

IN THE SUPREME COURT OF MISSISSIPPI

HELEN PEPPER

APPELLANT

VS.

CAUSE NO. CC-00329

CITY OF JACKSON

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF MISSISSIPPI

HELEN PEPPER.

APPELLANT

VS.

CAUSE NO. 2011 CC-00329

CITY OF JACKSON

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

- | | |
|----------------------------|--|
| 1. Helen Pepper | Employee-Appellant |
| 2. City of Jackson | Employer-Appellee |
| 3. Breland Hilburn | Civil Service Commissioner |
| 4. Horace Buckley | Civil Service Commissioner |
| 5. Jacquelyn Franklin | Civil Service Commissioner |
| 6. James Anderson, Jr. | Attorney for City of Jackson, Appellee |
| 7. Harvey Johnson, Jr. | Mayor of the City of Jackson |
| 8. Quentin Whitwell | Councilman for City of Jackson |
| 9. Kenneth Stokes | Councilman for City of Jackson |
| 10. Chokwe Lumumba | Councilman for City of Jackson |
| 11. Frank Bluntson | Councilman for City of Jackson |
| 12. Charles Tillman | Councilman for City of Jackson |
| 13. Tony Yarber | Councilman for City of Jackson |
| 14. Margaret Barrett-Simon | Councilwoman for City of Jackson |
| 15. Earnestine Alexander | Attorney for Helen Pepper, Appellant |

Respectfully submitted,

CITY OF JACKSON

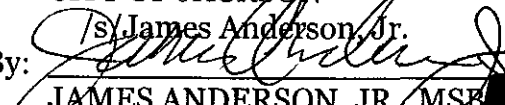
By: 
JAMES ANDERSON, JR., MSB
Special Asst. to the City Attorney

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STATEMENT OF THE ISSUES

The issues that this Court should resolve on this appeal are:

- I. Whether the decision of the City of Jackson's Civil Service Commission was based on substantial evidence; and,
- II. Whether the City of Jackson's Civil Service Commission acted in "Good Faith."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This appeal stems from events which led to a sixty (60) day suspension, without pay, of Helen Pepper, a deputy municipal court clerk. Pepper was employed at the time of the suspension with the Department of Administration of the Jackson Municipal Court for the City of Jackson. She was suspended without pay from April 11, 2005 to July 6, 2005 for violating Civil Service and Personnel Rules by not having a co-worker witness her placing her money bag into the office safe on November 1, 2004. Appellee's RE at pp.2-5. The violation was discovered as a result of an investigation into funds missing from Pepper's money bag. Pepper appealed the suspension to the Civil Service Commission for the City of Jackson ("the Commission"). The matter was heard before the Commission on December 14, 2006. Appellee's RE at pp.2-3. The Commission affirmed the suspension.

Pepper filed a *pro se* appeal of the Commission's decision to the Hinds County Circuit Court on or about May 14, 2007. Appellee's RE at p.1. Pepper "letter of appeal" noted just 5 issues, namely: (1) "the decision was wrongly decided based on the evidence already in the record"; (2) "too much vital evidence was suppressed and/or denied"; (3) "no and/or proper investigation done"; (4) "new evidence which was previously unavailable that supports a different outcome"; and, (5) "suppressed and/or denied evidence denied [Pepper] the opportunity to fairly and clearly present [her] case." *Id.* Pepper filed her Appellant Brief in circuit court, *sans* record excerpts, on April 7, 2008, more than six (6) months late.. Although a certificate of service was attached to her brief, Pepper admittedly failed to serve her brief to the City. As a result, the matter languished.. The City moved to strike the brief as well as various exhibits attached to Pepper's brief that were outside of the record. The circuit court ultimately struck

Pepper's exhibits, but allowed the Pepper's brief to be received and considered. On July 15, 2010, pursuant to U.C.C.C.R. 5.01 and 5.03, the circuit court affirmed the decision of the Commission on July 15, 2010. On August 13, 2010, Pepper, then *pro se*, filed her notice of appeal in which she made various new allegations against the circuit court and the City.

