

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

TUESDAY ABRAHAM

FILED

APPELLANT

MAY 31 2016

V.

CAUSE NO.: 15-050

EMPLOYEE APPEALS BOARD

MISSISSIPPI DEPARTMENT OF EDUCATION

RESPONDENT

ORDER

FACTS

Tuesday Abraham ("Ms. Abraham") was terminated by letter dated December 7, 2015.

The termination was effective December 9, 2015. Ms. Abraham's December 7, 2015, termination letter, titled "Disciplinary Action Notice" set forth the following reasons for her termination:

It is found that you have received the following disciplinary actions:

On August 3, 2015, you were issued a written reprimand for a Group Two, Number One violation (**Insubordination, including but not limited to, resisting management directives through actions and/or verbal exchange, and/or failure or refusal to follow supervisor's instruction, perform assigned work, or otherwise comply with applicable established written policy**) of the Mississippi State Employee Handbook (§7.1) for your actions of June 17, 2015.

On August 18, 2015, you were issued a written reprimand for a Group Two, Number One violation (**Insubordination, including but not limited to, resisting management directives through actions and/or verbal exchange, and/or failure or refusal to follow supervisor's instruction, perform assigned work, or otherwise comply with applicable established written policy**) of the Mississippi State Employee Handbook (§7.1) for

your actions of August 11, 2015 and August 13, 2015.

On August 20, 2015, you were issued a written reprimand for a Group Two, Number One violation **(Insubordination, including but not limited to, resisting management directives through actions and/or verbal exchange, and/or failure or refusal to follow supervisor's instruction, perform assigned work, or otherwise comply with applicable established written policy)** of the Mississippi State Employee Handbook (§7.1) for your actions of August 19, 2015.

The Mississippi State Employee Handbook (Chapter 7, Page 2, July 2014 edition) states "*Accumulation of two (2) Group Two written reprimands within a one (1) year period may result in demotion or dismissal.*" Based on the above-referenced incidents, you accumulated three (3) Group Two written reprimands within the requisite time frame.

A review of the entire written reprimands dated August 3, 18, and 20, 2015, reflects that in each of the three reprimands Ms. Abraham was told that a future violation may result in disciplinary action being issued to [her]. Specifically, the August 3, 2015, written reprimand from Korby Mann to Ms. Abraham stated, "A copy of this reprimand will be placed in your personnel file. Further violations of the Mississippi State Employee Handbook may result in additional disciplinary action being issued to you." (Emphasis added) Ms. Abraham's August 18, 2015, written reprimand from Toni Kirsch stated, "A copy of this reprimand will be placed in your personnel file. Further violations of the Mississippi State Employee Handbook may result in additional disciplinary action being issued to you" (Emphasis added) And finally, Ms. Abraham's August 20, 2015, written reprimand, also from Korby Mann, stated, "A copy of this reprimand will be placed in your personnel file. Further violations of the Mississippi State

Employee Handbook may result in additional disciplinary action being issued to you.”

(Emphasis added)

On August 15, 2015, Ms. Abraham filed an inter-agency grievance. By letter dated September 18, 2015, the Mississippi Department of Education (“MDE”) responded to Ms. Abraham’s inter-agency grievance. The gist of MDE’s September 18, 2015, response to Ms. Abraham’s grievance was that the MDE determined that her inter-agency grievance was without merit. Aggrieved by MDE’s September 18, 2015, response, Ms. Abraham filed an appeal of that grievance to the Mississippi Employee Appeals Board (MEAB) on October 7, 2015. However, Ms. Abraham did not file her MEAB appeal timely. Accordingly, this tribunal entered an Order dated November 18, 2015 – filed with the Mississippi State Personnel Board on November 19, 2015 – dismissing Ms. Abraham’s appeal for lack of subject matter jurisdiction, with prejudice. The dismissal of Ms. Abraham’s untimely appeal resulted in the August 3, 2015, August 18, 2015, and August 20, 2015, written reprimands becoming final.

On November 17, 2015, only one day before this tribunal completed the Order dismissing, with prejudice, Ms. Abraham’s appeal, and two days before his tribunal’s Order was filed with the Mississippi State Personnel Board, Carey Wright, Superintendent of Education, wrote Ms. Abraham a letter titled “Accumulation of Charges Pre-Disciplinary Action Notice.” This document informed Ms. Abraham that she had accumulated three Group Two offenses within one year and that as a result she was subject to disciplinary action, including termination for violation of The Mississippi State Employee Handbook (Chapter 7, Page 2, July 2014 edition). That section states “‘Accumulation of two (2) Group Two written reprimands within a one (1) year period may result in demotion or dismissal.’ Based on the above-referenced

incidents, you accumulated three (3) Group Two written reprimands within the requisite time frame.”

