COURT OF APPEAL
STATE OF MISSISSIPPI

HELEN PEPPER

VS NO. 2011-CC-00329

CITY OF JACKSON

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CERTIFICATE OF INTERESTED PARTIES

The undersigned Counsel of Record certifies that the following persons have an interest and outcome of this case. These representations are made in order for the Justices of the Supreme Court and Judges of the Court of Appeals to evaluate possible disqualification or recusal.

1. Helen Pepper, Plaintiffs- Appellants

2. James Anderson, Jr.
Office of the City Attorney
Post Office Box 2779
Jackson, MS 39201-2779

3. Honorable Swan Yerger
Circuit Clerk of Hinds County
P O Box 686
Jackson, MS 39205

4. Honorable Kathy Gillis
Supreme Court Clerk
P O Box 249
Jackson, MS 39205

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III. PROCEDURAL HISTORY OF THE CASE

The Appellant became employed with the City of Jackson on December 1, 1999 as a deputy Municipal Court Clerk. Helen Pepper worked in the Department of Administration where her responsibilities were to process affidavits, assist with the public, receive money, give receipts for money received and assist officers. (T. pg. 64, pgs. 9-11)

The Appellant was suspended on November 1, 2004 for sixty (60) days. On November 4, 2004, accounting personnel retrieved a bag dropped by the Appellant according to Municipal court procedures and found that approximately $1,531.00 was not accounted for. Of the $1,531.00, there were 12 one hundred ($100) dollar bills missing along with a check and a money order.

Disciplinary action was taken against Helen Pepper pursuant to a violation of Rule 12, Section 2, 1.1E and Personnel Rule 11.2.6. The charge was that incompetency or inefficiency in the performance of duties of the position to which he or she is appointed and/or inefficiency, incompetency, carelessness or negligence in performance of duties.

A hearing was held on December 14, 2006 before the City of Jackson Civil Service Commission. The Appellant represented herself pro se. On April 12th of 2007, the Civil Service Commission found that the testimony and evidence ***conclusively*** established that Helen Pepper as Deputy Municipal Court Clerk violated Civil Service and Personnel Rules and that the discipline imposed by the City of Jackson was not for political or religious reason and was for cause shown.

The Appellant filed a timely appeal to the Circuit Court of the First Judicial District of Hinds County, Mississippi. The Decision of the Civil Service was confirmed and The Appellant perfected this appeal to the Mississippi State Supreme Court.

IV. STANDARD OF REVIEW

Section 21-31-23 of Miss. Code .Ann. specifically sets for the procedure for removal, suspension, demotion and discharge of a municipality employee. The statute provides that the decision of the

municipality's civil service commission is conclusive and binding unless there is a subsequent appeal to the circuit court. See Miss. Code Ann. 31-31-23 (Rev. 1990). Moreover the Statute provides that the circuit court is restricted to the determination of whether judgment or order of removal, [or] discharge, ... made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken upon such ground or grounds. Id.

The Supreme Court has recognized that "[i]nterwined with this question is whether or not there was substantial evidence before the Civil Service Commission to support its order and whether it is arbitrary, unreasonable , confiscatory and capricious. *City of Jackson v Froshour*, 530 So. 2d 1348, 1355.

ARGUMENTS

I. **Whether there was substantial evidence before the Civil Service Commission to support it order?**
II. **Whether there is evidence that the Civil Service Commission acted in a manner that was arbitrary, unreasonable, confiscatory, or capricious.**
III. **Whether the suspension of appellant's employment for sixty (60) days was pursuant to guidelines established by the City of Jackson in regards to the type of misconduct alleged?**

ARGUMENTS

I. **Whether there was substantial evidence before the Civil Service Commission and the Hinds County Circuit Court to support it order?**

Disciplinary action was taken against the Appellant pursuant to a violation of Rule 12, Section 2, 1.1E and Personnel Rule 11.2.6. The charge was that incompetency or inefficiency in the performance of duties of the position to which he or she is appointed and/or inefficiency, incompetency, carelessness or negligence in performance of duties. When the word "incompetency" is employed to describe a professional duty or obligation, it means that the person has demonstrated a lack of ability to perform professional functions. The word inefficient is defined as not producing the intended results or wasteful of time, energy or material. Carelessness describes a state of mind that is indifferent or unconcerned.

