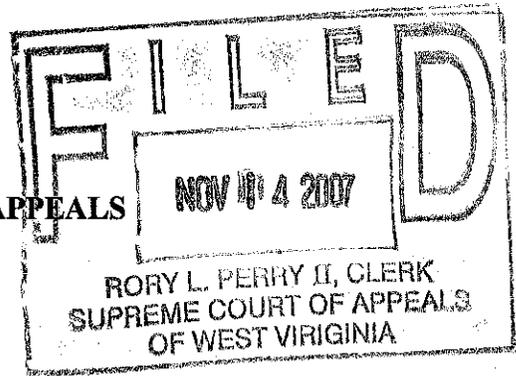


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

No. 071983



**SERGEANT GLEN MESSER OF THE SHERIFF'S DEPARTMENT OF MINGO
COUNTY, WEST VIRGINIA,**

Appellee,

v.

SHERIFF LONNIE HANNAH, SHERIFF OF MINGO COUNTY, WEST VIRGINIA,

Appellant.

On Appeal from the Circuit Court of Mingo County
from an Appeal of the Final Order of the Mingo County Civil Service Commission
for Deputy Sheriffs

Circuit Court Appeal No.: 06-AAA-1

**BRIEF OF APPELLANT
SHERIFF LONNIE HANNAH**

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KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

On September 19, 2006, the Mingo County Civil Service Commission for Deputy Sheriffs [the "Commission"] entered the "Final Order Relevant To Indefinite Suspension of Sergeant Glen Messer" [the "Final Order"]. The Final Order stems from a grievance filed by Sergeant Roy Glen Messer ["Messer"] against Sheriff Lonnie Hannah ["Sheriff Hannah"] before the Commission seeking review of Sheriff Hannah's indefinite suspension of Messer from the Mingo County Sheriff's Department after the results of an independent investigation showed that Messer had submitted untruthful payroll change notices for overtime travel. The Commission conducted a hearing on July 18, 2006 after which it requested each party to submit proposed findings of fact and conclusions of law. Thereafter, on September 19, 2006, the Commission entered the Final Order in which the Commission sustained the grievance filed by Messer and ordered that Messer be reinstated to his former rank and position with full pay for the entire period during which he was prevented from performing his usual employment. Sheriff Hannah timely appealed the Final Order to the Circuit Court of Mingo County, West Virginia, on October 31, 2006, pursuant to W.Va. Code § 7-14-17(b). On January 30, 2007, the Circuit Court denied Sheriff Hannah's appeal and affirmed the Final Order. The Circuit Court, relying on the standard of review enunciated by this Court in In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996), held that the Commission's findings were supported by the evidence, were not contrary to the evidence, and were not based upon a mistake of law. However, as the Commission's decision is clearly erroneous, Sheriff Hannah timely petitioned for appeal of the Circuit Court's affirmation of the Final Order to this Court pursuant to W.Va. Code § 7-14-17(b). This Court granted Sheriff Hannah's petition for appeal by Order dated October 11, 2007. As such, Sheriff Hannah timely files the brief of Appellant.

STATEMENT OF THE FACTS

Between April 10, 2006 and April 13, 2006, Messer and Deputy Charles Justice ["Justice"] were detailed to specialized training at the West Virginia State Police Academy [the "Academy"] in Institute, West Virginia. Transcript of Proceedings before the Commission ["Tr."], July 18, 2006, p. 25. Although Sheriff Hannah provided a cruiser with the intent that both Messer and Justice would travel to the Academy together, Messer informed Justice that he was going to drive his own vehicle instead. (Tr. 26, 122). Messer and Justice submitted separate payroll change notices requesting overtime for travel to and from the Academy to Sherriff Hannah at the completion of the training. Generally, two hours of overtime is allowed for travel to and from the Academy. (Tr. 26).

