

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00708-COA

CHARLES PATTERSON

APPELLANT

v.

**CITY OF GREENVILLE, MISSISSIPPI,
COUNCILMAN KENNETH L. GINES,
COUNCILMAN CAROLYN WEATHERS,
COUNCILMAN ANN HOLLOWELL,
COUNCILMAN BETTY WATKINS AND
COUNCILMAN ERRICK D. SIMMONS**

APPELLEES

DATE OF JUDGMENT: 04/18/2011
TRIAL JUDGE: HON. W. ASHLEY HINES
COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: EDWARD BLACKMON
ATTORNEY FOR APPELLEES: ANDREW N. ALEXANDER III
NATURE OF THE CASE: CIVIL - OTHER
TRIAL COURT DISPOSITION: DECISION OF THE CITY COUNCIL TO
FIRE THE POLICE CHIEF AFFIRMED BY
THE TRIAL COURT
DISPOSITION: AFFIRMED: 02/19/2013
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE LEE, C.J., BARNES AND FAIR, JJ.

FAIR, J., FOR THE COURT:

¶1. The Washington County Circuit Court affirmed the discharge of Charles Patterson, Greenville's former chief of police. Chief Patterson now appeals asserting that the city council's decision violated his constitutional or statutory rights, was arbitrary or capricious, or was beyond the agency's power. Finding that the city council's decision to discharge Chief Patterson was within its discretion, we affirm.

FACTS

¶2. Greenville was to host a fair in April 2010, and it was rumored that a fight would occur on the fairgrounds. Chief Patterson ordered several off-duty officers, who were working as private security at the fair, to take their police vehicles and park them somewhere visible. Mayor Heather McTeer was absent, and Vice Mayor Kenneth Gines was acting in her stead. Vice Mayor Gines asked Chief Patterson to rescind his order and advised him that it was a violation of law to use city vehicles for private security work. Chief Patterson refused to do so.

¶3. After meeting with the city council, Vice Mayor Gines again asked Chief Patterson to countermand his prior order. When Chief Patterson refused, he was suspended for three days. Following the meeting, Chief Patterson drove out to the fairgrounds in his police vehicle and instructed the off-duty officers there to move their vehicles to a nearby police substation. Lieutenant Ernest Sanders drove to the fair in his private vehicle, and Chief Patterson ordered him to go get his police vehicle.

¶4. In December, the city council held a hearing where four officers testified. Chief Patterson denied the allegations against him, but the city council unanimously voted to discharge him for malfeasance and the willful violation of a direct order. Chief Patterson appealed his dismissal to the Washington County Circuit Court, which affirmed the council's decision.

STANDARD OF REVIEW

¶5. “The decision of an administrative agency is not to be disturbed unless the agency

order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party.” *Bd. of Law Enforcement Officers Standards & Training v. Butler*, 672 So. 2d 1196, 1199 (Miss. 1996).

¶6. Substantial evidence has been defined as “evidence that a reasonable person would accept as adequate to support a conclusion.” *Miss. Transp. Comm’n v. Anson*, 879 So. 2d 958, 963 (¶14) (Miss. 2004). “It is something more than a mere scintilla or suspicion.” *Id.* (quoting *Marquez*, 774 So. 2d at 425). An act is considered arbitrary “when it is not done according to reason or judgment, but depending on the will alone.” *Burks v. Amite Cnty. Sch. Dist.*, 708 So. 2d 1366, 1370 (¶14) (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.*

DISCUSSION

¶7. Under the Greenville Code of Ordinances, section 2-87 provides: “The office of chief of police shall be filled by appointment by the city council; and the chief so appointed shall serve for a term of two (2) years or until removed by the city council in its discretion.”

