IN THE SUPREME COURT OF MISSISSIPPI

JOSEPH MICHAEL UPHURCH — **APPELLANT**

VERSUS — **NO. 2011-CC-00226**

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

**ON APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSISSIPPI**

APPELLANT'S BRIEF

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Supreme Court may evaluate whether the decision of the Circuit Court of Jackson County, Mississippi was erroneous.

1. Joseph Michael Upchurch, Appellant
2. Russell S. Gill, Marilyn H. David (Of Counsel), and RUSSELL S. GILL, P.L.L.C., Attorneys for Appellant
3. City of Moss Point, A Body Politic, Appellee
4. City of Moss Point Civil Service Commission, Appellee
5. Amy Lassiter St. Pe', Attorney for Appellee
6. Nathan A. Bosio, Attorney for Appellee

Respectfully submitted, this the 26 day of August, 2011.

JOSEPH MICHAEL UPCHURCH

BY: Russell Gill

RUSSELL S. GILL, MSB[redacted]

STATEMENT REGARDING ORAL ARGUMENT

In accordance with Rule 34 of the Mississippi Rules of Appellate Procedure, Appellant requests oral argument. This appeal involves an area of law that has yet to be decided by the Supreme Court. There has been no determination by this Court regarding:

(1) Whether Mississippi Code Annotated § 21-31-5 requires that there be a fully appointed and constituted Civil Service Commission of three members in order for the Commission to have power to terminate an employee.

(2) Whether there must be a fully appointed and constituted Civil Service Commission of three members at the time it terminates an employee, in order for due process requirements to be met.

(3) Whether the Civil Service Commission was exercising enforcement authority as an agent of the City of Moss Point, and made the final decision on behalf of the City, when the Commission conducted a de novo investigatory hearing, made findings of fact, and decided to terminate police officer Upchurch's employment.

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STATEMENT OF ISSUES

1. Was the City of Moss Point's Civil Service Commission lawfully constituted under Miss. Code Ann. § 21-31-5 (requiring three members to be appointed to the Commission) to hold a hearing and terminate Upchurch?
2. Did the Commission's decision (to remove Upchurch for signing a letter) violate his First Amendment rights, thus failing the standard of review?
3. Did Upchurch satisfy his burden of proof to show he was terminated due to race discrimination and retaliation?
4. Did the Commission's decision violate Upchurch's statutory rights against racial discrimination and discrimination under 42 U.S.C. § 1981, and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.,* failing the standard of review?
5. Did the Commission's decision violate Upchurch's equal protection and due process rights under the Fourteenth Amendment, thus failing the standard of review?
6. Did the Commission based its termination decision on erroneous factual findings, rendering the decision unsupported by substantial evidence, and arbitrary and capricious?
7. Were the reasons given by the Commission for Upchurch's termination a pretext for unlawful race discrimination, retaliation, and violations of constitutional and statutory rights?

STATEMENT OF CASE

This appeal stems from the termination of Lieutenant (Lt) Joseph Michael Upchurch from employment with the Moss Point Police Department. (Upchurch Exh. 1)[1] (R.E.12-14)[2] The Police Department set forth its grounds for termination in an "intent to terminate" letter to Upchurch dated February 3, 2010, wherein it stated:

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[1] "Upchurch Exh." refers to the exhibits Upchurch submitted at the Commission hearing.
[2] "R.E." refers to the Record Excerpts submitted to this Court.

This is written notice that Moss Point Police Chief Sheila Smallman recommended to the Mayor and Board of Aldermen of the City of Moss Point that you be discharged and terminated as an employee and policeman of the City for the following reasons and accusations: lack of respect for Department Heads; insubordination; lack of loyalty to the Moss Point Police Department; conduct unbecoming an officer and a supervisor; failure to comply and ill disregard for departmental policy and procedures; creating a hostile working environment for fellow subordinates; failure or refusal to carry out instructions; use of abusive, vulgar and foul language and making false, vicious or malicious statements about employees...

1. Failure to call a detective or evidence technician to the scene of the Shell Station robbery on January 10, 2010, which interfered with the proper collection of said evidence.

2. Lack of respect for the Police Chief, specifically statements made in the presence of other employees regarding a prior Chief that "now that is a Chief right here." Further, your statements to another police officer that the Police Chief wouldn't be here [the City] in 3 months. (January 13, 2010).

3. Disregard for departmental policy when he failed to notify the Chief or Deputy Chief that Corporal Shipman left work prior to the end of his shift and your failure to get overtime for Officer Bonds pre-approved by the Chief or Deputy Chief. (January 14, 2010).

4. Creating hostile work environment for fellow subordinates, specifically your treatment of Patrolman Cherry. Further, your refusal to carry out instructions by the Chief to properly train Patrolman Cherry. (January 16, 2010).

(R.E.17-18) Subsequent to the "intent to terminate" letter, the City of Moss Point, through its attorney, terminated Upchurch in a letter dated February 26, 2010. (R.E.19).

Lt Upchurch appealed the termination to the Commission (R.E.15-16), which held an investigatory hearing de novo held on May 11, 2010, including testimony of witnesses and documentary exhibits. Miss. Code Ann. 21-31-23. However, the Commission refused to allow Upchurch to fully present his case concerning violation of his constitutional and statutory rights, specifically that terminating his employment was not in good faith for cause because his termination was due to race discrimination and retaliation. (T. [3] 40,75,84,99,166-168;R.E.126,144,152,162,211-213)

[3] "T." refers to the transcript of the Commission hearing.

On or about June 16, 2010, the Commission issued its decision, making factual findings and constituting the final decision of the City (under *City of Jackson v. Little,* 245 So.2d 204, 205 (Miss. 1971)). The Commission terminated Upchurch for insubordination in connection with Patrolman Cherry's training, disregard of departmental policy regarding overtime authorization, failure to call an evidence technician to the scene of a robbery, and lack of respect toward Chief Smallman. But, the Commission added a new ground for termination for which Upchurch was never given notice: lack of loyalty to Chief Smallman by joining with 10 other officers in signing a letter to the City's Aldermen (which exposed unlawful activities in the police department). (R.E.13)

Upchurch appealed the Commission's decision to the Circuit Court of Jackson County on or about July 12, 2010. On January 11, 2011, the Circuit Court affirmed the Commission's decision. (R.E.3-4)

Upchurch now appeals the Circuit Court's decision, timely filing his Notice of Appeal on February 1, 2011. (R.E.5-6)

STATEMENT OF FACTS

Upchurch was employed with the Moss Point Police Department for approximately six years, but had three years in law enforcement prior to that, making a total of nine years. (T. 93-94;R.E.156-157). The Police Department sent Upchurch to the Academy in 2001, and Upchurch graduated from the Academy. *Id.* Upchurch moved up the ranks with the Department and ultimately attained the rank of lieutenant, which made him responsible for running day-to-day shifts. (T. 96;R.E.159)

Upchurch was recognized as an exemplary police officer and employee, receiving many accolades and letters of commendation during his career. (T.93-97,R.E.156-160) He consistently had the best performance records in the police department, which other officers tried to surpass by improving their performance. (R.E. 21, 92-96) (T.94-97;R.E. 157-160).

Upchurch began having problems in the department after Smallman took over as Police in

June 2008. (T.22,97-98;R.E.119,160-161) As a result of various incidents of racial discrimination by Smallman against him regarding disciplinary and other employment actions, Upchurch filed several grievances and discrimination complaints. (R.E. 20-32;53) He ultimately filed two racial discrimination lawsuits: *Upchurch v. City of Moss Point, Smallman, Johnson, et al.,* U.S. Dist.Ct. Miss., So.Div., Case No. 1:10 cv 228 LG-RHW & Case No. 1:11 cv 327 LG-RHW.

Upchurch, a white, filed one particular grievance as a result of Smallman, an African-American, referring to Upchurch multiple times as a "white boy" and taking unwarranted disciplinary action against him. (T. 99;R.E. 25) Detective Sergeant (Det. Sgt.) Craig confirmed this in her testimony (T.165-166,R.E.210-211) and written memo (R.E.42) dated February 12, 2009, which stated:

> On January 26, 2009, it was the second time Chief S. Smallman had made reference to the employees that were going over the Mayor's office as white boys. Chief Smallman exact words were "What are those white boys up to now?" My reply was who are you talking about? Chief Smallman reply was Stevenson, Ashley, Upchurch...etc. Both times the statement Chief Smallman made were what are those white boys up to now.

As a result of Upchurch's grievance and/or discrimination complaint, he received a letter dated February 26, 2009, wherein Nicole Jacobs, the City's Director of Human Resources, indicated the matter had been resolved by taking "the appropriate measures," apparently in Upchurch's favor.[4]

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[4] The Director of Human Resources wrote to Upchurch in an official letter (R.E.40)(T.101-102;R.E.164-165):

> The specific allegation surrounded the use of discriminatory language used by the Chief of Police, Chief Sheila Smallman.
>
> As a result of my investigation into the facts surrounding this allegation, I am pleased to inform you that the appropriate measures have been taken as it relates to your complaint.
>
> Unfortunately, due to confidentiality reasons, I cannot disclose the specific remedy that was taken; however, allow me to reassure you that the City of Moss Point takes matter of discrimination against any of our employees very seriously.

Contrary to the City's zero-tolerance policy for retaliation, Smallman retaliated against Upchurch. She gave him racially disparate and discriminatory treatment in shift assignment, working conditions, and educational opportunities, as described in Part IV.B of this brief. Among other things, Smallman acted in an inconsistent manner in her discipline of officers, which included adverse treatment of Upchurch.

The City Director of Human Resources even issued a memorandum (R.E.41) to Smallman, admonishing her for disparate treatment of officers under her command, as follows:

> For the past six months, I have been continuously discussing the need to be consistent with all of the Officers, particularly when it comes to matters such as disciplining.
> ...
> I point this out in hopes of this being a teachable moment for you...[w]hen Officers are held to different standards, it causes hurt feelings, resentment and sometimes even lawsuits.
> ...
> Again, I point these facts out to you to give you a real life example of what I have been saying over and over again these past few months. We can and must do a better job of being consistent in all employees.

Upchurch ultimately filed a complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") as a result of the racially disparate treatment from Smallman. (R.E.53)(T. 102;R.E.165). Additionally, Upchurch, along with several other officers[3], signed a Letter of No Confidence, dated February 3, 2010 and submitted to the City's Board of Aldermen, exposing illegalities and violations of law practiced by the Police Department's management. (R.E. 48-49)(T.104;R.E.167) After this, the City dismissed Upchurch.

> In addition, as noted in your employee handbook, the City has a zero tolerance policy for retaliation against an employee who has filed a grievance. As such, it is your immediate responsibility to notify this office if you feel that you are being retaliated against for having filed this grievance.

[3] Officers joining Upchurch in signing the "Letter of No Confidence" include the following: Lt. Ashley, Sgt. Craig, Cpl. Shipman, Cpl. Gaston, Cpl. Gray, Ofc. Brown, Ofc. Boden, Ofc. Norton, Ofc. Manyard, Former Ofc. Parrish. (R.E.49)

SUMMARY OF ARGUMENT

The Circuit Court erred by failing to find the Commission's decision did not pass the standard of review, in the following respects, which are all apparent from the face of the record. The Commission made the final decision on behalf of the City to terminate Upchurch's employment. But, the decision was beyond the power of the Commission to make, because the Commission was not duly appointed in accordance with Miss. Code Ann. § 21-31-5. The statute requires the Commission to have three appointed members, but the Commission had only two at the time.

