

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF VICKSBURG, MISSISSIPPI

APPELLANT

VS.

NO. 2008-CA-00287

ANTHONY LANE

APPELLEE

REPLY BRIEF OF APPELLANT

OF COUNSEL:

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Argument	1
Conclusion	6
Appendix	
Lane's Notice of Appeal to Civil Service Commission, dated July 28, 3006.....	1
Lane's Notice of Appeal to Warren County Circuit Court, dated October 16, 2006.....	2

TABLE OF AUTHORITIES

CASES:

<u>Beasley v. City of Gulfport</u> , 724 So. 2d 883 (Miss. 1998)	4
<u>Bowie v. Jackson Police Department</u> , 816 So. 2d 1012 (Miss. App. 2002)	3,4
<u>Bullock v. City of Pascagoula</u> , 574 So. 2d 637, 642 (Miss. 1991)	1,2
<u>Cash Distributing Co., Inc. v. Neely</u> , 947 So. 2d. 317 (Miss. App. 2006)	5
<u>City of Jackson v. Thomas</u> , 331 So. 2d 296 (Miss. 1976)	1,2
<u>City of Laurel v. Brewer</u> , 919 So. 2d 217 (Miss. App. 2005)	4
<u>Eidt v. City of Natchez</u> , 421 So. 2d. 1225 (Miss. 1982)	5
<u>Gilbert v. Homar</u> , 520 U.S. 924, 117 S. Ct. 1807, 138 L.Ed.2d 120 (1997)	3

STATUTES:

Miss. Code of 1972, Annotated Sections:

21-31-23	1,2
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ARGUMENT

1. WAS THE SUSPENSION, BASED ON THE INDICTMENT, PROPERLY BEFORE THE COURT?

Lane argues that the facts of this case include an investigation of his suspension that took place from July 22, 2005 to July 19, 2006. He states that, "On September 22, 2006, the Vicksburg Civil Service Commission issued its Order upholding the suspension and subsequent termination." (Appellee's brief, p.6) A close look at the record will reveal that this is not the case. Had the Civil Service Commission addressed the suspension, the Circuit Court would not need to have found an "implicit" affirmation of the suspension.

Lane did not request the Civil Service Commission to investigate the suspension imposed by the City on July 22, 2005. The City voted to suspend Lane on July 21, 2005, and Lane was notified by letter dated July 22, 2005. The letter states, "If you desire to appeal the decision of the Board of Mayor and Aldermen, you must request a review of the decision approving your suspension within ten (10) days of the date of this letter." (v.1; p.87) Lane did not request a review within the stated time period. Section 21-31-23 of the Mississippi Code of 1972, as amended, requires the same. Therefore, the Civil Service Commission did not have jurisdiction over the suspension. The suspension was accepted by Lane. Lane's exclusive remedy was to file a timely request for an investigation with the Civil Service Commission and without such, the Circuit Court has no jurisdiction. Bullock v. City of Pascagoula, 574 So. 2d 637, 642 (Miss. 1991), *citing* City of Jackson v. Thomas, 331 So. 2d 296 (Miss. 1976). Regardless of what happened with the criminal case, Lane failed to timely request an investigation by the Civil

Service Commission. Lane attempts to persuade this Court that because the suspension letter stated that Lane's employment status would be reviewed when his legal matters were resolved, that this somehow alleviates the requirement that Lane request a timely investigation. The Mississippi Supreme Court has held that the timely request as required by state law is necessary to confer jurisdiction. See Bullock and Thomas, supra. Had Lane requested such an investigation, the Civil Service Commission could have reinstated Lane at that time or upheld the suspension or terminated Lane; however, Lane did not seek any investigation until almost one (1) year after the action was taken by the City, which was regarding the termination.

On July 19, 2006, the Board of Mayor and Aldermen of the City of Vicksburg (hereinafter "City") held a pre-termination hearing for Anthony Lane. After the hearing, which Lane and his attorney attended, the City voted to terminate Lane. (v.1;p.81). Lane timely appealed this termination to the Civil Service Commission. His July 28, 2006 appeal letter states that, "... Mr. Lane appeals the City of Vicksburg's **termination** based on: conduct unbecoming of an officer, loss of public trust and respect and violation of his oath as a police officer." (emphasis added) (Appendix p.1) There is nothing in this Notice of Appeal to the Commission regarding the suspension.

On September 22, 2006, the Civil Service Commission, after a hearing, entered its Order. A close review of that Order shows on its face that there is nothing in the Order that mentions or addresses the previous suspension, only the termination. (v.1; p.8)

Arguably, had the Civil Service Commission reversed the decision of the City and instead of upholding the termination, decided to reinstate Lane, they could not have awarded back pay since the issue of the suspension was not appealed to them as required by the Civil Service Rules

and state law. Section 21-31-23 of the Mississippi states that, "Any person so removed, suspended, demoted, discharged or combination thereof may, **within ten (10) days from the time of such disciplinary action**, file with the commission a written demand for an investigation, whereupon the commission shall conduct such an investigation."

