

IN THE COURT OF APPEALS 3/25/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-01127 COA

JAMES MICHAEL COX

APPELLANT

v.

CITY OF JACKSON, MISSISSIPPI

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 E. GRAVES JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

E.P. LOBRANO, JR.

ATTORNEY FOR APPELLEE:

WILLIAM A. GOWAN

NATURE OF THE CASE: STATE BOARDS AND AGENCIES (OTHER THAN WORKERS'
COMPENSATION)

TRIAL COURT DISPOSITION: JACKSON POLICE OFFICER SUSPENDED FOR THREE
DAYS

BEFORE BRIDGES, C.J., DIAZ, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

Jackson Police Officer Michael Cox (Cox) was suspended without pay for three days because of his conduct during and after his department's participation in the funeral of a slain ATF agent. The Civil Service Commission (the Commission) found that Cox was appropriately disciplined and affirmed the three-day suspension. Cox appealed the Commission's decision to the Hinds County Circuit Court on December 20, 1993. The circuit judge set a date for the final filing of briefs and memoranda, but more than six months passed without any action being taken on the case. Cox appealed to this court under the authority of Mississippi Code Section 11-1-7, which states in pertinent part:

All chancellors or judges of the chancery and circuit courts of the state of Mississippi shall render their final decree on any and all matters taken under advisement by such chancellors or judges not later than six (6) months after the date when same are taken under advisement or not later than six (6) months after the date on which the chancellors or courts or judges set as a date for the final brief or memoranda. . . . In the event a final decree has not been entered within the six months period herein referred to, then any party to said law suit shall have the right to appeal on the record as otherwise provided the same as if a final decree has been rendered adversely.

M.C.A. § 11-1-17 (Supp. 1993). On appeal, Cox presents the following issues:

I. COX WAS DENIED PROCEDURAL DUE PROCESS WHEN HE WAS NOT GIVEN AN EQUAL OPPORTUNITY TO RESPOND ORALLY OR IN WRITING PRIOR TO HIS SUSPENSION.

II. COX'S DISCIPLINE CANNOT HAVE AS A PORTION OF ITS BASIS THE CHARGE OF "CONDUCT UNBECOMING OF A POLICE OFFICER" UNDER THE CONSTITUTIONAL LIMITATIONS ESTABLISHED WHEN APPLIED TO THE FACTS OF THIS CASE.

III. COX WAS DISCIPLINED IN VIOLATION OF HIS CONSTITUTIONALLY PROTECTED RIGHT OF "FREE SPEECH."

IV. COX WAS DEPRIVED OF EQUAL PROTECTION IN THAT THE PUNISHMENT THAT WAS METED OUT TO HIM WAS DISPARATE TO PUNISHMENT METED OUT TO OTHER OFFICERS UNDER THE SAME OR SIMILAR CIRCUMSTANCES.

V. THE CITY OF JACKSON TOTALLY AND WHOLLY FAILED TO MEET ITS BURDEN OF PROOF BY PROVING ITS CASE WITH "SUBSTANTIAL EVIDENCE IN SUPPORT OF ITS CHARGES."

Finding no error, we affirm Cox's three-day suspension without pay.

FACTS

On March 4, 1993, a funeral was held for Federal ATF Agent Robert Williams. The Jackson Police Department arranged for many of its members to attend the funeral. A memorandum was issued by Deputy Chief Bracey Coleman, which read in part as follows:

All personnel attending the funeral will meet at the Fairgrounds, Jefferson and Amite Street, at 1:00 P.M.

Although Cox was not on duty the day of the funeral, he wanted to attend. On the day of the funeral, he arrived at precinct four where he had been told to meet several other officers that were attending the funeral. There were no other officers at the precinct, but Mrs. Yonka Simmons (Simmons), a widow of a slain Jackson Police officer was waiting, having been told by Commander Wilkins that she could ride to the funeral with Cox. Cox and Simmons drove to the fairgrounds to meet the other officers. While at the fairgrounds, Simmons had to go to the restroom, and Officer Davis told Cox to take care of her needs. Cox left the fairgrounds with Simmons and never returned, but instead went ahead to the funeral home in Rankin County. Cox did not have permission to go ahead to the funeral home and leave the procession.