A review of the record will show that there is no substantial evidence to support a finding that the Appellant acted in a manner that was incompetent, inefficient or careless in the performance of duties of the position to which he or she was appointed to.

Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, *Johnson v. Ferguson*, 435 So.2d 1191 (Miss.1983) and that it does not rise to the level of "a preponderance of the evidence." *Babcock & Wilcox Co. v. McClain*, 149 So.2d 523 (Miss.1963). It may be said that it "means such relevant evidence as reasonable minds 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." *State Oil & Gas Bd. v. Mississippi Min. & Roy. Own. Ass'n*, 258 So.2d 767 (Miss. 1971); *United States v. Harper*, 450 F.2d 1032 (5th Cir.1971); *Delta CMI v. Speck*, 586 So.2d 768, 773 (Miss.1991).

Reviewing the evidence, we find that based on the testimony of witnesses the following events occurred; the Appellant arrived at her job with the City of Jackson and performed her work responsibilities without incident. These responsibilities included processing affidavits, receiving money from the public, giving receipts for money take from the public and assisting officers. Upon her return to work the next day, she was confronted by accounting and told that her deposit was short by $1200.00. The Appellant disputed that the funds could be missing and also offered that she had placed a check and a money order in the middle of the hundred dollar bills that constituted the $1200 and inquired as to whether they too had been taken. The accounting department then determined that the two (2) checks had also been taken from the bag. The incident was reported to the supervisor, Ms. Bank and investigation ensued. Upon completion of the investigation, there was an original determination that the Appellant would be fired but after reconsideration the Appellant was suspended for sixty (60) days.

The Circuit Court in its ruling stated that the Commission determined that the correct procedure of depositing money consisted of filling out a drop sheet, getting another clerk to witness the counting of the money, and getting written verification from the other clerk. The Circuit Court went on to state that the proper procedure after these steps require both parties to walk to the drop area and deposit the money. It goes further to state that the record supports the Commission's finding that the Appellant failed to follow those procedures. The Circuit Court recognized the fact that Chiquita Williams-Jemision, a co-employee of the Appellant, admitted to falsifying the verification form and failed to accompany the Appellant to the drop zone and required.

The Circuit Court does not state at any time that the Appellant did not follow procedure but that Chiquita Williams-Jemison did not follow established procedures for depositing money. To determine that the Appellant was incompetent requires action or non-action by the Appellant. The Commission in its decision made the Appellant responsible for the action or non-action of another person and this is improper. Testimony provides that Chiquita Williams-Jemison was not considered incompetent or careless and was only reprimanded for her non-action and falsifying records. (T. pg 68, 24 -26).

Testimony established that the department had implemented "safeguards" against employees removing funds from the Municipal Clerk's office but on this day both failed. The first was surveillance cameras. The tape for the camera had not been replaced during the morning and therefore it was determined that the incident was not taped. The second safeguard was a procedural safeguard in which another clerk was to review the other clerk's deposit drop to ensure that the money was placed in the bag and dropped. This too failed because the only clerk available was busy with customers and was unable to ensure that the Appellant's drop was completed. (T. 106, pgs. 20-29).

The department's failure to perform due diligence in ensuring that the camera was functional and that procedures were followed by having sufficient staff to ensure that when one clerk was unable to supervise the drop of the money bag of another were departmental failures. These departmental failures placed a heavy burden upon the Appellant. The presence of the camera was not only a safeguard for the city but for the employee as well. The camera would have shown that the Appellant did indeed follow procedure.

