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BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

KENNETH R. MCDANIEL	FILED	APPELLANT
VS.	SEP 23 2016	CAUSE NO. 16-013
MISSISSIPPI DEPARTMENT OF WILDLIFE, FISHERIES AND PARKS	EMPLOYEE APPEALS BOARD	RESPONDENT

ORDER

This cause came before the Mississippi Employee Appeals Board for a hearing on August 25, 2016, at the office of the Mississippi State Personnel Board in Jackson, Mississippi. The Appellant, Kenneth R. McDaniel (McDaniel) was represented by Attorneys Williams H. Hussey and Elliott Haller of Maxey Wann, PLLC in Jackson, Mississippi. The Mississippi Department of Wildlife, Fisheries and Parks (DWFP) was represented by W. Douglas Mann, Jr., Special Assistant Attorney General and D. Drew Malone, Special Assistant Attorney General. The hearing began at approximately 10:00 a.m. and was concluded around 1:00 p.m. This opinion represents the decision of the hearing officer based on the witnesses, exhibits, and argument presented at the hearing.

HISTORY

Kenneth R. McDaniel served as a conservation officer and area wildlife manager with the DWFP for twenty-six (26) years. Prior to his employment with DWFP McDaniel served an additional six (6) years in law enforcement. McDaniel attended the Mississippi Law Enforcement Academy and graduated prior to becoming a law enforcement officer. The DWFP did not dispute that McDaniel was an exemplary employee during his entire tenure with DWFP. McDaniel has now retired after thirty-one (31) years of service to the State of

Mississippi. At the time of the incident that is the subject of this appeal, McDaniel was serving as an area wildlife manager in Marion County, Mississippi. McDaniel throughout his career with DWFP was a sworn law enforcement officer at all times.

Director Larry Castle testified that a number of employees called "hybrids" work for DWFP in jobs where their duties may involve law enforcement but also require them to perform activities that are outside the realm of law enforcement. McDaniel was one of these "hybrid" employees who was both a sworn law enforcement conservation officer and an area wildlife manager. Area wildlife managers are not required to be sworn law enforcement officers, but McDaniel was at all times a sworn law enforcement officer throughout his long career with DWFP.

FACTS

On August 8, 2014, McDaniel was working in his capacity as an area wildlife manager at the wildlife management area in Marion County. He was servicing a bush hog owned by DWFP. While McDaniel was working on the bush hog, a citizen named Scott Davis appeared, and began asking McDaniel some work related questions about hunting season. Davis testified that McDaniel while answering his questions bent over to pick up a "grease rag" and [redacted] at that time. It is undisputed that McDaniel [redacted]

McDaniel later filled out an incident report concerning his injury of August 8, 2014, and described his injury as "sharp pain in back while bending over working on bush hog." It

should be noted that McDaniel failed to list any witnesses to his accident on page 2 of the incident report (Exhibit 5). McDaniel admitted that he failed to list Scott Davis as a witness. However, Davis did appear at the hearing subject to a subpoena and his testimony was credible. It is the finding of this tribunal that McDaniel was injured on the date in question at the wildlife management area while working on a bush hog answering questions concerning hunting season.

RULING

The issue in this cause is the interpretation of the Mississippi Code Annotated 25-3-9 (5) which was amended in 2014 by Senate Bill 2597. Section 5 reads "any state law enforcement officer who is injured by wound or accident in the line of duty shall not be required to use earned personal leave during the period of recovery of such injury. As used in this subsection, the term "state law enforcement officer" means a person employed by a state agency, who, as a condition of his or her employment, is required by law to complete a course of study at the Law Enforcement Officers Training Academy."

In his testimony, Director Larry Castle indicated that the DWFP did consider McDaniel to be a sworn law enforcement officer at all times during his employment as set out in the aforementioned statute. McDaniel, as a hybrid employee of DWFP worked as both a conservation officer, which required him to be a sworn law enforcement officer, and an area wildlife manager. Therefore, the statute in question does indeed apply to McDaniel.

The sole subject of dispute in this cause is whether McDaniel was "injured by wound or accident in the line of duty." There is very little information available to be considered in interpreting this statute as it is a fairly new statute. The Office of the Mississippi Attorney

General issued an AG's opinion on October 3, 2014. AG's opinion no. 2014-00373 addressed this statute. The DWFP interprets this AG's opinion to mean that the DWFP is the sole decision maker concerning whether or not McDaniel was injured "in the line of duty." The AG's opinion also addresses Mississippi Code Ann. 21-25-9 concerning "in the line of duty." It is discussed in MS AG Op., Ellis (November 18, 1992): This code section applies to Municipalities and the AG's opinion reads "the governing authorities of such city shall be the sole judge as to whether such illness or such injury was contracted or sustained in the line of duty of any employee, and the reason of such expenses."

The AG's opinion goes on to say "there appears to be no definitions or explanatory language in the above listed statutes relating to "in the line of duty." Section 1-3-65 of the Mississippi Code provides: All words and phrases containing the statutes are used according to their common and ordinary exception and meaning; but technical words and phrases according to their technical meaning." The opinion goes on to quote "Ballantine's Law Dictionary, Third Edition, 1969 defines "line of duty" as "the course of duty where in the military and civilian employment." Merriam Webster's Collegiate Dictionary, Tenth Edition 1993 defines "all that is authorized, required, or normally associated with some field of responsibility." Quoting further from the AG's opinion the words in question including "in the line of duty" are not technical words or phrases and therefore used according to their common and ordinary exception and meaning. "In the line of duty" commonly refers to actions and events occurring while on the job or while engaged in activities related to their employment. As this office opined in Ellis above, likewise, the employing authority under Section 25-9-93 must make the factual determination as to whether the injury incurred in the

line of duty. Of course, pursuant to Section 25-3-101, the State Personnel Board could "promulgate rules for the administration of Sections 25-3-91 through 25-3-99, which shall be binding upon state service agencies within the meaning of Section 25-9-107."

