

IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00449 COA

JAMES T. STUART

APPELLANT

v.

THE CIVIL SERVICE COMMISSION OF THE CITY OF HATTIESBURG, 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. RICHARD WAYNE MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM L. DUCKER

ATTORNEY FOR APPELLEE:

JERRY A. EVANS

NATURE OF THE CASE: ADMINISTRATIVE LAW - EMPLOYEE'S APPEAL FROM CIVIL
SERVICE COMMISSION DECISION WHICH AFFIRMED EMPLOYER'S DEMOTION OF
EMPLOYEE

TRIAL COURT DISPOSITION: AFFIRMED CIVIL SERVICE COMMISSION'S DECISION

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

James T. Stuart (Stuart), a veteran of nineteen years and eight months service with the Hattiesburg

Fire Department (Department), was serving a one-year probation period pursuant to his promotion from the rank of lieutenant to the rank of district captain in the Department, when he was demoted to the rank of lieutenant in the Department for his conduct while he was attending the National Fire Academy (Academy) in Emmitsburg, Maryland, on July 28, 1992. The Hattiesburg Civil Service Commission (Commission) affirmed Stuart's demotion in rank; and Stuart then appealed to the Forrest County Circuit Court, which affirmed the Commission's decision. Stuart then appealed from the Forrest County Circuit Court to Mississippi's appellate courts. We affirm the circuit court's decision.

I. Facts

Stuart was enrolled in the major command and control course which was being taught at the Academy in July, 1992. The Academy is under the control of the United States Fire Administration, which in turn is a part of the Federal Emergency Management Agency. On the afternoon of July 28, 1992, while he was participating in a classroom discussion on estimating the number of personnel required for aggressive control of an interior fire, Stuart commented that he "used to be able to do estimates easier, but now I have to use no good niggers and women to fight a fire." Twenty-six men, all of the Caucasian race, constituted the class to which Stuart made the foregoing comment.

Three employees of the Academy were in the classroom when Stuart misspoke in this fashion. They were Edward McDonald, the class instructor; Walter B. Satterfield, Education Specialist for the Academy, who was seated at a table in the rear of the classroom with Robert Murgallis, Adjunct Instructor for the Academy. All three of these employees of the Academy submitted written memoranda to higher officials of the Academy in which they recounted their respective versions of what Stuart said. As a result of their reports, Albert G. Kirchner, Jr., the Academy Superintendent sent Stuart a Memorandum dated July 30, 1992 in which he advised Stuart that he had decided to:

1. Terminate your enrollment in the Command and Control of Fire Department Major Operations course upon receipt of this memorandum.
2. Terminate your campus lodging and visitation privileges at 6 p.m. today;
3. Bar admission to National Fire Academy resident courses for three years, and;
4. Deny payment of your stipend.

Superintendent Kirchner then advised Stuart:

This decision may be appealed in writing within five working days to the Administrator of the United States Fire Administration. His decision is final. Your sponsoring agency will be notified by letter of this action.

Kirchner concluded his memorandum to Stuart by asking him to contact Student Services "as soon as

possible to arrange transportation to the airport, if needed."

After Stuart returned to Hattiesburg, he met with that city's Fire Chief, George L. Herrington, and Assistant Fire Chief James Cody on August 3, 1992. The chief and assistant chief advised Stuart that they would investigate Stuart's dismissal from the Academy, and they afforded Stuart an opportunity to present his version of the events at the Academy on July 28, 1992. Fifteen days later, on August 18, 1992, Fire Chief Herrington and Assistant Fire Chief Cody again met with Stuart for a pre-disciplinary action conference; and on August 21, 1992, Fire Chief Herrington wrote Stuart to give him official notice that he had been demoted from the probationary position of district captain to lieutenant in the Hattiesburg Fire Department for violation of that city's Civil Service Rule No. 16. Chief Herrington wrote in his letter to Stuart:

I hereby make the following written accusations against you:

Violation of Civil Service Rule #16

(F) Wantonly offensive conduct or language toward the public or fellow officers or employees.

(L) Conduct unbecoming to an officer or employee of the City either while on or off duty.

On Tuesday afternoon of July 28, 1992, while attending the Command and Control of Fire Department Major Operations Course at the National Fire Academy, you made offensive racial and gender remarks before the personnel present in the class.

