

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF VICKSBURG, MISSISSIPPI

APPELLANT

VS.

NO. 2008-CA-00287

ANTHONY LANE

APPELLEE

APPEAL FROM WARREN COUNTY CIRCUIT COURT

BRIEF OF APPELLANT

Oral Argument Is Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualifications or recusals.

1. Appellant, The City of Vicksburg, Mississippi. The Board members are Laurence E. Leyens, Mayor; Sidney H. Beauman, Jr., Alderman; Michael A. Mayfield, Sr.; Alderman.
2. Anthony Lane is the Appellee.
3. Ramel Cotton is the attorney for Anthony Lane.
4. Nancy Davis Thomas and Bobby D. Robinson are attorneys for the City.
5. Joe Graham, Clyde Harris and Janice Carstafhnur are the Civil Service Commissioners for the City of Vicksburg.

Nancy Davis Thomas

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STATEMENT OF THE ISSUES

WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE JULY 22, 2005 SUSPENSION OF ANTHONY LANE WAS "IMPLICITLY AFFIRMED" BY THE CIVIL SERVICE COMMISSION WHEN THE JULY 22, 2005 SUSPENSION WAS NOT APPEALED TO THE CIVIL SERVICE COMMISSION AS REQUIRED.

WHETHER OR NOT THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT "SINCE A JURY OF WARREN COUNTY, AFTER A TRIAL, FOUND THE APPELLANT NOT GUILTY AND A JUDGMENT OF ACQUITTAL WAS RENDERED BY THE CIRCUIT COURT, THEN THE SUSPENSION WITHOUT PAY WAS WITHOUT MERIT" AND ORDERED THE CITY TO REIMBURSE LANE FOR THE TIME THAT HE WAS SUSPENDED WITHOUT PAY.

STATEMENT OF THE CASE

Nature of the Case:

This is an employment case regarding Anthony Lane, a police officer for the City of Vicksburg, Mississippi. Officer Lane admittedly had a sexual relationship with a student under the age of 18 that he met while working at the school as a School Resource Officer for the Vicksburg Police Department. (v.1, p. 84). After receiving assurance from the Warren County District Attorney that Lane's conduct was not a crime (v.1, p.85), Anthony Lane was suspended for conduct unbecoming a police officer. After he served his suspension, he was indicted by the Warren County Grand Jury for sexual battery of a person under the age of 18 by a person in a position of trust. On July 22, 2005, after being indicted for a felony, Lane was suspended without pay until after the criminal trial. He did not appeal this suspension to the Civil Service Commission, but accepted it. (v.1, p.121). Although he was acquitted of committing a crime, information about what he had done was widely publicized and many citizens of Vicksburg were outraged. (v. 3, p. 60-64; Exhibit 5). The Board of Mayor and Aldermen of the City of Vicksburg, after a hearing, concluded that Anthony Lane had violated the public's trust and could not be an effective police officer. The Board of Mayor and Aldermen terminated Lane.

Lane appealed the termination to the Vicksburg Civil Service Commission (v.1, p.32). After having a hearing on the grounds for the termination, the Vicksburg Civil Service Commission upheld the termination on the basis that the termination was made in good faith for cause.

Lane appealed his termination to the Warren County Circuit Court (v.1, p.4). The Warren County Circuit Court Judge found that there was just cause for the termination and upheld the

termination. However, the Circuit Court also found that the July 22, 2005 suspension which was based on the indictment, was without merit since Lane was acquitted and therefore, ordered the City to reimburse Lane from the time of the suspension, July 22, 2005 until the acquittal on July 19, 2006. (v. 2, p. 154-158; R.E. 2-6)

Facts:

Anthony Lane was employed by the City of Vicksburg Police Department. His duty in the police department was as a School Resource Officer wherein he was stationed at Vicksburg High School. While stationed at the school, he met a high school student and had a sexual affair with her. When this came to the attention of the Chief of Police, Tommy Moffett, he wrote to the Warren County District Attorney to find out whether or not the police officer had committed a crime. Upon the response of the District Attorney that the sexual battery law did not apply to a consensual sexual relationship between the police officer and a student over the age of 16 and no charge could be prosecuted, on May 12, 2005, Chief Moffett recommended a twenty (20) day suspension for conduct unbecoming an officer. (v.1, p.82-85). Lane was given notice that he could appear at the hearing where this suspension would be recommended to the Board of Mayor and Aldermen, and he chose not to appear. Lane served his twenty (20) day suspension. (v.1, p.86).

