

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00589 COA

LAWRENCE YOUNG

APPELLANT

v.

MISSISSIPPI STATE TAX COMMISSION

APPELLEE

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

TRIAL JUDGE: HON. JAMES GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

RABUN JONES

GAINES S. DYER

ATTORNEYS FOR APPELLEE:

GARY W. STRINGER

BOBBY R. YOUNG

NATURE OF THE CASE: ADMINISTRATIVE AGENCY'S DECISION

TRIAL COURT DISPOSITION: REVERSED EMPLOYEE APPEALS BOARD'S
REINSTATEMENT OF APPELLANT'S EMPLOYMENT BY MISSISSIPPI STATE TAX
COMMISSION

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

This is the second appeal of this case. Earlier in *Young v. Mississippi State Tax Com'n*, 635 So. 2d 869, 870 (Miss. 1994), the Mississippi Supreme Court reversed the Hinds County Circuit Court's decision by which that court reversed the Mississippi Employee Appeals Board's reinstatement of Lawrence Young as an employee of the Mississippi State Tax Commission (Commission). *Id.* at 870. The Mississippi Supreme court reversed and remanded this case to the circuit court because that court declined to determine whether there was substantial evidence to support the Commission's decision to terminate Young's employment. *Id.* at 875. On remand, the supreme court instructed the circuit court to determine whether there was substantial evidence to support the Commission's termination of Young's employment. *Id.* On remand, the Hinds County Circuit Court found that there was substantial evidence to support all four of Young's alleged infractions and that court again reversed the decision of the Employee Appeals Board (EAB) to reinstate Young's employment as a sergeant with the Weight Enforcement Division of the Commission. Young has appealed to maintain that the circuit court erred when it found that the Commission's decision to terminate him was supported by substantial evidence. This Court has reviewed the record of the hearing conducted by the hearing officer for the EAB, from which review it has found that only the first three of the four alleged infractions were supported by substantial evidence. Because the Commission made no findings of fact and conclusions of law by which this Court can determine whether it would have dismissed Young for violation of any less than all four of his alleged infractions, this Court reverses the Hinds County Circuit Court and remands this case to the State Tax Commission for further proceedings consistent with this opinion. We reach this conclusion pursuant to the case of *Mississippi State Bd. of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993).

We dispense with the usual recitation of facts and litigation because those subjects have been covered in the first *Young* opinion. Besides, the facts will emerge from our evaluation of the evidence by which we conclude that the circuit court correctly found that there was substantial evidence to support the Commission's decision to terminate Young.

I. Issue

Young poses the issue for this Court to resolve in the following statement which we quote from his brief:

The Circuit Court erred when it held that the decision of the Mississippi State Tax Commission to terminate Lawrence Young's employment was based on substantial evidence.

A. Standard of Review

Our burden has been lightened somewhat by the decision of the Mississippi Supreme Court in *Young v. Mississippi State Tax Com'n*. *Young* instructs us that our task is to review and to assess the circuit court's decision that substantial evidence supported the Commission's termination of Young's employment. Thus, our standard of review in the case *sub judice* would appear narrower than what is often cited to be the usual standard of review of administrative agencies' decisions. For example, in

Sprouse v. Mississippi Employment Sec. Com'n, 639 So. 2d 901, 902 (Miss. 1994), the Mississippi Supreme Court explained the breadth of the appellate court's standard of review of decisions made by administrative agencies as follows:

This Court's standard of review of an administrative agency's findings and decisions is well established. An agency's conclusions must remain undisturbed 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. A rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise. Lastly, this Court must not reweigh the facts of the case or insert its judgment for that of the agency.

We include this standard of review at the beginning of our consideration of Young's one issue to remind us that we "must not reweigh the facts of the case or insert [our] judgment for that of the agency."

Next we contemplate the meaning of the term "substantial evidence" as the Mississippi Supreme Court employed it in *Young*. In *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991), the supreme court wrote:

Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." 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."

We interpret this quotation that "substantial evidence" must be more than a scintilla of evidence, but it need not be equivalent to a preponderance of the evidence. Substantial evidence may be found somewhere in between these concepts of evidence.

B. The Four Charges of Young's Insubordination

On September 28, 1989, Dr. Charles A. Marx, then Chairman of the State Tax Commission, wrote a letter to Young in which he included the following allegations of four separate infractions which Young had committed:

(1) On September 6, 1989, you disregarded a verbal work assignment that was intended to supersede a written schedule. Lt. Sylvester Ford instructed you to work in the Jackson area for the remainder of the day on September 6, 1989, and to report to Madison County on September 7, 1989, and to remain in Madison County from 7:00 a.m. until 4:00 p.m. However, in direct contravention of Lt. Ford's orders, you left the Jackson area at approximately 11:00 a.m. and went to Greenville, your home town. This action was admitted

by you on September 22, 1989. This action on your part constitutes a second group offense according to the Mississippi State Personnel Board forms of discipline and offenses in that you were insubordinate and left your assigned work site without permission during working hours.