On the same day, the Mayor of Hattiesburg, J. Ed. Morgan, wrote Stuart to confirm his demotion in rank which Fire Chief Herrington had imposed.

On September 30, 1992, the Commission for the City of Hattiesburg entered an order which affirmed the City's demotion of Stuart from district captain to lieutenant pursuant to a hearing which it had conducted the day before. The Commission had stated in the record at the close of the hearing on the previous day:

This Commission unanimously upholds the decision of the mayor and fire chief concerning the demotion of James T. Stuart and express that this disciplinary action was not made for political or religious reasons and was made in good faith for cause.

Stuart next appealed to the Circuit Court of Forrest County, and that court affirmed the Civil Service Commission's decision to sustain the City's demotion of Stuart. Stuart has appealed from the Forrest County Circuit Court to the Mississippi Supreme Court, which assigned the appeal to this Court.

II. Discussion and Resolution of Stuart's Issues

Stuart's brief contains the following three issues on which he pins his hopes for our reversing the

circuit court's affirmance of the Civil Service Commission's decision to sustain the City of Hattiesburg's demotion of Stuart. They are:

Proposition I:

That the actions of the Mayor and Fire Chief in demoting appellant and as upheld by the Civil Service Commission of the City of Hattiesburg were arbitrary and capricious and politically motivated.

Proposition II:

That appellant's constitutional right of freedom of free speech has been violated.

Proposition III:

That appellant's constitutional right to due process and equal protection under the law were violated by the Superintendent of the National Fire Academy and again by the City of Hattiesburg.

A. Proposition I.

We first consider Stuart's Proposition I. Stuart is covered by the civil service system which Sections 21-31-1 *et seq.* of the Mississippi Code of 1972 have created. Section 21-31-21 provides that "[t]he tenure of everyone holding office, place, position or employment under the provisions of § 21-33-1 to § 21-33-27 shall be only during good behavior." Miss. Code Ann. § 21-31-21 (1972). It then authorizes the employer to take any of the following disciplinary actions against an employee for any of the following reasons:

Any such person may be removed or discharged, suspended without pay, demoted or reduced in rank, or deprived of vacation privileges or other special privileges, or any combination thereof, for any of the following reasons:

Incompetency, inefficiency, or inattention of duty; dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, or any other act of omission or commission tending to injure the public service.

Id.

Section 21-31-23 of the Mississippi Code of 1972 establishes, first, the procedure for an aggrieved municipal employee to appeal from a municipality's adverse employment decision to the civil service commission of that municipality and, secondly, a further appeal by either the municipality or the municipality's employee from the civil service commission to the circuit court of the county in which the municipality is located. This section provides in part:

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.

Miss. Code Ann. § 21-31-23 (1972). It is on this quoted portion of Section 21-31-23 that Stuart relies to argue that "the decision made in his case was entirely political." In his brief, Stuart specifically maintains:

All of the above persons had political motivations for the demoting of J. T. Stuart, and what the City of Hattiesburg apparently was looking for was a scapegoat for all of its racial transgressions. As is indicated [in the record of the hearing before the Civil Service Commission], if the Chief was so concerned about Lieutenant Stuart's racial attitudes, why did they reassign him to the highest concentration of black population in the city?

Political motivation -- whether it is to better your own position like Jim Cody [the assistant fire chief] or appease the Federal Courts like the Mayor and Fire Chief all add up to one thing -- Let's discipline J. T. Stuart before we get anymore bad publicity.

The Commission responds to Stuart's argument as follows:

Of singular importance to the disciplinary action taken against Captain Stuart, but primary to his ability to continue in the probationary capacity as a District Fire Captain, was the knowledge and training to be gained from his attendance at the National Fire Academy. As a District Supervisor, Captain Stuart was to obtain training to deal with multi-engine companies, multi-personnel and to enhance the City of Hattiesburg's ability to deal with life-threatening situations. The training would have assisted and aided in the direct command of persons under him in this regard. Mr. Stuart's philosophy and his failure to complete the National Fire Academy directly affected his ability to deal with life-threatening situations and to otherwise command those people under him with a degree of confidence and assurance by those persons, that his commands are made without bias or prejudice as to their race or gender.

