchurch further testified when asked if he respected the Police Chief that ". . . I don't respect the way she's treated me. . ." (C.S.T.109). When asked by Mr. Bosio "[d]o you recall saying in addition: That's okay, they're going down; they're digging their hole deeper; mark my words, in three months they'll be out of here," Upchurch responded "[n]o, I don't remember saying exactly that, [b]ut I will admit that I was not pleased with the way I was treated. I mean if she can call me racial slurs, and I can't even say she's not going to be here in three months. . . ." (C.S.T. 130).

There was more than sufficient evidence to support the finding by the Commission that Officer Upchurch lacked loyalty to the police department and disrespected the Chief of Police. While Upchurch believes his testimony is stronger or more credible, it was the Commission's (as the judge and jury) job to weigh the evidence, which it did and found in favor of termination.

II. The Commission is Allowed by Law to Hear and Decide Cases with a Quorum Present

There were two (2) members of the Civil Service Commission present at the time of Upchurch's termination hearing. The applicable statute states "[t]he members of the Civil Service Commission. . .shall be three (3) in number." Miss. Code Ann. §21-31-5. The statute

further states that "a majority of the members of the Commission shall constitute a quorum." Miss. Code Ann.§ 21-31-5(3). The Attorney General has held that it is valid for a quorum to conduct an investigation and take official action. See 1994 WL 117293 (Bardwell, Miss AG). In a case analogous to the instant facts, the Attorney General stated "[e]ven though Section 21-3-19 above says that '[t]he mayor and board of aldermen shall hold regular meetings. . .' (emphasis added), it clearly contemplates situations where the attendance of the mayor or one or more aldermen would not be possible when it states '[i]n all cases it shall require a majority of all aldermen to constitute a quorum for the transaction of business.'" 1981 WL 39995 (Linda S. Williams, Miss A.G.).

Following the reasoning of the Attorney General in *Williams*, the wording of the statute in each type of governmental entity, including counties, code charter municipalities, council form municipalities and mayor-council form of municipalities, dictates that the councils/boards "shall" be a certain number and that a quorum "shall" be present to conduct business. *See* Mississippi Code Annotated Sections 19-3-1, 19-3-23, 21-3-7, 21-3-19, 21-7-7, 21-7-9, 21-8-7, 21-8-11, 21-9-15 and 21-9-39. Governmental entities across the State could not conduct business if Upchurch's argument that no business can take place without the full boards and councils present was correct. Upchurch's argument is unrealistic and impractical in its application.

The United States Supreme Court also looked at this issue in *Federal Trade Commission v. Flotill Products*, 88 S. Ct. 401 (1967) and found that it is not essential to the enforceability of a cease-and-desist order of the Federal Trade Commission that a majority of the full Commission concur and it is sufficient if there is concurrence by majority of quorum that participate in the decision to issue the order. Additionally, the United States District Court for New York in *Securities and Exchange Commission v. Feminella*, 947 F. Supp. 722 (U.S.D.C. NY 1996),

found that the SEC could decide to bring enforcement proceeding with quorum of two present at the meeting.

CONCLUSION

The Commission and the City of Moss Point were justified in its decision to terminate Joseph Michael Upchurch. The Commission acted in good faith and not for political or religious reasons. While there was contradictory testimony regarding all of the reasons for termination, the Commission, sitting as the judge and the jury, had to weigh this testimony. In doing so, it concluded the City's decision to terminate was made in good faith and should be upheld, which the Circuit Court affirmed. The City respectfully requests this Honorable Court reach the same conclusion as the Commission and the Circuit Court and find in favor of the City of Moss Point as substantial evidence was presented by the City that the decision to terminate Joseph Michael Upchurch was not for political or religious reasons and was made in good faith for cause.

Respectfully submitted, this the 23rd day of September 2011.

CITY OF MOSS POINT, A BODY POLITIC AND ITS CIVIL SERVICE COMMISSION

By: _____

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CERTIFICATE OF SERVICE

I, Amy Lassitter St. Pé, hereby certify that I have delivered, via overnight mail, the original and three (3) copies of the above and foregoing BRIEF OF APPELLEE to Clerk, Mississippi Supreme Court, Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201.

I further certify that I have this date delivered, via U.S, Mail, a true and correct copy of the above and foregoing BRIEF OF APPELLEE to the following:

Russell S. Gill
Shannon Ladner
RUSSELL S. GILL, PLLC
638 Howard Avenue
Biloxi, MS 39530

Honorable Robert P. Krebs
Circuit Court of Jackson County
3104 South Magnolia Street
Pascagoula, MS 39567

So Certified, this the 23rd day of September, 2011.

AMY LASSITTER ST. PÉ

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ADDENDUM

C

West's Annotated Mississippi Code Currentness

Title 19. Counties and County Officers
Chapter 3. Board of Supervisors
In General
§ 19-3-1. Districts and boundaries; election

Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their districts one (1) member of the board of supervisors. The board, by a three-fifths (3/5) vote of all members elected, may at any time, change or alter the districts, the boundaries to be entered at large in the minutes of the proceedings of the board. Provided, however, that such changed boundaries shall in as far as possible conform as to natural, visible artificial boundaries, such as streets, highways, railroads, rivers, lakes, bayous or other obvious lines of demarcation, except county lines and municipal corporate limits.

In the event the boundaries of the districts are changed or altered by order of the board of supervisors as hereinabove provided, the order so doing shall be published in a newspaper having general circulation in the county once each week for three (3) consecutive weeks.

CREDIT(S)

Laws 1930, Ch. 41, § 1; Laws 1932, Ch. 188, § 1; Laws 1956, Ch. 180, § 1; Laws 1966, Ch. 290, § 1; Laws 1968, Ch. 564, § 1; Laws 1971, Ch. 493, § 1; Laws 1980, Ch. 425, § 1.

Current through the 2011 Regular Session

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Title 19. Counties and County Officers
Chapter 3. Board of Supervisors
In General
§ 19-3-23. Quorum; fine for failure to attend

Three (3) members of the board of supervisors shall constitute a quorum; and in case that number should not attend on the first day of any regular, adjourned or special meeting, the sheriff may adjourn the meeting from day to day until a quorum is present. A member failing to attend any meeting, having notice thereof, shall be fined Five Dollars ($5.00) per day for each day he may be absent, for which the clerk shall enter judgment nisi; and unless a sufficient excuse be made at the next meeting of the board, execution shall issue for the fine, which shall be paid into the county treasury. No allowance shall be made and no warrants shall be issued to such member until the fine and all costs are paid.

CREDIT(S)

Laws 1990, Ch. 419, § 1, eff. from and after passage (approved March 15, 1990).