The Appellant was charged with being "careless" with City funds. The problem with this assertion is that there is no substantial evidence that the funds were not in the bag when it was dropped. There is no substantial evidence that the funds were dropped onto the floor and left by the Appellant. The City states that is was not accusing the Appellant of embezzlement[1] but if there is an assertion that the funds were not in the bag – one would think what else would it be. Either the Appellant did not place the funds in the bag or she did place the funds in the bag.

Ms. Bank during testimony affirmed this when she testified about the possibilities of what could have occurred in regards to the lost money. Her statement was "Anything is possible".[2] This is conclusive that there was not substantial evidence to tie the loss of the money to the Appelant.

There was yet another stumbling block for the City. The bags were opened by the accounting clerks. This area was not covered by surveillance tapes. Therefore, there is no clear evidence that the drop bag could not have been disturbed prior to being taken from the drop location by the accounting staff. There was a discrepancy in how many staff members had access to the drop location and how many of them had keys. [3]

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1 See T. pg 5, lns. 18 - 26

2 See T. pg 103

3 Testimony by accounting personnel was that there were five (5) keys to the drop box area. Ms. Banks testified that there were only three keys. (See T. pg. 25, ln 29 and T. pg 26, ln. 1-2 and T. pg 54, ln 4-13 and T. pg 70, ln 1 - 26)

The Court in *Ladnier v City of Biloxi*, 749 So. 2d 139, 158 (Miss. App. 1999) held that "where evidence is conflicting, the Civil Service Commission, acting as a jury, is responsible for determining what the facts in a given case are. (See *Hill v. City of Hattiesburg*, 223 Miss. 163, 166, 77 So. 2d 827, 828 (1955). This, of course, meant 'to a moral certainty' or 'beyond a reasonable doubt.' *Covington County v. Fite*, 120 Miss. 421, 82 So. 308, 309.

The testimony shows that the procedure for the close out of monetary transactions was described by the supervisor as "Once the clerk closes the register out and does her balance sheet ... she counts everything ... She posts what she has .... She puts it in a bag ...The clerk has to sign it ... as someone else signs and watch her drop ..... it in the safe. (T. p.78 - 79, lns 24 -29 and lns. 1-3).

On November 1, 2004, the Appellant performed the steps as described by Ms. Banks in commission of her responsibilities as a deputy municipal clerk without exception. However, the only other clerk who was present, Chiquita Williams, did not stop to watch the drop because she was busy at another window. (T. p 106 and 107, lns 20-29 and ln 1). Ms. Williams acknowledges that although she did not watch the Appellant count the money, she did sign the sheet, and she saw the Appellant walk to the back and drop her money. Id.

There is no substantial evidence to support the charge that the Appellant was unconcerned or indifferent to her responsibilities. The Appellant performed the steps as described by the supervisor. The Appellant could not be held responsible for the fact that Chiquita Williams did not walk with her to the back to verify that the drop was made. The record shows that Chiquita Williams acknowledges that "we all used to just sign the sheets. It wasn't just me."[4] Chiquita Williams went so far as to say

4 See T. pg 107, lns. 12 – 23).

"I guess we had gotten to the point to where we said the cameras were up, if you decide you were going to take money, you were going to take it."[5]

It would appear that that Appellant had no control over the actions or inaction of Chiquita Williams. She, however, performed her duty. There is no evidence that would indicate that she did not perform her duty. The Appellant and the other clerks were aware of the cameras in the area and there are no statements that the Appellant did not do what she was expected to do. There is an unreasonable inference that because the money was not available to accounting on the next morning that somehow the Appellant was the culprit. This is a great leap.

There were other discrepancies in the testimony of the City employees that would show that there was no evidence to support the contention that the Appellant was careless. Daphne Watson stated that she and Patricia Ervin were responsible for retrieving the bags and verifying the funds that were in the bag. Ms. Watson also stated that everyone in accounting has a key to the box. There was also testimony that accounting was not a totally secure area - that there were visitors from time to time. (T. p28, ln 3 – 18.). Ms. Watson acknowledged to the panel that she would not say that there is no way possible for anyone else to get to the bag in the drop box once it is dropped in the box. (T. p 34, lns. 1 – 11.)