¶8. The Mississippi Supreme Court has held that where an “office is held at the pleasure of the appointment power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing.” *Ware v. State*, 72 So. 237, 238 (Miss. 1916). In *Ex parte Castle*, 248 Miss. 159, 160, 159 So. 2d 81, 82-83 (1963), our supreme court considered the discharge of a deputy sheriff. Under the

Mississippi Code of 1942, section 4235 stated that the sheriff could discharge deputies “at pleasure.” *Castle*, 248 Miss. at 163-64, 159 So. 2d at 83. The supreme court found that no formal charges or hearings were required where a public officer holds his office only at the pleasure of superiors. *Id.* at 164, 159 So. 2d at 83.

¶9. But under Greenville Code section 2-3, the chief of police is an appointed officer, and section 2-6 provides a procedure for removing such officers:

(a) *Grounds.* Any city officer may be removed from office by the council for nonfeasance or malfeasance of duty; for willful violations of the ordinances of this city or for drunkenness in office.

(b) *Hearing.* Charges against any such officer shall be presented in writing to the council in open session; the officer being so charged shall be furnished a copy of such charges. The council shall fix a time for the hearing of such charges not less than five (5) days thereafter

¶10. Here, the record shows that Chief Patterson was terminated for malfeasance and provided with notice and a hearing. There is evidence that Chief Patterson allowed public property to be used for private employment in violation of section 21-17-5(2)(g) of the Mississippi Code Annotated (Supp. 2012) and the instructions of the city council and vice mayor. He was expressly advised that an attorney general’s opinion had previously been issued to the city advising that police vehicles could not be used by off-duty police officers moonlighting as private security officers. Miss. Att’y Gen. Op., 93-0929, 1994 WL 117370, *Blass* (Mar. 30, 1994). On November 16, 2010, Chief Patterson received notice of the hearing from the city council. At his request, the hearing was postponed until December 6, 2010. At the hearing, the city council heard testimony from three witnesses and Chief

Patterson himself before unanimously voting to terminate Chief Patterson.

¶11. Under section 2-87, Chief Patterson could have been removed from his position as chief of police at the discretion of the city council at any time, with or without cause. Under section 2-6, the council had to follow a specific procedure to remove Chief Patterson. The council followed the more stringent requirements of section 2-6. Considering the evidence presented, we find that the city council was within its discretion to discharge Chief Patterson. Its decision was not arbitrary or capricious, and was supported by substantial evidence.

¶12. THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J., AND JAMES, J.

CARLTON, J., DISSENTING:

¶13. I respectfully dissent from the majority's opinion.

¶14. I would reverse and remand this matter to the city council.¹ I submit that the city council, and hence the circuit court in affirming the city council's decision, acted arbitrarily and capriciously in terminating the police chief without first determining factually whether the chief's use of police vehicles constituted use for an official public law enforcement purpose and whether Vice Mayor Gines's direct order constituted a lawful order within his

¹ See Miss Att'y Gen. Op., 98-0102, 1998 WL 156073, *Walker* (Mar. 6, 1998).

authority to issue.² Vice Mayor Gines lacked authority to direct this order to the police chief because compliance with the order required the police chief to violate the sworn official duties vested by statute in the police chief to protect the public and prevent crime within the city's jurisdiction. *See* Miss. Code Ann. § 21-21-1 (Rev. 2007); Miss. Code Ann. § 45-6-3(c) (Rev. 2011). No malfeasance can be predicated upon the failure to comply with such an unlawful order that is void due to its contravention of specific statutory duties vested in the police chief as chief law enforcement officer of the municipality. *See* Miss. Att'y Gen. Op., 2002-0749, 2003 WL 356383, *Lee* (Jan. 3, 2003) (mayor lacks authority to become involved in day-to-day operation of the police department or to make law enforcement decisions).³ The record reflects that Vice Mayor Gines ordered Chief Patterson to refrain from fulfilling affirmative official "sworn" law enforcement duties of his office, as a police chief and as vested by statute, to prevent crime and to protect the community. *See* Miss. Code Ann. § 21-21-1; Miss. Code Ann. § 45-6-3(c). By statute, the chief of police is the chief law enforcement officer in the city and supervises the law enforcement duties of the police officers. *See* Miss. Code Ann. § 21-21-1; Miss. Code Ann. § 21-21-3 (Rev. 2007). Clearly,

² *See* Miss. Code Ann. § 45-6-3(c) (Rev. 2011) (defining sworn law enforcement officer); Miss. Code Ann. § 21-21-1 (Rev. 2007) (duties of the chief of police); Miss. Code Ann. § 21-17-5 (Supp. 2012) (governing authorities of municipality).