Current through the 2011 Regular Session

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 3. Code Charters
§ 21-3-7. Aldermen; qualifications

In all municipalities having a population of less than ten thousand according to the latest available federal census, there shall be five aldermen, which aldermen may be elected from the municipality at large, or, in the discretion of the municipal authority, the municipality may be divided into four wards, with one alderman to be selected from each ward and one from the municipality at large. On a petition of twenty per cent of the qualified electors of any such municipality, the provisions of this section as to whether or not the aldermen shall be elected from wards or from the municipality at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each of the four wards shall select one from the candidates for alderman from each particular ward who shall be a resident of said ward by majority vote of the entire electorate of the municipality.

In all municipalities having a population of ten thousand or more, according to the latest available federal census, there shall be seven aldermen, which aldermen may be elected from the municipality at large, or, in the discretion of the municipal authority, the municipality may be divided into six wards, with one alderman to be selected from each ward and one from the municipality at large. On a petition of twenty per cent of the qualified electors of any such municipality, the provisions of this section as to whether or not the aldermen shall be elected from wards or from the municipality at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. This section in no way affects the number of aldermen, councilmen, or commissioners of any city operating under a special charter. All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each of the six wards shall select one of the candidates for alderman from each particular ward by majority vote of the entire electorate of the municipality.

CREDIT(S)

Laws 1950, Ch. 491, § 36; Laws 1962, Ch. 537, § 1, eff. from and after passage (approved May 24, 1962).

HISTORICAL AND STATUTORY NOTES

Derivation:

Code 1942, § 3374-36.

LIBRARY REFERENCES

Municipal Corporations ⚿80.

WESTLAW Topic No. 268.
C.J.S. Municipal Corporations §§ 385 to 387.

JUDICIAL DECISIONS

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Validity 1

1. Validity

There was no judicial inconsistency between voiding Mississippi aldermanic election statute in all of its possible applications, excepting therefrom no municipality, and acknowledging that individualized treatment must be accorded municipalities which, prior to enactment of statute, employed at-large elections for some or all of their aldermanic posts. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Municipal Corporations 80

Total abrogation of aldermanic election statute in Mississippi, and not a more limited excision of only those provisions specifically mandating at-large elections for all aldermen, was only proper course on determining unconstitutionality of provisions inasmuch as less extensive invalidation would yield an incomplete and unworkable statute. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Statutes 64(4)

Decision declaring unconstitutional statutory provisions in Mississippi mandating at large elections for all municipalities having an aldermanic form of government had effect of reinstating previously enacted statutes governing election of municipal officials. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Statutes 168

Aldermanic election statute in Mississippi, mandating as it does at large aldermanic elections for all posts in all code charter municipalities irrespective of population, is violative of Fourteenth and Fifteenth Amendments as a purposeful device conceived and operating to further racial discrimination in voting process by significantly reducing possibility of black candidates winning election to aldermanic posts from predominantly black wards. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Constitutional Law 1482; Constitutional Law 3284; Municipal Corporations 80

Question of constitutionality of practice of holding at-large aldermanic elections in cities of Mississippi other than those which had relied upon statutory provisions that invidiously discriminated against black voters was properly left for a case-by-case examination in view of basic differences in political access by blacks which were bound to exist among a large number of discrete political entities. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Constitutional Law 978

Private charter municipalities and those with council manager types of governments, in event they were applying Mississippi statutes mandating at-large aldermanic elections, were enjoined from doing so in view of decision declaring statute unconstitutional as invidiously discriminating against black voters. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Declaratory Judgment 387

A statute controlling any portion of the elective process which is passed for the purpose of discriminating against Negroes on account of their race has no constitutional legitimacy. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp.

206. Elections ⚿12(2.1)

2. Construction and application

Enforcement of Mississippi statute mandating at large aldermanic elections for all posts in code charter municipalities was enjoined in any municipality of Mississippi affected by its terms. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Injunction ⚿85(1)

In view of cases dealing with statutory racial segregation and discrimination in Mississippi and with an awareness of history of race relations in Mississippi, three-judge court, in determining purpose of Mississippi statute mandating at-large elections for all municipalities with an aldermanic form of government, was not free to overlook context giving rise to enactment. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Municipal Corporations ⚿80

Section 21-3-7 vests the legislative power in a code charter municipality, including the power to sell, lease or convey municipal property, in the board of aldermen. The governing authorities of the Town of Walnut Grove therefore may provide free office space in a municipal building to the Walnut Grove Correctional Authority, as it is a public body corporate and politic with specific statutory authority to use space in municipal buildings, and they did authorize the authority to use the old city hall building rent free, however, there is no authority for the correctional authority to provide free office space to a private corporation. Op.Atty.Gen. No. 2000-0453, Gomillion, September 1, 2000.

The governing authorities of the City of Flowood may order that a non-binding referendum be conducted to determine whether the municipal electorate favors establishing a ward system, provided said governing authorities determine that the expenditure of public funds to conduct said referendum is in the city's best interest. Op.Atty.Gen. No. 2000-0181, Edens, April 14, 2000.

2.5. Construction with other laws

There is no conflict between Section 21-3-7(1) referencing Municipal courts and Section 99-33-9 referencing Justice courts. Each refers to separate and distinct judges and duties. . Op.Atty.Gen. No. 2010-0425, Haley, July 30, 2010, 2010 WL 3281466.

3. Construction with Voting Rights Act

Changed locations of polling places constituted a "standard, practice or procedure with respect to voting" within Voting Rights Act provision relating to obtaining federal approval for change in procedure. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Elections ⚿12(8)

Voting Rights Act provision relating to federal approval of changes in election procedures were designed to cover changes having potential for racial discrimination in voting, and such potential inheres in change in composition of electorate affected by annexation. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Elections ⚿12(8)

Appropriate remedy to correct error in conducting municipal election under changed procedures without having obtained prior federal approval of such procedures should be fashioned by district court after hearing views of parties. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Federal Courts ⚿480

Three-judge court impaneled to hear suit to enjoin municipal elections on ground that requirements of election differed from those in effect on November 1, 1964 should have considered only the issue of whether particular state enactment was subject to provisions of Voting Rights Act and therefore must be submitted for federal approval

before enforcement. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Federal Courts ⚿995

It is not function of court considering suit to enjoin municipal election on ground that procedure with respect to voting differed from that in force on November 1, 1964 to determine motive of city in extending its boundary. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Injunction ⚿130

Changing boundary lines by annexations which enlarge city's number of eligible voters constituted change of a "standard, practice or procedure with respect to voting" within Voting Rights Act provision relating to federal approval of change in voting procedures. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Municipal Corporations ⚿80

Change from ward to at-large elections of all aldermen was change within coverage of Voting Rights Act provision relating to obtaining federal approval of changes in election procedures. Perkins v. Matthews (U.S.Miss. 1971) 91 S.Ct. 431, 400 U.S. 379, 27 L.Ed.2d 476, on remand 336 F.Supp. 6. Municipal Corporations ⚿80

4. Constitutional challenge

An at-large election system may be susceptible to constitutional challenge whenever it operates to minimize or cancel out voting strength of racial or political elements of voting population. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Municipal Corporations ⚿80