In this cause, McDaniel is seeking to invoke Mississippi Code Annotated Section 25-3-93(5) in order to receive 120 hours of leave time, or approximately fifteen (15) days, concerning the injury he suffered on August 8, 2014. The only issue in dispute is whether McDaniel's injury while working on the farm implement/bush hog and answering a question concerning hunting season to a local citizen was indeed engaged in activities considered "in the line of duty." The DWFP made a determination that McDaniel's injury was not "in the line of duty." The DWFP did not draft a written policy or any guidelines as the meaning of "in the line of duty."

The Mississippi Court of Appeals in its recent opinion in *Mississippi Department of Wildlife, Fisheries, and Parks v Bradshaw*, No. 2015-SA-00340-COA stated "A state agency's personnel decisions are entitled to a "presumption of correctness." *Miss. Dep't of Corr. v. Smith*, 883 So. 2d 124126 (¶1) (Miss. Ct. App. 2004). "The statute and administrative regulations [governing appeals to the EAB] clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given [for his termination] are not true." *Miss. Dep't of Corr. v. McClee*, 677 So. 2d 732, 735 (Miss. 1996). "This is not mere semantics. Under our scheme, in a nutshell, ties go to the [agency/employer]." *Id.* The EAB is not authorized to reinstate the employee unless the employee carries his burdens of proof and persuasion "that the reasons stated in the notice of dismissal are not true or are not sufficient grounds for the action taken." *Bynum*

v. Miss. Dep't of Educ., 906 So. 2d 81, 90 (¶14) (Miss. Ct. App. 2004). If an employee seeks judicial review of an adverse decision of the EAB, "[t]he reviewing court must affirm the [EAB] decision if the decision was (1) supported by substantial evidence; (2) not arbitrary or capricious; (3) within the scope or power of the agency; and (4) not a violation of the aggrieved party's constitutional or statutory rights." *Ray II,* 172 So. 3d at 187 (¶15); *accord* Miss. Code Ann. § 25-9-132(2) (Rev. 2010). The Supreme "Court has held that 'substantial evidence means evidence which ... affords a substantial basis of fact from which the fact in issue can be reasonably inferred.'" *Ray II*, 172 So. 3d at 187 (¶16) (quoting *State Oil & Gas Bd. V. Miss. Mineral & Royalty Owners Ass'n,* 258 So. 2d 767, 779 (Miss. 1971)) (brackets omitted). "Substantial evidence exists so long as there is evidence that a reasonable mind might accept as sufficient to support a conclusion." *Id.* "The reviewing court is not authorized to substitute its judgment for that of the [EAB] where there is substantial (that is, more than a scintilla of) evidence to support the finding." *Id* (quoting *Miss. Pub. Serv. Comm'n v. Merchants Truck Line Inc.,* 598 So. 2d 778, 782 (Miss. 1992)) (brackets omitted). "Moreover, 'there is a rebuttable presumption in favor of the agency decision and the burden of proof is on the party challenging that decision.'" *Id.* (quoting *Montalvo v. Miss. State. Bd. of Med. Licensure*, 671 So. 2d 53, 56 (Miss. 1996)) (brackets omitted). The reviewing court also must bear in mind that "[t]he EAB 'is the trier of fact as well as the judge of witnesses' credibility.'" *Id.* At 188 (¶20) (quoting *Bynum*, 906 So. 2d at 90 (¶14)). On appeal from a circuit court's decision concerning an agency action, this Court applies the same standard of review as the circuit court. *Pub. Emps' Ret. Sys. v. Marquez*, 774 So. 2d 421, 429 (¶32) (Miss. 2000)."

DWFP made the decision that McDaniel's injury was not sustained "in the line of duty." Director Larry Castle testified that McDaniel's activity of working on a bush hog while answering a question about hunting season was not "in the line of duty." Director Castle gave the following distinction concerning DWFP's interpretation of the phrase "in the line of duty." Director Castle indicated that had McDaniel been at the same location and at the same time working on his DWFP issued vehicle's blue lights, that this activity would have been considered 'in the line of duty' by the agency. This testimony seems to be hair-splitting and is certainly arbitrary and capricious according to well-settled law of the State of Mississippi. The fact that McDaniel could be at the same location at the same time within the scope of his employment and working on his truck rather than a bush hog that is also property of the agency seems to give clear indication that the DWFP's decision was an arbitrary and capricious one. We find that there is substantial evidence to support McDaniel's position that he was engaged in activities within the meaning of "in the line of duty" as outlined in Section §25-3-93(5). The only guidance afforded this tribunal in making this decision is found in the aforementioned AG's opinion which gives direction concerning the term "in the line of duty." The opinion reads "in the line of duty" commonly refers to actions and events occurring on the job while engaged in activities related to their employment." It is clear that McDaniel was on the job, engaged in activities within the scope of his employment, and that he was engaged in activities within "the line of duty" under the statute in question. DWFP does not have a written policy or any guidelines as to what the department deems to be "in the line of duty."

DWFP is directed to adjust the compensation to McDaniel for the 120 hours leave in question, which amounts to fifteen (15) days. The agency is to take all action to make certain that his retirement benefits reflect this fifteen (15) days of compensation which will have an impact on his PERS retirement benefits. DWFP is ordered to restore all of his rights and benefits as allowed by law.

SO ORDERED this the 23rd day of September, 2016.

Grant M. Fox
Hearing Officer