³ *See generally* *Petition of Aultman*, 205 Miss. 397, 400-02, 38 So. 2d 901, 901-02 (1949) (police officers bear the duty to arrest persons who commit crimes in a municipality); *see also* Miss. Att'y Gen. Op., 2002-0052, 2002 WL 1011178, *Nickles* (Mar. 8, 2002) (board of aldermen as legislative body possess responsibility to hire sufficient police and to appropriate funds for support of the police department but may not micromanage the police department without running afoul of the doctrine of separation of powers).

a municipality is statutorily obligated to provide police protection to all of its citizens pursuant to Mississippi Code Annotated section 21-21-3.⁴

¶15. While a mayor, or a vice mayor⁵ as in the case at bar, possesses superintending control over police and the affairs of a municipality to provide oversight, to observe, and to report police activities to the board, the mayor lacks authority to supervise law enforcement by the police chief or to supervise police officers on a daily basis. Neither the mayor, nor the vice mayor, are sworn law enforcement officers. *See* Miss. Code Ann. § 21-5-7 (Rev. 2007); *see also* Miss. Att’y Gen. Op., 2002-0052, 2002 WL 1011178, *Nickles* (Mar. 8, 2002); Miss. Att’y Gen. Op., 96-0331, 1996 WL 369495, *Scott* (June 7, 1996).⁶ I respectfully submit that the vice mayor’s direct order, underlying the termination action, constituted a void and unlawful order exceeding the scope of Vice Mayor Gines’s authority. In addition to exceeding his authority, the order contradicts the statutory authority vested in the chief of police as the chief law enforcement officer in the municipality. *See* Miss. Att’y Gen. Op., 2002-0052, 2002 WL 1011178, *Nickles* (Mar. 8, 2002) (chief of police supervises police officers, and while the city employs, regulates, and supports a sufficient police force, the municipal authorities do not get to micromanage the police department’s law enforcement

⁴ *See also* Miss. Att’y Gen. Op., 2011-00341, 2011 WL 5006005, *Warren* (Sept. 2, 2011) (municipality duty to provide police protection includes duty to maintain public presence in municipal court room, but authority to ensure decorum and order in municipality’s courtroom belongs to the municipal judge).

⁵ *See* Miss. Code Ann. § 21-5-7 (Rev. 2007) (duties of mayor). Neither the mayor, nor the vice mayor in the mayor’s stead, are sworn law enforcement officers.

⁶ *See also* Miss. Code Ann. § 21-31-13 (Rev. 2007) (regarding civil service).

duties).⁷ *See also Marion Cnty. v. Taylor*, 55 Miss. 184, 184 (1877) (supervisor's order was a nullity since order exceeded statutory authority).