At-large voting schemes cannot stand constitutional test when they are shown to have been conceived or operated as purposeful devices to further racial discrimination or where state policy behind multimember districting is rooted in racial discrimination. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Municipal Corporations ⚿80

Purpose and effect of Mississippi statutory scheme mandating at large aldermanic elections for all posts in all code charter municipalities irrespective of population must be looked to in appraising constitutionality of scheme. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Municipal Corporations ⚿80

5. Minority voting strength

As a condition precedent to a holding that minority voting strength has suffered unconstitutional dilution in any municipality, there must exist within the municipality a minority element of sufficient size so that it might rationally be said that voting "strength" which the minority possesses has been reduced. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Municipal Corporations ⚿80

Municipalities in Mississippi operating with an aldermanic form of government were, considering impracticality of joinder and presence of other requisite elements, properly named as class defendants in action wherein plaintiffs alleged that Mississippi statute mandating that large aldermanic elections for all posts in all code charter municipalities irrespective of population operated unconstitutionally to dilute black voting strength by significantly reducing possibility of black candidates winning election to offices from predominantly black wards. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Federal Civil Procedure ⚿181

Action wherein plaintiffs alleged that Mississippi statute mandating at large aldermanic elections for all posts in all code charter municipalities irrespective of population operated unconstitutionally to dilute black voting strength by significantly reducing possibility of black candidates winning election to offices from predominantly black wards was, with presence of requisite elements of numerosity, typicality and commonality, maintainable as a class action on behalf of all black citizens, including all present and potentially eligible voters and all present and potential black

candidates for office of aldermen, residing in municipalities of state having an aldermanic form of government. Stewart v. Waller (N.D.Miss. 1975) 404 F.Supp. 206. Federal Civil Procedure ⚿186.15

6. Override of mayor's veto

Two-thirds vote of a five member board of aldermen necessary to override a code charter mayor's veto requires the votes of four aldermen, specifically, the votes of four aldermen voting as aldermen, exclusive of one alderman serving as mayor pro tempore. Op.Atty.Gen. Bailey, Sept. 26, 1990.

7. Annexation

Where a proposed annexation that would raise the population of a city from below 10,000 to in excess of 13,000 is pending, and on appeal in the state Supreme Court, Sections 21-1-21 and 21-3-7 and the effect of Section 5 of the federal Voting Rights Act would allow the city to proceed with the 2005 elections under the current seven member system. If the Mississippi Supreme Court reverses the chancellor's ruling, the City would be required to immediately take all reasonable and appropriate steps to conduct an election based on a five member system. Op.Atty.Gen. No. 2004-0565, Fernald, November 19, 2004.

7.5. Redistricting

Where alderman candidates file petitions based on ward lines that have not yet been precleared by the Justice Department, those petitions that contain a legally sufficient number of signatures of qualified electors to qualify under proposed ward lines are not valid at the time of submission, nor can they be supplemented by additional signatures so that they would now contain a legally sufficient number of signatures from the old, and currently still effective, ward lines. Op.Atty.Gen. No. 2005-0216, Wiggins, May 6, 2005, 2005 WL 1693002.

8. Dual candidacy

There is no authority that would prevent one, including a sitting alderman, from running simultaneously for the offices of alderman and mayor provided, of course, the individual meets all qualifications for the two offices. Obviously, one could not serve in both positions simultaneously because, inter alia, it would violate the doctrine of separation of powers set forth in Sections 1 and 2 of the Mississippi Constitution. Should the candidate win both elections, the city would have to conduct a special election to fill the vacancy in the office which the candidate chose not to enter. Op.Atty.Gen. No. 2004-0609, Butts, December 23, 2004.

9. Supervisory authority

Regardless of whether the city board is or is not in official session, individual members of a board of aldermen have no authority to direct the daily activities of municipal employees. Op.Atty.Gen. No. 2006-00499, Hurt, October 13, 2006, 2006 WL 3824123.

There is no authority for the board of aldermen to delegate any supervisory authority over other municipal employees to the city clerk. . Op.Atty.Gen. No. 2010-00109, Gerhart, March 26, 2010, 2010 WL 1556691.

10. Resignation

While their verbal resignations were recorded in the minutes, the fact that aldermen and mayor returned to meetings and voted indicates either a withdrawal of the verbal resignation or that there was never any intention to relinquish office. Thus, none of the three officials effectively resigned their offices. It is recognized that an alderman may withdraw his resignation prior to it becoming effective. Until the aldermen, or the mayor, submits a written letter of

resignation, and has not withdrawn same prior to its effective date, they all still remain in office. Op.Atty.Gen. No. 2006-00407, Mims, September 22, 2006, 2006 WL 3147025.

Miss. Code Ann. § 21-3-7, MS ST § 21-3-7

Current through the 2011 Regular Session

END OF DOCUMENT

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 3. Code Charters
§ 21-3-19. Board meetings

(1) The mayor and board of aldermen shall hold regular meetings the first Tuesday of each month at such place and hour as may be fixed by ordinance, and may, on a date fixed by ordinance, hold a second regular meeting in each month at the same place established for the first regular meeting provided said second meeting shall be held at a day and hour fixed by said ordinance which shall be not less than two (2) weeks from the first day of the first regular meeting and not more than three (3) weeks from the date thereof. When a regular meeting of the mayor and board of aldermen shall fall upon a holiday, the mayor and board shall meet the following day. The mayor and board may recess either meeting from time to time to convene on a day fixed by an order of the mayor and board entered on its minutes, and may transact any business coming before it for consideration. In all cases it shall require a majority of all aldermen to constitute a quorum for the transaction of business.

(2) The mayor and board of aldermen may, pursuant to section 21-17-17, Mississippi Code of 1972, set a day other than Tuesday for the holding of their regular monthly meeting.

CREDIT(S)

Laws 1950, Ch. 491, § 43; Laws 1960, Ch. 423, § 1; Laws 1973, Ch. 324, § 1; Laws 1979, Ch. 403, § 2, eff. July 1, 1979.

Current through the 2011 Regular Session

END OF DOCUMENT

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 7. Council Form of Government
§ 21-7-7. Council

The governing body of any such municipality shall be a council, known and designated as such, consisting of seven members. One of the members shall be the mayor, having the qualifications as prescribed by section 21-3-9, who shall have full rights, powers and privileges of other councilmen. The mayor shall be nominated and elected at large; the remaining councilmen shall be nominated and elected one from each ward into which the city shall be divided. However, if the city be divided into less than six wards, the remaining councilmen shall be nominated and elected at large. The councilmen, including the mayor, shall be elected for a term of four years to serve until their successors are elected and qualified in accordance with the provisions of section 21-11-7, said term commencing on the first Monday of January after the municipal election first following the adoption of the form of government as provided by this chapter.