Finally, the Notice of Appeal filed by Lane to the Circuit Court does not mention the suspension. The Notice clearly states, "By this Notice, Anthony Lane appeals to the Circuit Court of Warren County, Mississippi, against City of Vicksburg and Civil Service Commission of City of Vicksburg, from the Order entered in this case on September 22, 2006, by the Civil Service Commission, affirming the City of Vicksburg's **termination** of Anthony Lane." (emphasis added). (Appendix p.2) Lane failed to timely appeal his suspension and that matter was not an issue before the Civil Service Commission or the Warren County Circuit Court. The Court erred in finding that the Civil Service Commission "implicitly affirmed" the suspension and the Court erred in awarding back pay to Lane.

2. WAS THE SUSPENSION, BASED ON THE INDICTMENT, MADE IN GOOD FAITH FOR CAUSE?

The answer is simply "YES." The City based its decision to suspend Lane, a police officer, on the fact that he had been indicted for a felony. Does the fact that he was acquitted change the fact that he was indicted? The answer is simply "NO." In the concurring opinion written by Justice Southwick in the case of Bowie v. Jackson Police Department, 816 So. 2d 1012 (Miss. App. 2002), Justice Southwick cites Gilbert v. Homar, 520 U.S.924, 117 S. Ct. 1807, 138 L.Ed.2d 120 (1997) by stating, "The Gilbert court was concerned with whether there

were sufficient assurances that a suspension decision was based on reasonable grounds. Though a grand jury indictment would certainly have been sufficient, the Court found that ‘for present purposes arrest and charge give reason enough. They serve to assure that the state employer’s decision to suspend the employee is not ‘baseless or unwarranted’.” Bowie at 1022. Mississippi has held in several cases that back pay to an employee for time suspended was not warranted - even in cases where the employee who had been suspended was reinstated. Beasley v. City of Gulfport, 724 So. 2d 883 (Miss. 1998); City of Laurel v. Brewer, 919 So. 2d 217 (Miss. App. 2005). The suspension of Lane was not baseless or unwarranted. Section 21-31-23 of the Mississippi Code states that,

After such investigation, the commission may, if in its estimation the evidence is conclusive, affirm the disciplinary action, or, if it shall find that the disciplinary action was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted, discharged or a combination thereof, which reinstatement shall, if the commission so provides in its discretion, be retroactive and entitle such person to pay or compensation from the time of such disciplinary action.

The statute requires a determination, not implicit affirmation as the Circuit Court found, that the disciplinary action, ie, suspension, was not made in good faith for cause. There is nothing in the record to support the proposition that the suspension was not made in good faith for cause. Additionally, the statute provides that *prior* to compensating such person for back pay, such person is to be reinstated or reemployed. Back pay is contingent on reinstatement. Since Lane was not reinstated and his termination upheld, there is no basis in the record or in the law to award back pay to Lane. The fact that he was acquitted has no bearing on whether or not the

suspension, based on the grand jury indictment, was in good faith for cause.

3. IF LANE IS ENTITLED TO BACK PAY, THE CITY IS ENTITLED TO REDUCE BACK PAY BY ANY AMOUNT LANE EARNED DURING THE SUSPENSION.

Lane argues that any amount of income he received during the time of his suspension is irrelevant and should not be considered. Lane cites Cash Distributing Co. Inc., v. Neely, 947 So. 2d. 317 (Miss. App. 2006) in support of this argument, but Cash Distributing Co. Inc., v. Neely is not applicable to this case. Cash Distributing Co. Inc., v. Neely is a case based on the federal Age Discrimination in Employment Act where one of the elements of damages is the value of an employee's pension plan. In Cash Distributing Co. Inc., v. Neely, the Court discussed that in addition to back pay, the total value of the pension plan was recoverable and the employer would be entitled to a setoff of any amount paid towards that sum value; however, in that case, the jury did not give any award for the value of the pension plan, only back pay, so the employer was not entitled to a setoff. Id at 324. The case at bar is not an ADEA case so the same elements of damages are not applicable. If the Court finds that Lane is entitled to an award of back pay, the City would be entitled to reduce that amount by Lane's actual earnings during that time. In the case of Eidt v. City of Natchez, 421 So. 2d. 1225 (Miss. 1982), the Court dealt with the issue of a civil servant who was wrongfully discharged and then reinstated. The Court stated that, "Thus the Circuit Court pursuant to §11-51-75, *supra*, should have reversed the civil service commission's order and rendered Eidt a judgment for his back pay due him less the total of what, according to relevant and properly adduced evidence, he earned and reasonably should have earned after he was terminated." Eidt at 1233. In the present case, if Lane is entitled to an award

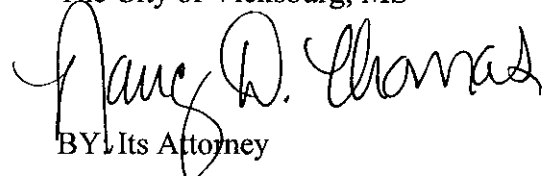
of back pay during his time of suspension from July 22, 2005 to July 19, 2006, the City would be entitled to reduce the award of back pay by Lane's actual earnings or what he reasonably should have earned during that time.