B. STATEMENT OF FACTS

Helen Pepper was working as a deputy municipal court clerk for the City of Jackson on November 1, 2004. A clerk's duties included collecting money, counting the money collected, bagging and depositing the money in the "drop box" ("dropping" the money), and verifying the counts and deposits made by other clerks. Tr. at p.21:19-24; Tr. at p.64:4-11; Tr. at p.118:10-11.

The clerks were required to follow a specific procedure for counting the money and "dropping" their money bags. The procedure provided the clerks a mechanism for ensuring all the money collected by each clerk was actually turned in by each clerk. The clerks were required to fill out a balance sheet which they referred to as "drop sheet". Tr. at p.21:17-24; Tr. at p.33:24-29; Tr. at p.108:2-9; *also see* Appellee's RE at p.6. Each clerk would count the money she collected in the presence of another clerk. Then she would fill out the balance sheet and place that sheet in the money bag along with the cash and checks collected. The depositing clerk would then have the other clerk go with her to the drop box in the back of the office and witness her deposit the money bag in the drop box. The depositing clerk would then sign the "money bag drop verification" form certifying that amount of money she counted and deposited in the drop box. The witnessing clerk would verify on the "money bag drop verification" form that she witnessed the money bag being deposited. Tr. at p.21:17-24; Tr. at p.66:16-29; *see* Appellee's RE at p.8.

The following day two accounting clerks would retrieve from the drop box all of the money bags dropped by the municipal court clerks. Tr. at p.10:7-17. They would proceed to verify the contents of each money bag. An accounting clerk would open the bag and count the bag's contents while sitting across from the other accounting clerk. Tr. at p.12:26-29. Once finished, the first accounting clerk would pass the bag's contents to the other one who would then count the contents again for verification. If the contents of the bag did not correspond with the municipal court clerk's balance sheet, they would notify the accounting supervisor. Id. If the accounting supervisor was unable to reconcile the discrepancy, she would notify the Court Administrator who would in turn handle the matter. Tr. at pp.8-10.

On November 1, 2004 around 2:00 p.m. Pepper was closing her cashier window. Tr. at p.17:21-25. The only other clerk working the cashier windows at that time was Chiquita Williams-Jemison. Id. While Williams-Jemison continued to work at her own window, Pepper filled out and signed her balance sheet certifying that she had collected a total of \$2,958.06 in cash and checks. Appellee's RE at p.6. Pepper's balance sheet indicated that she had collected \$1,200. in one hundred dollar bills. Id. It further indicated that she had collected \$331.00 in checks. Id. Again, while Williams-Jemison was working at her own window, Pepper placed her balance sheet in her money bag and dropped her money bag in the drop box. The Pepper signed her "money bag drop verification" form. Id. She then had Williams-Jemison sign the verification as a witness to the drop although Williams-Jemison had not in fact witnessed it. Tr. at p.108:8-16.

On November 2, 2004, the accounting clerks, Daphne Watson and Patricia Ervin, retrieved the money bags, including the money bag dropped by Pepper. Tr. at pp. 10-12. They followed standard procedure for verifying the contents of the bag. Id. Watson counted the contents of Pepper's bag first, then passed the contents to Ervin to count. Tr. at p.16:4-15.

Watson and Ervin found that, according to Pepper's balance sheet, all of the one hundred dollar bills were missing as well as all of the checks. Pepper's bag was short by \$1,531.06. They notified their supervisor, Charlotte Everett. Tr. at p.17:9-10. She re-counted the contents, re-checked Pepper's balance sheet, and came to the same conclusion as Watson and Ervin. Tr. at pp.39-40.

Everett reported the matter to Jeanette Banks, the Court Administrator who initiated an investigation and search for the missing funds. Tr. at p.40:17-24. Chiquita Williams-Jemison came forward and admitted that she did not witness Pepper drop the money bag in the drop box. Tr. at pp.67-68. Williams-Jemison was disciplined by the City of Jackson as a result of the falsified verification form. Tr. at p.68:19-29; Tr. at p.108:7-15.