The compensation for the members of the council shall, for the first four years of operation, under this chapter, be fixed by the board of mayor and aldermen holding office prior to the change in form of government. Thereafter the amount of compensation for each such member may be increased or decreased by the council, by council action taken prior to the election of members thereof for the ensuing term, such action to become effective with the ensuing terms.

CREDIT(S)

Laws 1948, Ch. 382, § 3, eff. from and after passage (approved April 13, 1948).

Current through the 2011 Regular Session

END OF DOCUMENT

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 7. Council Form of Government
§ 21-7-9. Council meetings

(1) Regular public meetings of the council shall be held on the first Tuesday after the first Monday in January after the election of the members of the council and monthly thereafter on the first Tuesday in each month. When a regular meeting of the council shall fall upon a holiday, the council shall meet the following day. Special meetings may be called at any time by the mayor or by three (3) members of the council. At any and all meetings of the council, five (5) members thereof shall constitute a quorum. The affirmative vote of a majority of the members present at any meeting shall be necessary to adopt any motion, resolution, or ordinance or to pass any measure whatever unless otherwise provided in this chapter. Upon every vote taken by the council the yeas and nays shall be called and recorded and every motion, resolution, or ordinance shall be reduced to writing before the vote is taken thereon. Upon request of one or more council members, any motion, resolution or ordinance shall be read by the clerk before the vote is taken thereon.

(2) The council may, pursuant to Section 21-17-17, set a day other than Tuesday for the holding of its regular monthly meeting.

CREDIT(S)

Laws 1948, Ch. 382, § 4; Laws 1973, Ch. 324, § 4; Laws 1979, Ch. 403, § 4; Laws 1987, Ch. 503, § 2, eff. July 1, 1987.

Current through the 2011 Regular Session

END OF DOCUMENT

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 8. Mayor-Council Form of Government
§ 21-8-7. Mayor and councilmen

(1) Each municipality operating under the mayor-council form of government shall be governed by an elected council and an elected mayor. Other officers and employees shall be duly appointed pursuant to this chapter, general law or ordinance.

(2) Except as otherwise provided in subsection (4) of this section, the mayor and council members shall be elected by the voters of the municipality at a regular municipal election held on the first Tuesday after the first Monday in June as provided in Section 21-11-7, and shall serve for a term of four (4) years beginning on the first day of July next following the election that is not on a weekend.

(3) The terms of the initial mayor and council members shall commence at the expiration of the terms of office of the elected officials of the municipality serving at the time of adoption of the mayor-council form.

(4)(a) The council shall consist of five (5), seven (7) or nine (9) members. In the event there are five (5) council members, the municipality shall be divided into either five (5) or four (4) wards. In the event there are seven (7) council members, the municipality shall be divided into either seven (7), six (6) or five (5) wards. In the event there are nine (9) council members, the municipality shall be divided into seven (7) or nine (9) wards. If the municipality is divided into fewer wards than it has council members, the other council member or members shall be elected from the municipality at large. The total number of council members and the number of council members elected from wards shall be established by the petition or petitions presented pursuant to Section 21-8-3. One (1) council member shall be elected from each ward by the voters of that ward. Council members elected to represent wards must be residents of their wards at the time of qualification for election, and any council member who removes the member's residence from the municipality or from the ward from which elected shall vacate that office. However, any candidate for council member who is properly qualified as a candidate under applicable law shall be deemed to be qualified as a candidate in whatever ward the member resides if the ward has changed after the council has redistricted the municipality as provided in paragraph (c)(ii) of this subsection (4), and if the wards have been so changed, any person may qualify as a candidate for council member, using the person's existing residence or by changing the person's residence, not less than fifteen (15) days before the first party primary or special party primary, as the case may be, notwithstanding any other residency or qualification requirements to the contrary.

(b) The council or board existing at the time of the adoption of the mayor-council form of government shall designate the geographical boundaries of the wards within one hundred twenty (120) days after the election in which the mayor-council form of government is selected. In designating the geographical boundaries of the wards, each ward shall contain, as nearly as possible, the population factor obtained by dividing the municipality's population as shown by the most recent decennial census by the number of wards into which the municipality is to be divided.

(c)(i) It shall be the mandatory duty of the council to redistrict the municipality by ordinance, which ordinance may not be vetoed by the mayor, within six (6) months after the official publication by the United States of the population of the municipality as enumerated in each decennial census, and within six (6) months after the effective date of any expansion of municipal boundaries; however, if the publication of the most recent decennial

census or effective date of an expansion of the municipal boundaries occurs six (6) months or more before the first party primary of a general municipal election, then the council shall redistrict the municipality by ordinance not less than sixty (60) days before the first party primary.

(ii) If the publication of the most recent decennial census occurs less than six (6) months before the first primary of a general municipal election, the election shall be held with regard to the existing defined wards; reapportioned wards based on the census shall not serve as the basis for representation until the next regularly scheduled election in which council members shall be elected.

(d) If annexation of additional territory into the municipal corporate limits of the municipality occurs less than six (6) months before the first party primary of a general municipal election, the council shall, by ordinance adopted within three (3) days of the effective date of the annexation, assign the annexed territory to an adjacent ward or wards so as to maintain as nearly as possible substantial equality of population between wards; any subsequent redistricting of the municipality by ordinance as required by this chapter shall not serve as the basis for representation until the next regularly scheduled election for municipal council members.

(5) Vacancies occurring in the council shall be filled as provided in Section 23-15-857.

(6) The mayor shall maintain an office at the city hall. The council members shall not maintain individual offices at the city hall; however, in a municipality having a population of one hundred thousand (100,000) and above according to the latest federal decennial census, council members may have individual offices in the city hall. Clerical work of council members in the performance of the duties of their office shall be performed by municipal employees or at municipal expense, and council members shall be reimbursed for the reasonable expenses incurred in the performance of the duties of their office.

CREDIT(S)

Laws 1973, Ch. 328, § 4; Laws 1974, Ch. 336 § 1; Laws 1976, Ch. 355, § 4; Laws 1977, Ch. 310, § 1; Laws 1980, Ch. 373, §§ 1, 2; Laws 1987, Ch. 509, § 1; Laws 1990, Ch. 304, § 1; Laws 1994, Ch. 358, § 1, eff. July 1, 1994. Amended by Laws 2001, Ch. 302, § 1, eff. April 9, 2001; Laws 2010, Ch. 319, § 2, eff. July 22, 2010; Laws 2011, Ch. 496, § 1, eff. from and after passage (approved April 6, 2011).

Current through the 2011 Regular Session

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 8. Mayor-Council Form of Government
→ § 21-8-11. Operation of council

(1) During the first council meeting of a new council, the council shall elect one (1) member as president of the council and one (1) of its other members as vice president, both of whom shall serve at the pleasure of the council. The president shall preside at all council meetings. In the event of the president's absence or disability, the vice president shall act as president. In the event of the absence of the president and vice president, a presiding officer shall be designated by majority vote of the council to serve during such meeting. All councilmen, including the president, shall have the right to vote in the council at all times, even when serving as acting mayor.