The Commission dismissed Upchurch because he signed a letter along with 10 other officers, exposing unlawful practices by police department management. As a matter of law, the Court can determine that the public would have an interest in knowing of the letter's contents, making the letter protected under the First Amendment. The Commission found the letter was disloyal, but there was no evidence or finding of any requirement for loyalty that overrode Upchurch's First Amendment right of expression. Because the Commission's decision violated Upchurch's First Amendment rights, this ground failed the standard of review.

In his testimony and evidence before the Commission, Upchurch made points refuting each of the allegations made against him by the Police Department (T. 105-124;(R.E.168-185). Upchurch provided testimony and evidence to show that his termination, as well as the events leading up to his termination, were a result of racial discriminatory and retaliatory actions of Smallman, and that the alleged reasons given for his termination were factually incorrect and a pretext for racial discrimination. He showed that, because of this, the alleged reasons for his termination were not in good faith for cause, as required under Miss. Code Ann. §21-31-23. Race discrimination violates Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, 42 U.S.C. § 1981, and the Fourteenth Amendment's equal protection clause, causing the termination decision to fail the standard of review (i.e., violation of statutory and constitutional rights).

Upchurch's probative points and associated evidence were not controverted by the City or or its witnesses, who simply failed to address them. This left Upchurch's evidence uncontested, warranting reversal of his termination for failing to pass the standard of review requiring substantial evidence.

Upchurch bore his burden of proof to establish pretext by showing that Police Chief Smallman, the City's primary witness, had discriminatory animus against him because she used race-related comments (e.g, "white boy") and did not discipline black officers who committed the same or similar infractions Upchurch was accused of.

Facts on the face of the record establish violations of Upchurch's due process rights under the Fourteenth Amendment. In particular, Upchurch was not given notice that the letter he signed would be a "lack of loyalty" ground for termination; thus, he had no meaningful opportunity to defend against it. The City also denied Upchurch a pre-termination hearing before officials who were independent of the agency initiating his termination. The City denied Upchurch a meaningful post-termination hearing, because the Commission refused to let him present his case and witness testimony that the grounds for termination were a pretext for race discrimination, retaliation, and First and Fourteenth Amendment violations.

With regard to alleged insubordination, the uncontroverted admissions in the Chief's contemporaneous memo established the Chief gave Upchurch vague and confusing instructions about training Patrolman Cherry, and Upchurch followed them exactly.

With regard to alleged disregard for departmental policy regarding authorization of overtime, Upchurch did not disregard departmental policy for this incident because there was no specific department policy. When asked to produce or identify the policy allegedly violated, the Chief could not. Furthermore, the uncontroverted evidence shows the Chief had a "do not disturb unless emergency" sign on her door. Upchurch made a good-faith judgment call that authorizing

two hours of overtime was not an emergency, but within his authority and chain of command, as he was the acting supervisor because the Chief and Deputy Chief were unavailable.

With regard to the alleged failure to call an evidence technician to the scene of a robbery, Chief Smallman had issued a directive that precluded supervisors like Upchurch from calling out the technician, and restricted this responsibility to the Deputy Chief. In accordance with the directive, Upchurch called the Deputy Chief, as was witnessed by another officer, but it was the Deputy Chief who failed to call out the technician. No evidence controverts these facts.

With regard to alleged lack of respect by commenting that Chief Smallman would not be in her job in three months, Upchurch was only relating news he had heard that Smallman was going back to her previous job at the Attorney General's office. There is no evidence that there was a rule against repeating news that someone might be changing jobs, and other employees making similar comments were not terminated or even disciplined, showing this ground is a pretext.

With regard to alleged lack of loyalty by exposing the unlawful practices of police department management in the letter Upchurch signed, another lieutenant and other officers and supervisors signed the letter, too. None of them were terminated or even disciplined, showing this ground is a pretext.

ARGUMENT

I. Standard of Review

A. This Court must apply a four-part standard of review to the Commission's factual findings.

This appeal entails a review of the circuit court's decision regarding the Commission's action to terminate Upchurch's employment. When this Court reviews a decision by a circuit court concerning an agency action, it applies the same standard of review the circuit court was bound to follow. *Mississippi Com'n on Environmental Quality v. Chickasaw County Bd. of Sup'rs,* 621

So.2d 1211, 1216 (Miss. 1993); *Mississippi Employment Sec. Com'n. v. Gaines,* 580 So.2d 1230, 1233 (Miss.1991); *Mississippi Employment Sec. Commission v. Pulphus,* 538 So.2d 770, 772 (Miss.1989).

This scope of review of the findings and actions of an administrative agency is well established. *Chickasaw County,* 621 So.2d at 1215. The reviewing court will entertain the appeal to determine whether or not the order of the administrative agency

1) was unsupported by substantial evidence,

2) was arbitrary or capricious,

3) was beyond the power of the administrative agency to make, or

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

Southeast Miss. Legal Serv. v. Miss. Power, 605 So.2d 796, 798 (Miss.1992). These are the only grounds for overturning an agency action; otherwise, the agency's determination must remain undisturbed. *Id.*; *Dept. of Health v. S.W. Miss. Med. Ctr.,* 580 So.2d 1238, 1239 (Miss.1991); *Melody Manor Convalescent Center v. Mississippi State Dept. of Health,* 546 So.2d 972, 974 (Miss.1989); *Eidt v. City of Natchez,* 421 So.2d 1225, 1231 (Miss.1982).

However, an older case from the Mississippi Supreme Court seemed to equate the first two parts of the standard of review with an appellate analysis of whether an agency's decision was "made in good faith for cause":

> ... the only sound, practicable or workable rule that can be announced is to hold that the court to which the appeal is taken from an administrative agency shall only inquire into whether or not the judgment appealed from is reasonable and proper *according to the facts disclosed before the board* that is to say whether or not its decision is supported by substantial evidence or is arbitrary or capricious, etc. or in other words whether or not it was made in good faith for cause. [211 Miss. at 693, 695, 53 So.2d at 52, 53].

City of Meridian v. Hill, 447 So.2d 641, 644 (Miss.,1984). However, the Court went on to distinguish the grounds for termination to be applied by the Commission in reaching its decision (i.e., "good faith for cause") from the standard of review to be applied by the courts (i.e., the traditional four-parts enunciated above), and actually applied only the latter as a standard of review. *Hill*, 447 So.2d at 643, 644.

In 1988, the Court seemed to follow suit, stating: "the criterion is whether or not from an examination of the record there exists credible evidence substantiating the action taken by the city. It is upon this basis that the court determines whether or not the decision was in "good faith for cause." *City of Jackson v. Froshour*, 530 So.2d 1348, 1355 (Miss. 1988). See also *Eidt v. City of Natchez,* 421 So.2d 1225, 1231 (Miss. 1982), *City of Jackson Police Dept. v. Ruddick,* 243 So.2d 566 (Miss. 1971), *City of Hattiesburg v. Jackson,* 235 Miss. 109, 108 So.2d 596 (1959); these are older cases where the Court applied the four-part standard of review.

In recent times, this Court has continued to require that circuit and chancery courts hearing appeals of agency actions adhere to the traditional four-part standard above. *Chickasaw County,* 621 So.2d at 1215. *See, e.g., Southeast Miss. Legal Serv. v. Miss. Power,* 605 So.2d at 798; *Mississippi Public Service Commission v. Columbus & Greenville Ry. Co.,* 573 So.2d 1343, 1346 (Miss.1990).

B. The Commission's decision must be supported by substantial evidence that is factual and acceptable to a reasonable mind.

The first part of the standard of view, "substantial evidence," has been defined as "such evidence 'as a reasonable mind might accept as adequate to support a conclusion. 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.'" *Ladnier v. City of Biloxi,* 749 So.2d 139, 147-48 (Miss. 1999) (quoting *State Oil & Gas Bd. v. Mississippi Mineral & Royalty Owners Assoc.,* 258 So.2d 767, 779 (Miss. 1971)). *See also Burleson v. Hancock County Sheriff's*

Department Civil Service, 872 So.2d 43, 51 (Miss. 2003); *Board of Law Enforcement Officers Standards and Training v. Butler,* 672 So.2d 1196, 1199 (Miss. 1996).

In other contexts, this Court has also defined substantial evidence as "evidence of such quality and weight" as would sway the conclusions of "reasonable and fair-minded jurors in the exercise of impartial judgment." *Alfa Ins. Corp. v. Ryals,* 918 So.2d 1260, 1261 (Miss.2005), as quoted in *Cash Distributing Co., Inc. v. Neely,* 947 So.2d 286, 298 (Miss. 2007).

C. An agency decision based upon facts that are erroneous is arbitrary and capricious, subject to reversal by this Court.

According to the Mississippi Supreme Court, "[a]n act is arbitrary when it is not done according to reason or judgment, but depending on the will alone." *Burks v. Amite County School Dist.,* 708 So.2d 1366, 1370 (Miss.1998). An act is capricious when "done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *Id.*

It follows that an agency decision based upon facts that are erroneous is arbitrary and capricious, subject to reversal by this Court. As the Court stated:

> [S]hould the record and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law and, as a matter appearing on the face of the record or proceedings, subject to modification or reversal. ***We thus are in our familiar posture of judicial review of administrative processes wherein we may interfere only where the board or agency's decision is arbitrary and capricious, accepting in principle the notion that a decision unsupported by any evidence is by definition arbitrary and capricious.*** [Citations omitted with emphasis supplied] *Gill,* 574 So.2d at 591.

Young v. Mississippi State Tax Com'n, 635 So.2d 869, 874 (Miss. 1994).

D. The Court's review is limited to the record and to the Commission's findings.

Judicial review is limited to the record and to the agency's findings. *Mississippi Employment Sec. Commission v. PDN, Inc.,* 586 So.2d 838, 840 (Miss.1991); *Barnett v. Miss Employment Sec. Commission,* 583 So.2d 193, 195 (Miss.1991); *Ray v. Bivens,* 562 So.2d 119,

121 (Miss.1990). The Court can review "matters appearing on the face of the record or proceedings." *Young,* 635 So.2d at 874.

E. This Court reviews whether the Commission's punishment was fair and equitable.

A penalty for disciplinary action would be assessed under the same standard of review as is employed when reviewing other agency findings and actions. *Chickasaw County,* 621 So.2d at 1217, where the Court found that *Harris v. Mississippi Real Estate Commission,* 500 So.2d 958, 963 (Miss.1986), suggested this, and the conclusion that a reviewing court may look at findings and punishment separately. *Matter of McGowan,* 533 So.2d 999 (La.App.1988), *cert. denied,* 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989) ($56,000 fine by Department of Environmental Quality set aside as abuse of discretion; ordinarily a penalty will not be disturbed unless arbitrary or capricious), as cited in *Chickasaw County,* 621 So.2d at 1218.

F. This Court reviews issues of law de novo.

This Court reviews questions of law de novo, including application of law to undisputed facts. *Sennett v. U.S. Fidelity and Guar. Co.,* 757 So.2d 206, 209 (Miss.,2000); *Mississippi Transp. Comm'n v. Fires,* 693 So.2d 917, 920 (Miss.1997); *ABC Mfr. Corp. v. Doyle,* 749 So.2d 43, 45 (Miss.1999); *National Enterprises, Inc. v. Valsamakis,* 879 So.2d 523, (Miss.App. 2004).

G. The Court reviews the decision of the Commission, which conducts an investigation, and makes the final decision to terminate on behalf of the City, but is not an independent trier of facts.

