

**IN THE COURT OF APPEALS 9/19/95**

**OF THE**

**STATE OF MISSISSIPPI**

**No. 93-CC-00706 COA**

**BURNETTE TAYLOR, JR. AND MISSISSIPPI**

**EMPLOYEE APPEALS BOARD APPELLANT**

**v.**

**MISSISSIPPI DEPARTMENT OF FINANCE**

**& ADMINISTRATION APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B.

TRIAL JUDGE: HON. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

FIRST JUDICIAL DISTRICT

ATTORNEY FOR APPELLANT: JOHN H. BARNETT, III

ATTORNEY FOR APPELLEE: JIM WARREN

NATURE OF THE CASE: COMMISSION CASE

TRIAL COURT DISPOSITION: TAYLOR WAS TERMINATED BY THE DEPARTMENT OF FINANCE AND ADMINISTRATION. HE WAS REINSTATED BY THE EMPLOYEE APPEALS BOARD. THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY REVERSED THE APPEALS BOARD, THEREBY REINSTATING TAYLOR'S TERMINATION.

BEFORE THOMAS, P.J., DIAZ AND COLEMAN, JJ.

THOMAS, P.J. FOR THE COURT:

Burnette Taylor, Jr. was terminated from his position as Physical Plant Manager with the Department of Finance and Administration because he stole state property. Taylor appealed his termination to the State Employee Appeals Board. All cases coming before the Appeals Board are de novo. Taylor's case went before a hearing officer, who after conducting a full hearing, ruled that Taylor should be reinstated to his position as Physical Plant Manager but have a sixty-day suspension without pay "in recognition of the wrong doing that Burnette Taylor committed." The hearing officer concluded that Taylor had permission from his supervisor to take the state property and because of such did not intend to do wrong. The Department of Finance and Administration requested a review by the full Mississippi Employee Appeals Board of the Hearing Officer's order. The Appeals Board, sitting en banc, affirmed the decision of the Hearing Officer reinstating Taylor with a sixty-day suspension without pay.

The Department then appealed to the Circuit Court of the First Judicial District of Hinds County via writ of certiorari. The circuit court did not question the findings of the Employee Appeals Board, but simply looked to errors that appeared on the face of the record and proceedings below and reversed and rendered the Appeals Board's order reinstating Taylor. The circuit court found that the Hearing Officer and the Mississippi Employee Appeals Board failed to make a finding that the Department of Finance and Administration violated any of its published policies, rules, or regulations in the action it took against Taylor, as required by Rule 20(B) of the Mississippi Employee Appeals Board Rules. Furthermore, the circuit court found that on the face of the record Taylor did not prove that the allegations against him were false.

Feeling aggrieved, Taylor appeals to this Court assigning the following issues:

**I. DID THE CIRCUIT COURT MISAPPLY THE LAW WHEN IT FOUND THAT THE BOARD HAD TO MAKE AN AFFIRMATIVE FINDING THAT THE AGENCY VIOLATED THE BOARD'S RULES?**

**II. DID THE CIRCUIT COURT ERR WHEN IT SUBSTITUTED ITS FINDING THAT THE APPELLANT DID NOT MEET HIS BURDEN OF PROOF?**

Finding that the road traveled by the circuit court was in error but the ultimate result correct, this Court affirms.

## **FACTS**

Burnette Taylor worked for the Department of Finance and Administration for approximately twenty years with his last remaining years in the capacity of Physical Plant Manager. Taylor's supervisor was Charles McCurdy. At some point during his employment with the state agency Taylor was told by McCurdy to take his men to the three State Charity Hospitals, which were recently closed down by

the legislature, and take inventory of all items located therein.

McCurdy, Taylor, and other state employees took inventory of the materials and began to remove those items from the hospital. Upon their arrival at the Meridian hospital for their second trip there were numerous trucks loading up and removing furniture and equipment. It was at this point, that Taylor asked McCurdy if he and his men could take some "stuff" for their personal use, because according to Taylor they "don't make no money" working for the State. McCurdy told him and his men that if they saw something that they needed or wanted that they could go and get it; this was corroborated by three other employees. McCurdy, however, denied ever making such a statement; he stated that he told the men that they could get disposable items such as paper clips.

Because of the alleged permission granted to them by their supervisor, Taylor and his men started getting "odds and ends" from the charity hospitals. Taylor took for his own personal use four mattresses, a Maytag washing machine, a tool box, a VCR, a scalpel knife, a table cloth, a love seat, a Redford tool box with bottom rollers, seven chairs, a refrigerator, an aluminum ladder, a Martin Peaster vacuum, a Realistic mini-cassette recorder, and finally, a Zenith TV. Since Taylor had taken a washing machine from the State he sold his old washing machine for one hundred dollars to one of his employees, James David McRory.