Messer submitted the following payroll change notices:

- (1) One payroll change notice dated April 10, 2006 reflecting that Messer worked two hours of overtime from 6:00 a.m. to 8:00 a.m. for traveling to the Academy;
- (2) One payroll change notice dated April 10, 2006 reflecting that Messer worked two hours of overtime from 4:00 p.m. to 6:00 p.m. from traveling from the Academy;
- (3) One payroll change notice dated April 11, 2006 reflecting that Messer worked two hours of overtime from 6:00 a.m. to 8:00 a.m. for traveling to the Academy;
- (4) One payroll change notice dated April 11, 2006 reflecting that Messer worked two hours of overtime from 4:00 p.m. to 6:00 p.m. for traveling from the Academy;
- (5) One payroll change notice dated April 12, 2006 reflecting that Messer worked four hours of overtime from 5:00 p.m. to 9:00 p.m. for training at the Academy;
- (6) One payroll change notice dated April 12, 2006 reflecting that Messer worked two hours of overtime from 6:00 a.m. to 8:00 a.m. for traveling to the Academy;

- (7) One payroll change notice dated April 12, 2006 reflecting that Messer worked two hours of overtime from 9:00 p.m. to 11:00 p.m. for traveling from the Academy;
- (8) One payroll change notice dated April 13, 2006 reflecting that Messer worked two hours of overtime from 6:00 a.m. to 8:00 a.m. for traveling to the Academy; and,
- (9) One payroll change notice dated April 13, 2006 reflecting that Messer worked two hours of overtime from 4:00 p.m. to 6:00 p.m. for traveling from the Academy.

Messer claimed, in total, sixteen (16) hours of overtime for travel to and from the Academy for the specialized training. The payroll change notices were recommended by Chief Deputy Stroud and authorized by Sheriff Hannah on April 24, 2006. Sheriff Hannah considered the submission of the payroll change notices by Messer as a representation that Messer had indeed incurred the overtime. A payroll check was issued in Messer's name, which included the amount of overtime claimed. (Tr. 32-42).

Following submission of the payroll change notices by Messer, Sheriff Hannah discovered a discrepancy between the amount of overtime claimed by Messer and the amount claimed by Justice. Unlike Messer, Justice did not claim two hours of overtime for travel from the Academy on April 12, 2006 or two hours of overtime for traveling to the Academy on April 13, 2006. Upon discovering the discrepancy, Sheriff Hannah asked Justice why his hours claimed in the payroll changes were less than Messer's. Justice informed Sheriff Hannah that he did not count as much travel time since he had stayed at a Motel 6 in Cross Lanes. (Tr. 43-44).

In later testimony before the Commission, Justice testified that he claimed six hours of overtime for April 12, 2006, which included two hours for travel and four hours in the evening for low light shooting at the Academy. (Tr. 124). The overtime claimed for the low light shooting was from 6:00 p.m. to 10:00 p.m. (Tr. 124). Messer was present and taking the low

light shooting as well. (Tr. 125). After the training, Justice left his cruiser at the Academy and rode with Messer. They stopped at a convenience store and bought a 12-pack of beer and then went to Messer's room at the Motel 6 in Cross Lanes. (Tr. 125-126). Sometime after 11:00 p.m., Justice went to bed. Messer was in the room when Justice went to sleep and Messer was present when Justice awoke in the morning. (Tr. 126). Messer also told Justice that on a separate evening Messer had gone to the dog track in Cross Lanes. (Tr. 128).

Because of the discrepancy between the amount of overtime hours claimed by Messer and Justice, Sheriff Hannah contacted the West Virginia State Police and requested an investigation regarding Messer's false claims regarding overtime. (Tr. 46-47). On May 11, 2006, Sgt. M. LaFauci of the West Virginia State Police was directed to investigate Messer. (Tr. 100-02). Sgt. LaFauci contacted the Motel 6 in Cross Lanes and discovered that Messer had rented a room from April 10, 2006 through April 13, 2006. (Tr. 104). On May 12, 2006, Sgt. LaFauci met with Sheriff Hannah and advised the Sheriff about the information obtained from Motel 6. (Tr. 48-49, 105). Based upon the information received from Sgt. LaFauci and the conversation with Justice, Sheriff Hannah made the decision to suspend Messer until the outcome of the investigation. Sheriff Hannah's decision was based on his belief that the payroll change issues compromised Messer's credibility. Until the matter was resolved, Sheriff Hannah did not believe that Messer could function properly as a police officer. (Tr. 49-50).