¶16. Stated otherwise, no malfeasance of office may be predicated upon the police chief's refusal or failure to comply with the unlawful and invalid order given herein by the vice mayor. The order at issue directed the chief of police to refrain from fulfilling the official sworn duties of his position as chief law enforcement officer. *See* Miss. Code Ann. § 21-21-1; Miss. Code Ann. § 45-6-3(c). The record reflects that as time for the Greenville fair approached in April 2010, rumors circled that a fight would occur on the fairgrounds. *See* Miss. Code Ann. § 45-6-3(c) (providing that primary duties of a sworn law enforcement officer include prevention and detection of crime and apprehension of criminals). The Greenville mall was hosting the fair event in its parking lot. After learning of the rumored fight to occur at the Greenville fair, Chief Patterson directed off-duty police officers to park their police vehicles at a nearby police substation located within the city limits. Such actions reflect no malfeasance of office or inappropriate use of public property for private purposes. The vehicles serve as an asset and instrument to aid law enforcement to fulfill their sworn law enforcement duties. In this case, the use of the police vehicles parked near the fairgrounds, as a show of force, reflects both an effort to deter the rumored potential fight at the fair and also an effort to pre-position these assets for ready availability in the event that the rumored fight actually erupted at the fair. *See* Miss. Code Ann. § 45-6-3(c) (sworn law

⁷ *See also* Joseph T. Bockrath, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection*, 46 A.L.R.3d 1084, 1086-1105 (1972).

enforcement duties include crime prevention); *see also Edwards House Co. v. City of Jackson*, 138 Miss. 644, 644, 103 So. 428, 429 (1925) (authority of municipality is limited by authority granted to it by the Legislature).

¶17. Vice Mayor Gines's order and unfounded assertion of malfeasance conveys an inherent assertion that the fair located in the mall parking lot was not entitled to law enforcement protection from crime by the City of Greenville or its police force because off-duty officers worked there as private security. The outside private employment of these police officers fails to relieve the chief of police of his sworn statutory official duties as chief law enforcement officer of the municipality. Outside private employment of off-duty police officers fails to impact the duty of the municipality and its police chief to protect and prevent crime previously rumored to occur at this public event within the municipal jurisdiction.⁸ *See* Miss. Code Ann. § 21-21-1; Miss. Code Ann. § 21-21-3; Miss. Code Ann. § 45-6-3; *see generally* Miss. Att'y Gen. Op., 1992 WL 614119, *Ross* (Aug. 26, 1992) (providing that since the Legislature has not delegated exclusive power specifically over State fairgrounds to a particular entity, nor has it taken away such power from the City of Jackson, the city retains jurisdiction over violations of state statutes at the fairgrounds).⁹

⁸ *Compare* Miss. Code Ann. § 25-3-25(6)(o) (Rev. 2010) (acknowledging that the Sheriff of Hinds County regularly provides security for the State fairgrounds and museums in Jackson) *with* Miss. Code Ann. § 19-3-40 (Rev. 2012) (providing that county supervisors cannot issue orders inconsistent with a specific provision of general law).

⁹ *See also Watts v. City of Jackson*, 664 F. Supp. 2d 680, 685-89 (S.D. Miss. 2009) (no adverse employment action may be used to retaliate for First Amendment claim).

¶18. With respect to the alleged use of the vehicles for private employment, the record indicates that the police vehicles were being parked at a previously established police substation. No dispute appears in the record regarding the location of the parked vehicles at a police substation. Thus, logically from these facts, the police vehicles were parked at an authorized official law enforcement location. The record moreover reflects that Chief Patterson was not working for a private employer or private purpose. The record shows that Chief Patterson was serving in his official public capacity as chief of police acting for a public law enforcement purpose when directing that the vehicles be parked at this previously established police substation near the rumored fight and the fair venue. The record does not indicate that the vehicles were being utilized for any private purpose or for a private employer but, instead, the record reflects use for a public law enforcement purpose of crime prevention by parking vehicles at the police substation, providing ready availability and assisting crime prevention by scaring off “would-be fighters” at the public event.¹⁰ As previously acknowledged, a municipality bears a statutory obligation to protect all of its citizens pursuant to section 21-21-3. *See* Miss. Att’y Gen. Op., 98-0102, 1998 WL 156073, *Walker* (Mar. 6, 1998) (“Whether a police chief is using a police car primarily in the performance of his official duties for the city is a factual determination which the governing authorities must make, subject to review by a court of competent jurisdiction.”). Crime

¹⁰ *See Bradley v. City of Jackson*, 590 F. Supp. 2d 817, 823 (S.D. Miss. 2008) (recognizing that in evaluating liability pursuant to § 1983, Mississippi Code Annotated section 17-25-11, while authorizing wear of uniforms and guns, did not prohibit the use of vehicles).

prevention and the protection of the public constitutes a public law enforcement purpose falling within the scope of duty of the municipal police chief.