All of the property obtained by Taylor and his men was taken to the house of Norman Morgan, one of Taylor's employees, and left there until picked up by one of the parties. Morgan's house was used as a holding area. According to one of Taylor's employees, all of the men under Taylor were involved in the scheme to take property.

Upon an investigation by the Highway Patrol, Taylor returned all of the property he had obtained. He was indicted and charged with grand larceny in Warren County. Taylor plead guilty to the charge with the understanding that he would receive a non-adjudication probation sentence, which in fact occurred. In his plea of guilty Taylor admitted that "I took property valued at over \$100.00 that I knew was not mine. I did not intend to return it."

Taylor was terminated from his employment with the State of Mississippi for committing a Group III offense. The agency alleged that Taylor's theft of state property constituted "acts of conduct occurring on or off the job which are plainly related to job performance and are of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or other state employees." Taylor appealed his termination to the Mississippi Employee Appeals Board.

### **APPEALS BOARD FINDINGS**

The Appeals Board found that while Taylor admitted that he took state property for his own personal use with the intent not to return the property, the fact that he brought the property back when told to do so showed that he intended to do no wrong. The board further found that "Taylor committed no act on the job which was not authorized by his superiors, and this hearing officer is hard put to determine how following the order and allowances of his superiors could constitute negligence in regard to the agency's duties to the public or other state employees, assuming that the supervisors will also perform their duties." Therefore, the board ordered that Taylor be reinstated to his position as Physical Plant Manager with a sixty day suspension in recognition of the "wrong doing Taylor

committed."

## **FINDINGS BY THE CIRCUIT COURT**

The circuit court, via writ of certiorari, reversed the decision of the Appeals Board for the following reasons. First, the circuit court found "on the face of the record that the Employee Appeals Board made no finding that the Department of Finance and Administration violated any published policy, rule or regulation of the State Personnel Board." Rule 20(B) of the Employee Appeals Board's Administrative Rules states that:

If the responding agency has acted in accordance with the published policies, rules and regulations of the State Personnel Board, and if the personnel action taken by the responding agency is allowed under said policies, rules and regulations, the Employee Appeals Board shall not alter the action taken by the agency.

Therefore, since the Appeals Board did not make a finding that the action taken by the Department of Finance and Administration, in terminating Taylor, was not allowed under the procedures of the State Personnel Board, then under Administrative rule 20(B), the Appeals Board could not alter the action taken. Finally, the circuit court found that on the face of the record it was clear that Taylor failed to show that the allegations leading to his termination were not true or that the allegations were not sufficient for the action taken.

## **DISCUSSION**

The preliminary question which must be asked by this Court is whether the circuit court had the authority to hear the Department of Finance and Administration's appeal of the Employee Appeals Board's final decision. Section 25-9-132 of the Mississippi Code allows for the appeal from the decision of the Appeals Board by an employee, but it is silent on whether the state agency may appeal. Miss. Code Ann. § 25-9-132 (1972); *see, Gill v. Mississippi Dep't of Wildlife Conserv.*, 574 So. 2d 586, 589 (Miss. 1990); *Hood v. Mississippi Dep't of Wildlife Conserv.*, 571 So. 2d 263, 267 (Miss. 1990).

The circuit court, however, does have limited judicial review via writ of certiorari. Section 11-51-93 allows the circuit court the power to review the decisions before a justice court, but confines the court to review only "questions of law arising or appearing on the face of the record. . . ." Furthermore, section 11-51-95 allows the circuit court "to review the judgments of all tribunals inferior to the circuit court."

Our Supreme Court has held that the Employee Appeals Board is a "tribunal inferior" within the meaning of section 11-51-95. *Gill*, 574 So. 2d at 590. As stated in *Gill* the "writ of certiorari is alive and well as a vehicle to review the decisions of the Mississippi State Personnel Board where no other mode of appeal is provided or available, within the limitations inherent within the writ." *Id.* With this said, the circuit court had jurisdiction to review the Department of Finance and Administration's appeal of the Appeal Board's decision.

When the circuit court reviews the decision of the Appeals Board, it is limited to only "the

examination of questions of law arising or appearing on the face of the record and proceedings." Miss. Code Ann. §11-51-93 (1972).

Should 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.

*Gill v. Mississippi Dep't of Wildlife Conserv.*, 574 So. 2d 586, 590 (Miss. 1990).