By letter dated May 12, 2006, Sheriff Hannah informed Messer of an ongoing investigation involving Messer's submission of fraudulent documents. Sheriff Hannah suspended Messer without pay until the matter was resolved. That same day, Sgt. LaFauci met with the Mingo County Prosecuting Attorney Michael Sparks ["Prosecuting Attorney Sparks"]. Prosecuting Attorney Sparks advised Sgt. LaFauci that there was probable cause and requested

that Sgt. LaFauci personally go to the Motel 6 and obtain a copy of the Motel 6 statement. (Tr. 106-107). Sgt. LaFauci obtained a copy of the Motel 6 statement which reflected that Messer had stayed at the Motel 6 in Cross Lanes from April 10, 2006 through April 13, 2006.

During the course of the investigation, Messer provided a statement to Sgt. LaFauci in which he acknowledged that he had rented the motel room at Motel 6 while training at the Academy. Messer further stated that he had stayed at the motel "some" and that he had driven home "a few times." Messer further advised Sgt. LaFauci that he had claimed the overtime for travel instead of charging the sheriff's office for the motel stay and fuel because he thought the travel time would be less than the motel.

In the July 18, 2006 hearing before the Commission, Sgt. LaFauci testified that Prosecuting Attorney Sparks contacted him and advised him to obtain a criminal complaint based upon the results of the investigation. (Tr. 111). On June 6, 2006, Sgt. LaFauci was on his way to obtain a criminal complaint when Prosecuting Attorney Sparks told him not to have the Magistrate sign the summons. Instead, Prosecuting Attorney Sparks advised Sgt. LaFauci to prepare a report to present to the September term of the grand jury in the event the matter could not be resolved administratively. (Tr. 112). Sgt. LaFauci further testified that he believed there was legally sufficient evidence to bring a charge of attempting to obtain money under false pretenses. He believed there was concrete evidence that on at least one night Messer stayed at the Motel 6. (Tr. 112-113).

In a letter dated July 7, 2006, Prosecuting Attorney Sparks advised Sheriff Hannah that there was legally sufficient evidence that Messer did commit Attempt (False Pretenses), a violation of W.Va. Code § 61-11-8(3) and § 61-3-24(a)(3), in connection with his employment as a public official. Prosecuting Attorney Sparks further advised Sheriff Hannah that Messer's

integrity and credibility as a law enforcement officer had been irreparably compromised and that he would not prosecute any case in which Messer was the primary investigating officer. (Ex. 14).

In the July 18, 2006 hearing before the Commission, Prosecuting Attorney Sparks testified that he requested appointment of a special prosecutor to handle the matter involving Messer. Prosecuting Attorney Sparks further testified that there was evidence sufficient to charge Messer or he would not have gone through the process of requesting a special prosecutor. (Tr. 142-143). Prosecuting Attorney Sparks also testified that if he had questions concerning Messer's credibility, he could not in good faith put Messer on the witness stand to testify against a criminal defendant because the credibility of a law enforcement officer is very important in obtaining convictions. (Tr. 144-145). Prosecuting Attorney Sparks also indicated that he might have to disclose this instance of Messer's credibility under legal rules requiring the prosecuting attorney to disclose to a criminal defendant exculpatory evidence. (Tr. 145).

Messer declined to testify in the July 18, 2006 hearing before the Commission when called as a witness by Sheriff Hannah. Messer's refusal to testify was based upon invocation of his Fifth Amendment right against self incrimination. (Tr. 22-24).

Despite this evidence, the Commission, in the Final Order, held as follows:

... Sheriff Hannah did not have 'just cause' for the imposition of indefinite suspension of Messer without pay, under West Virginia Code, § 7-14-17, and that Messer should not have been suspended without pay, as the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interest of the public. Rather, it is the conclusion of this Commission that Messer's conduct, in claiming the additional three to four hours of overtime was trivial and inconsequential and a mere technical violation of statute or official duty without wrongful intention, as Messer indicated to the investigating State Police Officer that he felt that charging for overtime driving to and from his training would cost the Sheriff's Office less than the cost

of his motel room. Again, this Commission feels that the Sheriff should have attempted to handle this discrepancy in overtime charges in an administrative manner rather than through a State Police investigation of Messer.