Pepper was suspended sixty (60) days without pay as a result of her failure to follow the proper procedure for ensuring the money collected was deposited. Appellee's RE at pp.4-5. The suspension was predicated on progressive discipline due to prior disciplinary actions against Pepper. Tr. at pp.73-76. She was advised of her suspension in a memorandum dated April 6, 2005. Appellee's RE at pp.4-5.

Pepper appealed her suspension to the Civil Service Commission. The Commission heard the appeal on December 14, 2006. The City of Jackson called Watson, Everett, and Banks as witnesses. Pepper, appearing *pro se*, called Williams-Jemison and Shenita Bankhead, as witnesses and also testified on her own behalf. Pepper cross-examined witnesses and introduced several exhibits into evidence. Tr. at p.3. All the tangible evidence Pepper offered as evidence was received into evidence without objection.

Watson, Everett, Banks, Williams-Jemison, and Pepper all testified, and were in agreement, as to the specific procedure the clerks were to follow for counting the money and "dropping" their money bags. Tr. at p.21:19-24; Tr. at p.53:3-8; Tr. at p.66-67; Tr. at 108:2-6;

Tr. at pp.124-125. They all confirmed that the depositing clerk was required to have another clerk/employee witness the deposit the money bag in the drop box. *Id.* Pepper testified that she tallied and verified her balance sheet on November 1, 2004, and it did not contain an error. Tr. at 118:10-11. Pepper did not contest the fact that twelve one hundred dollar bills and several checks present when she tallied her money, and were supposed to be in her money bag, were missing.

Williams-Jemison testified that she was busy at her cashier window, and never witnessed Pepper counting her money or dropping her money. Tr. at p.105:10-16. She further testified that although she did not witness the money bag, Pepper came to her (Williams-Jemison) and asked her to sign the verification form as a witness to the drop. Tr. at p.106:5-7. Pepper challenged the location of William-Jemison's cashier window. Tr. at pp.125-126. However, Pepper did not contest Williams-Jemison testimony that she was busy at her own cashier window while Pepper was counting and dropping her money bag. *Id.* While questioning Williams-Jemison, Pepper admits Williams-Jemison did not follow her to the drop box.:

“(PEPPER) Q. Where were you when I came to you and asked you to sign this sheet?

(WILLIAMS-JEMISON) A. I was at my register working.”

Tr. at p.106:5-7.

William-Jemison further testified that the drop box was located in the back of the office and the registers were in the front. Tr. at p.108:4-6.

The Commission found that the proper procedure for depositing the money bags required that each clerk have a witness observe them deposit their money bag. Appellee's RE at pp.4-5. The Commission also found that Pepper had failed to adhere to this requirement; therefore, she had violated Civil Service and Personnel Rules as set out in the Disciplinary Action

memorandum dated April 6, 2005. *Id.* The Commission further found that the disciplinary action was not taken for political or religious reasons and was for cause shown. *Id.* The sixty (60) day suspension, without pay, was affirmed. *Id.*

SUMMARY OF THE ARGUMENT

The issue in this case is whether the decision of the Civil Service Commission for the City of Jackson was based on substantial evidence, and made in "good faith" for cause. Helen Pepper was suspended for the violation of Civil Service and personnel Rules:

Civil Service Rule XII, Sec. 2, 1.1 E - Incompetency or inefficiency in the performance of duties of the position to which he/she is appointed, including becoming physically or mentally unable to perform. (See Exhibit 7 of the record)

Personnel Employee Handbook Rule 11.2.6 - Inefficiency, incompetence, carelessness, or negligence in performance of duties.

See Exhibit 7 to the Transcript located in Exhibit Vol.2 of 2.

The evidence presented during a full hearing before the Commission confirmed that the City of Jackson's decision to discipline Pepper was not based on political or religious reasons, but rather for good cause shown. Pepper does not allege in her assignment of error to (Letter of Appeal) that either the City or the Commission based their decision on political or religious reasons.