In *Froshour,* the Mississippi Supreme Court stated the following: "The function of the Civil Service Commission is to investigate and determine whether the disciplinary action taken by the City 'was or was not made for political or religious reasons *and* was or was not made in good faith for cause.'" *Froshour,* 530 So.2d at 1354 (emphasis in original). See also Miss. Code Ann. § 21-31-23 (1972). In *Ladnier,* 749 So.2d at 153, the Court held: The duty is upon the Commission "as trier of the facts, to determine what the real facts were in connection with the

discharge. They saw and heard the witnesses, and observed their demeanor." *Hill v. City of Hattiesburg,* 223 Miss. 163, 166, 77 So.2d 827, 828 (1955).

However, the Commission is not an independent or politically protected trier of fact. *City of Jackson v. Little*, 245 So.2d at 204. The Commission actually makes the final decision to terminate, on behalf of the City, as established by this Court in *City of Jackson v. Little. Id.* In that case, the Mississippi Supreme Court examined the rules and laws governing the City of Jackson's Civil Service Commissioners and found that, in ruling on a police officer's discharge, the Commissioners did not serve in a politically protected capacity. [5]

The *Little* Court determined the capacity in which a municipal Civil Service Commission functions in Mississippi when it investigates and decides a police officer's discharge, and the operative effect of the Commission's decision. It found that "a municipal civil service commission is an agency of the city to enforce the civil service requirements of the statute; and that it makes 'the City's final decision as to whether a policeman shall be discharged.'" *Little*, 245 So.2d at 205. The Moss Point Commission's regulations acknowledged this by stating it conducts investigations into employee disciplinary actions on "matters relating to the enforcement of the

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[5] The Court looked to the following conditions of appointment of the civil service commissioners, which are still the same (see present-day conditions of appointment at Miss. Code Ann. § 21-31-5, -7):

> The three members of the Civil Service Commission are appointed by the City Commission and serve without compensation for six-year, staggered terms. A civil service commissioner 'may be removed from office for him incompetency, incompatibility, dereliction of duty or other good cause, by the appointing power.' Code s 3825-31. 'Incompatibility' is defined as the inability to exist in peaceful harmony. Webster's Third New International Dictionary 1144 (1961). This tends to negative the effective independence of the civil service agency, and to relate its functions to the policies of the elected governing body of the city.

Little, 245 So.2d at 205. Today's Commissioners in Moss Point also serve at the pleasure of city officials and may be removed, on the nebulous-sounding ground of "incompatibility." Miss. Code Ann. § 21-31-5(2).

Civil Service Law and these rules and regulations." (Commission Regulations, § XVII.1, R.E.65) [6]

Keeping this in mind when applying the Court's standard of review results in the following summary of the law:

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[6] The Court elaborated upon the operative effect of the Commission's decision as the final decision of the City:

> The Civil Service Commission created by this statute is an agency of the municipality it serves. It has a number of duties to perform, one of which is, under Section 10 of the statute, to investigate the discharge of a policeman by the municipal authorities and determine whether or not the discharge was made for political or religious reasons or in good faith for cause. In other words, it is an agency of the municipality for enforcing the Civil Service requirements of the statute, and makes, when called on so to do, the City's final decision as to whether a policeman shall be discharged. The parties to such controversy from its inception to its final decision by the City Civil Service Commission are the policeman and the City in its corporate capacity. * * *' (198 Miss. at 740, 21 So.2d at 917).

Little, 245 So.2d at 206. The Mississippi Supreme Court in *Little* relied upon the following functions of city Civil Service Commissions to reach its holding:

> The commission may investigate and hold a public hearing on the issue and can decide whether the discharge 'was or was not for political or religious reasons and was not made in good faith for cause.' Id. If the commission upholds the appointing power, the 'accused may appeal, therefrom to the circuit court.

Little, 245 So.2d at 206. These functions remain the same today. See Miss. Code Ann. § 21-31-9 (Commission's power to conduct investigations, and make reports on all matters touching enforcement and effect of civil service provisions; power to investigate all complaints, subpoena witnesses, administer oaths, and conduct hearings); § 21-31-23 (refers to "the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission," [emphasis added] which may only be appealed on grounds of whether it "was or was not made in good faith for cause"; states that Commission's "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").

Therefore, the Moss Point Commissioners, in investigating and ruling upon Upchurch's discharge, were performing an enforcement function as an agency of the City. They are not independent fact-finders. The Commissioners' decision was the City's final decision, which was to discharge Upchurch. The *Little* court emphasized this as its consistent holding by referring to prior cases:

> In *Davidson, supra,* the Court again held to the same effect, stating that the city, in employing and discharging employees, is acting in an executive or administrative capacity, and that the civil service commission 'in its investigation under the cited Act, as the agent of the city, is moving within the ambit of the same function.' 211 Miss. at 693-694, 53 So.2d at 53.
>
> As an agency of the city, making its final decision as to whether an employee shall be discharged, the civil service commission is acting under the civil service statutes in an executive or administrative capacity.

Little, 245 So.2d at 206.

1. Although the Commission is not an independent trier of fact, it is the Commission's job to conduct an investigatory hearing de novo into grounds for disciplinary action, to make the final decision to terminate on behalf of the City, to terminate only if reasons exist for it in "good faith for cause" and these reasons are not political or religious, and to make factual findings supporting reasons for termination. *Stegall v. City of Meridian,* 230 Miss. 176, 180, 92 So.2d 331, 332 (1957).

2. It is the Court's role to review the Commission's findings and final decision, using the four-part standard of review, which includes (but is not limited to) determining "as a matter of law whether or not there is a basis in substantial evidence of its [the Commission's] good faith" and for cause. *Hill v. City of Hattiesburg,* 223 Miss. 163, 77 So.2d 827 (Miss. 1955).

3. The scope of this Court's review of the circuit court's decision "... shall be limited to a review of the record made before the [Commission] or hearing officer to determine if the action of the [Commission] is unlawful for the reason that it failed to pass the four-part standard of review." *Young,* 635 So.2d at 874(where the Court dealt with the analogous State Civil Service system, in which an employee instituted an appeal of the decision of the Employee Appeals Board to the circuit court).

4. The Court may reverse the termination if the record of the Commission's hearing and proceedings below show the Commission's termination decision was based upon erroneous evidence or factual findings, because this renders the termination decision to be "unsupported by credible evidence," "contrary to law," arbitrary and capricious, and, "as a matter appearing on the face of the record or proceedings, subject to modification or reversal." *Young,* 635 So.2d at 874.

II. The court erred in finding that the Commission was lawfully constituted in accordance with Miss. Code Ann. § 21-31-5 and that the decision was within its power to make.

At the time of the May 11, 2010 hearing before the Commission, there were only two members appointed to the Commission. (T. 6, R.E.) Miss. Code Ann. § 21-31-5 required the hearing to be conducted before a three-member Civil Service Commission: "The members of the

civil service commission . . . shall be three (3) in number." Miss. Code Ann. § 21-31-5(1)(a). "Members" must be present to hear the evidence and to take official action. *Bardwell,* Op. Atty. Gen. No. 94-0121, Mar. 9 1994. Ergo, three Commissioners must be present for a hearing and official action for a termination decision like the one concerning Upchurch.

Upchurch objected to holding the hearing with an incomplete Commission and requested a continuance until a duly appointed Commission could be had. (T.6,10,12-13; R.E.114-117) But, the Commission denied his request and the City held a post-termination hearing without a duly appointed Commission – i.e., with only two Commissioners appointed and present. (T.2,6;R.E.110,114) By having appointed only two members, the Commission was incomplete under the law, not in compliance with statutory requirements giving it authority, and therefore without authority to hold hearing or make official decisions. There was no duly appointed Commission at the time of Upchurch's hearing that could make an official decision.(T.2,6,10-13;R.E.114-17)

The two appointed members could not constitute a lawful quorum, because it follows that an unlawfully constituted body cannot take action to establish a quorum. Therefore, the decision to terminate Upchurch was beyond the power of the Commission to make, failing the standard of review and warranting reversal of the termination. *Southeast Miss. Legal Serv.,* 605 So.2d at 798.

III. The Circuit Court erred because the Commission's decision violated Upchurch's First Amendment rights, thus failing the standard of review.

A. A First Amendment violation is apparent on the face of the record.

The Commission violated Upchurch's right to First Amendment protections against discrimination based upon association, speech, or religion, by removing him because he signed a letter (R.E. 48-49) with a group of other police officers, exposing unlawful practices committed by the police department's management, and because he repeated news he had heard that Chief Smallman would be leaving for a new job in a few months (R.E.13). This is a matter of law for the Court to decide de novo, because the facts are undisputed and apparent from the face of the

record before the Commission and the court below (Ct.T. 7-8, [7] R.E.241-242). *Young,* 635 So.2d at 874.

Upchurch showed to the court below that the Commission's termination decision (R.E.13) was due to the letter. (Ct.T.7,8,13;R.E.241-242,247) Thus, the alleged reason of "disloyalty" given for his termination was a pretext for terminating him for exposing the unlawful practices. Because of this, the alleged reasons for his termination were not in good faith for cause. (T.76-77;Ct.T.6;R.E. 145-146,240)

Also, since it was apparent from the face of the record that the letter was signed in the legitimate exercise of Upchurch's First Amendment rights, the court below erred by upholding the Commission's decision to terminate Upchurch for signing it. This violated his First Amendment right, thus causing the Commission's decision to fail the fourth part of the standard of review (i.e., violation of a constitutional right).

B. Upchurch's evidence satisfies the elements of a First Amendment violation.

An employee makes a prima facie case of a covered First Amendment violation by showing (1) that he engaged in First Amendment activity that was a matter of public concern, and (2) that the activity was a substantial or motivating factor in the decision to take action against to the employee. [8] *Solis v. Rio Grande City Independent School,* 734 F.2d 243 (5th Cir. 1984); *North Miss. Communications, Inc. V. Jones,* 874 F.2d 1064 (5th Cir. 1989).

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[7] "Ct.T." refers to the transcript of the hearing in the circuit court below.

[8] An overview of the balancing process was summarized by the Seventh Circuit in *Breuer,* 909 F.2d at 1037 (7th Cir. 1990):

> The threshold inquiry is whether [the employee's] statements and actions involved matters of public concern so that the defendant's discharge decision may be "subject to judicial review" under the First Amendment. See Connick v. Myers, 461 U.S. 138, 146-147, 103 S.Ct. 1684, 1689-1690, 75 L.Ed.2d 708. If not, it is not necessary to scrutinize the discharge further for a violation of the First Amendment. Id. at 146, 103 S.Ct. at 1689. If so, the public employer may request the court to balance " 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " Id. at 142, 103 S.Ct. at 1687 (quoting Pickering, 391 U.S. at 568, 88 S.Ct. at 1734). Though these inquiries require

(1) Upchurch's comments and letter were motivating factors in the termination decision.

Beginning with an examination of the second element, it is necessary for a plaintiff to show that the asserted retaliation by a governmental employer was motivated specifically by what has been determined to be protected speech, *Lindsey v. Board of Regents of University System of Georgia,* 607 F.2d 672, 676 (5th Cir. 1979). Upchurch has met this requirement: the Commissioners stated in their decision that Upchurch's comments about the Chief's leaving her job and his participating in the letter to the Aldermen were a motivating factor in the decision to terminate him. (R.E.13)

(2) Unlawful activities exposed in Upchurch's letter were of public concern.

As to the first element, the controlling factor for determining a matter of public concern is whether the expression was made because it was part of what the employee was employed to do, or whether the employer has adequate justification for treating the employee differently from any other member of the general public. *Garcetti v. Ceballos,* 126 S.Ct 1951, 1957-59 (2006). The focus is whether the public or the community is likely to be truly concerned with or interested in the particular expression. *Piver v. Pender Counter Bd. Of Educ.,* 835 F.2d 1076, 1079 (4th Cir. 1987). This inquiry requires an examination of the "content, form, and context" of his statements "as revealed by the whole record." *Connick,* 461 U.S.at147-148,103 S.Ct.at 1690-1691.

