

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

EMPLOYEE APPEALS BOARD

FRANKIE FIPPS

APPELLANT

VS.

DOCKET NO. 14-005

MISSISSIPPI DEPARTMENT OF CORRECTIONS

RESPONDENT

ORDER

Before the Mississippi Employee Appeals Board is the appeal of Frankie Fipps (“Fipps” or “Appellant”) for being terminated by the Mississippi Department of Corrections (“MDOC”). A hearing was held on Fipps’ appeal on March 21, 2014. Fipps was represented by Melvin D. Miller, II. The MDOC was represented by David Scott.

Having considered the testimony of all witnesses who testified at the appeal hearing and having considered all exhibits introduced into evidence, this tribunal enters the following Order.

FINDINGS OF FACT

1. Fipps began his employment with the MDOC on or about June 1, 2009. Fipps’ duty station, at all material times, was the Mississippi State Penitentiary at Parchman, Mississippi.
2. By letter dated February 5, 2014, Fipps was terminated from his Correctional Officer II position with the MDOC with an effective termination date of February 5, 2014.
3. The MDOC, in its February 5, 2014, termination letter to Fipps, provided the following grounds for his termination:

Group III, Number 13 - An act or acts of conduct, including, but not limited to, the arrest or conviction for a felony or misdemeanor, occurring on or off the job which are plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency’s duties to the public or to other State Employees.

Specifically, on January 2, 2014, you were arrested by the Indianola Police Department for the crimes of kidnapping and rape. According to Jerry Pate, an Investigator with the Indianola Police Department, you gave an audio confession of the aforementioned charges.

Mississippi State Employee's Handbook, July 2013 edition, states that the commission of one Group III Offense may be disciplined by the agency with a written reprimand and/or may result in suspension without pay for up to thirty working days, demotion, or dismissal.

4. Fipps was arrested on January 2, 2014, by the Indianola Police Department for kidnapping and rape that allegedly occurred in Indianola, Mississippi or Sunflower County.

5. Neither the charge of rape or kidnapping is alleged to have occurred, in any respect, on the grounds of the Mississippi State Penitentiary, or any property owned or under the control of the MDOC or the State of Mississippi.

6. Following his arrest, Fipps gave a statement to Jerry Pate, the Indianola Police Department Investigator.

7. Fipps, in his statement to Investigator Jerry Pate, admitted to having consensual sexual intercourse with a female.

8. Fipps, in his statement to Investigator Jerry Pate, did not admit that he raped the female, nor did Fipps, in his statement, confess to any of the charges against him.

9. Fipps told Investigator Pate that the female consented to sexual intercourse with him.

10. Fipps' arrest for the felonies of kidnapping and/or rape by the Indianola Police Department was not plainly related to Fipps' job performance, and was not of such a nature that to continue Fipps in his assigned position of Correctional Officer II could constitute negligence in regard to the agency's duties to the public or to other State employees.

11. Because Fipps' arrest for the felonies of rape and/or kidnapping was not an act or acts of conduct which were plainly related to Fipps' job performance, and because they were not of such a nature that to continue Fipps in his assigned position of Correctional Officer II would not constitute negligence in regard to the MDOC's duties to the public or to other State employees, Fipps met his burden of proof that he did not commit the Group III Offense, Number 13 as alleged by the MDOC in Fipps' February 5, 2014, termination letter.

CONCLUSIONS OF LAW

As the Appellant and employee, Fipps 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 MDOC 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 of Frankie Fipps and MDOC Investigator Ragon, the only two witnesses that testified at Fipps' appeal hearing, and having considered all exhibits introduced

into evidence, this tribunal finds as a fact that Frankie Fipps met his burden of proof/persuasion set forth by the *Mississippi State Personnel Board Policy and Procedures Manual* and by Mississippi law. Contrary to the February 5, 2014, termination letter, Fipps did not confess to kidnapping and rape. Further, his arrest for alleged rape and kidnapping are not “plainly related to job performance” and “are not of such a nature that to continue the employee [Fipps] in the assigned position [Correctional Officer II] could constitute negligence in regard to the agency’s duties to the public or to other State employees.” Accordingly, Fipps’ termination is REVERSED and the MDOC is directed to reinstate Fipps to his position of Correctional Officer II. The reasons for this tribunal’s decision follow.

There is no question that Fipps was arrested for either kidnapping and/or rape by the Indianola Police Department. Fipps testified at his appeal hearing that he was charged only with kidnapping of a female. Fipps’ February 5, 2014, termination letter alleged Fipps was arrested for both rape and kidnapping.