Once Cox arrived at the funeral home, he parked his police car, and he and Simmons went to pay their respects to the family. A few minutes before the funeral, the procession of JPD officers arrived. Chief Wilson inquired about the JPD patrol car parked at the funeral home and asked why it had not been in the procession. When questioned by Officer Carter, Cox replied that he had not wanted to be late for the funeral. Officer Carter asked Cox on behalf of Chief Wilson to join the procession for the remainder of the funeral, but Cox ignored the request and stayed off to the side of the other JPD officers. As a result of Cox's conduct, Officer Carter was asked to gather information about the incident. Carter received no response from Cox in his first couple of attempts to get Cox's statement about his failure to participate in the procession. The day after the incident Officer Carter again asked Cox to deliver a written statement about the incident, and Cox told Carter that the only way he would deliver a written statement was if he was given a direct order to do so. Carter did not receive the statement until the following day. Cox's written statement read in part as follows:

At 1324 hours Deputy Chief Lou Davis had been talking to Mrs. Simmons as she sat in the patrol unit. He walked up to me and stated that Mrs. Simmons needed to go to the restroom and that I needed to take her to take care of her needs. I immediately left the Mississippi State Fairgrounds and took Mrs. Simmons to take care of her needs. I then took Mrs. Simmons to the Baldwin Lee Funeral Home in Pearl, Mississippi where the funeral was to be held. I let Mrs. Simmons out at the front door and went to park the patrol unit. My arrival at the funeral home was 1343 hours. I went inside the funeral home

to pay my respects to the family and sign the registry [sic]. I walked out the front door of the parlor and talked to some of the law enforcement officers from other agencies that I knew. Two men that work with Baldwin Lee Funeral Home closed the parlor doors and stated that the service was going to start soon. I walked out the front door and met Investigator Charles E. Smith. Smith advised that he had brought Deputy Chief Lou Davis with him and that he needed [sic] to sign the registry [sic]. We walked toward the front door of the funeral home as the remaining officers from the Jackson Police Department arrived. The time was 1355 hours. I escorted Investigator Smith to the registry [sic] where he signed it. Chief Jimmy Wilson walked to the funeral parlor and went inside. This was very embarrassing to me to know that officers of this department were not only late to arrive at the funeral home but would barge into the funeral parlor to make an appearance. This shows that these officers were inconsiderate of the family members that were in the funeral parlor for prayer and closing of the casket. This could also seem as if the officers thought they [sic] more important than the family members.

Sgt. Carter asked me why I did not wait at the fair grounds [sic] with everyone else. I advised him that Mrs. Simmons had to go to the restroom so I took her. I also stated that I was glad that I had come on to the funeral home so that I was not part of this late and embarrassing cat and pony show displayed by our department. Sgt. Carter gave me a direct order to write an interoffice correspondence as to my actions.

Mrs. Simmons stated that she was glad that I had brought her to the funeral home so she could console the Agent's widow prior to the funeral service. She stated that she was embarrassed by the late arrival of the Jackson Police Department and the intrusion into the funeral parlor by our representatives.

This might be proper protocol in Washington, D.C. but it is not proper protocol in the State of Mississippi to be late to attend someone's funeral or to intrude into the funeral parlor where family members are saying their last goodbyes to the deceased. I APOLOGIZE to the family members for the inconsiderate actions of the Jackson Police Department.

As a result of Cox's refusal to join the procession at the funeral, his refusal to cooperate with Officer Carter in turning in a written statement, and the blatant disrespect displayed in his statement toward Chief Wilson and the entire JPD, Cox was suspended for five days without pay. Cox was charged with violating the following civil service rules: (1) Civil Service Rule XII, Section 2, Paragraph C--Willful Violation of Any Lawful and Reasonable Regulations, Order, Or Directive Made or Given By A Superior Where Such Violation Has Amounted to Insubordination Or Serious Breach Of Proper Discipline Or Has Resulted In Loss Or Injury To The Public. Specifically, Cox was not given permission to separate from the police caravan. (2) Civil Service Rule XII, Section 2, Paragraph C--same as above. Specifically, Cox failed to comply with orders from Sgt. Carter on the day of the funeral which directed him to submit a written statement of noncompliance to the Chief's order. (3) Civil Service Rule XII, Section 2, Paragraph M--Conduct Unbecoming To An Employee Of The City, Either On Or Off Duty. Specifically, Cox expressed disrespect toward the Office of the Chief of Police and to Chief Jimmy L. Wilson personally in his written statement.

Cox's letter of suspension was delivered to him on July 27, 1993. He requested a hearing with the Civil Service Commission within the ten-day statutory time limit. The Civil Service Commission affirmed the suspension, but reduced the time from five days without pay to three days without pay. Cox now appeals to this Court.