Ms. Everett followed with testimony that there was her, Ms. Betty Brown, Ms. Watson and Ms. Ervin in the accounting office at the time the money was being counted. Ms. Everett stated that there were five people who had access to the drop box: Jeanette Banks, Charlotte Everett, Brenda Coleman, Betty Brown and Daphne Watson.

The testimony by Ms. Everett and Ms. Watson was not substantial enough that a reasonable mind could accept the testimony as being adequate enough to support a conclusion that the money

5 See T. pg. 106, lns 20- 29

disappears as a result of the Appellants' carelessness. A reasonable mind would conclude that there were deficiencies in the procedure for handling money in the municipal court area that could not be totally attributed to the Appellant.

The facts of this case do not support the burden of substantial evidence. There is no relevant substantial evidence that a reasonable mind might accept as adequate to support the conclusion that the Appellant was careless.

There were tremendous flaws in the operational procedure of the city and therefore these inferences should not be allowed to determine the enhanced penalty of a sixty (60) day suspension of the Appellant. The City had resources available to protect the employee and the City and it decided that it was inconvenient for them not to be utilized. The City of Jackson provided no substantial evidence that the Appellant did not perform her job responsibilities or that she was in anyway "careless" in her handling of the funds or that she had any control of the funds after they were dropped and reviewed by accounting. The record is clear that the investigation found no evidence that the Appellant had embezzled the funds – they just mysteriously disappeared.

Lastly, the cash register disciplinary procedure provided for a four (4) day suspension of the Appellant not the sixty (60) day suspension that was arbitrarily determined. The Civil Service commission erroneously found that there was substantial and credible evidence to support the sixty (60) day termination of Helen Pepper.

II. Whether there is evidence that the Civil Service Commission acted in a manner that was arbitrary, unreasonable, confiscatory, or capricious.

A. Arbitrary and Capricious

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,—absolute in power, tyrannical, despotic, non-rational,—implying either a lack of

understanding of or a disregard for the fundamental nature of things. "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is 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.... *Mississippi State Dep't. of Health v. Southwest Mississippi Reg'l Med. Ctr.*, 580 So.2d 1238, 1240 (Miss.1991) (quoting *In re Hous. Auth. of City of Salisbury*, 23,5 N.C. 463, 70 S.E.2d 500, 503 (1952)).

The determination by the City of Jackson, the Civil Service Commission and the Hinds County Circuit Court that a sixty (60) day suspension of the Appellant was arbitrary and capricious in that fact that the suspension was not grounded in reason or judgment but was dependent on will alone. The decision implied a lack of understanding and a fundamental disregard for the nature of things.

A review of the facts will show that the Appellant performed her job responsibilities as proscribed. Somehow, funds became missing from a drop bag that she dropped the day before. Testimony is unclear as to who actually had access to the drop bag area after the Appellant dropped it. The Appellant's shift ended at 3:00 p.m. providing plenty of time and opportunity for another person to access the drop box. It was stated that there had never been any disciplinary actions associated with the loss of money by accounting personnel but it was also established that the Appellant had never had shortages of this magnitude during her tenure with the Municipal Clerk's office.

There was no substantial evidence provide that the Appellant was responsible for the loss of the funds and therefore the suspension was capricious because it was done without reason and total disregard for the facts and circumstances associated with the actions of the Appellant.

B. Unreasonable

Unreasonable is defined as lacking reason or judgment. The Civil Service Commission and the Circuit court were unreasonable in its determination to uphold the sixty (60) day suspension of the

Appellant. Neither stated why a sixty (60) day suspension was appropriate for an offense that typically meted a four (4) day suspension according the City Policy and Procedures.