(2) Regular public meetings of the council shall be held on the first Tuesday after the first day of July after the election of the members of the council that is not on a weekend and at least monthly thereafter on the first Tuesday after the first Monday in each month, or at such other times as the council by order may set. Special meetings may be called at any time by the mayor or a majority of the members of the council. At any and all meetings of the council, a majority of the members thereof shall constitute a quorum and the affirmative vote of a majority of the members present at any meeting shall be necessary to adopt any motion, resolution or ordinance, or to pass any measure whatever unless otherwise provided in this chapter. Upon every vote taken by the council the yeas and nays shall be recorded and every motion, resolution or ordinance shall be reduced to writing before the vote is taken thereon. Upon request of one or more council members, any motion, resolution or ordinance shall be read by the clerk before the vote is taken thereon.

(3) No councilman shall be a member of any commission or board appointed or designated herein, or serve as a member of any commission or board under their jurisdiction except as otherwise provided by law.

CREDIT(S)

Laws 1973, Ch. 328, § 6; Laws 1976, Ch. 355, § 5; Laws 1987, Ch. 503, § 3, eff. July 1, 1987. Amended by Laws 2010, Ch. 319, § 5, eff. July 22, 2010.

Current through the 2011 Regular Session

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 9. Council-Manager Plan of Government
§ 21-9-15. Council, composition, election and qualifications

(1)(a) The legislative power of any city in which the council-manager plan of government is in effect under this chapter shall be vested in a council consisting of a mayor and five (5) councilmen.

(b) Any city with a larger or smaller number of councilmen, prior to September 30, 1962, may retain this larger or smaller number of councilmen or may adopt the council size of five (5) as prescribed herein. This option shall be exercised through the enactment of an appropriate ordinance by the municipal governing body prior to the election to adopt the council-manager plan of government. In the event the council fails to exercise this option, the council shall consist of five (5) councilmen.

(c) At the next regular municipal election which takes place after the adoption of the council-manager form of government, the mayor shall be elected at large by the voters of the entire city. Also, the councilmen shall be elected at large by the voters of the entire city to represent a city-wide district, or each of four (4) councilmen may be elected from a ward to represent such ward and one (1) councilman may be elected to represent a city-wide district. This option shall be exercised by an appropriate ordinance enacted by the city governing body prior to the election to adopt the council-manager plan of government. In the event the council fails to exercise this option, the councilmen shall be elected at large to represent the city-wide district. In its discretion at any time after adoption and implementation of the council-manager plan of government the council may provide for the election of councilmen by wards as provided herein, which shall become effective at the next regularly scheduled election for city councilmen.

(d) Councilmen elected to represent wards must be residents of their wards; and in cities having more or fewer than five (5) councilmen, prior to September 30, 1962, the city governing body shall determine the number of councilmen to represent the wards and the number of councilmen to represent the city-wide district.

(e) The council of any municipality having a population exceeding forty-five thousand (45,000) inhabitants according to the 1970 decennial census which is situated in a Class 1 county bordering on the State of Alabama and which is governed by a council-manager plan of government on January 1, 1977 may, in its discretion, adopt an ordinance to require the election of four (4) of the five (5) council members from wards and not from the city at large. The four (4) council members shall be elected one (1) each from the wards in which they reside in the municipality, and shall be elected only by the registered voters residing within the ward in which the council member resides. The mayor and fifth council member may continue to be elected from the city at large. Any council member who shall remove his residence from the ward from which he was elected shall, by operation of law, vacate his seat on the council.

After publication of the population of the municipality according to the 1980 decennial census, the governing authorities of the municipality shall designate the geographical boundaries of new wards as provided in this subparagraph. Each ward shall contain as nearly as possible the population factor obtained by dividing by four (4) the city's population as shown by the 1980 and each most recent decennial census thereafter. It shall be the mandatory duty of the council to redistrict the city by ordinance, which ordinance may not be vetoed by the mayor, within six (6) months after the official publication by the United States of the population of the city as enumerated in

each decennial census, and within six (6) months after the effective date of any expansion of municipal boundaries; provided, however, if the publication of the most recent decennial census or effective date of an expansion of the municipal boundaries occurs six (6) months or more prior to the first primary of a general municipal election, then the council shall redistrict the city by ordinance within at least sixty (60) days of such first primary. If the publication of the most recent decennial census occurs less than six (6) months prior to the first primary of a general municipal election, the election shall be held with regard to currently defined wards; and reapportioned wards based on the census shall not serve as the basis for representation until the next regularly scheduled election in which council members shall be elected. If annexation of additional territory into the municipal corporate limits of the city shall occur less than six (6) months prior to the first primary of a general municipal election, the city council shall, by ordinance adopted within three (3) days of the effective date of such annexation, assign such annexed territory to an adjacent ward or wards so as to maintain as nearly as possible substantial equality of population between wards. Any subsequent redistricting of the city by ordinance as required by this section shall not serve as the basis for representation until the next regularly scheduled election for city councilmen.

(2) However, in any municipality situated in a Class 1 county bordering on the Mississippi Sound and the State of Alabama, traversed by U.S. Highway 90, the legislative power of such municipality in which the council-manager plan of government is in effect shall be vested in a council consisting of a mayor and six (6) councilmen. In the next regular municipal election in such municipality, the mayor shall be elected at large by the voters of the entire municipality. Also, the councilmen shall be elected at large by the voters of the entire municipality to represent a municipality-wide district, or each of five (5) councilmen may be elected from one (1) of five (5) wards to represent said ward and one (1) councilman shall be elected to represent a municipality-wide district. This option as to wards shall be exercised by an appropriate ordinance enacted by the municipal governing body. In the event the council fails to exercise this option, the councilmen shall be elected at large to represent the municipality-wide district. Councilmen elected to represent wards must be residents of their wards.

The method of electing the mayor and councilmen shall be the same as otherwise provided by law except as provided in this chapter. The mayor and councilmen elected hereunder shall hold office for a term of four (4) years and until their successors are elected and qualified. No person shall be eligible to the office of mayor or councilman unless he is a qualified elector of such city.

(3)(a) In the event a city with a population of one hundred thousand (100,000) or more inhabitants according to the last decennial census adopts the council-manager form of government, the legislative power of said city shall be vested in a council consisting of a mayor and eight (8) councilmen.

(b) At the next regular municipal election which takes place after the adoption of the council-manager form of government, the mayor shall be elected at large by the voters of the entire municipality. The municipality shall be divided into five (5) wards with one (1) councilman to be elected from each ward by the voters of that ward, and three (3) councilmen to be elected from the municipality at large. Councilmen elected to represent wards must be residents of their wards at the time of qualification for election, and any councilman who removes his residence from the city or from the ward from which he was elected shall vacate his office.