For example, when a government employee supplied information to members of the city council, it was held to be a matter of public concern. *Joslyn v. Kinch,* 613 F.Supp. 1168 (D.R.I. 1985). Thus, when Upchurch sent the letter with information to the Moss Point Aldermen – a body similar to a city council -- it was a matter of public concern, protected by the First Amendment, over which he should not have been terminated.

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predicate factual determinations, they are questions of law. Connick, 461 at 148 n. 7, 103 S.Ct. at 1690 n. 7; *Biggs v. Village of Dupo,* 892 F.2d 1298, 1300 n. 1 (7th Cir.1990).

A government employee's complaints about management of the school system was held to be a matter of public concern. *Blackburn v. Floyd County Bd. Of Educ. By and Through Adams,* 749 F.Supp. 159 (E.D. Ky. 1990). Similarly, when Upchurch complained in the letter about dishonesty, race discrimination, and personnel-regulation violations and improprieties like favoritism in promotions, practiced by the senior management of the police department (T104-105,167-168), it was a matter in which the public was be interested, also protected by the First Amendment, and it was unlawful for the City and the Commissioners to terminate him for it. (See letter at R.E. 48-49.)

Upchurch's case is similar to the following cases, where public employees terminated for making critical comments about their employers were required to be reinstated: *Pickering v. Board of Education of Township High School District 205,* 391 U.S. 563, 88 S. Ct. 1731 (1968) (teacher could not be dismissed from public employment for writing a letter to a newspaper, unless it could be proved that statements made were knowingly or recklessly false and that the expression interfered with teacher's performance of classroom duties or with operation of school); and *Reeves v. Claiborne County Bd. Of Educ.,* 828 F.2d 1096 (5th Cir. 1987) (teacher fired for giving testimony in unrelated suit against school board deprived of liberty and must be reinstated). There was no showing before the Commissioners that Upchurch's accusations of race discrimination, dishonesty, promotion favoritism in violation of personnel laws, etc. (R.E. 48-49), were false, or that the group letter and his comments on how long the Chief would stay interfered with Upchurch's duty performance or the police department's lawful operation. Thus, Upchurch should be reinstated under these First Amendment cases.

(3) The City and the Commission should not be allowed to cover up unlawful activities by disciplining employees who raise these matters.

Upchurch believes the Court must also decide whether the chief of a city department like

the police or the Commission should be able to cover up serious improprieties like dishonesty and race discrimination – violations of law and matters of interest to the public -- by disciplining employees who raise these matters. (That is what Chief Smallman and the Commission have done here, by having Upchurch terminated.)

Other courts have said no. This Court should, too. In particular, the Fifth Circuit has held that an employee's complaint that a public employer's actions might violate federal law was a matter of public concern. *Thomas v. Harris County,* 784 F.2d 648 (5th Cir. 1986). Upchurch's letter raising claims that the police department practiced race discrimination – a violation of Title VII of the Civil Rights Act of 1964 -- would similarly be found to be a matter of public concern. The Seventh Circuit found that any statement about wrongdoing or breach of trust, like Upchurch's allegations of dishonesty and lack of integrity, are a matter of public concern. *Breuer v. Hart,* 909 F.2d 1035 (7th Cir. 1990). The Third Circuit found that bringing to light actual or potential wrong-doing by public officials, *Caulanus v. Albanese,* 721 F.2d 98 (3rd Cir. 1993), and a police department employee's statement to news reporter that the police department practiced race discrimination and retaliation – like Upchurch's allegations of race discrimination -- *Rode v. Dellarciprete,* 845 F.2d 1195 (3d Cir. 1988), constituted matters of public concern. So were the following expressions: *Patrick v. Miller,* 953 F.2d 1240 (10th Cir. 1992) (complaints about illegalities in city budget process); *Assaro v. County of Allegpheny,* 110 F.2d 968 (3rd Cir. 1997) (public employee's complaints about sexual harassment to her supervisor deemed matter of public concern even though harassment was not systematic even though complaint was not a public declaration); *Belk v. Town of Minocqua,* 858 F.2d 1258 (7th Cir. 1988) (complaint identifying public employers' violations of law); *McKinley v. City of Eloy,* 705 F.2d 1110 (9th Cir. 1983) (police officer's criticism of city's decision not to give raise is matter of public concern, since it

bears upon public duties); *Anderson v. Central Point School Dist. No. 6,* 746 F.2d 505 (9th Cir. 1984) (if a letter has matters of both public and private concern, public aspects control).

C. There was no overriding requirement for loyalty or respect.

The Commissioners made a conclusory statement that Upchurch's termination was justified because his comments about the Chief leaving the department and letter showed lack of loyalty and lack of respect for the police department chief. [9] (R.E. 13) This unsupported finding does not carry the day, because it does not hold up under the analysis prescribed by the Fifth Circuit in these cases. For there to be an overriding loyalty requirement, the Court must determine as a matter of law whether the relationship between the Chief and Upchurch "fell into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Gonzalez v. Benavides,* 712 F.2d 142 (C.A.Tex. 1983). Then the Court must decide whether Upchurch's right to identify violations of law like race discrimination, dishonesty, favoritism in promotions, etc., in the police department's management above him, which were not within his job responsibility to resolve and which he raised through his chain-of-command to the City's Aldermen, was outweighed, or even covered by, a need for loyalty.

By raising these matters through his chain-of-command, Upchurch expressed them privately to his employer, the City. Under *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), a governmental employee's constitutional right of private expression upon matters of public concern must be balanced against the interest of the employing agency in promoting the efficiency of the public service. *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 696 (1979). Here, it is in the interest of the police department to uncover dishonesty and race discrimination practiced by its management.

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[9] This ground for termination is also a pretext and not supported by substantial evidence, as established in Part VII.A of this brief.

Further, as in another Mississippi case, *Ayers v. Western Line Consol. School Dist.,* 691 F.2d 766, 767 n.3 (5th Cir. 1982), Upchurch's critical expressions to superiors (Aldermen) in the police department's chain-of-command were not delivered in a manner, time, or place so as to threaten the employing agency's institutional efficiency and thus lose their constitutional protection.

The Court must determine as a matter of law whether Upchurch's comment, privately expressed in his work place, about how long the Chief might decide to stay in the job, even related to loyalty, or respect. Upchurch argues it was idle conversation and does not.

D. A balancing test is a matter of law for the Court, based upon facts in the record.

Balancing Upchurch's First Amendment rights against any countervailing police-department interests is a matter of law for the Court to decide, based upon facts in the record. In *Pickering*, the United States Supreme Court stated: "The problem in any case is to arrive at a balance between the interests of the (public employee), as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568, 88 S.Ct. at 1735. This is the test that should be applied in this case. The question of whether Upchurch was terminated for reasons that impermissibly abridged his First Amendment rights is ultimately a question of law for the Court. *Williams v. Board of Regents of University System of Georgia,* 629 F.2d 993, 1003 (5th Cir. 1980) (holding that the "ultimate balancing of interests of citizen and state with regard to first amendment protection . . . remains in the sphere of the court").

Although the balancing test prescribed in *Pickering* is a question of law for the Court, the Fifth Circuit has recognized that in striking this balance between the interests of a governmental employee as a citizen and the interests of the government in promoting efficiency of the services it performs through its employees, there are factual matters to be considered. *Schneider v. City of Atlanta,* 628 F.2d 915, 919-920, & n.4 (5th Cir. 1980). For example, in order for the balance to be

struck in favor of a governmental employer, the government must "clearly demonstrate that the employee's conduct substantially interferes with the discharge of duties and responsibilities inherent, in (governmental) employment." *Smith v. United States,* 502 F.2d 512, 517 (5th Cir. 1974). The City failed to carry its burden of proof on this, by producing no evidence on this issue, and the Commission made no findings on the issue, either. (R.E.13) This requires the Court to vacate this ground for termination.

Therefore, the facts determinative of whether this is a First Amendment violation are on the face of the record (i.e., Upchurch's letter and comments, and the City's lack of evidence of overriding respect or loyalty requirements), but the ultimate balancing remains in the province of the Court, as a question of law. See, e. g., *McGill v. Board of Education of Pekin Elementary School Dist.,* 602 F.2d 774, 777 (7th Cir. 1979).

IV. The Circuit Court erred because the Commission's decision violated Upchurch's statutory rights in Title VII of the Civil Rights Act, failing the standard of review.

A. This Court delineated how to prove a statutory violation based upon race discrimination and pretext.

Upchurch provided unrebutted testimony and evidence to show that his termination was due to race discrimination and retaliation, and that the alleged reasons given for his termination were a pretext for racial discrimination; because of this, the alleged reasons for his termination were not in good faith for cause. (Ct.T. 5-6,27; T.10,38,230, R.E. 239-240,261,115,125,234)

The court below erred in failing to find there was substantial evidence in the record showing race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, thus causing the Commission's decision to fail the fourth part of the standard of review (i.e., violation of a statutory right).

This Court has recently delineated the elements and burden-shifting necessary when a plaintiff claims adverse action like termination was taken against him due to unlawful

discrimination, in *Cash,* 947 So.2d at 292. [10]

The Court adopted the following elements of a prima facie case of discrimination from *McDonnell Douglas (see Cash,* 947 So. 2d at 296-297):

> First, a[] plaintiff must establish a prima facie case by showing (1) he or she was a member of the class protected [under discrimination laws] . . .(2) he or she was otherwise qualified for the position, (3) he or she suffered an adverse employment action, and (4) he or she was replaced by a . . . person [who is not a member of the protected class]...

B. Facts in the record establish racial discrimination.

Upchurch raised issues of race discrimination and pretext in the proceedings below (T.10, 38,230;Ct.T.5-6,27,R.E.115,125,234,239-240,261, R.E. 20-32), and the facts regarding such are apparent from the face of and undisputed in the Commission record, as detailed in Parts (1)-(6), & VIII, *infra.*

(1) Racial Slurs and Harassment

On January 26, 2009, Chief Smallman discriminated against Upchurch by using racial slurs and harassment. This shows Smallman's intent to discriminate against Upchurch, as well as

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[10]The Court in *Cash* explained that a plaintiff claiming employment discrimination must follow a precise scheme, or allocation, of the burdens of proof (both production and persuasion)," as laid out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [*McDonnell Douglas,* 411 U.S.] at 802[, 93 S.Ct. 1817]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.* at 804[, 93 S.Ct. 1817]. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Where a plaintiff establishes a prima facie case, discrimination is presumed unless the employer provides a nondiscriminatory explanation for the adverse employment action. This is so because the acts establishing the prima facie case, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

"If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Burdine,* 450 U.S. at 254, 101 S.Ct. 1089.

The employee does not need to rebut with specific evidence each and every nondiscriminatory reason offered by an employer for the termination, but "must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine,* 450 U.S. at 253, cited in *Cash,* 947 So.2d at 294.

the fact that the Commission's reasons for terminating him (based upon Smallman's testimony) were a pretext for discrimination. *Cash,* 947 So.2d at 297 (race-related comments are evidence of a pretext for race discrimination).

Specifically, Smallman repeatedly referred to Upchurch and other white officers as "white boys" in the presence of Detective Joyce Craig, an African American female. (R.E. 25, 42; T.165-166, R.E.210-211) Using the term "boy" repeatedly to refer only to employees of one racial group but not another is prohibited racial harassment. *White v. BFI Waste Services,*375 F.3d288 (4th Cir. 2004).