The testimony of all the witnesses supports that the Commission's finding that "...each deputy Clerk must have a witness observe them place their money bag into the safe." The procedure was designed to keep an accurate account of the money collected and turned in by the clerks. All of the clerks, based on the evidence, had an affirmative duty to comply with this procedure. The terms incompetent, inefficient, careless, and negligent are all accurate descriptions for one who fails to comply with the procedural safeguards. The Commission had ample evidence to find that failure to follow the procedure constituted incompetence, inefficiency, carelessness, and/or negligent conduct under the aforementioned Civil Service and Personnel Rules.

Pepper was rightfully subjected to progressive disciplinary action as a result of previous transgressions. Evidence presented at the hearing verified that Pepper had been disciplined

several times for past violations of Civil Service and Personnel Rules. The evidence presented at the hearing conclusively established that Pepper was in violation of the Civil Service and Personnel Rules and that the disciplinary action taken by the City of Jackson was not for political or religious reasons, and was for "good cause shown." In addition, the discipline was neither arbitrary nor capricious, but rather was reasonable under the circumstances.

STANDARD OF REVIEW

The civil service commission reviews the employment decisions of a city to remove, suspend, demote, or discharge a civil service employee. Miss. Code Ann. § 21-31-23 (Rev.2007). A city's disciplinary action may be reversed if it was made for political reasons, religious reasons, or was not made in good faith for cause. *Id.* An administrative agency's conclusions will not be overturned on appeal " unless the agency's order (1) is not supported by substantial evidence, (2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights." *Sprouse v. Miss. Employment Sec. Comm'n*, 639 So.2d 901, 902 (Miss.1994); *Young v. City of Biloxi*, 22 So.3d 1269, ¶7 (Miss.App. 2009). Issues not raised before the Commission are waived and may not be heard for the first time on appeal. *Little v. City of Jackson*, 375 So. 2d 1031, 1033 (Miss. 1979); *City of Vicksburg v. Cooper*, 909 So.2d 126, 129 (Miss. App. 2005). The duty of the appellate court is to determine " whether or not, from an examination of the record there exists credible evidence substantiating the [C]ommission's action." *Grant v. City of Columbus*, 812 So.2d 976, 978(¶ 6) (Miss.2002). " [T]his Court must not reweigh the facts of the case or insert its judgment for that of the agency." *Allen v. Miss. Employment Sec. Comm'n*, 639 So.2d 904, 906 (Miss.1994); *Young v. City of Biloxi*, 22 So.3d 1269, ¶12 (Miss.App. 2009).

ARGUMENT

I. SUBSTANTIAL EVIDENCE

I. The Commission's findings are supported by substantial evidence in the record.

The Commission properly noted in its opinion that "[t]he Commission may reverse or modify a disciplinary action if the discipline was for political or religious reasons and/or the discipline was not made in good faith for cause." Opinion and Order of the Commission, p.1 , ¶2, citing *City of Laurel v. Brewer*, 919 So.2d 217 (Miss. Ct. App. 2005); Miss. Code Ann. Section 21-31-23 (As Amended 2001). Further, the Commission recognized that as the finder of fact, the Commission was required to determine if the credible evidence established the disciplinary action of the City of Jackson was for good cause.

a. The procedure for "dropping" the money bag.

The Commission found that each deputy clerk was required to have a witness observe the clerk place the money bag into the safe/drop box. This is supported by the testimony of Watson, Everett, Banks and Williams-Jemison. Daphne Watson testified:

"The procedure is they fill out the drop sheets, the form that she showed earlier. They fill those out. They put them in the bag. They are supposed to be verified by another clerk before they drop it, and that clerk is supposed to verify that they dropped the money in the drop box." Tr. at p.21:19-24.

Charlotte Everett testified:

"The procedure is the clerks count their money. They ring their reports up, and their money should balance with th report from the system. They are supposed to get another clerk ...go to the drop box and drop the money together." Tr. at p.53:3-8.

Court Administrator Jeanette Banks confirmed in her testimony that the witnessing clerk was required to accompany the depositing clerk to the drop box. Tr. at p.69:1-3. Chiquita Williams-Jemison testified that “[t]he procedure is you watch the person count their money, you count their money, and walk to the back of the office and watch them drop it.” It was clearly established that the clerks had a duty to make certain that the witnessing clerk observed the depositing clerk place their money bag in the drop box. *Id.*

b. Helen Pepper failed to comply with the procedure for depositing her money bag.

