

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD **EMPLOYEE APPEALS BOARD**

DARRELL E. DEW

APPELLANT

VS.

DOCKET NO. 12-084

**MISSISSIPPI DEPARTMENT OF WILDLIFE,
FISHERIES AND PARKS**

RESPONDENT

ORDER

Before the Mississippi Employee Appeals Board is an appeal by Master Sergeant Darrell Dew (hereafter "Dew") for his termination of employment from the Mississippi Department of Wildlife, Fisheries and Parks (hereafter "MDWFP") effective December 17, 2012.

Dew's present appeal is his second appeal concerning his termination from the MDWFP. Dew was terminated on June 4, 2012, with an effective date of June 8, 2012. That termination was reversed by the Mississippi Employee Appeals Board because Dew was not provided procedural due process he was entitled to receive under the *Mississippi State Personnel Board Policy and Procedure Manual*. See, Order dated November 14, 2012, in Case No. 12-035. Subsequent to the Order reversing Dew's initial termination, Dew was provided another pre-termination hearing by MDWFP and then subsequently terminated by MDWFP on December 17, 2012. Dew's December 17, 2012, termination and the grounds upon which he was terminated, is set forth in a December 17, 2012, letter from Sam Polles, Executive Director of the MDWFP. Dew timely appealed his December 17, 2012, termination and the second appeal hearing was heard on August 14, 2013.¹

¹The reason for the significant length of time between Dew's termination on December 17, 2012, and the hearing of his appeal on August 14, 2013, was because Dew was charged by the United States of America in the Southern District of Mississippi for alleged violations of certain federal game laws.

Dew's December 17, 2012, termination letter stated that he was being terminated because the MDWFP had determined that Dew had engaged in illegal hunting and trapping and that many of his illegal hunting and trapping activities had occurred while he was in a MDWFP issued State vehicle, in uniform and in an on-duty status. Further, Dew's termination letter alleged that he was terminated on the basis that he exceeded the bag limit on wild turkey and violated various other regulations. Based on this alleged conduct, the MDWFP determined that Dew's actions constituted both a Group Three Number 10 offense of "unauthorized use or misuse of State property or records," and a Group Three Number 11 offense. Specifically, Dew's termination letter stated:

An act or acts of conduct including, but not limited to, the arrest or conviction of a felony or misdemeanor 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 duty to the public or other state employees.

The *Mississippi State Employee Handbook* provides that an employee guilty of a Group Three offense may be disciplined by the Agency with a written reprimand or the employee may be suspended without pay for up to thirty (30) working days, demoted or dismissed. It was the decision of the MDWFP that Dew be dismissed.

As the Appellant and employee, Dew has the burden of proof/persuasion that the allegations upon which his termination was based are either (1) untrue or, (2) if true, the actions taken by the MDWFP in terminating him were not justified for the conduct that he engaged in. See, *Mississippi State Personnel Board Policy and Procedures Manual* 10.7.21(C).

The Mississippi Supreme Court has made clear that the administrative rule which places the burden of proof/persuasion on the employee is not merely semantics. In *Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999) the court stated:

The statute and administrative regulations clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given are not true. Rule 17, Administrative Rules of the Mississippi Employee Appeals Board; Miss. Code Ann. § 25-9-127 (1972). ... This is not mere semantics. Under our scheme, in a nutshell, ties go to the appointing authority. That is, unless the employee carries the burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned. *Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993); Miss. Code Ann. § 25-9-127.

Having considered the testimony and exhibits from the initial hearing² in this matter on October 1, 2012, having considered the testimony of the witnesses who testified at the August 14, 2013, appeal hearing, and the exhibits introduced into evidence on August 14, 2013, this tribunal finds that Dew failed to meet his burden of proof that the allegations upon which his December 17, 2012, termination was based are untrue. This tribunal further finds that Dew failed to meet his burden of proof that the actions taken by the MDWFP in terminating Dew were too severe for the conduct in which Dew engaged. The reasons for this tribunal's finding follow.

Dew was a sworn law enforcement officer with the MDWFP. While in "on duty" status, Dew committed a number of game violations including killing and taking turkey in

²At the August 14, 2013, hearing, it was stipulated by the MDWFP and Dew that the testimony and exhibits from the first hearing could be considered by the EAB as substantive evidence in rendering its decision on Dew's second appeal.

excess of the Mississippi Spring, 2012, wild turkey season limit of three turkeys. Dew also used his State issued vehicle to trap game and committed a number of other violations including illegal hunting on a national wildlife refuge on more than one occasion.

Dew pled guilty in the United States District Court for the Southern District of Mississippi in Cause No. 5:13CR6DCB-FKB-001 to three misdemeanors. Specifically, Dew pled guilty to (1) illegal hunting on a national wildlife refuge with the offense ending on December 9, 2011; (2) illegal hunting on a national wildlife refuge with the offense ending on January 2, 2012; and (3) killing and taking one male wild turkey in excess of Mississippi's Spring, 2012, wild turkey season limit of three wild turkeys for the offense ending on April 23, 2012. Dew's conduct violated 16 U.S.C. § 668(dd) and 18 U.S.C. § 13(a). The United States District Court for the Southern District of Mississippi's sentence and judgment prohibited Dew from hunting on any federal national forest or any federal wildlife refuge for a period of two years from his conviction date. Further, the Federal Court ordered that Dew not hunt for a period of one year from the date of July 12, 2013, the date the Federal Court entered Judgment against Dew.