(2) On September 8, 1989, you were instructed by Lt. Ford to remove all of your personal belongings from the patrol car you were driving and you were further instructed to leave the patrol car at C-96 (Greenville scales) to enable two other officers to bring the car to Jackson. However, you have admitted to having told Lt. Ford that you needed a direct order in writing before you would follow his orders. This refusal to follow instructions also constitutes a second group offense consisting of insubordination due to the failure to follow supervisor's directive.

(3) On August 28, 1989, after you had been instructed to keep your patrol car clean by Lt. Ford, he observed your state vehicle as being dirty in violation of his orders. This is a violation of second group offense consisting of insubordination and failure to perform assigned work.

(4) On more than one occasion Lt. Ford has instructed you to improve your work habits. After reviewing your records it is evident that there has been no improvement. Again this is a second group offense consisting of insubordination, failure to follow instructions given by your supervisor and, failure to perform assigned work.

Section 9.10(B) of the Mississippi State Personnel Board Policy Manual dated 07-01-89, which was in force when Young was charged with the four previously quoted infractions, defined "insubordination" as follows:

"Group Two includes the following offenses: 1. insubordination, including, but not limited to, resisting management directives through actions and/or verbal exchange, and/or failure or refusal to follow supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy [emphasis supplied];

....

5. leaving the work site without permission during working hours in the absence of a

threat to life;

Young established that insubordination as defined by Section 9.10(B) of the Policy Manual was the correct standard by which to judge whether a state employee was guilty of insubordination, rather than the standard enunciated by the Mississippi Supreme Court in *Sims v. Board of Trustees, Holly Springs, Mun. Separate School Dist.*, 414 So. 2d 431, 435 (Miss. 1982). Section 9.10 of the SPB Policy Manual, dated 07-01-89, contains a schedule of offenses and authorized disciplinary actions applicable to state employees. These offenses are categorized into three groups--Group One, Group Two, and Group Three--depending upon the severity of the acts and behavior of the employee. According to the State Personnel Board's own published guidelines, two Group Two reprimands within a one (1) year period may result in demotion or dismissal. Section 9.10 was the basis for the Commission's termination of Young's employment.

With the foregoing information as a backdrop, we consider whether the circuit court correctly found that the Commission's termination of Young's employment was supported by substantial evidence.

First Allegation:

On September 6, 1989, you disregarded a verbal work assignment that was intended to supersede a written schedule. Lt. Sylvester Ford instructed you to work in the Jackson area for the remainder of the day on September 6, 1989, and to report to Madison County on September 7, 1989, and to remain in Madison County from 7:00 a.m. until 4:00 p.m. However, in direct contravention of Lt. Ford's orders, you left the Jackson area at approximately 11:00 a.m. and went to Greenville, your home town. This action was admitted by you on September 22, 1989. This action on your part constitutes a second group offense according to the Mississippi State Personnel Board forms of discipline and offenses in that you were insubordinate and left your assigned work site without permission during working hours.

Ford testified that he met Young and Donnie Fleming, Young's partner, at a Texaco station on High Street in Jackson on the morning of September 6, 1989, and told them to work the rest of that day in the Jackson area and then to work the next day, September 7, in the Madison County area. He further testified that he told them to work the next day in the Madison County area, which would include Highway 49. Ford specifically told them not to leave Madison County the next day until they contacted him. The next day Ford tried unsuccessfully to find Young and Fleming when he traveled up Highway 49 around lunch time. Ford later talked with Young at his home over the telephone about 4:30 p. m. after the "radio room" called Ford to report that Young was already in Greenville. Ford testified that to arrive in Greenville by 4:00 p. m. or 4:30 p. m., Young would have had to leave the Madison County area by around 2:00 p. m., which was two hours before Young's and Fleming's work day was scheduled to end at 4:00 p. m. Ford was certain that he had instructed Young and Fleming to contact him before they left the Madison County area to return home to Greenville, and he was equally certain that they had not contacted him before they left for Greenville.