On or about July 21, 2005, Lane was indicted by the Warren County Grand Jury for sexual battery based upon his consensual sexual relationship with the high school student. On July 22, 2005, the City notified Lane that based on the felony arrest, he would be suspended indefinitely and that his employment status would be reviewed once his legal issues had been resolved.(v.1, p.87). This letter specifically told him that he had ten (10) days in which to appeal

this action. He did not file an appeal, but accepted the suspension.(v.1, p.121).

On June 12, 2006, Anthony Lane was acquitted for the crime of sexual battery of a student under 18 by a person in a position of trust. Thereafter, he petitioned the Board of Mayor and Aldermen of the City of Vicksburg for reinstatement to his job as a police officer. The Board did not vote to reinstate Lane to the Vicksburg Police Department and set the matter for a pre-termination hearing, which was held on July 19, 2007. After the hearing, the Board voted to terminate Anthony Lane from the Vicksburg Police Department. Lane, through his attorney, was notified by letter dated July 19, 2006 that the reasons for the Board's termination of Lane were conduct unbecoming an officer, loss of public trust and respect and violation of his oath as a police officer. Specific rule violations cited were the Vicksburg Police Department Standard Operating Guide Rule IV, 4.1, General (n) and Civil Service Regulations Rule XII, 12.2(f), (l) and (p). (v.1, p. 81). Lane appealed the termination to the Civil Service Commission which conducted an investigation to determine whether or not Lane was terminated in good faith for cause. (v.1, p. 4-5). After hearing the testimony of Chief Moffett and Lamar Horton, Human Resource Director for the City, the Commission upheld the termination of Anthony Lane by Order dated September 22, 2006 finding that the City's action in terminating Lane, based on loss of public trust and respect, violation of his oath and conduct unbecoming, was in good faith for cause. (v.1, p.8-9; R.E. 7-8). Lane appealed the termination to the Warren County Circuit Court. (v.1, p.4-5). The Warren County Circuit Court upheld the decision of the Civil Service Commission as to the termination; however, the Court found that the July 22, 2005 suspension without pay was "implicitly affirmed" by the Order of the Civil Service Commission and further found that because Lane was, "acquitted of the criminal charges he was suspended for should

have been reimbursed for said time that he was suspended without pay.”

(v.2, p. 154-158; R.E. 2-6).

SUMMARY OF THE ARGUMENT

The Circuit Court erred by finding that the second suspension was “implicitly affirmed” by the Civil Service Commission. The Civil Service did not consider the suspension because Lane did not appeal the suspension to the Commission, but accepted the suspension without pay. Lane was provided notice and an opportunity to be heard at the time of the suspension and given instructions to appeal the suspension decision if he was aggrieved. He did nothing. It was error for the Court to make a finding that the issue of the suspension was “implicitly affirmed” when it was not an issue before the Commission or the Circuit Court.

The Circuit Court also found that because Lane was acquitted of committing a crime, that the suspension without pay was without merit and ordered the City to reimburse Lane for the time between the indictment and the acquittal. Such a finding is contrary to Mississippi law wherein there is a difference between an employment matter and criminal matter, namely because of the burden of proof in each proceeding. A burden of “beyond a reasonable doubt” is required for a conviction, but the burden is “preponderance of the evidence” in an employment case. If the evidence is sufficient for termination, as it was in this case, certainly it was sufficient for the suspension. Additionally, although Lane was not convicted of a crime, there was probable cause and sufficient evidence upon which to base the indictment and the suspension. The City should not be required to reimburse Lane any wages.