Dew does not contest that he violated certain Mississippi and Federal game laws.³ However, he contends that he was treated differently than other persons who work for the MDWFP who had engaged in similar conduct. In essence, Dew contends he is the recipient of a form of discrimination.

³In the hearing on Dew's first appeal, he was asked specific questions by counsel for MDWFP to which Dew asserted his Fifth Amendment privilege against self incrimination. The questions to which Dew refused to answer concerned whether Dew had "killed more than the bag limit," whether he had engaged in "trapping violations," and "did he shoot over the limit." This tribunal draws an adverse inference from Dew's assertion of his Fifth Amendment privilege on the questions he was asked.

Counsel for Dew was asked at the August 14, 2013, hearing if Dew contended that he was terminated for any one of the following reasons: “race, color, religious creed, national origin, sex, age, disability, or political affiliation.” Dew’s counsel stated that Dew did not contend that he was terminated for any of the aforesaid reasons. Thus, this tribunal finds as a fact that Dew was not terminated because of race, color, religious creed, national origin, sex, age, disability, or political affiliation.

Having determined Dew was not the recipient of discrimination of a protected class, the issue is whether Dew was treated differently from similarly situated MDWFP employees. Having considered all of the evidence in this case, both testimony and exhibits, this tribunal finds that Dew did not meet his burden of proof that he was treated differently than other persons who engaged in improper conduct while a MDWFP employee.

To support his “treated differently” discrimination argument, Dew called Alton Norris and Lann Wilf as witnesses to testify.

Mr. Norris is retired from the MDWFP. While Norris was an employee of the MDWFP as an Area Manager for the Delta National Forest, he used his State issued truck and a horse trailer and travelled to Arkansas to hunt. This occurred some time in the mid-1980's. As a result of his conduct, Norris was given a three day suspension. However, when comparing Norris’ transgressions with those of Dew, Norris’ use of a State issued vehicle to travel to and from Arkansas to hunt hogs (legally) is not as serious as Dew’s admitted conduct. Norris’ misconduct was limited to one, isolated incident. Norris did not, as Dew, illegally kill over the legal limit of any wildlife or illegally hunt on a national wildlife refuge, nor did Norris engage in other conduct similar to Dew’s.

Dew also introduced in his case-in-chief the testimony of Lann Wilf. Mr. Wilf was

disciplined for killing two does in one 24 hour time period while hunting at a hunting club. The club upon which Wilf was hunting was in a DMAP area club under Wilf's supervision as a biologist. Wilf used DMAP tags and improperly tagged the does. Wilf was not a sworn law enforcement officer. As a result of Wilf's conduct, he was given a letter of reprimand.

Wilf explained during his testimony, which this tribunal finds credible, that he did not intend to violate the law. Wilf's testimony and the facts surrounding his transgression did raise legitimate issues as to whether what Wilf did in killing the does was a violation of the law as opposed to a violation of MDWFP procedures. Dew did not meet his burden of proof that Wilf violated game laws as opposed to a violation of MDWFP policies.

Further, Wilf was not a sworn law enforcement officer such as Dew. Wilf was a biologist for the MDWFP. Dew, on the other hand, was a sworn law enforcement officer who was charged with enforcing the State of Mississippi game laws. For this reason alone, Wilf was not similarly situated as Dew. In addition, this tribunal finds that while Wilf's conduct was improper, it was not as egregious as Dew's conduct.

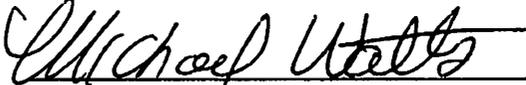
Finally, Dew contends another MDWFP employee Brian Ballinger violated the law in 2002 by killing two gobblers [turkey] at the same time. It is true that Ballinger, a MDWFP sworn law enforcement officer, gave himself a ticket for killing two gobblers on or about April 15, 2002. Ballinger was not terminated for his conduct. However, this fact provides Dew little support for his argument that he was treated differently than Ballinger. Dew did not report himself for his violation of Federal and State game laws. Dew's game

violations and other crimes were more severe than Ballinger's. Ballinger was not similarly situated as Dew in either the number of game violations or their severity.

In summary, this tribunal finds that the MDWFP was justified in terminating Dew based on his violation of both Federal and State game laws. For those reasons Dew's termination of December 17, 2012, is AFFIRMED in all respects. As this hearing officer stated on the record at the August 14, 2013, hearing, Dew is entitled to back pay from the MDWFP from the date of his termination of June 8, 2012, up until December 17, 2012, the date of his termination. It is ORDERED therefore that MDWFP promptly pay Dew his back pay and provide to him any other benefits he would have received during the period of time of June 8, 2012, through December 17, 2012.

SO ORDERED, THIS THE 25 DAY OF SEPTEMBER, 2013.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: 
MICHAEL N. WATTS
Presiding Hearing Officer