After a pre-disciplinary conference held on December 1, 2015, Ms. Abraham was terminated from her MDE employment effective December 9, 2015. Ms. Abraham timely appealed her termination to the MEAB.

A hearing was held on Ms. Abraham’s appeal on April 15, 2016. During the hearing, certain facts were stipulated into evidence. One of the stipulated facts by the MDE was that Ms. Abraham had not engaged in conduct after August 20, 2015, which could form the basis of disciplinary action against Ms. Abraham. In other words, Ms. Abraham had not, after the August 20, 2015, written reprimand for the Group Two, Number One offense of insubordination engaged in “future violations of the Mississippi State Employee Handbook which [could] result in additional disciplinary action being issued to Ms. Abraham.” *See*, Ms. Abraham’s August 20, 2015, written reprimand.

LAW

The issue before this tribunal is whether the termination of Ms. Abraham by the MDE effective December 9, 2015, is allowed by the rules and regulations of the Mississippi State Personnel Board when Ms. Abraham had not committed either a Group One, Group Two, or Group Three offense of the *Mississippi State Employee Handbook* after August 20, 2015. For the reasons set forth below, this tribunal finds that the MDE should not have terminated Ms. Abraham effective December 9, 2015. The MDE’s termination of Ms. Abraham is REVERSED. The reasons for this tribunal’s decision follow.

At the oral argument/hearing on April 15, 2016, counsel for both the MDE and Ms. Abraham admitted that they could find no authority directly on point concerning the question of whether a state agency may terminate a state employee, after the state employee has received two or more Group Two offenses and the time to challenge the appeals on the underlying charge upon which the termination was based had expired or after the employee was punished by a written reprimand initially, but later terminated without the employee having engaged in conduct which might be considered an additional Group One, Group Two, or Group Three offense. Likewise, the undersigned hearing officer did not locate authority directly on point. However, this tribunal is aware of the case of *Miss. Dept. of Corrections v. Angela McCray* which was appealed from the MEAB to the Hinds County Circuit Court. A copy of *McCray* is attached to this Order.

In *McCray* the MEAB, *en banc*, held that the Mississippi Department of Corrections could not terminate an employee when the Department of Corrections had initially only reprimanded the employee, with a warning that future misconduct would result in harsher penalties and then, after the appeal time expired, back up and re-punish via termination the employee who had committed no new offense. Hinds County Circuit Court Judge William Gowan in Civil Action No. 251-13-5 on September 12, 2013, affirmed the MEAB's *en banc* ruling. Specifically, Judge Gowan held:

While it is true the agency may fire an employee for one Group III offense, the Court is of the opinion the agency cannot at first reprimand the employee, with a warning that future misconduct would result in harsher penalties, and then months later after the appeal time has lapsed back up and re-punish the employee, who has committed no new offense, via termination.

This tribunal recognizes that *McCray's* facts are not exactly the same as the facts presented in Ms. Abraham's appeal. However, the reasoning behind the MEAB's *en banc* ruling in *McCray*, which was ultimately affirmed by the Circuit Court of Hinds County, is persuasive to this tribunal in reaching its decision in this case. In addition, this tribunal also considered the following in reaching its decision to reverse Ms. Abraham's termination.

The MDE, in all three of Ms. Abraham's written reprimands, stated that any future violation could result in additional disciplinary action being issued to her. This statement by the MDE in the written reprimands to Ms. Abraham is not ambiguous. The MDE informed Ms. Abraham in her August 20, 2015 (and the other two reprimands), that her punishment was limited to the written reprimand to be placed in her personnel file and that only if she engaged in future violations could she receive additional punishment. These facts are very similar to *McCray*.

The MDE at the April 15, 2016, oral argument/hearing stated that the reason that Ms. Abraham was not advised in her August 18 or 20, 2015, written reprimands that she might later be terminated was because Ms. Abraham had filed an inter-agency grievance. The MDE stated it was waiting for the final resolution of that grievance before advising her that she would be considered for termination or other disciplinary action. MDE's argument is not persuasive. This is so because under the MDE's theory an employee could commit two Group Two offenses, or a Group Three offense on January 2nd of any given year, be given a suspension without pay or a written reprimand for the violations, and then on December 31st of that year terminate the employee without the employee having committed an additional Group One, Group Two, or Group Three offense.