Final Order at ¶ 11. Nowhere in the Final Order does the Commission mention Prosecuting Attorney Sparks or the effect of Messer's actions on criminal investigations in which he was the primary investigating officer. Rather, the Commission reinstated Messer to his former rank and position with full pay for the entire period during which he was prevented from working and ordered that no charges be put on Messer's record. Id. at ¶ 13.

On October 31, 2006, Sheriff Hannah submitted his appeal of the Final Order to the Circuit Court of Mingo County pursuant to W.Va. Code § 7-14-17(b). Sheriff Hannah alleged two assignments of error:

- I. The Commission erred in ruling that Sheriff Hannah did not have "just cause" for the imposition of an indefinite suspension of Messer without pay under W.Va. Code § 7-14-17.
- II. The Commission erred in ruling that Messer should not have been suspended, without pay, as the alleged misconduct of overstating overtime was not of a substantial nature which directly affected the rights and interests of the public.

"Sheriff Lonnie Hannah's Appeal of the Mingo County Civil Service Commission for Deputy Sheriffs' Final Order Relevant to Indefinite Suspension of Sergeant Glen Messer" ["Appeal Order"], October 21, 2006, p. 7. Sheriff Hannah directed the Circuit Court's attention to the compelling evidence that Messer submitted claims for overtime that he did not incur. Id. at p. 9-11. Sheriff Hannah also directed the Circuit Court's attention to the testimony of Prosecuting Attorney Sparks that Messer's integrity and credibility as a law enforcement officer had been irreparably compromised to the point where Prosecuting Attorney Sparks would not prosecute any case in which Messer was the primary investigating officer. Id. at p. 12. Regardless, the

Circuit Court denied Sheriff Hannah's appeal. On May 25, 2007, Sherriff Hannah petitioned for the appeal of the Appeal Order to this Court. Messer did not file a response to Sheriff Hannah's petition. This Court accepted the petition and Sheriff Hanna timely files the brief of Appellant.

ASSIGNMENTS OF ERROR

- I. The Circuit Court erred in failing to reverse the Final Order on grounds that the Commission failed to consider an important aspect of the problem causing Sheriff Hannah to indefinitely suspend Messer under W.Va. Code § 7-14-17.
- II. The Circuit Court erred in failing to reverse the Final Order as the Commission's ruling that Messer's misconduct of overstated overtime was not of a substantial nature that directly affected the rights and interest of the public was clearly erroneous.

STANDARD OF REVIEW

This Court's review of a circuit court's decision made in view of a commission's action is generally *de novo*. In re Queen, 196 W.Va. 442, 446, 472 S.E.2d 483, 487 (1996). Therefore, this Court will review a commission's decision from the same position as the circuit court. Id. As this Court stated in the syllabus of Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990), "[a] final order of a deputy sheriffs' civil service commission, based upon findings not supported by the evidence, upon findings contrary to the evidence, or upon mistake of law, will be reversed and set aside by this Court upon review." This Court expounded upon this standard of review in the syllabus of In re Queen, 196 W.Va. 442, 472 S.E.2d 483 (1996):

1. An adjudicative decision of the Correctional Officers' Civil Service Commission should not be overturned by an appellate court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Review under this standard is narrow and the reviewing court looks to the Civil Service Commission's action to determine whether the record reveals that a substantial and rational basis exists for its decision.
2. An appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly

wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise.

3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.
4. "Substantial evidence" requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive.