Before addressing the reasons for this tribunal's decision that Fipps’ termination must be reversed, it is necessary to set forth a synopsis of the facts that were developed at Fipps’ appeal hearing. In late December, 2013, Fipps met a female in Indianola, Mississippi. The female voluntarily got into Fipps’ vehicle and they drove to an area where they engaged in sexual intercourse. All actions between Fipps and the female occurred on property that was not owned or controlled by the MDOC or the State of Mississippi. Subsequently, the female pressed charges against Fipps for either rape or kidnapping or both.¹ The Indianola Police Department charged Fipps

¹The undersigned hearing officer does not have a copy of the actual arrest warrant against Fipps to determine the charges against him.

with rape and kidnapping, Fipps was arrested, subsequently made bail and was released.

Based on Fipps' arrest, the MDOC terminated Fipps. The MDOC in its February 5, 2014, termination letter alleged that Fipps had committed a Group III, Number 13 violation of the Mississippi State Employee Handbook. In Fipps' February 5, 2014, termination letter, the MDOC alleged Fipps was terminated for being arrested for the felonies of rape and kidnapping, and that such arrests were plainly related to job performance and are of such nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other State Employees. (Emphasis added)

There is no question Fipps was arrested for a felony (or felonies) off the job. However, this tribunal finds that Fipps met his burden of proof that his arrest for the felonies of kidnapping and/or rape [were not] of such a nature that to continue Fipps in the assigned position could constitute negligence in regard to the agency's duties to the public or to other State employees nor was Fipps' arrest "plainly related to [Fipps'] job performance."

At the time of Fipps' arrest in January, 2014, Fipps was an employee at the MDOC and held the title of Correctional Officer II. So far as the record is concerned, there is no evidence to support, in any respect, that Fipps' Correctional Officer II position would provide an opportunity for him to kidnap a female inmate or rape, attack, or otherwise assault female inmates (female visitors) or MDOC female employees. Fipps met his burden of proof that his arrest was not "plainly related to his job performance" as a Correctional Officer II. Fipps likewise met his burden of proof regarding whether the MDOC's retention of Fipps as an employee could constitute negligence in regard to the MDOC. This is so because the evidence adduced at Fipps' appeal hearing established that the two alleged felonies against Fipps were based, primarily, if not totally, on the testimony of the female

with whom Fipps engaged in sex. Investigator Ragon testified that he listened to the entire taped interview Fipps provided Investigator Pate and that Fipps did not, contrary to the MDOC's February 5, 2014, termination letter to Fipps, confess to Investigator Pate of raping and kidnapping the female. It was clear from Investigator Ragon's testimony that from Ragon's investigation of what Fipps told Investigator Pate, that Fipps did not make any inculpatory statements. Fipps maintained in that interview by Investigator Pate that sex with the female was consensual.

The facts before the Mississippi Employee Appeals Board establish only that a female said Fipps raped and/or kidnapped her. There is no evidence that the female was bruised, had her clothes forcibly removed from her body, nor is there any other objective evidence of a sexual assault. So far as the record before the Mississippi Employee Appeals Board is concerned, the charges boil down to "she said" versus "Fipps said." The undersigned hearing officer carefully observed the demeanor of Fipps during his testimony at his appeal hearing. Fipps was direct in answering questions by both the MDOC's attorney and his personal attorney. Fipps was not evasive during questioning and his body language, tone of voice, overall demeanor, and his version of the incident were credible. These facts, coupled with the fact that Fipps' job duties as a Correctional Officer II do not require he interact routinely with female inmates, or work alone with female MDOC employees compels this tribunal to find that Fipps met his burden of proof in all respects and that his arrest for kidnapping and/or rape were not plainly related to his job performance as a Correctional Officer II, nor would the retention of Fipps by the MDOC under the facts of this case² constitute negligence on behalf of the MDOC to the public or other State employees.

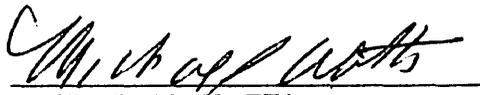
²This opinion and ruling is limited to the facts in the instant case and should not be interpreted by future employees who appeal or other hearing officers as a precedent in adjudicating future appeals.

Accordingly, Fipps' termination is REVERSED. The MDOC is directed to reinstate Fipps to his employment status as Correctional Officer II effective as of the date of his termination (February 5, 2014) and to restore to Fipps all of his rights and benefits including back pay, medical leave and personal leave to the extent allowed by law. It is also ordered that Fipps be restored to all of his retirement benefits he would have been entitled to had he not been erroneously terminated, provided the integrity of such benefits remain uncompromised in accordance with all applicable laws, policies, rules and regulations.

SO ORDERED, THIS THE 25 DAY OF April, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:



MICHAEL N. WATTS
Presiding Hearing Officer