(c) It shall be the duty of the municipal governing body existing at the time of the adoption of the council-manager form of government to designate the geographical boundaries of the five (5) wards within sixty (60) days after the election in which the council-manager form is selected. In designating the geographical boundaries of the five (5) wards, each ward shall contain as nearly as possible the population factor obtained by dividing by five (5) the city's population as shown by the most recent decennial census. It shall be the mandatory duty of the council to redistrict the city by ordinance, which ordinance may not be vetoed by the mayor, within six (6) months after the official publication by the United States of the population of the city as enumerated in each decennial census, and within six (6) months after the effective date of any expansion of municipal boundaries; however, if the publication of the most recent decennial census or effective date of an expansion of the municipal boundaries occurs six (6) months

or more prior to the first primary of a general municipal election, then the council shall redistrict the city by ordinance within at least sixty (60) days of such first primary. If the publication of the most recent decennial census occurs less than six (6) months prior to the first primary of a general municipal election, the election shall be held with regard to currently defined wards; and reapportioned wards based on the census shall not serve as the basis for representation until the next regularly scheduled election in which city councilmen shall be elected. If annexation of additional territory into the municipal corporate limits of the city shall occur less than six (6) months prior to the first primary of a general municipal election, the city council shall, by ordinance adopted within three (3) days of the effective date of such annexation, assign such annexed territory to an adjacent ward or wards so as to maintain as nearly as possible substantial equality of population between wards; any subsequent redistricting of the city by ordinance as required by this section shall not serve as the basis for representation until the next regularly scheduled election for city councilmen.

(4) The method of electing the mayor and councilmen shall be the same as otherwise provided by law, except as provided in this chapter. The mayor and councilmen elected hereunder shall hold office for a term of four (4) years and until their successors are elected and qualified. No person shall be eligible to the office of mayor or councilman unless he is a qualified elector of such city.

CREDIT(S)

Laws 1948, Ch. 385, §§ 9, 35; Laws 1952, Ch. 372, §§ 8, 18; Laws 1962, Ch. 548, § 3; Laws 1971, Ch. 384, § 1; Laws 1974, Ch. 439, § 2; Laws 1977, Ch. 302, § 1; Laws 1988, Ch. 462, § 1, eff. January 3, 1989.

Current through the 2011 Regular Session

END OF DOCUMENT

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 9. Council-Manager Plan of Government
§ 21-9-39. Council's meetings

(1) Regular public meetings of the council shall be held on the first Tuesday of each month, at such time of day as the council may provide. When a regular meeting of the council shall fall on a holiday, the council shall meet the following day. Special meetings may be called at any time by the mayor or two (2) councilmen on at least two (2) days' notice to the mayor and each member of the council. A special meeting may also be held at any time by written consent of the mayor and all members of the council. At all meetings of the council, a majority of the members thereof shall constitute a quorum. The affirmative vote of a majority of all of the members of the council shall be necessary to adopt any motion, resolution or ordinance, or to pass any measure whatever, unless a greater number is provided in this chapter. Upon every vote taken by the council, the yeas and nays shall be called and recorded, and every motion, resolution or ordinance shall be reduced to writing before the vote is taken thereon. Upon request of one or more council members, any motion, resolution or ordinance shall be read by the clerk before the vote is taken thereon. The city or town manager may be appointed only at a regular meeting of the council with no less than a majority of the members, plus one (1), in attendance.

(2) The council may, pursuant to Section 21-17-17, set a day other than Tuesday for the holding of its regular monthly meeting.

CREDIT(S)

Laws 1948, Ch. 385, § 28; Laws 1952, Ch. 372, § 15; Laws 1973, Ch. 324, § 3; Laws 1979, Ch. 403, § 5; Laws 1987, Ch. 503, § 4, eff. July 1, 1987.

Current through the 2011 Regular Session

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 31. Civil Service
General Provisions (Refs & Annos)
§ 21-31-5. Commissioners

(1)(a) The members of the civil service commission shall be appointed by the city commission, shall be three (3) in number, and shall serve without compensation; however, the governing authorities of any municipality, in their discretion, may pay each of the members of the commission a sum not to exceed One Hundred Dollars ($100.00) per month to compensate them for their services. No person shall be appointed a member of such commission who is not a citizen of the United States, a resident of such city for at least five (5) years immediately preceding such appointment, and an elector of the county wherein he resides. The terms of office of such commissioners shall be for six (6) years, except that the first three (3) members shall be appointed for different terms, as follows: One (1) shall serve a period of two (2) years, one (1) shall serve a period of four (4) years, and one (1) shall serve a period of six (6) years.

(b) From and after May 18, 1988, the governing authorities of any municipality organized under the provisions of Chapter 8, Title 21, Mississippi Code of 1972, in which a civil service commission is created pursuant to Sections 21-31-1 through 21-31-27, may increase the members of the commission to the same number of wards into which the municipality is divided and, if the commission is so expanded, the governing authorities shall appoint one (1) member of the commission from each ward. The commissioners shall serve without compensation; however, the governing authorities of any municipality, in their discretion, may pay each of the members of the commission a sum not to exceed One Hundred Dollars ($100.00) per month to compensate them for their services. No person shall be appointed a member of such commission who is not a citizen of the United States, a resident of the municipality for at least five (5) years immediately preceding such appointment, and an elector of the county wherein he resides. When making initial appointments under this paragraph (b), the governing authorities may stagger the terms of such appointees provided that no initial appointment is made for a period of less than one (1) year nor more than six (6) years; thereafter, all appointments shall be for terms of six (6) years. Appointment of members of the commission by the governing authorities under this paragraph (b) shall be made by the mayor with the confirmation of an affirmative vote of a majority of the city council present and voting at any meeting.

(2) Any member of such commission may be removed from office for incompetency, incompatibility, dereliction of duty, or other good cause, by the appointing power. However, no member shall be removed until charges have been preferred in writing and a full hearing had before the appointing power. Any member being so removed shall have the right of appeal, any time within thirty (30) days thereafter, to the circuit court and may demand a jury trial; such trial shall be confined to the determination of whether the order of removal, made by the appointing power, was, or was not, made in good faith and for cause.

(3) A majority of the members of the commission shall constitute a quorum.

CREDIT(S)

Laws 1944, Ch. 208, § 1; Laws 1964, Ch. 507, § 1; Laws 1968, Ch. 557, § 1; Laws 1988, Ch. 535, § 1, eff. from and after passage (approved May 18, 1988).

Current through the 2011 Regular Session

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness

Title 21. Municipalities
Chapter 31. Civil Service
General Provisions (Refs & Annos)
§ 21-31-23. Disciplinary process

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under the provisions of sections 21-31-1 to 21-31-27, except for such persons as may be employed to fill a vacancy caused by the absence of a fireman or policeman while in service as a member of the armed forces of the United States, shall be removed, suspended, demoted or discharged, or any combination thereof, except for cause, and only upon the written accusation of the appointing power or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. The chiefs of the fire and/or police department may suspend a member pending the confirmation of the suspension by the regular appointing power, which shall be within three (3) days.