Even if this Court found that the City did owe back pay to Lane, such matter should be remanded to the Civil Service Commission to determine whether or not Lane obtained other

employment in the interim and any wages he earned should be set off against any back pay from the City.

ARGUMENT

1. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE JULY 22, 2005 SUSPENSION OF ANTHONY LANE WAS “IMPLICITLY AFFIRMED” BY THE CIVIL SERVICE COMMISSION WHEN THE JULY 22, 2005 SUSPENSION WAS NOT APPEALED TO THE CIVIL SERVICE COMMISSION AS REQUIRED

The Circuit Court Judge stated in his Order that, “The Court now addresses the second suspension of the Appellant on July 22, 2005. Said suspension was without pay and was implicitly affirmed by the order of the Civil Service Commission.” (v.2, p.157). The suspension without pay, beginning July 22, 2005, was not an issue before the Civil Service Commission. At the time the Board of Mayor and Aldermen of the City of Vicksburg suspended Lane, he was given a letter, dated July 22, 2005, which specifically stated:

Pursuant to Section 21-31-23 of the Rules and Regulations of the Civil Service Commission, 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. This section is attached.

(v.1, p.87). Lane did not file an appeal of the suspension. Therefore, the Circuit Court was in error in ordering back pay for the time of the suspension. The Mississippi Supreme Court has stated, “It is well settled Mississippi law that there is a procedural bar to considering issues not first raised at trial. Brown v. Thompson, 927 So. 2d. 733, 738 (Miss. 2006.) Additionally, the Court has stated that an issue not raised in the court below is procedurally barred from consideration on appeal. Crosswhite v. Golmon, 939 So. 2d 831, 833 (Miss. App. 2006). In the present case, the issues of wrongful suspension and back pay were never brought before either

the Civil Service Commission or the Circuit Court. Neither the Order of the Civil Service Commission (v.1, p.8), nor Lane's Notice of Appeal from that Order (v.1, p.5) mention or address the suspension beginning July 22, 2005. Even the Circuit Court's Order requiring the parties to file briefs only mentions Lane's appeal of his termination. (v.1, p.42-43). The only matter in question before the Civil Service Commission or the Warren County Circuit Court was whether or not Lane was terminated in good faith for cause. Lane did not appeal the suspension within ten days of July 22, 2005, therefore it was not before the Commission or the Court and the Circuit Court erred by finding that the suspension was "implicitly affirmed" when there is nothing in the record about the suspension, other than it happened and Lane accepted it.

Secondly, in light of the Circuit Court's limited scope of review of the decisions of Civil Service Commissions, the Circuit Court did not have authority to award back pay. Section 21-31-23 of the Mississippi Code of 1972, as amended, limits the Circuit Court's review to whether or not "the order of removal, discharge, demotion, suspension, or combination thereof made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds." Since there was no appeal taken by Anthony Lane regarding the July 22, 2005 suspension at all, there was no allegation that the suspension was not made in good faith for cause. In the case of Cooper v. Vicksburg, 909 So. 2d 126, 130 (Miss. App. 2005), on the issue of whether or not a Commissioner should have recused herself, the Court stated, "even if Cooper had properly raised the recusal issue to the Circuit Court sitting as an appellate court of a decision of a municipality's civil service commission, that issue would probably still have been procedurally improper pursuant to the limited scope of review established under the Mississippi Code Annotated §21-31-23." Therefore, based on the Circuit

Court's limited scope of review as to whether or not the action taken was made in good faith for cause, the Circuit Court did not have authority to determine what the Civil Service Commission "implicitly affirmed" and then adjudge such implicit finding was not in good faith for cause and award back pay. There was no investigation before the Civil Service Commission as to whether or not the July 22, 2005 suspension was made in good faith for cause or not. Arguably, had there been an appeal and an investigation at the time of the suspension, since a law enforcement officer had been indicted by a grand jury for sexual battery, the Civil Service Commission would be hard pressed to find that a suspension on that basis was not in good faith for cause. The July 22, 2005 suspension was not properly before the Circuit Court and the Circuit Court erred by finding that the Civil Service Commission "implicitly affirmed" the suspension and then awarded back pay.