(2) Promotion Denials

In January 2009, Smallman appointed black female officer Tiffany Dees to the position of detective, and black male officer Terrance Gray to the position of corporal. Smallman did not post these positions as available permanent positions, as required by Civil Service regulations, nor have Dees and Gray take the required examinations for these positions, which violated Civil Sservice regulations. None of the qualified white officers, including Upchurch, were given the opportunity to compete for these positions. (T.98, R.E.161) Upchurch's qualifications for the positions were superior to those of Dees and Gray. (R.E. 20-22,98,93-97)

These facts satisfy the elements of a prima facie case under *McDonnell Douglas* and *Cash,* creating a rebuttable presumption of race discrimination against Upchurch. *Cash,* 947 So.2d at 292. The City offered no evidence, and the Commission made no findings, rebutting the presumption. In fact, when Upchurch filed a racial discrimination complaint about this, the City resolved it in Upchurch's favor, by ordering Chief Smallman to open, advertise, and compete the positions in accordance with Civil Service regulations within 90 days. (R.E.52) Specifically, on February 4, 2009, the City issued a decision stating that the positions must be posted as available for competitive permanent promotion and then filled according to the rules and regulations of the

City's Civil Service Commission. (R.E. 52, T.105,R.E.168) This meant that Smallman's non-competitive appointments of Dees and Gray into the promotions could not continue.

Therefore, under *Cash,* Upchurch has shown this incident was race discrimination, a violation of his statutory and constitutional rights. This incident indicates Smallman's discriminatory animus toward Upchurch, which, under *Cash,* is probative evidence that the justifications Smallman gave for terminating him were a pretext for unlawful discrimination. As shown below in Part VII, the only evidence supporting Upchurch's termination was Smallman's testimony, which was mostly hearsay and uncorroborated.

(3) Prior EEO Activity

On March 14, 2009, Upchurch filed an EEO complaint alleging discrimination based on his race and gender. (T.102-103; R.E.165-166, 53) Specifically, Upchurch alleged that he was given unfavorable schedules, and denied promotion (as detailed immediately above in Part IV.B(2)) and a new patrol car, despite being entitled to one on the basis of seniority. In January 2010, Upchurch requested a Right-to-Sue Letter from the EEOC. (R.E.53)

Upchurch also filed several complaints of race discrimination and retaliation with the City. (R.E. 20-32, 50,52)

(4) Retaliation

The City retaliated against Upchurch for filing his complaints, as follows.

Within a week after the corrective action (R.E.52) ordered by the City on February 4, 2009, in response to Upchurch's discrimination allegations, Smallman issued a letter to her subordinates in the Police Department, threatening disciplinary action if certain complaints were raised again to the City, including but "not limited to – [complaints about] appointed positions, special assignments, an answer and/or decision you may not agree with, citizens' complaints,

vehicle assignments, equipment, etc." (R.E.38) She then called a personal meeting with Upchurch alone, to impress this upon him and to require him to sign for receipt of the threatening letter. (R.E. 27)

On February 27, 2009, Chief Smallman and Deputy Chief Johnson took away his take home-car privileges. No one else had their privileges taken away, despite being similarly situated, including black officer Dees, who missed a court date. After investigating, the City ordered Chief Smallman to reinstate Upchurch'car privileges. (R.E.23)

On April 7, 2009, Smallman and Johnson issued a written reprimand against Upchurch for failing to appear in court, although he had not been subpoenaed or seen the docket, and his supervisor had approved his absence. Similarly situated black employees were not treated this way. (R.E. 23)

In December 2009, Smallman and Johnson put a "verbal write-up" in Upchurch's personnel record, for allegedly violating a rule he did not break. They wrote him up for approving a civilian to ride-along in his patrol car, when Upchurch followed the written procedure for approving ride-alongs, which Upchurch himself authored for the department. The written procedure stated that ride-alongs could be approved by either the "Chief of Police or his/her designated representative," who is the supervisor on duty. Upchurch was the supervisor on duty, so he approved the ride-along and thus complied with the written procedure. Other supervisors on duty in the past, including black supervisors, always approved ride-alongs, and they were not given disciplinary action as Upchurch was. (R.E. 25)

On January 8, 2010, Smallman and Johnson gave Upchurch another "write-up" for a rule he did not break. This time it was because Upchurch followed the department's standing operating procedure of calling his supervisor on one occasion when he was late. Smallman and Johnson wrote him up for not calling Deputy Chief Johnson, but there was no rule requiring this.

Black officers (like Dees) who did the same as Upchurch were not given disciplinary action for similar or worse actions. (R.E.28,41)

Smallman even retaliated against and threatened employees (like Detective Craig, R.E.41,43) she suspected were possible witnesses for Upchurch in his upcoming race discrimination and termination proceedings. (T.34-36,49-53;R.E.122-124) The fact that other similarly situated employees were not treated the same as Upchurch or Craig shows that the Police Department's actions were a pretext for retaliation, under *Cash*.

(5) Discrimination in Terms and Conditions of Employment

In December 2008, Smallman discriminated against Upchurch in terms and conditions of employment by reassigning him from night shift to day shift, despite being informed by Upchurch that he would be attending school in the mornings beginning in January 2009. Black employees were not treated this way, as evidenced by Terrance Gray, a black male, not having his schedule changed under similar circumstances when he was attending school classes. (R.E. 21-22,41; T-98, R.E.161) When Upchurch filed a complaint over this, the City resolved it in his favor by ordering Smallman to return Upchurch to the night shift immediately. (R.E. 52; T.101, R.E.164)

This disparate treatment between black and white officers shows that Smallman had intent to discriminate against Upchurch, and that she manifested this intent when she and the Commission had him terminated for the pretextual reasons documented in the Commission's decision.

(6) Discrimination and Retaliation by Wrongful Termination of Employment

The City and the Commission discriminated and retaliated against Upchurch by wrongfully terminating his employment, making false accusations against him and denying him due process, as shown in this brief.

Black employees were not treated this way when black employees committed infractions similar to or worse than the ones Upchurch was allegedly terminated for, as evidenced by: (a)

Tiffany Dees, a black female, using her city vehicle to move personal items, which is against departmental regulations, standards, practice, and/or policy, but having no action taken against her; (b) two black officers handcuffing a Hispanic individual to the wall for 10 hours, which is against departmental regulations, standards, practice, and/or policy, with no reprimand; and (c) Smallman and Dees falsifying physical training test results, which is unlawful, with no action taken against them. (See Upchurch's Amended Complaint, p. 7, ¶ 31, in his federal lawsuit, *Upchurch v. City of Moss Point, et al.,supra.*)

Even the Mayor documented this in his testimony, saying: "The issue that surfaced more often than not dealt with a lack of documentation for some allegations. Circumstances where transgressions alleged [against] Officer Upchurch were similarly observed, if not documented, in other officers. But there was a failure to take action against the other officers, raising questions as to why action was being taken against Officer Upchurch." (T.89,R.E.155) The City's Human Resources Director admonished Smallman in writing for inconsistent disciplinary actions. (R.E.41;T.175-176,R.E.216-217)

After Upchurch's termination, his duties were assumed by a black police officer, Terrance Gray appointed by Smallman, although Lance Shipman, a white male, was the senior corporal, had been Upchurch's second-in-command, and desired and/or tried to apply for the position. Shipman was more qualified for assuming the duties than Gray. (See Upchurch's Amended Complaint, p. 7, ¶ 32, in his federal lawsuit, *Upchurch v. City of Moss Point, et al.,supra.*

Upchurch attempted to fully develop his case of race discrimination on these points at the Commission hearing, but the Commission denied him the opportunity to present testimony to do this. See Part VI.F of this brief.

V. The Circuit Court erred because the Commission's decision violated Upchurch's statutory rights against racial discrimination under Section 1981.

Chief Smallman, the Police Department, and the Commission committed racial

discrimination against Upchurch based upon the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 & 1983, [11] as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071-72 (1991). This is shown by Upchurch's evidence of the elements of a prima facie case and pretext of racial discrimination under Title VII (see Part IV in this brief). Facts in the record establishing racial discrimination under Title VII also establish a violation of Section 1981.

Under Section 1981, racial discrimination is prohibited in the making and enforcing of employment contracts. Discriminatory hiring, promotions, wages, retaliation, and discharge are prohibited. *CBOCS West, Inc. v. Humphries,* 128. S. Ct 1951 (2008). The City and the Commission denied Upchurch's civil rights under Section 1981 in the making and enforcement of his employment contract with the City, to wit, by committing these discriminatory acts and by terminating his employment, due to his race as a white man and retaliation, as described in Part IV above.

VI. The Circuit Court erred because the Commission's decision violated Upchurch's rights under the Fourteenth Amendment.

Upchurch provided unrebutted testimony and evidence to show that his termination was due to race discrimination, retaliation, and due process violations, and that the alleged reasons given for his termination were a pretext for these transgressions. Because of this, the alleged reasons for his termination were not in good faith for cause. (Ct.T. 5-6, 16-19, 27; T.10,38,230, R.E.239-240,250-253,261,115,125,234)

The court below erred in failing to find that these transgressions (described below under this Part) were a violation of the equal protection and due process clauses of the Fourteenth Amendment, thus causing the Commission's decision to fail the fourth part of the standard of review (i.e., violation of constitutional rights). Violation of these rights warrants reversal of Upchurch's termination, as a matter of law. *Chickasaw County,* 621 So.2d at 1215. The

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[11] The Fifth Circuit holds that a Section 1981 action must be brought through Section 1983. *Oden v. Oktibbeha Cnty., Miss.,* 246 F.3d 458, 463 (5th Cir.2001).

violations were apparent on the face of the record. *Young,* 635 So.2d at 874.

A. Facts on the face of the record establish violation of Upchurch's equal protection rights under the Fourteenth Amendment.

The Fourteenth Amendment's equal protection clause proscribes discrimination based upon race, *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817 (1967). Under this constitutional authority, Section 1983 has been interpreted to prohibit public-sector employment discrimination on the basis of race and color. *See, e.g., Pontarelli v. Stone,* 930 F.2d 104, 114 (1st Cir. 1991).

B. Facts on the face of the record establish violation of Upchurch's due process rights under the Fourteenth Amendment.

The Fourteenth Amendment's due process clause prohibits deprivation of property interest in continued employment, typically brought under Section 1983. 42 U.S.C. §1983.

Where state law mandates that a government employee has a right to a job unless there are grounds to fire the employee "for cause," state law creates a "property interest" that cannot be taken away without procedural due process. *Cleveland Bd. Of Educ. V. Loudermill.,* 470 U.S. 532, 105 S.ct. 1487 (1985); *Bueno v. City of Donna,* 714 F.2d 484 (5th Cir. 1983).

As a Civil Service employee, Upchurch could not be removed without just cause. Miss. Code Ann. § 21-31-23. Therefore, he had a property right in his continued employment, of which the Commission unlawfully deprived him under the Fourteenth's Amendment's due process clause of the Fourteenth Amendment. (Ct.T. 19; R.E.253)

C. Upchurch was denied notice of the "lack of loyalty" ground for termination.

A ground for which the Commission terminated Upchurch was that he was one of several officers who signed the letter exposing unlawful actions of the police-department management. (R.E. 48-49) (See Part III for more detail.) The letter was not one of the four original grounds for terminating Upchurch, which were listed in the "intent to terminate" letter the City issued to him. (R.E. 17-18; Ct.T. 7;R.E.241)

Therefore, Upchurch was denied due process to defend against the "lack of loyalty" charge regarding the letter, and he was denied a meaningful hearing regarding same, because he had no notice it was considered a ground for removal. (Ct.T. 13; R.E.247) This ground should be reversed because the Commission violated Upchurch's constitutional rights to due process.