I. COX WAS DENIED PROCEDURAL DUE PROCESS WHEN HE WAS NOT GIVEN AN EQUAL OPPORTUNITY TO RESPOND ORALLY OR IN WRITING PRIOR TO HIS SUSPENSION.

Cox argues that he was denied procedural due process because he was not allowed to respond to his suspension either orally or in writing. Cox relies on the twenty-year old circuit court opinion by Judge William F. Coleman of *McMillin, Griffith, and Phillips v. City of Jackson*, Cause No. 23,073 (December 22, 1976). In that case, three officers were suspended for ninety (90) days without pay for alleged brutality. Judge Coleman found that suspension which deprived the officers of one-fourth their annual salary to be "tantamount to discharge." Therefore, Judge Coleman held that proper procedural safeguards were not followed, and that the officers should have had written notices of their charges, a reasonable time to study the charges, and an opportunity to submit rebuttals.

In Cox's case, his three-day suspension was not tantamount to discharge, but was properly carried out according to the controlling statute, Mississippi Code Section 21-31-23:

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under the provisions of sections 21-31-1 to 21-31-27, except for such persons as may be employed to fill a vacancy caused by the absence of a fireman or policeman while in service as a member of the armed forces of the United States, shall be removed, suspended, demoted or discharged, or any combination thereof, except for cause, and only upon the written accusation of the appointing power or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. The chiefs of the fire and/or police department may suspend a member pending the confirmation of the suspension by the regular appointing power, which shall be within three (3) days.

In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the official charged with the responsibility of making the termination decision. Such official may, in his discretion, provide for a pretermination hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing. A duplicate of such notice shall be filed with the commission. After the employee has responded or has failed to respond within a reasonable time, the official charged with the responsibility of making the termination decision shall determine the appropriate disciplinary action, and shall notify the employee of his decision in writing at the earliest practicable date.

Where there are extraordinary circumstances or situations which require the immediate discharge or removal of an employee, such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing provided in this section within twenty (20) days after the date of termination. For the purposes of this section, extraordinary situations or circumstances include, but are not limited to, circumstances where retention of the employee would result in damage to municipal property, would be detrimental to the interest of municipal government or would result in injury to the employee, to a fellow employee or to the general public.

Any person so removed, suspended, demoted, discharged or combination thereof may, within ten (10) days from the time of such disciplinary action, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such disciplinary action was or was not made for political or religious reasons and was or was not made in good faith for cause. After such investigation the commission may, if in its estimation the evidence is conclusive, affirm the disciplinary action, or if it shall find that the disciplinary action was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position, or employment from which such person was removed, suspended, demoted, discharged or combination thereof, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such disciplinary action. The commission upon such investigation may, in lieu of affirming the disciplinary action, modify the order of removal, suspension, demotion, discharge or combination thereof by directing a suspension without pay, for a given period and subsequent restoration of duty, or by directing a demotion in classification, grade or pay, or by any combination thereof. The findings of the commission shall be certified in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. The findings of the commission shall be conclusive and binding unless either the accused or the municipality shall, within thirty (30) days from the date of the entry of such judgment or order on the minutes of the commission and notification to the accused and the municipality, appeal to the circuit court of the county within which the municipality is located. Any appeal of the judgment or order of the commission shall not act as a supersedeas of such judgment or order, but the judgment or order shall remain in effect pending a final determination of the matter on appeal. Such appeal shall be taken by serving the commission and the appellee, within thirty (30) days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such

judgment or order, be filed by the commission with such court. The commission shall within thirty (30) days after the filing of such notice, make, certify and file such transcript with such court. The said circuit court shall thereupon proceed to hear and determine such appeal. However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

M.C.A. § 21-31-23 (Supp. 1993). Under the statute, Cox was entitled to a written statement of the accusation of wrongdoing, which he received from Chief Wilson on July 19, 1993, detailing the specific violations of civil service rules and suspending him for five days without pay. The statute allows for a discretionary pretermination hearing, but does not provide for a presuspension hearing. However, a suspended employee has the right to file a written demand for an investigation with the civil service commission within ten days of the suspension. Cox filed such a demand and a public hearing was held on his suspension. The commission heard testimony and reduced Cox's suspension to three days without pay.