The Commission found that Pepper did not have a co-worker accompany her when she placed her money bag into the safe/drop box. Pepper and Williams-Jemison were the only two clerks present at the cashier windows when Pepper was closing her register on November 1, 2004. Tr. at p.105:28-29. Williams-Jemison, the clerk who signed Pepper's verification form, admitted to Banks that the form was false. Tr. at p.67:15-20. Williams-Jemison testified that she neither witnessed Pepper counting her money or depositing her money bag Tr. at pp.105-107. Williams-Jemison testified that she was busy at her own register when Pepper came to her and asked her to sign the verification. Pepper testified that Williams-Jemison signed the verification while at her register in the front of the office *before* Pepper went to the back of the office to deposit her money bag. Tr. at pp.106-107. Pepper challenged the location of Williams-Jemison's register, but never challenged the sequence of events. In fact, Pepper admitted in her own testimony that Williams-Jemison was at her own register at the front of the office when Pepper was performing her count. Tr. at p.125:1-2. Pepper never states that Williams-Jemison accompanied her to the drop box in the back of the office. In addition Pepper did not contradict Williams-Jemison's testimony that the verification form was signed before Pepper made her drop, instead Pepper corroborated Williams-Jemison's testimony. There is ample evidence in the record, including Pepper's own testimony, supporting the Commission's finding that Pepper

knowingly did not have Williams-Jemison observe her at the drop box depositing her money bag.

c. Pepper failure to adhere to the procedure violated Civil Service and Personnel Rules.

Helen Pepper was charged and suspended for the violation of Civil Service and personnel Rules, namely:

Civil Service Rule XII, Sec. 2, 1.1 E - Incompetency or inefficiency in the performance of duties of the position to which he/she is appointed, including becoming physically or mentally unable to perform.

Personnel Employee Handbook Rule 11.2.6 - Inefficiency, incompetence, carelessness, or negligence in performance of duties.

The question before the Commission, and now before this Court, is whether the Pepper's admitted failure to have a witness observe her place her money bag into the safe/drop box constituted (1) inefficiency, (2) incompetency, (3) carelessness and/or (4) negligence. All four terms apply. The evidence shows that: (1) Pepper asked Williams-Jemison to sign the verification form before the drop was actually made; (2) Pepper walked to the back of the office alone to drop her money bag; and, (3) Pepper's money bag was short \$1,531.06 when it was taken out of the drop box the following day. Pepper, at best, neglected to follow the proper procedure by having her co-worker sign as a witness to an event that had not yet occurred. She was incompetent, at best, in not having her co-worker follow her to the drop box. She was careless, at best, in not appreciating the importance of following proper procedure, especially when it dealt with public funds. She was inefficient, inasmuch she had been reprimanded several times before for her conduct.¹ Tr. at p.73:18-23. Just as the Circuit Court found, there is ample evidence in the record to substantiate the Commission's findings.

¹ The disciplinary action taken against the Appellant was progressive due to the excessive number of oral warnings and reprimands. Tr. at p.73:18-23.

II. GOOD FAITH

As noted above, the Commission's conclusions will not be overturned on appeal " unless the [Commission's] order (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights." *Sprouse v. Miss. Employment Sec. Comm'n*, 639 So.2d 901, 902 (Miss.1994); *Young v. City of Biloxi*, 22 So.3d 1269, ¶7 (Miss.App. 2009).

Pepper argues that the Commission decision was arbitrary and capricious. However, the Commission's adhered to the applicable legal standard for reviewing disciplinary actions. The Commission factual findings were based on substantial evidence, *supra*. As previously noted, the Commission may only reverse the city's disciplinary action if it was made for (1) political reasons, (2) religious reasons, or (3) was not made in good faith for cause. Miss. Code Ann. § 21-31-23 (Rev.2007).

a. Neither the issue of "political motivation", nor "double jeopardy" were not raised before the Commission, thus they are waived.