In this tribunal's view the appropriate time to have terminated Ms. Abraham, had the MDE chosen to do so, was upon Ms. Abraham's receipt of either the August 18, 2015, written reprimand of the Group Two, number one offense of insubordination or the August 20, 2015, written reprimand. To hold otherwise would be contrary to the MDE's statement that it would only consider future discipline against Ms. Abraham as a basis for punishment.

In addition, one of the purposes of the structured disciplinary framework set forth in the *Mississippi State Personnel Board Policy & Procedure Manual* is that all employees will be disciplined within an established framework. The MDE, or any other State agency, may not impose a specific discipline on an employee, as was done in Ms. Abraham's case (a written reprimand – with a warning that a future violation could result in additional disciplinary action), and later decide to terminate that employee for no further improper conduct. State employees should not be required to work with the sword of Damocles hanging above their heads and wonder if they might be terminated days, weeks, or months after punishment when the employee has not committed an additional Group One, Group Two, or Group Three offense. To allow the MDE or other state agency to discipline an employee, impose that discipline and then later utilize the offense or offenses for which the employee had already been punished to terminate the employee would transform the present disciplinary framework to a system of allowing each state agency authority to pick and choose when they terminate an employee.

Notwithstanding the fact that MDE initially stipulated that Ms. Abraham had not engaged in any conduct which would implicate a Group One, Group Two, or Group Three offense, the MDE in its oral argument stated that once this tribunal filed its November 19, 2015, Order dismissing Ms. Abraham's appeal for lack of jurisdiction, a new "violation" or offense occurred.

The MDE argued that at that time all of Ms. Abraham's appeals became final, that was the time she accumulated two Group Two offenses within one year. This argument is without merit. The accumulation of two Group Two offenses within a year occurred on August 18, 2015, and occurred again on August 20, 2015. There were no additional violations to "accumulate" after August 20, 2015. The fact that appeals from those matters were not final until some later date does not mean that the accumulations did not occur on August 18, 2015 and August 20, 2015. A review of the *Mississippi State Personnel Board Policy & Procedure Manual* Section 9.1(A), 9.1(B), and 9.1(C) reflect that the accumulation of two Group Two offenses within a year is not an "offense." Rather, the accumulation of two Group Two offenses is a permissible punishment that could have been imposed on either August 18, 2015, or August 20, 2015. However, MDE failed to exercise its right of termination of Ms. Abraham on either August 18, 2015, or August 20, 2015.

Ms. Abraham's termination is REVERSED. The MDE is directed to reinstate Ms. Abraham to her employment effective as of the date of her termination (December 9, 2015) and to restore to Ms. Abraham all of her rights and benefits including back pay, medical leave and personal leave to the extent allowed by law. It is also ordered that Ms. Abraham be restored to all of her retirement benefits she would have been entitled to had she 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 31 DAY OF MAY, 2016.

MISSISSIPPI EMPLOYEE APPEALS BOARD

BY: Michael Watts
MICHAEL N. WATTS
Chief Hearing Officer

F I L E D

SEP 13 2013

**IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

BARBARA DUNN, CIRCUIT CLERK
BY _____ D.C.

**MISSISSIPPI DEPARTMENT
OF CORRECTIONS**

VS.

CIVIL ACTION NO: 251-13-5

ANGELA MCCRAY

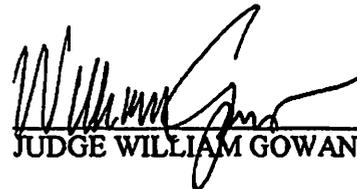
ORDER

The Court having granted certiorari and having considered the agency's appeal from the Employee Appeals Board's (EAB) decision to reverse the agency decision and reinstate appellee finds the decision of the EAB should be affirmed.

While it is true the agency may fire an employee for one Group III offense, the Court is of the opinion the agency cannot at first reprimand the employee, with a warning that future misconduct would result in harsher penalties, and then months later after the appeal time has lapsed back up and re-punish the employee, who has committed no new offense, via termination.

IT IS THEREFORE ORDERED AND ADJUDGED, that the decision of the EAB should be and the same is hereby **AFFIRMED**.

SO ORDERED, this the 12th day of September, 2013.


JUDGE WILLIAM GOWAN