2. WHETHER OR NOT THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT "SINCE A JURY OF WARREN COUNTY, AFTER A TRIAL, FOUND THE APPELLANT NOT GUILTY AND A JUDGMENT OF ACQUITTAL WAS RENDERED BY THE CIRCUIT COURT, THEN THE SUSPENSION WITHOUT PAY WAS WITHOUT MERIT" AND ORDERED THE CITY TO REIMBURSE LANE FOR THE TIME THAT HE WAS SUSPENDED WITHOUT PAY.

Simply put, the first inquiry regarding this issue is what effect, if any, does a verdict of "not guilty" in a criminal court have on an employment matter . The Mississippi Supreme Court has found that an acquittal in a criminal trial may not have any bearing on an employment action based on the employee's behavior. The Court in Mississippi Department of Public Safety v. Carver, 809 So. 2d 713, 717 (Miss. App. 2001), *citing* Holly v. Mississippi Department of Corrections, 722 So. 2d 632, 636 (Miss. 1998) stated that, "Even an outright acquittal in a criminal proceeding would not answer unequivocally the right of a state agency to discipline an employee based on the alleged underlying conduct that led to the criminal charges since the

standard of proof to criminally convict and to support a personnel action are substantially different.” In Holly, the Court explained that, “criminal judgements carry a higher burden of proof than civil judgments . . . As a result, it is possible that the evidence was sufficient to support Holly’s termination while being insufficient to support a criminal conviction.” *Id* at 636. Such is the case with Anthony Lane. Although there was not a conviction, there was sufficient evidence to support the suspension, which was not appealed, and the termination, which was upheld by both the Civil Service Commission and the Circuit Court. There is no basis in Mississippi law to find that the suspension of an employee who has been indicted for a felony is without merit because of his subsequent acquittal. The suspension must stand on its own. The question is whether or not the suspension was made in good faith for cause. The acquittal, which occurred approximately one (1) year later, does not have any bearing on the decision to suspend.

The Court addressed a similar issue in the matter of City of Laurel v. Brewer, 919 So. 2d 217 (Miss. App. 2005). In that case, a police officer, Brewer, was terminated for releasing a canine to effect an arrest. Additionally, criminal charges were filed against Brewer. Brewer requested an investigation by the Civil Service Commission who found that the termination was not warranted and reinstated the police officer, but denied back pay. The Court found that the “Civil Service Commission’s *award* or *denial* of back pay should be affirmed if it is supported by substantial evidence.” *Id.* at 39. In Brewer, the Court cited Beasley v. City of Gulfport, 724 So.2d 883, 887-888 (Miss. 1998) and stated, “the commission found that there was substantial evidence of misconduct on the part of Beasley, but the misconduct was not sufficient to terminate him. Based on this evidence, the supreme court affirmed the commission’s decision to reinstate without back pay.” In the present case, the commission terminated Lane and the Circuit Court

upheld the termination, so there was sufficient evidence to terminate; if there was sufficient evidence to terminate, there had to have been sufficient evidence to suspend and to deny back pay. Citing FDIC v. Mallen, 486 U.S. 230, 108 S.Ct. 1780 (1988), the U.S. Supreme Court in Gilbert v. Homar, 520 U.S. 924, 117 S.Ct. 1807 (1997) stated that “an exparte finding of probable cause such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. . . . First, as with an indictment, the arrest and formal charges imposed upon respondent by an independent body demonstrate that the suspension is not arbitrary.. Second, like an indictment, the imposition of felony charges itself is an objective fact that will in most cases raise serious public concern.” Gilbert at 934.