Fleming testified that Young and he left Madison County on their way home to Greenville about 2:30 p. m. on September 7. Before they left, they had issued three tickets and sold some decals in Madison County. Fleming verified Ford's testimony that Ford had instructed them to contact him before they left for Greenville. Fleming stated that he had no excuse for leaving Madison County early and that Young and he had talked about leaving before they actually left. Fleming expressed his concern about leaving early because he knew that the other portable-scales team was still working in Madison County when they left for home.

Young testified that he heard Ford tell Fleming at the Texaco station on High Street on September 6 that if he and Young did not hear anything further from him the next day, September 7, they were to check out and work their way back to Greenville. Young then testified that Ford contacted him about noon on September 7 to learn his "ten-twenty," or location. Because Young had heard nothing further from Ford, Fleming and he decided to leave about 2:30 that afternoon and work their way back home. Young testified that on their way to Greenville, they stopped a truck in Belzoni who needed a 1989 fuel decal. They sold the driver that decal. Young testified that as the Commission's policy required, he checked via radio with the Jackson radio room to advise the radio operator that he had reached home in Greenville.

In his brief Young notes that whereas Chairman Marx's letter stated that he and his partner Fleming left Madison County at 11:00 a. m., the "undisputed proof" showed that they were in Madison County until 1:30 p. m. or until 2:00 or 2:30 p. m. He further emphasizes the evidence that they wrote a ticket in Belzoni at 3:15 p. m. while they were on their way home to Greenville. He also notes that Fleming and he agreed that "working their way back home" was a customary procedure. Finally, Young maintains that working their way back home on the afternoon of September 7 was consistent with their verbal order which initially directed them to be in Jackson on September 6.

Nevertheless, from the foregoing synopsis of testimony which was adduced at the EAB hearing, we find that the testimony of Lt. Ford and Fleming afforded a substantial basis of fact from which the Commission could reasonably infer that Young was guilty of insubordination as that term is defined by Section 9.10(B) of the Mississippi State Personnel Board Policy Manual. Young's insubordination arose from his violation of his superior's instruction to contact him before he left for Greenville and from his leaving his post of duty "without permission during working hours in the absence of a threat to life." We affirm the circuit court's finding that there was substantial evidence to support the Commission's termination of Young on this first allegation.

Second Allegation:

On September 8, 1989, you were instructed by Lt. Ford to remove all of your personal belongings from the patrol car you were driving and you were further instructed to leave the patrol car at C-96 (Greenville scales) to enable two other officers to bring the car to Jackson. However, you have admitted to having told Lt. Ford that you needed a direct order in writing before you would follow his orders. This refusal to follow instructions also constitutes a second group offense consisting of insubordination due to the failure to follow supervisor's directive.

With regard to this second allegation, Ford testified that on the morning of September 8, the morning after Young and Fleming had returned home early to Greenville from Madison County, he talked by telephone with Young, who was then at the Greenville weigh station. Ford told Young to take all of his personal belongings from the patrol car because he was going to bring the patrol car back to Jackson. Ford testified that he was bringing the patrol car back because he was assigning Young and Fleming to work at the Greenville weigh station for the next two weeks. According to Ford, Young retorted that "You talk like you are intoxicated." Ford testified that he replied that he didn't believe that he was intoxicated, but that he wanted Young to work at the Greenville weigh station.

According to Ford, Young replied, "Well, whatever you want to tell me, you need to put it in writing; and furthermore, I'm fixing to go to Bolivar County. That's what my schedule says. That's where I'm fixing to go." Ford then told Young to put Fleming on the phone, to which Young replied that Fleming didn't want to speak to Ford while he was intoxicated. According to Ford, Young then denied that Fleming was there. Then, after a brief pause, Fleming got on the phone. Ford told Fleming to take all his personal belongings from the patrol car, to which Fleming replied, "Okay. Whatever you want me to do." Ford concluded this portion of his testimony about Young's resistance to his order to remove his personal possessions from the patrol car by stating, "Lawrence [Young], from my own personal opinion, had made up his mind he was going to do what he wanted to do."

Fleming testified that shortly after this telephone conversation between Ford and Young, Young told him that he would feel better about turning the patrol car over to another portable scales team, "[i]f he had it in writing, you know. Make it official, you know." Young's version of this telephone conversation was substantially the same as Ford's. Young expressed his concern about turning over a state-owned car without something in writing. He testified, "[t]he car was issued to me, and if I turned it over to another officer by word of mouth and something happened to the car between here and Jackson, I felt it would be totally responsibility of me."