In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the official charged with the responsibility of making the termination decision. Such official may, in his discretion, provide for a pretermination hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing. A duplicate of such notice shall be filed with the commission. After the employee has responded or has failed to respond within a reasonable time, the official charged with the responsibility of making the termination decision shall determine the appropriate disciplinary action, and shall notify the employee of his decision in writing at the earliest practicable date.

Where there are extraordinary circumstances or situations which require the immediate discharge or removal of an employee, such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing provided in this section within twenty (20) days after the date of termination. For the purposes of this section, extraordinary situations or circumstances include, but are not limited to, circumstances where retention of the employee would result in damage to municipal property, would be detrimental to the interest of municipal government or would result in injury to the employee, to a fellow employee or to the general public.

Any person so removed, suspended, demoted, discharged or combination thereof may, within ten (10) days from the time of such disciplinary action, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such disciplinary action was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may, if in its estimation the evidence is conclusive, affirm the disciplinary action, or if it shall find that the disciplinary action was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position, or employment from which such person was removed, suspended, demoted, discharged or combination thereof, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such disciplinary action. The commission upon such

investigation may, in lieu of affirming the disciplinary action, modify the order of removal, suspension, demotion, discharge or combination thereof by directing a suspension, without pay, for a given period and subsequent restoration of duty, or by directing a demotion in classification, grade or pay, or by any combination thereof. The findings of the commission shall be certified in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. The findings of the commission shall be conclusive and binding unless either the accused or the municipality shall, within thirty (30) days from the date of the entry of such judgment or order on the minutes of the commission and notification to the accused and the municipality, appeal to the circuit court of the county within which the municipality is located. Any appeal of the judgment or order of the commission shall not act as a supersedeas of such judgment or order, but the judgment or order shall remain in effect pending a final determination of the matter on appeal. Such appeal shall be taken by serving the commission and the appellee, within thirty (30) days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within thirty (30) days after the filing of such notice, make, certify and file such transcript with such court. The said circuit court shall thereupon proceed to hear and determine such appeal. However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

CREDIT(S)

Laws 1944, Ch. 208, § 10; Laws 1984, Ch. 521, § 2, eff. July 1, 1984.

Current through the 2011 Regular Session

END OF DOCUMENT

Claims apply to eligible cases filed on or after October 1, 2008 through September 30, 2010.

[Adopted effective October 1, 2008.]

PUBLISHER'S NOTE

This Rule and Appendix B, adopted for use in a pilot program for expedited claims in Jones, Lee, and Rankin Counties, as described in Appendix B to these Rules, apply to eligible cases filed on or after October 1, 2008 through September 30, 2010.

Rule 5.01. Appeals to be on the Record/Exceptions

Except for cases appealed directly from justice court or municipal court, all cases appealed to circuit court shall be on the record and not a trial de novo. Direct appeals from justice court and municipal court shall be by trial de novo.

[Adopted effective May 1, 1995.]

Rule 5.02. Duty to Make Record

In appeals on the record it is the duty of the lower court or lower authority (which includes, but is not limited to, state and local administrative agencies and governing authorities of any political subdivision of the state) to make and preserve a record of the proceedings sufficient for the court to review. Such record may be made with or without the assistance of a court reporter. The time and manner for the perfecting of appeals from lower authorities shall be as provided by statute.

[Adopted effective May 1, 1995.]

Rule 5.03. Scope of Appeals from Administrative Agencies

In appeals from administrative agencies the court may only entertain an appeal to determine if the order or judgment of the lower authority:

(1) Was supported by substantial evidence; or

(2) Was arbitrary or capricious; or

(3) Was beyond the power of the lower authority to make; or

(4) Violated some statutory or constitutional right of the complaining party.

[Adopted effective May 1, 1995.]

Rule 5.04. Notice of Appeal

Any party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be served on all parties or their attorneys of record and the court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal. The court clerk may not accept a notice of appeal without a certificate of service, unless so directed by the court in writing. In all appeals, whether on the record or by trial de novo, the notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal. The appellant may proceed in forma pauperis upon written approval of the court acting as the appellate court. The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or an appeal de novo; and must be addressed to the appropriate court.

[Adopted effective May 1, 1995; amended May 13, 1996; November 26, 1996.]

Rule 5.05. Filing of Record in Appeals on the Record

In appeals in which the appeal is solely on the record, the record from the lower court or lower authority must be filed with the court clerk within thirty (30) days of filing of the notice of appeal. Provided, however, in cases involving a transcript, the court reporter or lower authority may request an extension of time. The court, on its own motion or on application of any party, may compel the compilation and transmission of the record of proceedings. Failure to file the record with the court clerk or to request the assistance of the court in compelling the same within thirty (30) days of the filing of the written notice of appeal may be deemed an abandonment of the appeal and the court may dismiss the same with costs to the appealing party or parties.

[Adopted effective May 1, 1995.]

Rule 5.06 Briefs on Appeals on the Record

Briefs filed in an appeal on the record must conform to the practice in the Supreme Court, including form, time of filing and service, except that the parties should file only an original and one copy of each brief. The consequences of failure to timely file a brief will be the same as in the Supreme Court.

[Adopted effective May 1, 1995.]

Rule 5.07. Procedure on Appeals by Trial De Novo.

In appeals by trial de novo, the circuit court clerk, upon the filing of the written notice of appeal, must enter the case on the docket, noting that it is an appeal with trial de novo. The appeal will proceed as if a complaint and answer had been filed, but the court may require the filing of any supplemental pleadings to clarify the issues. All proceedings on an appeal de

1981 WL 39995 (Miss.A.G.)

Office of the Attorney General

State of Mississippi
*1 September 8, 1981

RE: Meetings of Board of Aldermen

Ms. Linda S. Williams

Alderman
Post Office Box 125
Osyka, Mississippi 39657
Dear Ms. Williams:

Attorney General Allain has received your letter of request and has assigned it to me for research and reply.

Your letter states as follows:
"As an alderman in the town of Osyka, I am requesting a legal opinion of the attendance of elected officials at board meetings. Is it mandatory for board meetings to be held on the first Tuesday of each month? If so, does non-attendance by the mayor and/or alderman constitute a violation of law? Are there any provisions in the law for non-attendance (sickness, work, etc.)? If the regularly scheduled board meeting cannot be held because of a lack of a quorum, what procedure, if any, is specified by law?"