In Gilbert v. Homar, the U.S. Supreme Court considered a case wherein a police officer was charged with a felony and subsequently suspended without pay. Although the specific issue in that case dealt with due process, not an issue in the present case, the Court specifically stated “...the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility.” Id. at 932. Regarding whether or not the suspension should have been with or without pay, the Court went on to state, “we think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him.” Id. at 932. Based on this U. S. Supreme Court case, the payment of back pay to an employee occupying a position of public trust and high public visibility who has been charged with a felony is not required. Neither does a subsequent acquittal in the criminal trial require the

payment of back pay. In the Gilbert case, the felony charges were subsequently dismissed and the police officer was demoted to grounds keeper.

Alternatively, the Circuit Court erred in not remanding this matter back to the Civil Service Commission for a clear record on the issue of the suspension, whether it was “implicitly affirmed” as suggested by the Circuit Court, and whether or not there should be an award of back pay and if so, whether Lane’s interim employment wages, if any, should reduce a back pay award. “A wrongfully discharged employee has a duty to mitigate damages, and there should be deducted from his or her damages the amount by which the employee could have diminished the damages by reasonable action.” (30 CJS Employee §134).

CONCLUSION

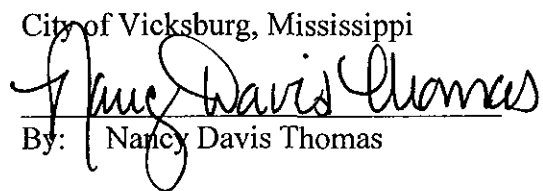
The Circuit Court’s finding that the Civil Service Commission “implicitly affirmed” the July 22, 2005 suspension is erroneous. The Civil Service Commission did not consider the July 22, 2005 suspension because that matter was not before the Commission. Lane did not appeal that suspension or request an investigation as to whether or not it was done in good faith for cause. This matter was not properly before the Court and should be reversed. Additionally, if in fact, the Civil Service Commission is deemed to have implicitly affirmed the suspension, there was substantial evidence to support that the suspension was made in good faith for cause based on the felony indictment of Lane, a police officer. The indictment itself was sufficient evidence of probable cause, and where there is probable cause, there is the absence of arbitrary and capricious. The subsequent acquittal of Lane on the criminal charges does not invalidate the probable cause for the indictment. The subsequent acquittal of the criminal charges does not repair the loss of respect and loss of trust that erupted within citizens of Vicksburg during the

trial. The Circuit Court properly found that the Civil Service Commission upheld the termination of Lane in good faith for cause. There is absolutely nothing in the record to support the Circuit Court's finding that the July 22, 2005 suspension was without merit. The question is whether or not the suspension was made in good faith for cause. A subsequent acquittal of Lane in a criminal trial does not abrogate the good faith and cause that were present when the suspension, based on a grand jury indictment, was handed down. If the Civil Service Commission had considered the suspension and whether or not Lane was entitled to any back pay, any earnings in the interim should have reduced the back pay award. None of that was addressed because the July 22, 2005 suspension and any entitlement to back pay were not an issue.

The City of Vicksburg respectfully requests that this Court reverse the judgment of the Warren County Circuit Court that the July 22, 2005 suspension was without merit due to Lane's subsequent acquittal, and reverse the award of any back pay.

Respectfully submitted,

City of Vicksburg, Mississippi

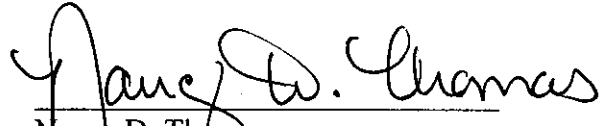


By: Nancy Davis Thomas

CERTIFICATE OF SERVICE

I, Nancy D. Thomas, the undersigned, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANT, CITY OF VICKSBURG, MISSISSIPPI to Ramel L. Cotton, Esq., at Post Office Box 9366, Jackson, Mississippi 39286 - 9366.