In his brief, Young suggests that there was a dispute as to what he said in reply to Ford's order that he remove his personal belongings from the patrol car. Young characterizes his response as "being either a response for a written directive concerning the automobile so that he would be protected if the automobile was damaged or a refusal to obey unless he received a written command." He characterizes his request for written authorization as "low key and not profane, but somewhat hostile." He concludes this part of his brief by stressing that "as soon as this short conversation [between Ford and him] ended, Lawrence Young did as he had been orally directed, and returned the vehicle immediately."

We have already noted that Section 9.10(B) of the Mississippi State Personnel Board Policy Manual dated 07-01-89, includes within the definition of insubordination "resisting management directives through actions and/or verbal exchange." Lieutenant Ford's testimony, as corroborated by the testimony of Fleming, afforded a substantial basis of fact from which the Commission could reasonably infer that Young "resist[ed] management directives [to remove his personal belongings from the patrol car] through actions and/or verbal exchange," and was therefore guilty of insubordination. Thus we affirm the circuit court's finding that there was substantial evidence to support the Commission's second allegation of Young's insubordination.

Third Allegation:

On August 28, 1989, after you had been instructed to keep your patrol car clean by Lt. Ford, he observed your state vehicle as being dirty in violation of his orders. This is a violation of second group offense consisting of insubordination and failure to perform assigned work.

Ford testified that when Young and Fleming brought their patrol car to Jackson to change the decals on it, it was filthy. Ford testified that the car "had so much sap and road film on it, it didn't look like a white car. It looked kind of like it was grayish black." He told Young and Fleming to "get the car cleaned up." The next day, when Ford met with Young and Fleming in Yazoo City, they had not cleaned the car. Ford testified further about their meeting in Yazoo City as follows:

I said, "Didn't I tell y'all to get the car cleaned up?"

And [Young] said, "Well, yeah. We are going to get the car cleaned up."

I said, "Well, I done told you once or twice -- I don't know how many times -- but I told them, I said, "Well, next time I catch the car like that I'm going to bring it to Jackson, and I'm gonna park it."

Lawrence said, "Well, you do what you got to do, and I'll do what I've got to do."

I said, "That's fine. Because if the car is like this again, I am going to do what I have to do."

Fleming testified that after Ford's conversation with Young and him in Yazoo City on Tuesday, Young and he washed the car on Wednesday, and Ford observed the clean car the next day at the Greenville scales. Young explained that it was hard to keep the car clean all the time because of where he parked it at home beneath shade trees and because they spent much of their time pursuing log trucks down dusty roads. In his brief, Young argues that the evidence showed no time limit within which cleaning the car was to be accomplished. The Commission counters that there was no time limit because Ford intended for Young and Fleming to follow his order to clean the car as quickly as possible.

We recite Young's and the Commission's arguments about time limits to demonstrate that from the same facts different inferences may be made. The Commission inferred that Young's failure to clean the car within one day's time of Ford's instructing him to clean it constituted insubordination. Again, we concur with the circuit court's determination that there was substantial evidence from which to conclude that Young was guilty of insubordination as defined by this third allegation.

Fourth Allegation:

On more than one occasion Lt. Ford has instructed you to improve your work habits. After reviewing your records it is evident that there has been no improvement. Again this is a second group offense consisting of insubordination, failure to follow instructions given by your supervisor and, failure to perform assigned work.

Dr. Marx, Chairman of the State Tax Commission, testified that Young and Fleming had written only one overweight ticket in the eight-month period from January 1, 1989 through the month of August, 1989. He further testified that their money receipts were far below the money receipts of other portable scales units. Ford testified that he first admonished Young about his work habits on May 31, 1989, when he made Young's annual employee appraisal. In his brief, Young points out that Ford's performance appraisal of Young was a "3.2," which was higher than fully successful. It appears from the record that on May 31, 1989 Ford told Young, "Y'all need to go to work." Young testified that he understood Ford's May 31 statement to be a "pep talk." It was not until August 28, 1989, that Ford again discussed Young's performance with him. Young emphasizes that after Ford's comments on August 28, Fleming and he wrote three of their total of five tickets for 1989 on September 7, 1989, during their departure from Madison County.

The Commission faces two problems with this fourth allegation. The first is that the record contains no direct order from Ford to Young regarding his issuing more tickets. The second problem is that as Young points out in his brief, Fleming and he wrote three tickets within about ten days of their discussion on August 28. With regard to this fourth allegation of insubordination, we conclude that there was no substantial evidence that Young was guilty of insubordination. We, therefore, find that the circuit court erred by finding that there was substantial evidence to support this fourth allegation.