The Employee Appeals Board reinstated Taylor to his position as Physical Plant Manager holding essentially that even though he did willfully and intentionally take state property for his own personal use, as evidenced by his plea of guilty to the charge of grand larceny, Taylor did not intend to do wrong and because of such should not have been terminated. The circuit court reversed that decision, thereby reinstating the termination by the state agency. The circuit court felt that on the face of the record the Appeals Board violated Rule 20(B), and furthermore, on the face of the record, Taylor did not prove that the allegations against him were not true. Our question on the merits of this case becomes whether the circuit court erred in its reversal.

Taylor argues that the circuit court was in error in finding that the Appeals Board made no finding that the agency violated the rules, regulations, or policies of the State Personnel Board. It is Taylor's contention that Rule 20(B) does not require such a finding before the Appeals Board can alter an action of a state agency. Taylor further argues that the circuit court erred in finding that on the face of the record Taylor did not prove that the allegations against him were not true or in the alternative that the allegations were insufficient to justify his termination.

On the other hand the Department of Finance and Administration argues that the Employee Appeals Board violated Rule 20(B) by altering the punishment imposed by the agency. They argue that while the Board found that Taylor did not commit the Group III offense charged, it apparently found him guilty of some Group III offense because of the sixty day suspension imposed. The agency argues that only a Group III offense can be punishable in such a manner as imposed upon Taylor.

First and foremost, the circuit court was correct in finding that before the Appeals Board can alter a decision of a state agency it first must find that the agency violated some rule or regulation. Rule 20(B) of the Employee Appeal Board's Administrative Rules states that:

If the responding agency has acted in accordance with the published policies, rules and regulations of the State Personnel Board, and if the personnel action taken by the responding agency is allowed under said policies, rules and regulations, the Employee Appeals Board shall not alter the action taken by the agency.

In *Young v. Mississippi State Tax Commission*, 635 So. 2d 869, 872 (Miss. 1994), our Supreme Court approved of a circuit court's interpretation of the above rule to mean that before the Employee

Appeals Board could alter a decision or action of a state agency, it was necessary that the Appeals Board "make a finding that (1) the agency's personnel action was not allowed under the policy, rules and regulations of the [State Personnel Board] or that (2) the agency did not act in accordance with the published policies, rules and regulations of the [State Personnel Board]."

However, the circuit court was incorrect in finding that the Appeals board did not make such a finding in this case. The Appeals Board found, in essence, that the action taken by the state agency was not allowed under the rules of the State Personnel board. The Board found that the Department of Finance and Administration violated State Personnel Board rules when it found that Taylor had committed a Group III offense, particularly, that he had committed "acts of conduct occurring on or off the job which are plainly related to job performance and are of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or other state employees."

While the Appeals Board did make such a finding, this Court finds that such a finding is clearly erroneous. This Court is aware of the deference given to the decisions of administrative agencies. "Nevertheless, agency fact finding and legal interpretation is subject to judicial review and where, as here, the conclusions reached by the [Appeals Board] are contrary to law, this deference must give way." *Young*, 635 So. 2d at 873. As stated in *Gill*, a decision which is unsupported by credible evidence is by definition arbitrary and capricious. *Gill*, 574 So. 2d at 590.

Taylor admitted, in a sworn guilty plea to the charge of grand larceny, that he took state property for his personal use with the intent not to return said property. The fact that he claims to have received permission to his acts of thievery from his supervisor does not change this fact in the eyes of this Court. Clearly, Taylor had committed the Group III offense with which he was charged and the state agency was justified in terminating his employment. Under Rule 20(B), once it is determined that the state agency acted in conformity with the rules and regulations of the State Personnel Board, the action taken by the agency cannot be changed.

Even if this Court were to find that the Appeal Board's decision was not clearly erroneous, Taylor would still not prevail. Apparently the Appeals Board found that while Taylor had not committed the Group III offense charged, he did in fact commit some other Group III offense. This is evidenced by the punishment imposed by the Board. The Board reinstated Taylor but with a sixty day suspension. A Group III offense is punishable by one of the following: (1) termination; (2) demotion; or (3) *up to* a thirty day suspension. This Court is not aware of a situation in which an employee could be charged with a sixty day suspension. If the Board found that Taylor did in fact commit a Group III offense, which this Court finds that it did find such, Rule 20(B) precludes the Appeals Board from altering the degree of punishment given by the agency unless a rule or policy was violated.

Therefore, this Court affirms the circuit court's reversal of the Employee Appeal Board's decision. In view of the opinion expressed herein, the Board's decision that Taylor's actions did not constitute the Group III offense, is clearly erroneous. Were this Court or the circuit court to affirm the Appeals Board's decision, such an action would be tantamount to giving state employees a license to commit larceny.

**THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, REVERSING THE DECISION OF THE EMPLOYEE APPEALS BOARD**

**IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, MCMILLIN, PAYNE  
AND SOUTHWICK, JJ., CONCUR.**