D. Upchurch was denied a meaningful pre-termination hearing.

Although Upchurch was afforded a post-termination hearing regarding his termination from employment, due process requires a pre-termination hearing held by impartial and neutral fact-finders: See *Dwyer v. Regan,* 977 F.2d 825 (2d Cir. 1985), which held that due process requires the pre-termination hearing be held before a fact-finder other than the agency undertaking the challenged action.

Here, the City and the Commission decided that a pre-termination hearing was "not necessary," allegedly because Upchurch spoke to the Aldermen. (R.E.19) The Mayor, the Board of Aldermen, and the Commission making a decision upon Upchurch's termination (R.E.13) are part of the City of Moss Point, as is the police department that initiated the termination. Miss. Code Ann. § 21-31-1. The Mayor, Aldermen, Commissioners, and police officials were not neutral fact-finders, and no pre-termination hearing was held before neutral fact-finders.

E. Upchurch was denied a meaningful post-termination hearing.

Furthermore, Upchurch was denied due process because he was denied a meaningful hearing, post-termination. As established above in Part II, the City held a post-termination hearing without a duly appointed Commission – i.e., with only two Commissioners appointed and present.

This harmed Upchurch and denied him due process because it decreased the number of Commissioners available to hear his cause and vote on the decision to terminate his employment, and thereby diminished his opportunity to be heard and to prevail in his case. (Ct.T. 16-19,R.E.250)

F. The Commissioners denied Upchurch a meaningful opportunity to present his evidence regarding violation of his constitutional and statutory rights.

At his hearing, Upchurch attempted to raise race discrimination, retaliation, and pretext as violations of his constitutional and statutory rights (as explained in this brief). (T.10,40,43,49,76-78, 81-85, 99-101, 166; R.E.115,126-128,145-147,149-153,162-201,211); see also T.65-75,R.E.134-144, regarding tape recording showing retaliatory intent.) But the Commission refused to allow him to present his case and evidence on these issues. (T. 40, 75, 78, 84, 99, 166 – 168; R.E.115,144,147,152,162,211-213) After repeated exchanges regarding this matter and cutting short several Upchurch witnesses who were prepared to testify as to these issues, the Commission finally interrupted Upchurch's case and ordered counsel to "move on." (R.E.78)

As a result, Upchurch was unable to fully present his case and evidence that:

(1) Race discrimination, retaliation, and pretext violated his constitutional and statutory rights.

(2) The reasons found by the Commission were not the real reasons for his termination, but a pretext for unlawful race discrimination, retaliation, and violation of his rights under the First and Fourteenth Amendments.

(3) He was terminated for minor offenses, when similar or worse offenses committed by other similarly situated employees were overlooked by the City and the Commission, making the punishment arbitrary and capricious.

(4) Termination, due to race discrimination and violation of his free expression and due process rights under the First and Fourteenth Amendments, is not in "good faith for cause."

Thus, the Commission denied Upchurch a meaningful opportunity to present his evidence and to have his case heard – a violation of his constitutional rights, failing the standard of review.

G. Upchurch was deprived of his liberty interest.

Upchurch also had a liberty interest of which the City and the Commissioners deprived him. His liberty interest includes his right to a reputation free from the false stigmatizing charges

made against him, which the City and the Commissioners violated by wrongfully firing him and making the false information public. *Board of Regents of State Colleges v. Roth,* 92 S.Ct. 2701 (1972).

VII. The circuit court erred in finding that substantial evidence showed the termination was made in good faith and for cause.

A. There is a lack of substantial evidence to support the Commission's findings, and the findings are erroneous, rendering them arbitrary and capricious.

There is a lack of substantial evidence in the record to support the Commission's findings. The evidence, in fact, shows that the City's reasons for terminating Upchurch are erroneous, rendering the termination decision arbitrary and capricious. *Young,* 635 So.2d at 874.

(1) Alleged Insubordination

In its findings, the Commission lists the City's grounds for terminating Upchurch. (R.E.13) The first is "[i]nsubordination, including disrespect for authority by refusing to carry out instructions from Chief Sheila Smallman to properly train Patrolman Cherry." (R.E.13)

(a) Mississippi law defines insubordination.

In *Sims v. Board of Trustees, Holly Springs Municipal Separate School District,* 414 So.2d 431, 435 (Miss. 1982), a case involving the termination of a teaching contract by the trustees of the school district, the Court approved the following definition of "insubordination": A "constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority." An employee's mere verbalization of objections does not reach the level of insubordination.

The Court has applied this definition of insubordination several times since then. *Shannon Engineering & Construction v. Emp. Sec. Comm'n,* 549 So.2d 446, 449 (Miss.1989); *Noxubee County Bd. of Educ. v. Givens,* 481 So.2d 816, 819 (Miss. 1985). The Court even extended the *Sims* definition to unemployment cases. *Gore v. Mississippi Employment Sec. Com'n,* 592 So.2d 1008, 1010 (Miss. 1992). Insubordination is considered misconduct in unemployment law, and

must be proven by the employer. Miss Code Ann. § 71-5-513A(1)(C)(Supp.1999). *Gore,* 592 So.2d at 1010; *Shannon Eng.,*549 So.2d at 449; *Campbell v. Mississippi Employment Sec. Com'n,* 782 So.2d 751, 755 (Miss.App. 2000).

The term "misconduct" as used in unemployment law has been defined by this Court as "conduct evincing willful and wanton disregard of the employer's interest" not including "mere inefficiency [or] unsatisfactory conduct ... as a result of ... good faith errors in judgment or discretion." *Wheeler v. Arriola,* 408 So.2d 1381, 1383 (Miss.1982).

(b) Upchurch's isolated incident does not qualify as insubordination.

Under this definition, an isolated incident does not constitute insubordination, but that is all Upchurch is accused of. The City pointed to a single incident where Chief Smallman stated she gave Upchurch a vague instruction to train Officer Cherry "in the field," but she did not testify as to when, where, how, or how often. Afterward, on one occasion, Smallman saw Cherry in the building, not in the field. (T. 218-219;R.E.226-227)

Nothing in the record suggests that Upchurch was guilty of a "constant or continuing refusal to obey a direct or implied order" of the employer. To the contrary, the only allegation of insubordination is this one incident, an isolated occasion. As a matter of law, this is not such willful and wanton misconduct as would warrant terminating one's employment.

(c) Chief Smallman's alleged instructions were vague and confusing.

Furthermore, Chief Smallman's alleged instructions were vague and confusing. According to the Court, an employee's response to a supervisor's confusing directions is not insubordination: "In view of [the employee's] state of confusion, substantially induced by the administrative ineffectiveness of the [employer], any refusal on her part to obey an order can hardly be labeled insubordination." *Noxubee,* 481 So.2d at 819. Such is the case with Upchurch.

Smallman did not give Upchurch any specific instructions on how and in what areas she wanted Cherry trained, and Upchurch had no departmental policy to follow on training, so there were no adequate "instructions from Chief Sheila Smallman to properly train Patrolman Cherry," and the City has not produced evidence of any. (T. 122-123; R.E.183-184).

Upchurch cannot be penalized for neglect of a duty that he was never assigned or that he never violated. This Court dealt with such an issue in *Noxubee,* 481 So.2d at 819:

> This claim [of neglect of duty] fails because there is no evidence in the record that [employee] Givens was ever assigned any specific duty. Put another way, a teacher may not be discharged for neglect of duties he or she has not been assigned. Givens' contract required that she report to the Noxubee Elementary School. She was advised, however, that she was transferred to the Wilson Center at Brooksville and she complied and reported to that school. For some three weeks, however, she was never given anything to do. She returned for several days to Noxubee Elementary where again she sat around and was assigned no duties. Where school authorities have been this vague in the assignment of duties to a teacher, the discharge of a teacher on grounds of neglect is necessarily arbitrary and capricious.
>
> . . .
>
> While we frequently give great deference to the decisions of school administrators in matters such as this, they do not have carte blanche authority to do as they please. *820 Where, as here, a school board has acted in a manner which is arbitrary and capricious and where its actions are not supported by substantial evidence, the chancery court and ultimately this Court have the responsibility to intervene. *Madison County Board of Education v. Miles,* 252 Miss. 711, 173 So.2d 425 (1965).

As in *Noxubee,* Smallman was confusing and vague in her instructions. But, Upchurch complied with exactly what he understood Smallman's vague and confusing instructions to be. He understood her instructions were that he was to take over Cherry's training, which he immediately did, according to the uncontroverted evidence. (T.137;R.E.195) Then she later told Upchurch she wanted Cherry taken out of dispatch and, once again, Upchurch complied. (T.137,138;R.E.195-196)

Smallman's testimony does not contradict Upchurch's version and timing of events, because she never testified she told Upchurch when or how often to take Cherry out of dispatch or

"into the field," where in the field to train him, or what to train him on. (T.218-219;R.E.226-227) She apparently left all of that up to Upchurch.

Smallman's contemporaneous memo sheds more lights on the matter than her testimony. Her letter states she told Upchurch "to take Cherry under his wings and train him" beginning Monday, November 9, 2009. (Smallman adds "in patrol" as a parenthetical comment, apparently to indicate she did not say that to Upchurch at the time, although she may have intended to.) (City Ex. 5, R.E. 104) Smallman states that, on November 9th, Cherry told her he had been in dispatch all day, but she does not indicate whether she confirmed this was true. Smallman then indicates Upchurch was confused about her vague instructions, because she wrote that, on November 13th, she met with Upchurch, who stated he had a different understanding of what she said: "he recalled what I said in the meeting but he thought I meant to make sure that Cherry was trained." (R.E.104)

It is only then that she gave Upchurch instructions to train Cherry "in patrol," or in the field. She writes she at that point told Upchurch "that Sunday (Nov 15th) will be the last date that Cherry and Reynolds spend in the station, when they return on November 18, 2009, they are to be trained in patrol. He stated that he understood. I then advised Lt Upchurch that should he fail to follow a direct order in the future, that he will receive disciplinary action." (City Ex. 5, R.E. 105) Upchurch's testimony establishes he immediately complied with the new instructions (T.122,137, R.E. 183,195), and nothing in Smallman's or anyone else's testimony contradicts it.

Based on uncontroverted evidence, when Smallman found Cherry in dispatch on November 9th, she had not yet instructed Upchurch to train him only in patrol. In fact, she wrote in her memo that she told Upchurch that Cherry was to be trained in the station building until November 18th. (Smallman Letter, R.E.105) This was not insubordination, but a misunderstanding created by an imprecise communication from Smallman to Upchurch.

Smallman and the Commission choose to label it "insubordination," but labels do not pass

the standard of review in this Court. As a matter of law, Upchurch's confusion caused by Smallman's vague communication, and any "good faith errors in judgment or discretion" on Upchurch's part, do not qualify as insubordination in Mississippi. *Wheeler,* 408 So.2d at 1383. The above uncontroverted facts show Upchurch was not insubordinate, because he complied with what he understood Smallman's vague and confusing instructions to be, and what her contemporaneous memo stated them to be. When the instructions are confusing and vague, the Court has an obligation to intervene, as it did in *Noxubee.*

(d) Upchurch did carry out instructions to adequately train Cherry.