Cox was afforded proper procedural due process as set forth in the statute. His argument that he should have been given an opportunity to respond orally or in writing to the charges levied against him is unfounded. His reliance on the Fifth Circuit case *Thurston v. Dekle*, 531 F.2d 1264 (1976), *vacated by* 438 U.S. 901 (1978), is misplaced. In *Thurston*, the Fifth Circuit Court of Appeals examined the due process jurisprudence of the United States Supreme Court and determined:

Where a governmental employer chooses to postpone the opportunity of a nonprobationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. *These must include, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.*

Thurston, 531 F.2d at 1273 (emphasis added). Cox seizes on this case to claim that he was denied due process protection. However, *Thurston* deals specifically with pretermination proceedings where much more is at risk than with a suspension. Moreover, in 1993, the United States Fifth Circuit Court of Appeals again examined what process is due a nonprobationary employee terminated for cause. The Court of Appeals held:

The United States Supreme Court decided in *Cleveland Board of Education v. Loudermill*, that if a governmental employer provides a full post-termination hearing, pretermination due process is limited. In such circumstances, before dismissing an employee, the employer need only provide the employee with written or oral notice of the charges raised against him, explain to the employee the nature of the evidence of those charges, and afford the employee an opportunity to respond.

A satisfactory pretermination "hearing" need not be elaborate, for such a hearing is merely designed to prevent the employer from making a mistake. The purpose of the hearing is simply to ensure that the charges raised against the employee are true and support his or

her dismissal. Thus, an informal hearing which allows the employee to give his version of the facts sufficiently hedges against an erroneous dismissal and likewise satisfies the requirements of due process.

Browning v. City of Odessa, 990 F.2d 842, 844 (5th Cir. 1993) (citations omitted).

In light of *Loudermill* and *Browning*, an elaborate pretermination hearing is not necessary. In fact, when post-termination proceedings are in place, pretermination due process is limited. It logically follows that in cases of suspension even less is required, and in light of his written notification and full-blown post-suspension hearing, Cox's argument that he was denied procedural due process fails.

II. COX'S DISCIPLINE CANNOT HAVE AS A PORTION OF ITS BASIS THE CHARGE OF "CONDUCT UNBECOMING OF A POLICE OFFICER" UNDER THE CONSTITUTIONAL LIMITATIONS ESTABLISHED WHEN APPLIED TO THE FACTS OF THIS CASE.

Cox was charged in part under the following:

(3) Civil Service Rule XII, Section 2, Paragraph M--Conduct Unbecoming To An Employee Of The City, Either On Or Off Duty. Specifically, Cox expressed disrespect toward the Office of the Chief of Police and to Chief Jimmy L. Wilson personally in his written statement.

In his letter of explanation to the police department, Cox made the following comments about

Chief Wilson and the department:

Chief Jimmy Wilson walked to the funeral parlor and went inside. This was very embarrassing to me to know that officers of this department were not only late to arrive at the funeral home but would barge into the funeral parlor to make an appearance. This shows that these officers were inconsiderate of the family members that were in the funeral parlor for prayer and closing of the casket. This could also seem as if the officers thought they [sic] more important than the family members.

Sgt. Carter asked me why I did not wait at the fair grounds [sic] with everyone else. I advised him that Mrs. Simmons had to go to the restroom so I took her. I also stated that I was glad that I had come on to the funeral home so that I was not part of this late and embarrassing cat and pony show displayed by our department. Sgt. Carter gave me a direct order to write an interoffice correspondence as to my actions.

Mrs. Simmons stated that she was glad that I had brought her to the funeral home so she could console the Agent's widow prior to the funeral service. She stated that she was embarrassed by the late arrival of the Jackson Police Department and the intrusion into the funeral parlor by our representatives.

This might be proper protocol in Washington, D.C. [Chief Wilson's former place of

employment] but it is not proper protocol in the State of Mississippi to be late to attend someone's funeral or to intrude into the funeral parlor where family members are saying their last goodbyes to the deceased. I APOLOGIZE to the family members for the inconsiderate actions of the Jackson Police Department.

