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EMPLOYEE APPEALS BOARD

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

JASON T. KERR

APPELLANT

VS.

NO. 12-036

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

RESPONDENT

ORDER

Presently before the undersigned hearing officer is an appeal by Corporal Jason T. Kerr (hereafter "Kerr"). Kerr, at all pertinent times, was as employee of the Mississippi Department of Wildlife, Fisheries and Parks. Kerr was terminated from his job by the Mississippi Department of Wildlife, Fisheries and Parks. At the time of his termination, Kerr had served twelve months as a state service employee. By letter dated June 4, 2012, Kerr was provided a Notice of Separation from Employment by the Mississippi Department of Wildlife, Fisheries and Parks. The June 4, 2012, termination letter was signed by Sam Polles, Executive Director of the Mississippi Department of Wildlife, Fisheries and Parks. The June 4, 2012, termination letter alleged that Kerr admitted certain wildlife, hunting and trapping violations and that an investigation by undercover officers of the Mississippi Department of Wildlife, Fisheries and Parks confirmed that Kerr committed the aforesaid violations while he was "on duty" status.

Kerr's termination letter stated that Kerr's actions constituted "a Group Three Number 10 offense of, 'unauthorized use or misuse of State property or records,' and a Group Three Number 11 offense of, '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 duties to the public or other state employees.”

Prior to Kerr's Notice of Termination, he was suspended with pay. Following Kerr's suspension with pay, Kerr was provided another letter from the Mississippi Department of Wildlife, Fisheries and Parks on May 17, 2012. The May 17, 2012, letter advised Kerr of a pre-disciplinary conference. The May 17, 2012, letter provided, in pertinent part, “Please be advised that on May 24, 2012, or as soon thereafter as possible, a decision will be made that could result in disciplinary action against you, up to and including termination of your employment with the Department.” The May 17, 2012, letter also stated under the section entitled “Your Rights,” “You have the right to respond to the above charges in writing or orally, or both. Any written response must be received by Colonel Adcock [Dr. Sam Polles' designee] no later than May 23, 2012. You must notify Colonel Adcock no later than May 23, 2012, as to whether or not you decide to respond orally.”

The record reflects that Kerr received this May 17, 2012, “pre-disciplinary conference” letter on May 18, 2012.¹ Kerr, through counsel, has filed a Motion to Dismiss for Lack of Jurisdiction, on the basis that the Mississippi Department of Wildlife, Fisheries and Parks did not provide Kerr ten (10) working days between the date of his notification of pre-termination conference and the actual pre-termination conference as required by Section 9.3 (Due Process) of the *Mississippi State Personnel Board Policy and Procedures Manual*. Section 9.3 provides:

¹ See, Mississippi Department of Wildlife, Fisheries and Parks' Response to Appellant's Motion to Dismiss.

All permanent State Service employees, i.e., all State government employees who have successfully served twelve months in State-Service designated positions, are entitled to procedural due process of law prior to any employment action to dismiss or otherwise adversely affect their compensation or employment status. The process which is due to each State Service employee is written notice of a proposed disciplinary action which states with sufficient particularity what charges or allegations are being made concerning the employee, the proposed discipline which may be taken, and the opportunity for a conference with the appointing authority or designated representative allowing the employee to respond and present a defense to the allegations prior to final action by the appointing authority. The written notice shall be presented to the employee at least ten working days prior to the conference. The employee may also respond in writing to the allegations contained in the written notice. (Emphasis added)

The Mississippi Department of Wildlife, Fisheries and Parks does not deny that Kerr was not provided ten working days from the date of his written notification of his pre-disciplinary conference and the actual pre-disciplinary conference on May 24, 2012. It contends though that under various Mississippi cases, including *Payne v. Mississippi Department of Mental Health*, 964 So. 2d 582 (Miss. Ct. App. 2007), *Harris v. Mississippi Department of Corrections*, 831 So. 2d 1105 (Miss. 2002), *Mississippi State Department of Health v. Hogue*, 801 So. 2d 794 (Miss. Ct. App. 2001), and *Davis v. Mississippi State Department of Health*, 856 So. 2d 485 (Miss. Ct. App. 2003), that because the appeal to the Employee Appeals Board is *de novo*, any due process deprivation that occurred is remedied by an EAB hearing. Further, the Mississippi Department of Wildlife, Fisheries and Parks argues that Kerr, once he was placed on leave with pay, was on constructive notice that his job was in jeopardy.

Having considered Kerr's Motion to Dismiss for Lack of Jurisdiction, the Mississippi Department of Wildlife, Fisheries and Parks' arguments and the cases cited by it, I find that

the EAB has jurisdiction and therefore Kerr's Motion to Dismiss is denied. However, denial of Kerr's Motion does not mean that the case can proceed forward in its present posture. The Mississippi Department of Wildlife, Fisheries and Parks failed to provide Kerr the required ten (10) working days between the date it notified him that a pre-disciplinary conference would be held and the actual pre-termination hearing was held. Kerr was only provided three working days' notice. Requiring Kerr to attend the pre-disciplinary conference with only three (3) working days' notice was a violation of Kerr's procedural due process rights. The deficiency was not cured by any constructive notice that Kerr may have gleaned by being placed on leave with pay.

The scope and intent of the *Mississippi State Personnel Board Policy and Procedures Manual* is as follows:

This manual contains the policies and rules of the Mississippi state employment service and applies to all employees placed under the purview of the Mississippi State Personnel Board by Mississippi Code Annotated § 25-9-101, *et. seq.* and other pertinent laws.

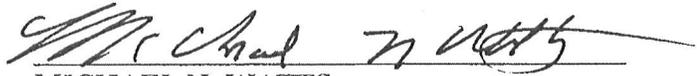
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The purpose of this manual is to provide a standardized, comprehensive system of human capital administration consistent with Mississippi's laws.

As a state government employee under the purview of the Mississippi State Personnel Board, Kerr was entitled to procedural due process as set forth by Section 9.3. Because Kerr was not given the procedural due process to which he was entitled, his June 4, 2012, termination is REVERSED. This case is REMANDED to the Mississippi Department of Wildlife, Fisheries and Parks for Kerr to be provided procedural due process.

SO ORDERED, THIS THE 14th DAY OF November, 2012.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: 
MICHAEL N. WATTS
Presiding Hearing Officer