Patrolman Thomas Reynolds testified that Upchurch treated and trained him and Cherry the same (T. 161-162,R.E.206-207), that Upchurch followed the usual training procedure for both him and Cherry (T.163,R.E.208). Other evidence corroborates that Upchurch did properly train Patrolman Cherry (T.121-123,R.E.182A-183).

Upchurch assigned Cherry a Field Training Officer (FTO – Gray), following the usual practice for training new officers. (T. 163;R.E.208,56). Upchurch testified that Cherry's FTO trained Cherry on building searches, traffic stops, dispatch, and supervising the jail – again, following the normal training routine used to train Upchurch and used by other trainers. (T. 121-123,163;R.E.182A-183,208) Cherry testified that Gray trained him for 2.5 months. (T.205-206;R.E.222-223)

Upchurch further testified that Smallman wanted Cherry to move beyond supervising the jail (T. 122;R.E.183), but supervisors at the jail and at dispatch wrote reports recommending Cherry receive further training at the jail and dispatch instead (R.E. 33, 34).

The evidence shows that any problem with Cherry's training was not Upchurch, but Cherry himself. Reynolds testified that Cherry had a "problem with instructions." (T.163,R.E.208) Corporal Shipman testified that he supervised Cherry after Upchurch was

terminated, and Cherry "wouldn't want to listen...just didn't want to do the training, or listen to what training was when we tried to teach him things." (T. 153;R.E.201). Shipman also testified that Cherry was argumentative ... wouldn't listen to his FTO [Field Training Officer]," and that Cherry had problems with other supervisors. (T. 153;R.E.201)

(e) Uncorroborated hearsay testimony from Chief Smallman and Officer Cherry does not qualify as substantial evidence.

There is no substantial evidence to support this ground, and the uncorroborated hearsay testimony of Chief Smallman and Cherry does not constitute substantial evidence under Mississippi law. This Court ruled on such an issue in *Noxubee,* 481 So.2d at 820:

> Where, as here, a school board [employer] has acted in a manner which is arbitrary and capricious and where its actions are not supported by substantial evidence, the chancery court and ultimately this Court have the responsibility to intervene. *Madison County Board of Education v. Miles,* 252 Miss. 711, 173 So.2d 425 (1965).
>
> In this context a point about the evidence in this case needs to be made clear. The School Board had before it testimony of Superintendent Dickson which, if uncontradicted and if accepted by the School Board, arguably would support [employee] Givens' termination. That testimony, however, on all relevant points, was pure hearsay. To be sure, formal rules of evidence do not apply at school board hearings and there is no prohibition upon the school board receiving hearsay testimony. Miss. Code Ann. § 37-9-111(5) (Supp.1985). On the other hand, the controlling fact in this record is that individuals on the scene at the Wilson Attendance Center and at the Noxubee Elementary School, including the principals of the two schools, gave direct non-hearsay testimony. We find in the testimony of these eyewitnesses no corroboration of the hearsay testimony of Superintendent Dickson on the points that might arguably be said to justify termination. For this reason, we do not regard the testimony of Superintendent Dickson as substantial evidence within the meaning of Section 37-9-113(3)(a). Put another way, the presence of this uncorroborated hearsay evidence on this record is not sufficient to avoid the determination that the School Board's ruling was arbitrary or capricious within the meaning of Section 37-9-113(3)(b). *See also,* Miss. Code Ann. § 37-9-111(5) (Supp.1985).

Therefore, the employer's burden of proving insubordination, a form of misconduct, is not met by offering uncorroborated hearsay, *Mississippi Emp. Sec. Comm'n v. McLane-Southern, Inc.,*

583 So.2d 626, 628 (Miss.1991); *Campbell,* 782 So.2d at 755. But this is what the City offered, and what the Commission unlawfully accepted, in Upchurch's case.

All evidence of alleged failure to follow Smallman's instructions comes from uncorroborated hearsay in the testimony of Cherry and Chief Smallman, where she states Cherry told her that he spent all his time training in dispatch and jail and that he had been in dispatch all day on November 9th. (T. 225;R.E.230) There is no evidence in the record that anyone bothered to confirm whether this was true, based upon independent evidence.

(f) The Commission failed to find that the order Upchurch allegedly refused to obey was reasonable and given by and with proper authority.

The Commission also failed to find that the order Upchurch allegedly refused to obey was reasonable, and there is no evidence in the record showing such. The Commission and the Court cannot merely presume that Smallman had the right to expect Upchurch to have Cherry in the field on November 9th, when prior to that date she had not said to. (T.218-219;R.E.226-227) To the contrary, she said Cherry was to train in the station until November 18th (R.E.105), and no record evidence contradicts this assertion. Because misconduct must be proven, the Court has held that the reasonableness of such expectations cannot be presumed, but must be proved. *Campbell,* 782 So.2d at 755.

(2) Alleged Disregard for Departmental Policy Regarding Overtime Approval

The second ground (R.E.13) the Commission listed for Upchurch's termination was:

> Disregard for departmental policy in failing to notify Chief or Deputy Chief that Officer Shipman left work prior to the end of his shift; failure to obtain authorization to work Officer Bond overtime. Whether there was a written policy or not, an officer with nine years of experience should know the chain of command and what is within the scope of his authority.

Shipman had a physical therapy appointment to go to on the day of the incident. (T. 116; R.E.178). He had previously made the Deputy Chief aware of his schedule, and it was Upchurch's understanding that the Deputy Chief was supposed to have someone come in to

relieve Shipman from supervising the jail at 4:00. (R.E.36)(T. 116;R.E.178). However, no one came to replace Shipman after he left for his physical therapy appointment, leaving the shift one man short (for either supervising the jail or working the streets) until 5:45. (T.116–120,142;R.E.178-182,197). The Deputy Chief was not at work that day, and Smallman had a "do not disturb unless emergency" sign on her door because she was in a closed meeting (R.E. 35), so Upchurch, as the supervisor in charge, asked Officer Bond if he could stay over on overtime (for about 1.75 hours, costing the Department about $32, R.E.179,197) until Upchurch "could find a better solution." (T. 116-117; R.E.178-179)

Upchurch did not disregard departmental policy for this incident because there was no specific departmental policy. (T. 118, 120; R.E.180,182). When asked to produce or identify the department policy allegedly violated, Smallman could not. (T-226-227;R.E.231-232)

Deciding not to disturb the Chief during her closed meeting was a judgment call, made by Upchurch as the acting supervisor (T.136,117;R.E.194,179), responsible for running the shift day-to-day (R.E.159). This Court has already made clear that "mere inefficiency [or] unsatisfactory conduct ... as a result of ... good faith errors in judgment or discretion" is not misconduct. *Wheeler,* 408 So.2d at 1383.

Moreover, Upchurch merely did what supervisors in his position had been doing for years, without reprimand. (T. 119, 120, 123-124) (R.E.181-185). He complied with Chief Smallman's written instructions, posted on her door, which stated, "DO NOT DISTURB . . . UNLESS YOU HAVE AN EMERGENCY." (R.E. 35) (T. 107-108, 116, 78-79; R.E.170,171,178,147-148) Authorizing 1.75 hours of overtime was not an emergency that the acting supervisor did not typically handle (T.136,R.E.194), and since no one higher ranking was available, Upchurch was the acting supervisor. (T.117, 119, 123-124, 135, 142; R.E.179,181,184-185,193,197)

For these reasons, Upchurch clearly acted "within the scope of his authority," and followed

the chain of command, which placed him in charge when the Chief and Deputy Chief were unavailable. (T-117;R.E.179) The City produced no evidence contradicting these facts, so there is no substantial evidence supporting the Commission's finding. There is no evidence in the record that Upchurch went outside the chain of command, because he was next in the chain of command, after the Chief and Deputy Chief. There is no evidence in the record that he acted outside the authority of an acting supervisor, which he was, according to his uncontradicted testimony. (T.117;R.E.179)

As established in *Campbell,* 782 So.2d at 755, the Commission is not allowed to merely presume without evidence that the chain of command did not fall to Upchurch on that occasion, or that he did not have the authority as acting supervisor to authorize 1.75 hours of overtime when Chief Smallman posted orders on her door that she was unavailable, or that he did not act as a reasonable acting supervisor would have acted under those circumstances – there must be evidence in the record to establish these presumptions, and there is not.

In summary, Upchurch cannot be penalized for neglect of a duty that he was never assigned or that he never violated. *Noxubee,* 481 So.2d at 819. As in *Noxubee,* the Chief's instructions [e.g., "do not disturb unless emergency"] were confusing and vague, and Upchurch did his best to comply with what he thought those instructions meant. In the course of doing so, he made a judgment call that authorizing 1.75 hours of overtime (costing the Department about $32) was not an emergency, based upon his experience with the department's past practice in similar situations.

When the instructions are confusing and vague, the Court has an obligation to intervene, as it did in *Noxubee.* What the Commission states it expected of Upchurch in the situation where his superiors were unavailable was not what was expected of other supervisors in the past (T.136; R.E.194) – showing that this, too, is an unlawful pretextual ground for termination that fails the standard of review.

(3) Alleged Failure to Call in Evidence Technician

The Commission's third ground (R.E.13) for Upchurch's termination was:

> Failure to call a detective or an evidence technician to the Shell Station robbery on January 10, 2010. Testimony by Officer Clark who was on the scene stated that he recommended to Officer Upchurch that an Evidence Technician should be called. Although Officer Upchurch testified that it was the responsibility of the Deputy Chief to call the Evidence Technician, he told Officer Clark that he would make that decision. Further, Chief Smallman testified that Officer Savage stated to her that Officer Upchurch told him the reason he did not call the Evidence Technician was because she (referring to the Evidence Technician) wasn't qualified. Officer Upchurch stated that he called the Deputy Chief and informed him of the robbery but the testimony given does not show that he requested an Evidence Technician.

(a) As a matter of law, Chief Smallman's directive precluded Upchurch from calling out the evidence technician.

This finding flies in the face of the substantial evidence standard, because all the record evidence shows Upchurch was never assigned any duty to call in a detective or an evidence technician to the Shell Station robbery on January 10, 2010. In fact, on July 26, 2009, Chief Smallman had issued a directive explicitly removing this responsibility from supervisors like Upchurch and giving it to the Deputy Chief. (R.E. 37) The directive, which is not in dispute, stated (at R.E.37):

> [E]ffective immediately, the Deputy Chief will determine whether or not the Investigator and/or Evidence Technician are to be called out. At that time the Deputy Chief will call them or request the Dispatcher to contact them. If the Deputy Chief is unavailable or he requests the Supervisor to make the call, then the shift Supervisor will be responsible.

Upchurch complied in full with the written directive on the night of the incident. (T-112,115;R.E.174,177) He testified that he called the Deputy Chief as the directive from Smallman required him to do. (T. 106,107;R.E.169,170) This was verified by eyewitness Officer Shipman (T-158,R.E.205) and there is no contradictory evidence. It was the Deputy Chief who had the responsibility to call out an investigator (i.e., detective) or evidence technician and failed to do it, not Upchurch. (T. 107-108, 114); (R.E.170-171,176)

In November 2009, the Deputy Chief himself had reprimanded Upchurch (R.E.106) for calling out an investigator and stressed that only he (the Deputy Chief) could call a detective (investigator) to the scene of a crime. (T. 111, 113;R.E.173,175) Investigator/Detective Craig verified this. (T-170;R.E.215) So this procedure that Upchurch followed was in place well before the night of the January 2010 incident.