On appeal, Cox argues that many "conduct unbecoming" provisions have been attacked under the "void for vagueness" doctrine. He attacks the charge against him as overbroad and vague. However, Cox was specifically charged with showing disrespect toward the office of the chief of police as well as Chief Jimmy Wilson himself in his written memorandum. In *Barrett v. Thomas*, 649 F.2d 1193, 1198 (5th Cir. 1981), *cert. denied* 456 U.S. 925 (1982), the Fifth Circuit Court of Appeals refused to hold unconstitutionally vague or overbroad a similar rule in the Dallas County Sheriff's office entitled "conduct subversive of the good order or discipline of the department." The court stated, "We are reluctant to circumscribe narrowly the sheriff's discretion in promoting the legitimate ends of 'discipline, esprit de corps, and uniformity' among his law enforcement officers." *Id.* In addressing a vagueness challenge to an Alabama statute prohibiting immoral conduct among public school teachers, the United States District Court for the Northern District stated, "[T]he standard test for determining whether the terms of a statute are sufficiently precise to comply with due process concepts is whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may act accordingly." *Alford v. Ingram*, 931 F. Supp. 768, 771 (M.D. Ala. 1996) (citations omitted). Cox exhibited the kind of disrespect that any officer of ordinary intelligence would equate with conduct unbecoming an officer. Such blatant disrespect, if left unchecked, fosters instability and breakdown among workers. Cox has failed to prove that the civil service provision under which he was charged is void for vagueness. This issue is meritless.

III. COX WAS DISCIPLINED IN VIOLATION OF HIS CONSTITUTIONALLY PROTECTED RIGHT OF "FREE SPEECH."

Cox contends that he was suspended because of the content of his memorandum, and therefore his constitutionally protected right to free speech was violated. It is settled that a public employee's position cannot be conditioned upon a basis that infringes the employee's constitutionally protected freedom of expression. *Connick v. Myers*, 461 U.S. 138, 142 (1983). In order to determine whether a public employee's speech is constitutionally protected by the First Amendment, a two-step inquiry must be made. *Harper v. Crockett*, 868 F. Supp. 1557, 1564 (E.D. Ark. 1994) (citations omitted). The following must be considered:

If the speech addresses a matter of public concern, then the Court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." If the speech is not a matter of public concern, the Court does not reach the second, "balancing" step of the inquiry.

Id. We must determine whether Cox's speech reaches the level of a matter of public concern. In order to determine whether speech is a matter of public concern, we examine "the content, form, and

context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Moreover,

[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Id. at 146. Cox was not speaking as a citizen on a matter of public concern. Instead, he was speaking as an employee, voicing personal grievances against the police department and the chief of police. He had been ordered to follow certain protocol at the funeral, and when he disobeyed direct orders, he was reprimanded. His written statement was no more than an inter office communication explaining his actions and venting his personal views on the way the department had carried out funeral arrangements. The memorandum was not released to the public, nor was the situation a matter of public concern. The police department's attendance at the funeral of a slain fellow law enforcement officer was not of political, social or other concern to the public. Cox has failed to prove that his speech was a matter of public concern, and therefore constitutionally protected. As the United States Supreme Court stated:

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case.

Id. at 149. Because Cox's speech was not a matter of public concern, we need not reach the balancing test to determine if it was protected. This issue is without merit.

IV. COX WAS DEPRIVED OF EQUAL PROTECTION IN THAT THE PUNISHMENT THAT WAS METED OUT TO HIM WAS DISPARATE TO PUNISHMENT METED OUT TO OTHER OFFICERS UNDER THE SAME OR SIMILAR CIRCUMSTANCES.

V. THE CITY OF JACKSON TOTALLY AND WHOLLY FAILED TO MEET ITS BURDEN OF PROOF BY PROVING ITS CASE WITH "SUBSTANTIAL EVIDENCE IN SUPPORT OF ITS CHARGES."

Cox argues that he was deprived of equal protection because other officers on the police force received the same or lesser suspensions for their violations. Additionally, he argues that the city failed to meet its burden of proof. However, Cox does not support his argument with any authority whatsoever. The Mississippi Supreme Court has addressed the lack of supporting authority and substantial argument:

Not only do the appellants fail to cite any authority to support the three propositions, but they also decline to devote any discussion or attention whatsoever to these alleged errors. Therefore, this Court is unable to assess these issues on the merits. The failure to cite any authority can be treated as a procedural bar, and this Court is under no obligation to consider the assignments.

Smith v. Dorsey, 599 So. 2d 529, 532 (Miss. 1992). Under our standard of review as set forth in *City of Jackson v. Froshur*, 530 So. 2d 1348, 1354-55 (Miss. 1988), this Court cannot substitute its judgment for that of the City. "It is clear that the scope of review of the circuit court, and of this Court, is limited, and . . . the criterion is whether or not from an examination of the record there exists credible evidence substantiating the action taken by the city." *Id.* We are satisfied that the Commission's decision was supported by substantial evidence and was made in good faith for cause. Finding no error, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY AFFIRMING THE CIVIL SERVICE COMMISSION'S SUSPENSION OF OFFICER COX FOR THREE DAYS WITHOUT PAY IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.