The punishment was unreasonable as it was obvious from the Record that the Appellant was not suspended for what Ms. Banks described as "the whole conduct of the employee, which there had been several incidents with the employee of continued bad conduct, several instances. So it was not necessarily just on the shortage." This is troublesome because this shows that the Appellant was being constantly punished for behavior that she had already been punished for. This is double jeopardy and the suspension of the Appellant cannot be upheld under these circumstances.

The Court in *Ladnier v City of Biloxi*, 749 So. 2d 139, 153 (Miss. App 1999) stated that "We agree with the appellant that a civil service employee cannot lawfully be disciplined twice for the same conduct. The Court in *State Dep't of Trans. v. State Career Serv. Comm'n*, 366 So.2d 473 (Fla. Dist. Ct.App.1979) held that "disciplinary action administered to a public employee may not be increased at a later date nor may an agency discipline an employee twice for the same offense."

The sixty (60) day suspension was unreasonable because the Appellant had no prior offenses and therefore should have been subjected to the penalty imposed by the city for matters of this nature. If the Circuit Court's statement is true, then the Appellant was penalized twice for infractions that she would have already been punished for which is against Civil Service Commission policies.

III. Whether the suspension of appellant's employment for sixty (60) days was in excess of the disciplinary action pursuant to guidelines established by the City of Jackson in regards to the type of misconduct alleged?

The Cash Register Operational Procedure for the City of Jackson provides disciplinary procedure for unresolved cash differences provided for four (4) days without pay for the 1st occurrence; thirty (30) days leave w/o pay for the 2nd occurrence and termination on the 3rd occurrence. The Appellant did not have

any other unresolved cash differences and therefore the maximum disciplinary penalty for this instance of unresolved cash difference should have resulted in a four (4) day suspension without pay.

The Appellant had not been discipline for any other shortages.[6] She had been an employee for approximately five (5) years before this incident occurred. There had been no other unresolved cash differences and therefore the penalty was substantially more than provided for by the City's disciplinary policy.

IV. Whether the Civil Service Commission and the Circuit Court erred when it did not find that the sixty (60) day suspension of the Appellant was politically motivated?

Ms. Banks and the Appellant had a history of sorts. The Appellant had gone so far as to lodge an EEOC complaint against Ms. Banks. It is beyond peradventure that this fact did not provide the motivation for Ms. Banks to suspend the Appellant for sixty (60) day – in extreme digression from the typical four (4) days for such an offense. Ms. Banks acknowledged that the basis for the suspension was progressive discipline due to an excessive amount of oral warnings, written reprimands and continual conduct. The Civil Service Commission stated that The Appellant was not being held "accountable for any other date other than that one date". The Circuit Court upheld the sixty (60) day suspension stating that the length of the progressive discipline was "due to an excessive amount of oral warnings, written reprimands, and continual conduct." T pg. 73.

The evidence does not show that the suspension was made in good faith for cause specifically because the penalty for the purported behavior was a four (4) day suspension not a sixty (60) day suspension. The fact that an EEOC complaint [7] had been filed bears witness to the fact that the suspension was not made in good faith for cause. The fact that Ms. Banks testified that Ms. Banks

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6 T. pg. 75

7 When the issue of the EEOC complaint was addressed, Commissioner Hilburn stated "The EEOC complaint has nothing to do with what happened on November 1st. Let's move on." (See T. pg. 100, ln 5- 7).

instances."[9] This declaration should have put the Civil service commission on notice that Ms. Bank's motivation was indeed to punish the Appellant for "any past conduct that had occurred." The Civil Service Commission failed to inquire as to what these incidents of bad conduct by the employee were. By failing to make this inquiry, the Civil Service Commission allowed Ms. Bank to apply "political" rationale to the suspension of The Appellant.