¶19. Mississippi Code Annotated section 17-25-11 (Rev. 2012) was enacted in 2006 and allows law enforcement to wear their official uniform and their official weapon while working off-duty and for private employers. The new authorization for such wearing of the uniforms and weapons somewhat changes the complete prohibition previously provided for by statute. However, no need exists in this case to even evaluate whether the use of a vehicle for a private employer could have been authorized, since the record on its face reflects the use of the police vehicles for the public law enforcement purpose of preventing a potential crime of violence in the city at a fair open to the public, and since the record reflects that the vehicles were parked at a previously authorized official police substation. More specifically, the vehicles at issue were parked at a nearby police substation to fulfill the public purpose of performing an affirmative law enforcement duty imposed on the city and on the city's chief of police to protect the city's citizens by preventing potential crime threatening injury or harm to the public at the fair within municipal jurisdiction. *See* Miss. Code Ann. § 99-11-3 (Supp. 2012); *see generally Thornhill v. Wilson*, 504 So. 2d 1205, 1206-07 (Miss. 1987); *Delker v. State*, 50 So. 3d 309, 316 (¶16) (Miss. Ct. App. 2009); *Scott v. City of Goodman*, 997 So. 2d 270, 272 n.1 (Miss. Ct. App. 2008).

¶20. Again, crime prevention and the protection of the public constitute public purposes, and law enforcement may use its equipment, vehicles, and other assets to fulfill these official law enforcement purposes. The Greenville fair in the mall parking lot was not rendered

ineligible for municipal police protection due to the hiring of off-duty police as private security by the mall or other private employers. A municipality bears a statutory obligation to protect all of its citizens pursuant to Mississippi Code Annotated section 21-21-3, and city police possess jurisdiction over crimes within city limits. *See* Miss. Atty' Gen. Op., 2004-0048, 2004 WL 555123, *Redmond* (Feb. 13, 2004) (municipality may also share concurrent jurisdiction over crimes occurring within a city at some locations); Miss. Att'y Gen. Op., 93-0709, 1993 WL 467813, *Harrell* (Oct. 25, 1993) (board of aldermen has statutory duty to provide reasonable police protection for municipality). The fair was open to the public and located within the jurisdiction of the city, and upon receipt of a report of a rumored potential crime of violence to occur at this public event, Chief Patterson possessed an affirmative official public duty as chief law enforcement officer of the municipality to protect the public and prevent crime.¹¹

¶21. Based on the foregoing, I respectfully dissent.

IRVING, P.J., AND JAMES, J., JOIN THIS OPINION.

¹¹ *See* Miss. Att'y Gen. Op., 2011-00341, 2011 WL 5006005, *Warren* (Sept. 2, 2011); Miss. Code Ann. § 45-3-21(i) (Rev. 2011) (stating that the Highway Safety Patrol may respond to calls for assistance in a law enforcement incident and that such request and action shall be reflected in radio logs of Mississippi Highway Patrol district substation and the requesting agency); *see also* *Ouzts v. State*, 947 So. 2d 1005, 1007-09 (¶¶9-19) (Miss. Ct. App. 2006) (police stopped defendant in a DUI case not in prosecuting county but in second county and used substation in second county, and evidence found sufficient). The use of law-enforcement substations is recognized by statute as a lawful public use. *See* Miss. Code Ann. § 45-3-19 (Rev. 2011) (allowing Highway Safety Patrol Commissioner to establish a headquarters and substations to carry out purpose of organization and enforcement of laws).