Although Pepper now argues that suspension was "politically motivated," she made no such assertion before the Commission, thus waiving the issue. Issues not raised before the Commission are waived and may not be heard for the first time on appeal. *Little v. City of Jackson*, 375 So. 2d 1031, 1033 (Miss. 1979); *City of Vicksburg v. Cooper*, 909 So.2d 126, 129 (Miss. App. 2005).

In addition, Pepper's assertion that an EEOC complaint alluded to in the testimony may now form the basis to assert political motivation on the part of the City is misplaced. The record is void of any facts or evidence concerning the alleged EEOC

complaint. The Commission ruled the alleged EEOC complaint was irrelevant; Pepper chose not to neither lay a foundation for such evidence, nor make any offer of proof upon which this Court may now make a determination of its relevance.

Pepper, likewise, asserts the defense of “double jeopardy” for the first time on appeal before this Court. Again, issues not asserted before the Commission are waived, *supra*.² See *Little v. City of Jackson*, 375 So. 2d 1031, 1033 (Miss. 1979); *City of Vicksburg v. Cooper*, 909 So.2d 126, 129 (Miss. App. 2005). Pepper made no assertion that receiving progressive discipline constituted “double jeopardy” during the hearing before the Commission. Had she done so, the parties would have been able to solicit evidence on the issue, and the Commission would have been able rule or make a factual finding on the matter. Instead, Pepper chose to ride one “dead horse” by denying she violated the established procedures. The Commission correctly found that the length of the suspension was predicated on the City’s progressive discipline policies due to prior discipline Pepper had received.

b. The disciplinary guidelines of the “Cash Register Operational Procedure” did not apply to Pepper’s misconduct.

Curiously, while Pepper now argues “progressive discipline” constitutes “double jeopardy”, she attempts to limit her suspension by using that very principle. Pepper, again in error, attempts to couch her transgression as coming under the “Cash Register Operational Procedure,” guidelines used for *progressively* disciplining cashiers whose registers are not balanced prior to leaving their shift. These guidelines had no

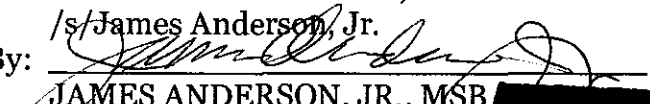
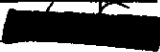
² Out of an abundance of precaution, the Appellee would point out that during her appeal to the circuit court, Pepper neither asserted (1) that the Commission acted beyond the scope, or power granted to it, nor (2) that the Commission’s affirmation of the suspension somehow violates one’s constitutional rights. Any new assertions regarding these issues would be procedurally barred.

application to the procedure for depositing funds in the drop box. Pepper was not found to have an "unbalanced register" at the closing of her shift. The Commission found that Pepper failed to follow the correct procedure for *depositing funds*, a transgression which included her complicity in her co-worker's, Williams-Jamison's, falsification of the verification form.

CONCLUSION

The Commission's decision was based on substantial evidence supporting its finding that Pepper knowingly failed to follow the proper procedure in depositing the moneys collected. Further, the Commission was correct in finding that the disciplinary action was neither arbitrary, nor capricious, but rather made in "good faith" for cause. The Circuit Court came to the same conclusion that this Court must surely come to now; the Commission' decision is based upon substantial evidence and must be upheld.

Respectfully submitted this the 20th day of October, 2011.

THE CITY OF JACKSON, MISSISSIPPI
/s/ James Anderson, Jr.
By: 
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CERTIFICATE OF SERVICE

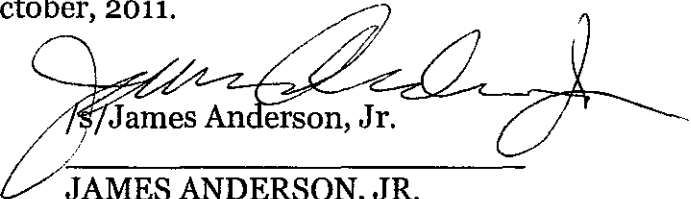
The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing ***Appellee's Brief*** to the following:

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Honorable Swan Yerger
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So certified, this the 20th of October, 2011.


/s/ James Anderson, Jr.

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