We are informed that Osyka is a "Code Charter" municipality. As such, the regular meetings of the mayor and board of aldermen are governed by Mississippi Code Annotated § 21-3-19 (Supp. 1980) which reads as follows:

"(1) The mayor and board of aldermen shall hold regular meetings the first Tuesday of each month at such place and hour as may be fixed by ordinance, and may, on a date fixed by ordinance, hold a second regular meeting in each month at the same place established for the first regular meeting provided said second meeting shall be held at a day and hour fixed by said ordinance which shall be not less than two (2) weeks from the first day of the first regular meeting and not more than three (3) weeks from the date thereof. When a regular meeting of the mayor and board of aldermen shall fall upon a holiday, the mayor and board shall meet the following day. The mayor and board may recess either meeting from time to time to convene on a day fixed by an order of the mayor and board entered on its minutes, and may transact any business coming before it for consideration. In all cases it shall require a majority of all aldermen to constitute a quorum for the transaction of business.
"(2) The mayor and board of aldermen may, pursuant to section 21-17-17, Mississippi Code of 1972, set a day other than Tuesday for the holding of their regular monthly meeting."

In response to your first question, paragraph (2) of the above quoted Code section refers to Section 21-17-17 which sets forth the procedure to be followed in order to change the day of the regular meeting of the board of aldermen. It reads as follows:

"Notwithstanding the provisions of sections 21-3-19, 21-5-13, 21-7-9 and 21-9-39, Mississippi Code of 1972, the governing authorities of any municipality may by ordinance duly adopted change the day of the week set by the appropriate section hereinabove as their regular monthly or bimonthly meeting date. Before the adoption of any such ordinance, the ordinance shall first be published once a week for at least three (3) consecutive weeks in a newspaper

published in or having general circulation within the municipality. Once such regular meeting day has been changed, meetings shall be held as otherwise provided by law."

***2** In response to your second question, even though Section 21-3-19 above says that "The mayor and board of aldermen shall hold regular meetings . . ." (emphasis added), it clearly contemplates situations where the attendance of the mayor or one of more aldermen would not be possible when it states "In all cases it shall require a majority of all aldermen to constitute a quorum for the transaction of business." Although we find no specific provision in the law for non-attendance, we are of the opinion that sickness and other unavoidable absences are legitimate excuses.

In response to your third question, Section 21-3-19 above provides that the mayor and board of aldermen "may, on a date fixed by ordinance, hold a second regular meeting in each month at the same place established for the first regular meeting provided said second meeting shall be held at a day and hour fixed by said ordinance which shall be not less than two (2) weeks from the first day of the first regular meeting and not more than three (3) weeks from the date thereof. . . ." (Emphasis added). This provision gives the mayor and aldermen the power to pass an ordinance giving them the option to have a second meeting when necessary.

If this office can be of benefit in the future, please do not hesitate to contact us.

Very truly yours,

Bill Allain
Attorney General
1981 WL 39995 (Miss.A.G.)

END OF DOCUMENT

1994 WL 117293 (Miss.A.G.)

Office of the Attorney General

State of Mississippi
Opinion No. 94-0121

March 9, 1994

Re: Civil Service Commission; public hearings

Ms. Gina Bardwell

Page, Mannino & Peresich
759 Vieux Marche Mall
Biloxi, Mississippi 39530
Dear Ms. Bardwell:

Attorney General Mike Moore has received your letter on behalf of the Civil Service Commission of the City of Biloxi and has asked me to respond. Your letter states:

> Pursuant to Miss. Code Ann. § 21-31-5, the Civil Service Commission for Biloxi has been expanded to include a member from each of the City's seven wards.
> First, the Civil Service Commission would request an opinion from your office on the question of whether it can enter into executive session pursuant to the provisions of the Open Meetings Act solely for the purpose of discussing and deliberating on the finding to be issued by the Commission on a particular appeal? The Commission would not take final action on any particular matter but would engage in an effort to reach an accord on the form of the findings to be ultimately certified to the appointing authority. Second, the Commission would request an opinion from your office as to whether it could adopt regulations which would allow the referral of a matter for investigation/hearing to a panel made up of three (3) Commissioners. The purpose of such a referral would allow the panel to hold the requisite evidentiary hearing and then to recommend proposed findings on the matter for final consideration and adoption by the full Commission. The proposed rule or regulation could, if necessary, include a provision whereby any Commissioner could request that a second hearing be held before the full Commission if that Commissioner determined that the panel did not fully address any necessary aspect of the disciplinary action.
> We are aware of Miss. Code Ann. § 21-31-23 which provides that all investigations conducted by the Civil Service Commission shall be conducted by public hearing and that the Commission must certify the findings reached after an investigation into a matter within its jurisdiction to the appointing authority. The statute does not clearly address deliberations which lead to the Commission's findings and does not clearly provide that the investigation and/or hearing must be held before all members of the Commission, especially a Commission made up of seven (7) members pursuant to Miss. Code Ann. § 21-31-5(1)(b). Miss. Code Ann. § 25-41-7(4)(a) may also be relevant to the first question in that it allows a public body to hold an executive session to discuss personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position. Due to the provisions of Miss. Code Ann. § 21-31-21, which outlines the grounds for discipline of a civil service employee, an investigation into a disciplinary action by the Civil Service Commission will more likely than not relate to those personnel matters specified above. As such, there appears to be a conflict between the provisions of these two Code sections which requires clarification by your office.

*2 As the attached opinion to Leslie Scott, November 20, 1991, states, the hearings of a Civil Service Commission which exists by virtue of Miss. Code Ann. § 21-31-1 et. seq., must be open to the public, and the commission may only enter into executive sessions after a majority of the commission members have properly concluded that the purpose of the hearing falls into an exception to the Open Meetings Act. As this opinion states, § 21-31-23 specifically makes investigations by a civil service commission created pursuant to this chapter open to the public. We are of the opinion that a Civil Service Commission may enter into executive session to discuss actions to be taken concerning personnel matters pursuant to § 25-41-7(4)(a) after the Commission has heard the witnesses in a public hearing. While the investigation of the Commission must be by public hearing pursuant to § 21-31-23, the discussions of actions to be taken related to personnel matters may be held in executive session pursuant to § 25-41-7(4)(a).

Section 21-31-5(3) states that, "a majority of the members of the commission shall constitute a quorum." The Civil Service Commission must have a quorum, a majority, present to take official action. We are of the opinion that members of the Commission must be present and hear the evidence in the public hearing in order to take official action. A regulation which allows the Commission to delegate a matter to a panel with less than a quorum for investigation or official action would be inconsistent with the statutory scheme set forth in § 21-31-1 et seq.

If we may be of any further assistance, please let us know.

Sincerely yours,

Mike Moore
Attorney General
By: Alice D. Wise

Special Assistant Attorney General

Note

TO RETRIEVE THE FULL TEXT OF THE ATTACHED OPINION(S) SET FORTH AT THIS POINT, ENTER THE FOLLOWING FIELD SEARCH:

DA(11-20-91) & PR(Leslie +2 Scott)
1994 WL 117293 (Miss.A.G.)

END OF DOCUMENT