This the 18th day of June 2008.


Nancy D. Thomas



Miss. Code Ann. § 21-31-23

C

West's Annotated Mississippi Code Currentness

Title 21. Municipalities

Chapter 31. Civil Service

General Provisions (Refs & Annos)

→ § 21-31-23. Disciplinary process

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under the provisions of sections 21-31-1 to 21-31-27, except for such persons as may be employed to fill a vacancy caused by the absence of a fireman or policeman while in service as a member of the armed forces of the United States, shall be removed, suspended, demoted or discharged, or any combination thereof, except for cause, and only upon the written accusation of the appointing power or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. The chiefs of the fire and/or police department may suspend a member pending the confirmation of the suspension by the regular appointing power, which shall be within three (3) days.

In the absence of extraordinary circumstances or situations, before any such employee may be removed or discharged, he shall be given written notice of the intended termination, which notice shall state the reasons for termination and inform the employee that he has the right to respond in writing to the reasons given for termination within a reasonable time and respond orally before the official charged with the responsibility of making the termination decision. Such official may, in his discretion, provide for a pretermination hearing and examination of witnesses, and if a hearing is to be held, the notice to the employee shall also set the time and place of such hearing. A duplicate of such notice shall be filed with the commission. After the employee has responded or has failed to respond within a reasonable time, the official charged with the responsibility of making the termination decision shall determine the appropriate disciplinary action, and shall notify the employee of his decision in writing at the earliest practicable date.

Where there are extraordinary circumstances or situations which require the immediate discharge or removal of an employee, such employee may be terminated without a pretermination hearing as required by this section, but such employee shall be given written notice of the specific reasons for termination within twenty-four (24) hours after the termination, and shall be given an opportunity for a hearing similar to the pretermination hearing provided in this section within twenty (20) days after the date of termination. For the purposes of this section, extraordinary situations or circumstances include, but are not limited to, circumstances where retention of the employee would result in damage to municipal property, would be detrimental to the interest of municipal government or would result in injury to the employee, to a fellow employee or to the general public.

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 investigation. The investigation shall be confined to the determination of the question of whether such disciplinary action was or was not made for political or religious reasons and was or was not made in good faith for cause. 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 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 commission upon such investigation may, in lieu of affirming the disciplinary action, modify the order of removal, suspension, demotion, discharge or combination thereof by directing a suspension, without pay, for a given period and subsequent restoration of duty, or by directing a demotion in classification, grade or pay, or by any combination thereof. The findings of the commission shall be certified in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be by public hearing, after reasonable written notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. The findings of the commission shall be conclusive and binding unless either the accused or the municipality shall, within thirty (30) days from the date of the entry of such judgment or order on the minutes of the commission and notification to the accused and the municipality, appeal to the circuit court of the county within which the municipality is located. Any appeal of the judgment or order of the commission shall not act as a supersedeas of such judgment or order, but the judgment or order shall remain in effect pending a final determination of the matter on appeal. Such appeal shall be taken by serving the commission and the appellee, within thirty (30) days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding 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 such court. The commission shall, within thirty (30) days after the filing of such notice, make, certify and file such transcript with such court. The said circuit court shall thereupon proceed to hear and determine such appeal. However, such hearing shall be confined to the determination of whether the judgment or order of removal, discharge, demotion, suspension or combination thereof made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

CREDIT(S)

Laws 1944, Ch. 208, § 10; Laws 1984, Ch. 521, § 2, eff. July 1, 1984.

HISTORICAL AND STATUTORY NOTES

Derivation:

Code 1942, § 3825-11.

CROSS REFERENCES

Employee's dismissal or demotion for engaging in political activities, see § 21-31-75.

Park commissioners' removal from office for cause, see § 21-37-33.

Public utility commissioner's removal for cause, see § 21-27-15.

Wrongful actions related to claims, penalties, see §§ 21-39-15, 21-39-17.

LAW REVIEW AND JOURNAL COMMENTARIES