C. Result of our Review of the Evidence

We repeat that in the first appearance of this case at the appellate level, the supreme court held that Section 9.10(B) of the Mississippi State Personnel Board Policy Manual dated 07-01-89 contained the appropriate definition of insubordination by which to adjudicate whether Young had been guilty of insubordination. It directed the circuit court on remand to determine whether there was substantial evidence to support the allegations of Young's insubordination. Thus, if the evidence of Young's insubordination was substantial, then the Commission's termination of Young's employment was warranted under Section 9.10 of the Mississippi State Personnel Board Policy Manual because Section 9.10 provided that two Group Two reprimands within a one (1) year period may result in demotion or dismissal. Section 9.10 was the basis for the Commission's termination of Young's employment.

We have found that three of the Commission's allegations of Young's insubordination were supported by substantial evidence and that one of its allegations of his insubordination was not supported by substantial evidence. We must now observe that the Commission made no specific findings of fact and conclusions of law about whether it terminated Young's employment only because of the cumulative impact of all four infractions. We earlier noted that according to the State Personnel Board's own published guidelines, two "Group Two" reprimands of an employee within a one year period *may* result in that employee's dismissal. Nevertheless, the guidelines do not demand, or necessitate, dismissal of an employee who receives two "Group Two" reprimands within a one year period. The guidelines permit an employer to discipline such an employee less severely than by terminating his employment. For example, the employer may utilize demotion of the employee rather than dismissal of the employee.

The Mississippi Supreme Court dealt with a quite similar, if not identical, situation in *Mississippi State Board of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993). In *Wilson*, the Board of Nursing revoked the license of John Wilson because (1) he "was addicted to or dependent upon alcohol or other habit-forming drugs, primarily cocaine." and (2) "engaged in conduct constituting a crime and likely to deceive, defraud or harm the public." *Id.* at 487. Wilson appealed to the Hinds County Chancery Court, which reversed the decision of the Board of Nursing on the issue of addiction to cocaine, upheld the board's decision with respect to the charge of Wilson's conduct constituting a crime, but nevertheless reinstated Wilson's license as a registered nurse. *Id.* The Board of Nursing appealed to the supreme court, which reversed the chancellor's order reinstating Wilson's license but remanded the case to the Board of Nursing for its consideration of whether Wilson's license should be revoked on only the issue of his conduct. *Id.*

The supreme court first observed that the chancellor did not err as a matter of law in viewing the charges collectively as opposed to one out of many because nothing in the record refuted the idea that the Board of Nursing, in its discretion, considered the totality of the charges in imposing the harshest penalty available--revocation of Wilson's nursing license. *Id.* The court reasoned that if the Board of Nursing intended to revoke Wilson's license upon anything less than a finding of guilt on all three charges, it should have so stated in its findings of fact and conclusions of law. *Id.* In the case *sub judice*, the State Tax Commission made no finding that it dismissed Young "upon anything less than a finding of guilt on all [four] infractions.

As we have already mentioned, the State Tax Commission had less severe penalties for Young's infractions. In *Wilson*, the supreme court noted that the Board of Nursing could "tailor the punishment to fit the severity of the transgressor's transgression." *Id.* at 493. About the Board of Nursing's failure to make specific findings on its reasons for revoking Wilson's license, the supreme court opined:

In the case at bar, the charges were brought collectively in a three-count complaint. Nothing in the record negates the idea that the Board of Nursing, in imposing the harshest available penalty, relied upon its finding that Wilson was guilty of all three charges. Stated differently, there is no indication in the record the board would have revoked Wilson's license had it found him guilty of only one or two of the charges. Although the board could--and should--have made specific findings of fact and conclusions of law on this point, it did not do so. As stated, if the board intended to revoke Wilson's license on

anything less than his guilt of all three charges found in the complaint, it should have said so.

Id. The supreme court then held that the proper course was for the chancellor to remand the case to the State Board of Nursing for a determination of whether it would order revocation of Wilson's license or some lesser penalty on the remaining charges. *Id.*

As in *Wilson*, this Court cannot determine from the record whether the Commission would have dismissed Young had it found him guilty of any two of the first three allegations of infractions. While we acknowledge that any two of those three allegations would have supported Young's dismissal, the Commission did not find that it dismissed Young for any reason other than his guilt of all four infractions. Thus, we must follow the precedent of the *Wilson* case by reversing the Hinds County Circuit Court which affirmed the State Tax Commission's dismissal of Young and remand this case to the State Tax Commission for further proceedings consistent with this opinion.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED TO THE STATE TAX COMMISSION FOR FURTHER PROCEEDINGS. COSTS ARE ASSESSED IN EQUAL SHARES TO APPELLANT AND APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., NOT PARTICIPATING.