Out of an abundance of caution, Upchurch notified Investigator Craig about the incident at the time, but did not call her out. Craig verified this in a memorandum dated February 9, 2010. (Memo, R.E.47)(T.164,170;R.E.209,215)

The City adduced no evidence contradicting Upchurch's version of events. At the Commission hearing, Chief Smallman tried to lay the blame for the Deputy Chief's failure to call out the evidence technician by claiming Upchurch should have done the Deputy's job for him. She claims Upchurch should have told the Deputy to call out the evidence technician, thereby overriding the Deputy's discretionary decision. (T.223-224,R.E.228-229) But, doing so was not Upchurch's place or his job; Upchurch was not assigned any duty to do that, and it was not departmental policy to attempt to override the superior's discretionary call. (T.133-134,R.E.191-192)

Other officers (Clark and Savage) wanted to make the decision to call out the evidence technician and place the phone call, but Upchurch enforced the Chief's written directive by stopping them, and instead placing the decision in the Deputy's hands. (T.164) Upchurch reminded Clark that Clark did not have the authority to call out an evidence technician (i.e., CID), as confirmed in Clark's testimony. (T.183;R.E.218) Clark testified that his attempt to call out an evidence technician would have violated the department's directive and that Upchurch did nothing wrong by stopping Clark from doing so. (T-186;R.E.221)

As the Commission removed Upchurch for failing to call out the evidence technician, the Commission presumed he had the duty and assignment to do so. This presumption is erroneous,

according to the only evidence in the record that is on point (i.e., evidence about the Chief's written directive), so the Commission's decision is not supported by substantial evidence, and a decision based upon erroneous facts is arbitrary and capricious, according to *Young,* 635 So.2d at 874.

(b) The Commission's finding shows a lack of understanding of or a disregard for the surrounding facts, i.e., Smallman's written directive.

The Commission made a finding that Clark recommended to Upchurch that an evidence technician be called out, but Upchurch did not do it. (R.E. 13) However, this finding shows a lack of understanding of the surroundings fact that a subordinate's recommendation cannot justify termination, in view of the Chief's uncontroverted directive precluding Upchurch from calling out the evidence technician.

Again, the Commission based its decision upon uncorroborated hearsay, with regard to another finding: "Chief Smallman testified that Officer Savage stated to her that Officer Upchurch told him the reason he did not call the Evidence Technician was because she (referring to the Evidence Technician) wasn't qualified." (R.E. 13)(T.215, R.E.225) This uncorroborated double-hearsay is not substantial evidence according to this Court's law, *Noxubee,* 481 So.2d at 820, and the only competent testimony on the issue, that of Upchurch himself, is that he was precluded from calling out an evidence technician by Smallman's directive. (T.133-135; R.E.191-193)

The Commission's findings show a lack of understanding of or a disregard for the surrounding facts, specifically the fact that Smallman's directive precluded Upchurch from calling out an evidence technician, no matter who recommended it. Under the Court's standard of review, this causes the Commission's decision to fail. *Barks,* 708 So.2d at 1310.

(4) Alleged Lack of Respect and Loyalty by Signing Letter

The Commission's fourth and final ground (R.E.13) for Upchurch's termination was:

> Lack of loyalty to the Moss Point Police Department as well as lack of respect for the Chief of Police. Officer Upchurch admitted that he made comments that the Chief wouldn't be in the position three months. This comment was made on more

than one occasion. A letter dated February 3, 2010 to the Board of Aldermen expressing lack of confidence in the Police Department administration listed Lieutenant Upchurch as one of the concerned officers who authored the letter. This clearly points out a lack of respect for department heads, lack of loyalty to the Moss Point Police Department, and lack of respect for the Chief of Police because, as a lieutenant, Mr. Upchurch was part of the Police Department Administration.

(a) There were no specific departmental policies or overriding requirements for loyalty or respect.

There were no specific or overriding departmental requirements for loyalty or respect, as addressed under Part III.C of this brief. The Commission made no findings that any such requirements existed, and the City produced no evidence that they did. So, this ground fails because there is no substantial evidence showing any such requirements for Upchurch to violate.

Furthermore, while Upchurch admits to saying Smallman would not be at the Moss Point Police Department in three months, he did not say it out of a lack of loyalty or respect. He was just relating what he had heard as news. (T.116; R.E.178) Upchurch had heard from other people that Smallman was going back to her old job at the Attorney General's office. (T. 115;R.E.177) There is no evidence of a departmental rule against repeating news that someone might be changing jobs, and the City produced no other competent evidence to refute this regarding Upchurch's state of mind when he made the comment, or what he meant by it.

(b) Failure to punish others for similar comments shows this ground was a pretext and not a just cause brought in good faith.

Other employees made similar comments about Smallman's leaving in a few months. (T. 109;R.E.172) Officer Joseph Savage testified that he heard similar statements from other officers. (T. 212;R.E.224). Specifically, he heard a similar statement from Shipman, but Shipman was not terminated. (T. 212;R.E.224) This disparate treatment shows, under the rule of *Cash,* 947 So.2d at 297 & n.12, that this alleged ground is a pretext for unlawful discrimination and retaliation.

The record has no evidence contradicting the fact that there was no disciplinary action taken against other similarly situated officers making similar comments. A one-time instance of

repeating the news, which other officers are circulating as well without repercussion, is certainly not sufficient "just cause" brought in "good faith" for the Commission to destroy the career of a police officer.

With regard to the letter (R.E. 48-49) exposing unlawful actions of the police-department management, the Commission arbitrarily decided that Upchurch being one of the authors and signatories of the letter warranted termination. The Commission found that Upchurch being a lieutenant was the reason his involvement in the letter showed a lack of respect and a lack of loyalty. (R.E. 13)

However, the face of the letter shows it was also signed by another lieutenant, a sergeant, and three corporals. (R.E. 49). All of these positions, like Upchurch's, are supervisory, and none of the other authors/signatories of the letter were terminated or even disciplined. Under the rules enunciated in *Cash,* this evidence of disparate treatment shows this ground for removal was a pretext, and arbitrary and capricious. *Cash,* 948 So.2d at 297 (pretext may be proven by "evidence that the reason offered by the employer for the adverse employment decision also applied to other employees who were not subjected to the same punishment.") The record evidence showing Upchurch's loyalty to the Police Department (i.e., his testimony, T-143-144; R.E.198-199) stands unrebutted.

B. The Commission's conclusions are contrary to law.

As shown under Part VII, the Commission's factual findings forming the basis of the termination decision were erroneous. Erroneous factual findings cannot constitute substantial evidence, they are contrary to law, and they are not valid or reasonable grounds for a decision. Basing the decision upon such invalid and unreasonable grounds is arbitrary and capricious. Under these circumstances, the Court is required to intervene. *Young,* 635 So.2d at 869.

VIII. The record shows uncontradicted substantial evidence that the alleged reasons for termination are a pretext.

There is no just cause for Upchurch's removal, because evidence shows the Commission's

reasons are a pretext and he was in fact removed due to violation of his First Amendment rights and due to race discrimination and retaliation.

An employee can show pretext by using (1) evidence from his prima facie case, (2) the employer's verbal or written comments indicating a discriminatory animus, or (3) evidence that the reason offered by the employer for the adverse employment decision also applied to other employees who were not subjected to the same punishment. *Cash,* 947 So.2d at 297, & n.12.

This Court has recognized unequal treatment, and comments related to a protected class like race, as evidence showing pretext for discriminatory discharge. *Cash,* 947 So.2d at 298. Thus, even if, as the Commission claims, Upchurch had been insubordinate, or committed any of the other alleged infractions for which he was terminated, those justifications were pretextual based on evidence of unequal treatment, race-related statements made by Upchurch's supervisor (Chief Smallman), and the impeachment of the City's witnesses (shown Part IV.B of this brief).

Cases where there employer has a dual motivation for termination would still result in a ruling for the employee. The Court held that the law "does not require the factfinder to disbelieve a particular event occurred, but rather requires the factfinder to find that- *even if it did occur*-it was not the *motivating reason* for the dismissal." *Cash,* 947 So.2d at 296. The employer's reasons for a termination could be true, but still not be the real reasons for the employee's dismissal. Therefore, if any of the alleged reasons for Upchurch's termination turned out to be based in fact, Upchurch has still proved by uncontroverted evidence that they were pretexts, and not the real reasons for his termination.

The Commission used falsehoods and minor rules violations as a pretext for terminating Upchurch, while not terminating black employees for the same or similar conduct. The stated reasons for the adverse action (termination of employment) against Upchurch are either false or are activities regularly condoned, encouraged, or overlooked for other employees, and therefore

constitute pretext for adverse action against Upchurch. See the admonishment from the City's Human Resources Director for the disparate treatment practiced by Smallman in disciplinary actions. (R.E. 41; T. 175-176, R.E.216-217) Even the Mayor reported he witnessed that Smallman had tried to discipline Upchurch for alleged transgressions that other officers committed but were not punished for. (T.88-89; R.E.154-155)

Yet, the Commission relied almost exclusively upon uncorroborated hearsay testimony from Smallman as to justify terminating Upchurch, as explained in Part VII of this brief. Smallman is the sole individual who initiated and spearheaded this action to terminate Upchurch's employment. (T.29, 62; R.E.120,133) Upchurch had no previous discipline of any significance in his entire six years of police service with the City before this, and Smallman manufactured four incidents to justify termination, all allegedly occurring within a single six-day period during his nine total years in law enforcement. (T.123-124;R.E.184-185) These circumstances show the four grounds are a pretext for discrimination and retaliation.

The City and the Commission knew or were recklessly indifferent to the fact that their racially discriminatory and retaliatory conduct violated established Federal law. Chief Smallman's intent to discriminate is shown by the fact that, after Upchurch filed his first internal discrimination complaint, Chief Smallman stated if he filed another complaint with Human Resources about the matters he considered discriminatory he would be "punished." (R.E.27,38-39)

Even worse, Chief Smallman had a staff meeting, where she tried to intimidate all employees in the Police Department from assisting as a witness in Upchurch's discrimination or termination cases, by threatening them with termination. (T.34-36, 49-53, 65-73; R.E.122-124,128-132,134-142) She announced at the staffing meeting that she knew some of them had "received phone calls" from Upchurch (T.33,34,R.E.121,122), and "[i]f you want to get involved in it, you are jeopardizing your job" and "a lot could happen to you [T.34;R.E.122]. . . Now hear

me when I say this. . . . Either you get on board or you get out the door. . . . You get your behind out the door. [T.35-36;R.E.123-124]. . . Now you can get out the door on your own or I will help you get out that door. [T.50;R.E.129] . . . It is going to be suspension or termination, if not just termination. [T.52;R.E.131]"

These comments show pretext by establishing discriminatory animus against Upchurch, by the witness on whose uncorroborated hearsay testimony the Commission hung its hat for its decision.

CONCLUSION

For the above reasons, the Commission's decision does not pass the standard of review, and the Court should reverse the Circuit Court's order affirming it.

Respectfully submitted, this the 26 day of August 2011.

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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 31(c), I hereby certify that I have delivered, via overnight mail, the original and three (3) copies of the above and foregoing Appellant's Brief to Clerk, Mississippi Supreme Court, Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201.

I further certify that I have this date delivered, via overnight mail, a true and correct copy of the above and foregoing Appellant's Brief to the following:

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Trial Court Judge

I further certify that, pursuant to M.R.A.P. Rule 28(m), I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Microsoft Word format.

SO CERTIFIED, this the 26th day of August, 2011.

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ADDENDUM

Miss. Code Ann. § 21-31-5

West's Annotated Mississippi Code: Title 21. Municipalities, Civil Service

§ 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.

Miss. Code Ann. § 21-31-23

West's Annotated Mississippi Code

Title 21. Municipalities

Civil Service

General Provisions

§ 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.