Mr. Stuart would have this Court ignore the impact his conduct and resulting discharge from the National Fire Academy had on his ability to carry out the duties and responsibilities as a district supervisor, and in support of his proposition argues political motivation. Much of Mr. Stuart's argument in this regard is pure supposition and, in those instances where he does cite to the record in support of his argument of political motivation, his interpretation of the facts presented by the record is at best subjective and in most instances conjecture on his part.

The following language in Section 21-31-23 of the Mississippi Code of 1972 defines the scope of review by which the circuit court must abide in an appeal from a decision of a civil service commission:

[S]uch 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.

Miss. Code Ann. § 21-31-23 (1972). In *City of Meridian v. Hill*, 447 So. 2d 641, 643-44 (Miss. 1984), the Mississippi Supreme Court acknowledged that "On appeal here, the question before us is whether or not the action of the Civil Service Commission was in good faith for cause."

In *City of Jackson v. Froshour*, 530 So. 2d 1348, 1349 (Miss. 1988), the City of Jackson appealed the judgment of the Circuit Court of the First Judicial District of Hinds County which reversed an order of the Civil Service Commission of Jackson affirming the City's discharge of the appellee, Dennis Froshour, and directing that he be reinstated as an employee of the Jackson Police Department. The Mississippi Supreme Court reversed and rendered the judgment of the circuit court and reinstated the order of the Civil Service Commission of Jackson. In its opinion, the supreme court wrote:

It is thus clear that the scope of review of the circuit court, and of this Court, is limited, and we must ever bear in mind that it is not what the court, had it been a member of the governing authority, might have done in a particular instance, or indeed whether or not the court thinks a mistake may have been made, but instead the criterion is whether or not from an examination of the record there exists credible evidence substantiating the action taken by the city. It is upon this basis that the court determines whether or not the decision was in "good faith for cause." Courts are not empowered to supervise the intelligence, wisdom or fairness of the governing authorities, and no resources are available to a court to exercise such a function even if granted, in this extremely difficult task of determining the fitness of a particular person for a particular job. The task must be left to the governing authorities of the city.

Freshour, 530 So. 2d at 1355.

Was Stuart's demotion from district captain, which he was to hold for one year on a probationary status, to lieutenant "entirely political," as Stuart contends; or was the action of the Civil Service Commission "in good faith for cause" as the Commission maintains? From our review of the record, we find that "there exists credible evidence substantiating the action taken by the city" and that, therefore, the Commission's action in sustaining the City of Hattiesburg's demotion of Stuart was "in good faith for cause," as indeed the circuit court specifically found in its order by which it affirmed the Commission's order. We therefore conclude that Stuart's demotion was not at all political and that the Commission did not violate that part of Section 21-31-23 of the Mississippi Code of 1972 which requires that the Commission's investigation be confined to the determination of the question of whether Stuart's demotion was made for political reasons. Thus, we decide Stuart's first proposition adversely to him by holding that the City's demotion of Stuart, which the Commission upheld, was not arbitrary and capricious and that it was not politically motivated.

B. Proposition II.

Stuart's second proposition is that his "constitutional right of freedom of speech has been violated." To support his second proposition, Stuart strangely cites *Jackson Police Department v. Ruddick*, 243 So. 2d 566, 568 (Miss. 1971), in which the Mississippi Supreme Court reversed the circuit court's reversal of the Jackson Civil Service Commission's affirmance of the Chief of Police's firing of a clerk-typist in the Jackson Police Department. In other words, the supreme court reinstated and affirmed the order of the Jackson Civil Service Commission. The police chief fired Ms. Ruddick because she stated that "Captain _____'s wife had been a whore prior to the time she married Captain _____." *Id.* at 567. Of interest to this Court is the fact that the causes which the Jackson Chief of Police cited for disciplining Ms. Ruddick by firing her were identical to the causes which the Hattiesburg Fire Chief cited for demoting Stuart. *Id.* Ruddick made no claim that her constitutional right to freedom of speech to call the police captain's wife a former whore had been violated by the police chief's firing her. We find that this case supports the Commission in the case *sub judice*.

Stuart next cites *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 284 (1971), in which the United States Supreme Court held that it was not disobedient to wear a jacket on which were written "F___ the Draft" around a courthouse. Stuart quotes the following from that opinion:

A state cannot, consistently with the constitutional guaranty of freedom of expression, excise, as offensive conduct, one particular scurrilous epithet, as offensive conduct, one particular scurrilous epithet from the public discourse, either upon the theory that its use is inherently likely to cause violent reaction, or upon a general assertion that the state, acting as the guardian of public morality, may properly remove this offensive word from the public vocabulary.