Departmental policies and procedures that were put in place to prevent the situation from occurred was not followed and/or enforced. There were surveillance cameras that put in place to ensure that the Department and the employee were protected. In addition, evidence was provided that the procedure of another clerk watching drops by other clerks was not followed and the sheet were not being signed or reviewed by management. The Appellant was not in a supervisory role and she had no control over the action or inaction of other employees. [10] The responsibility to ensure that the Department and the employee were protected from the circumstances that occurred falls flatly at the feet of Ms. Banks.

During the hearing, the City of Jackson admitted that it had no direct evidence indicating that the Appellant embezzled the money or that she retained the missing funds. (T. pg 5, ln 18 -25). This City states that the disciplinary charge was based on the fact that The Appellant admitted to collecting the sum of $2,858.06; that she made a drop at the end of her shift; that when accounting retrieved the bag the next morning, they were only able to verify $1,327.06; that only accounting had access to the drop box; and that Helen Pepper's bag was the only bag with missing funds.

The City of Jackson further stated that the conclusion that the Appellant was careless with the funds is not unreasonable when considering that funds were only missing from the Appellant's bag and that accounting personnel had been employed with the City of Jackson and that there had never been any

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9 This was repeated several times during the testimony of Ms. Banks.

10 Ms. Banks stated in her testimony that "I think Chiquita said that she was real busy. I think she was the only one at the front, and she had customers. That would have also ensured that – if she had watched you count and drop, that would have been a means because the camera was not there." (See. T. pg 89 – 90, lns. 28-29 and lns. 1-4).

incidents of misconduct as it relates to the accounting personnel and their taking sums of money of this magnitude or that sum of money. This was not the burden of the City. The City's burden was to prove by substantial evidence that the actions of the Appellant amount to carelessness and incompetency.

The Court in *City of Meridian v Davidson*, 211 Miss. 683, 53 So. 2d 48, 57 (Miss., 1951) quoting *Nelson v State ex rel. Quigg*, 156 Fla. 189, 23 So. 2d 136 in where the Court in reviewing the actions of the City Commission of Miami said: " We have held, and it seems to be an almost universal rule, that the findings of fact made by an administrative board, bureau, or commission in compliance with the law, will not be disturbed on appeal if such findings are sustained by substantial evidence."

The Appellant had worked for the city for approximately five years and did not have any other problems associated with missing funds. [11] The City during Ms. Banks's testimony stated that it was conceivable that the funds may not have been placed in the drop bag or they may have been lost and for that reason the Appellant was only charged with careless handling of funds. (T.p 7, lns 1 -8.)

In order to find The Appellant to be careless, there would have to be a substantial showing of actions attributable to the Appellant. Per all accounts, The Appellant followed departmental procedure. Ms. Williams did not. Coupled with the fact that the scheduled penalty for unresolved issues associated with money for a 1st instance was a four (4) day suspension, it was beyond peradventure that the penalty of a sixty (60) day suspension was based on political reasons and not the substantial evidence required by law.

The Commission in *City of Jackson v Martin*, 633 So. 2d 253, 254 (Aug, 1993) concluded that Martin had been negligent at times in the performance of her duties but the City of Jackson had not produced sufficient evidence to bear its burden of establishing that Martin had been terminated for "just cause". The case of bar is

11 See T. pg 75, lns. 5-25.

I. CONCLUSION AND PRAYER

Based on the testimony and the facts of the case at bar, there does not exist credible evidence to substantiate the suspension of The Appellant for ninety (60) days or that of the Civil Service Commission in upholding the suspension of The Appellant.

The record is clear that there is no substantial evidence to support the suspension and that that the actions of the Civil Service Commission should be deemed arbitrary and capricious and unreasonable.

The Appellant should be given back pay with interest, credit for the time associated with benefits and any and all other relief that she is entitled to for the time that she was suspended by the City of Jackson.

CERTIFICATE OF SERVICE

I, Earnestine Alexander, certify that I have this day delivered through postage paid mail or hand-delivered, a copy of the foregoing document to the parties below:

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Honorable Kathy Gillis
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This the 19th day of September, 2011.

Earnestine Alexander
Earnestine Alexander