CONCLUSION

The narrow issue of Lane's suspension is presently before the Court. The issues associated with that suspension are 1) whether or not Lane's suspension was properly a matter before the Circuit Court, when Lane did not timely request an investigation before the Civil Service Commission regarding the suspension, 2) if that matter was properly before the Court, whether or not the decision to suspend was made in good faith and for cause, and 3) whether or not Lane is entitled to back pay during the time of his suspension. The City respectfully requests that this Court find that the matter of Lane's suspension was not properly before the Circuit Court and the Circuit Court erred by finding the Civil Service Commission "implicitly affirmed" the suspension. The City also respectfully requests that in the event the Court finds that the suspension was properly before the Court, that such suspension was made in good faith for cause. Finally, the City respectfully requests that if the Court finds that back pay should be awarded, that the City be entitled to reduce any back pay award by the amount of compensation Lane made during the time of suspension.

Respectfully submitted,

The City of Vicksburg, MS


BY Its Attorney

APPENDIX



SMITH, RUSHING, COTTON
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July 28, 2006

RAMEL L. COTTON
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*Also licensed in Florida

Mr. Lamar Horton
Vicksburg Human Resources Dir.
1401 Walnut Street
Vicksburg, Mississippi 39181

RE: Appeal of Notice of Termination of Anthony Lane

Dear Mr. Horton:

This letter is being written to formally appeal the Notice of Termination of Anthony Lane received in our office on July 21, 2006. More specifically, Mr. Lane appeals the City of Vicksburg's termination based on: conduct unbecoming of an officer, loss of public trust and respect and violation of his oath as a police officer.

Please inform me when a hearing before the Vicksburg Civil Service Commission will be held regarding this matter. Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

SMITH RUSHING COTTON & ROBINSON, PLLC

Ramel L. Cotton

RLC/tc
cc: Walter W. Osborne, Jr., City Clerk
Legal Department



IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

ANTHONY LANE

APPELLANT

VERSUS

CAUSE NO. 06,0207-CI

CITY OF VICKSBURG AND
CIVIL SERVICE COMMISSION OF
CITY OF VICKSBURG

APPELLEES

NOTICE OF APPEAL

By this Notice, Anthony Lane appeals to the Circuit Court of Warren County, Mississippi, against City of Vicksburg and Civil Service Commission of City of Vicksburg, from the Order entered in this case on September 22, 2006, by the Civil Service Commission, affirming the City of Vicksburg's termination of Anthony Lane. A copy of the Civil Service Commission's Order is attached hereto as Exhibit "A."

Appellant, Anthony Lane, states that the grounds for this appeal are as follows:

1. Whether the disciplinary action was made in compliance with the rules and regulations of the Commission and the City of Vicksburg and whether the proper procedures were followed in the termination of Anthony Lane;
2. Whether the Commission properly found that Anthony Lane failed to satisfy his burden of proof by either testimony or written materials;
3. Whether the Commission properly found that the disciplinary action was made in good faith and for cause and not due to any political or religious reasons;
4. Whether the decision of the Commission was arbitrary, capricious, not supported by substantial credible evidence, and contrary to the overwhelming weight of the evidence and authority; and
5. Whether the decision of the Commission violated Double Jeopardy.

Appellant, Anthony Lane, hereby demands that a certified transcript of the record and of all papers on file in the Office of the Commission affecting or relating to such judgment or order, be filed by the Commission with this Court.

FILED

OCT 16 2006

SHELLY ASHLEY-PALMERTREE, CIRCUIT CLERK

BY ASH D.C.



Respectfully submitted, this the 16th day of October, 2006.

Anthony Lane

BY:


Ramel L. Cotton, MSB# 

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OF COUNSEL:

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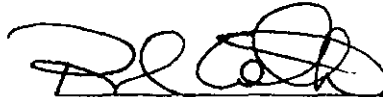
CERTIFICATE OF SERVICE

I, Ramel L. Cotton, the undersigned, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal to the following:

Joe Graham, Chairperson
Civil Service Commission
1401 Walnut Street
Vicksburg, Mississippi 39181

Nancy Thomas, Esq.
Vicksburg Legal Dept.
1401 Walnut Street
Vicksburg, Mississippi 39181

This the 16th day of October, 2006.



Ramel L. Cotton

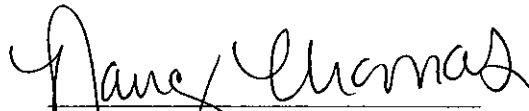
CERTIFICATE OF SERVICE

I, Nancy D. Thomas, do hereby certify that I have this date mailed, by United States Mail,
a true and correct copy of the foregoing Reply Brief of Appellant to each of the following
persons, at his last known address:

Ramel L. Cotton, Esq.
Morgan & Morgan
One Jackson Place
188 E. Capitol Street, Suite 777
Jackson, MS 39201

Honorable Isadore Patrick
Circuit Court Judge
Warren County Courthouse
Post Office Box 351
Vicksburg, MS 39181

This the 20th day of November 2008.


NANCY THOMAS