Cohen, 403 U. S. at 22.

The Commission counters Stuart's reliance on *Cohen* by quoting from *Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), in which the United States Supreme Court held that in determining whether a public employee's speech is entitled to judicial protection under the First Amendment, such protection should be balanced with "[t]he interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The Court also observed in *Connick* that when conduct of an employee interferes with working relationships which are essential to fulfilling public responsibility, the employer's judgment is to be given a wide degree of deference. *Connick*, 75 L. Ed. 2d at 723.

The evidence is beyond dispute that when Stuart made his racial and gender disparaging statement as a student at the National Fire Academy, for which he later apologized, he was there as an employee and representative of the City of Hattiesburg, an equal opportunity employer. Thus, his statement could well have been taken as the official attitude and philosophy of that City. In its brief, the Commission stresses that Stuart's comments and consequent discharge from the National Fire Academy "were contrary to the interest of the City of Hattiesburg, as an employer, in promoting the efficiency of the public service it performs for *all of its citizens* through *all of its employees*, regardless of race, creed, color, or national origin. The Commission further argues that Stuart's comments "directly impacted his ability in a command position to direct employees under him in life-endangering situations."

We agree with the Commission that Stuart's speech is not entitled to judicial protection when balanced against the interest of the City of Hattiesburg. Thus, we resolve this issue adversely to Stuart.

C. Proposition III.

In his third proposition, Stuart complains that both the National Fire Academy and the City of Hattiesburg violated his constitutional rights to due process and equal protection under the law. As for remedying what the National Fire Academy may have done, this Court is impotent simply because that entity is not a party to this case. Stuart cites *Jenkins v. State*, 570 So. 2d 1191, 1193 (Miss. 1990), in which the Mississippi Supreme Court held that it was a denial of due process for a judge to preside as trial judge over the case of a defendant whom he had helped to indict as a prosecutor. Stuart contends that what happened in *Jenkins* is exactly what happened in the case *sub judice*; that is, the superintendent of the National Fire Academy "investigated the Stuart matter and made the decision concerning his punishment" and the City of Hattiesburg just "rubber stamped the improper judgment of [the superintendent] and hoped the matter would be appeased in the media." Stuart concludes his argument on this issue as follows:

J. T. confessed what he had done and apologized immediately upon arrival back in Hattiesburg, but he was not presented with any opportunity to explain himself or alternative to demotion in rank. He submits that is a violation of due process.

We previously noted that after Stuart returned to Hattiesburg, he met with that city's fire chief and assistant fire chief on August 3, 1992. The chief and assistant chief advised him that they would investigate his dismissal from the Academy, and they afforded Stuart an opportunity to present his

version of the events at the Academy. Fifteen days later, on August 18, 1992, Fire Chief Herrington and Assistant Fire Chief Cody again met with Stuart for a pre-disciplinary action conference; and on August 21, 1992, Fire Chief Herrington wrote Stuart to give him official notice that he had been demoted from the probationary position of district captain to lieutenant in the Hattiesburg Fire Department for violation of that city's Civil Service Rule No. 16. There followed the hearing before the Commission, and the subsequent appeal of the Commission's order sustaining the City's demotion of Stuart to the Forrest County Circuit Court, throughout all of which Stuart was represented by counsel.

Stuart's argument in support of his third proposition, which we earlier quoted, is hardly persuasive. As the Commission's argument notes, Stuart's "due process and equal protection argument is void of any factual basis supported by the record." Again, we agree with the Commission that Stuart's third proposition, for the support of which he offers but one case for our consideration, "should not be considered by this Court as having any merit in fact or law." Hence, for the third time we decide Stuart's proposition adversely to him.

III. Summary

The scope of review which Section 21-31-23 establishes for the circuit court and hence this court on appellate review is restricted to whether the Commission made its decision "in good faith for cause." We have concluded from our review of the record and from our evaluation of Stuart's arguments in support of his three issues, or propositions as he designates them, that indeed the Commission's order which sustained the City of Hattiesburg's demotion of Stuart from district captain to lieutenant was "in good faith for cause." Thus, we affirm the circuit court's order which affirmed the Commission's order.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS ARE ASSESSED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.J.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.