ARGUMENT

The Final Order is clearly erroneous as the Commission erred in holding that Sheriff Hannah did not have "just cause" to suspend Messer. The Circuit Court ultimately affirmed the Commission's decision to reinstate Messer and award him back pay despite the overwhelming evidence that Messer submitted untruthful payroll change notices. However, the Commission entirely failed to consider that Prosecuting Attorney Sparks advised Sheriff Hannah that Messer's integrity and credibility as a law enforcement officer had been irreparably compromised and that he would not prosecute any case in which Messer was the primary investigating officer. Accordingly, the Commission erred by failing to consider an important aspect of the problem. See Syl. Pt. 2, In re Queen, 196 W.Va. 442, 472 S.E.2d 483. The Commission, although acknowledging that the evidence showed that Messer probably submitted untruthful payroll change notices, focused on the nature of Messer's untruthfulness rather than the fact that Messer's untruthfulness created a cloud over his credibility. Furthermore, as a result of the Final Order, Messer has gone completely unpunished despite the evidence showing that he

submitted untruthful payroll change notices. The Commission's decision is also contrary to cases in West Virginia, as well as several other states, that have upheld the discipline of law enforcement officers when the integrity and the honesty of the officer is legitimately in question.

Moreover, the Final Order is clearly erroneous as, contrary to the ruling of the Commission, it is of no consequence how much overtime was wrongfully claimed by Messer. A law enforcement officer's position is sensitive and there is a strict need for both propriety and the appearance of propriety. When conduct casts aspersions or doubts on a law enforcement officer's honesty and integrity, the public's rights and interests are directly affected and just cause exists for disciplinary action. Here, Messer's credibility was clearly compromised so much so that the Prosecuting Attorney of Mingo County has indicated that he will not prosecute any cases in which Messer was the primary investigating officer. Such a cloud over the Sheriff's Department cannot be tolerated and Sheriff Hannah acted appropriately in suspending Messer. Accordingly, the Commission's decision to overturn Messer's suspension was clearly erroneous as the evidence showed that Messer submitted untruthful payroll change notices and such actions substantially affected the rights and interests of the public. *Id.* Therefore, the Circuit Court erred in failing to reverse the Final Order.

I. THE CIRCUIT COURT ERRED IN FAILING TO REVERSE THE FINAL ORDER AS CLEARLY ERRONEOUS AS THE COMMISSION FAILED TO CONSIDER AN IMPORTANT ASPECT OF THE PROBLEM CAUSING SHERIFF HANNAH TO INDEFINITELY SUSPEND MESSER UNDER W.VA. CODE § 7-14-17.

W.Va. Code § 7-14-17 sets forth the procedure in which a deputy sheriff may be removed, discharged or suspended from a county sheriff's department as well as the process by which a deputy sheriff may be subject to a reduction in rank or pay. Pursuant to subsection (a) of this provision, "[n]o deputy sheriff of any county subject to the provisions of this article may be

removed, discharged, suspended or reduced in rank or pay *except for just cause*, which may not be religious or political[.]” (*emphasis added*) W.Va. Code § 7-14-17(a). The burden is on the sheriff to justify his or her action against a deputy sheriff. *Id.* In this case, the Final Order is clearly erroneous as the Commission erred in ruling that Sheriff Hannah did not meet his burden of proving “just cause” for the indefinite suspension of Messer in order to further investigate the filing of untruthful payroll changes for overtime travel.¹ The Commission “entirely failed to consider an important aspect of the problem[.]” *See Syl. Pt. 2, In re Queen*, 196 W.Va. 442, 472 S.E.2d 483. Specifically, the Commission entirely failed to consider in the Final Order the fact that Messer’s credibility had been irreparably compromised to the point that Prosecuting Attorney Sparks opined that he could not prosecute any cases in which Messer was the investigating officer. *See* Final Order, generally. Rather, the Commission focused its decision on the position that even if Messer did submit untruthful payroll change notices, that claiming the additional three to four hours of overtime was “trivial and inconsequential and a mere technical violation of statute or official duty without wrongful intention[.]” *Id.* at pp. 3-4. Therefore, the Commission’s decision was clearly wrong and the Circuit Court erred in failing to reverse the Final Order.

The Commission had before it compelling evidence which clearly preponderated that Messer submitted claims for overtime which was not incurred:

¹ Sheriff Hannah shouldered the burden of demonstrating “just cause” by only a preponderance of the evidence. *See Montgomery v. West Virginia State Police*, 215 W.Va. 511, 600 S.E.2d 223 (2004). “Just cause” refers to misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention. *Syl. pt. 5, Mangum*, 183 W.Va. 184, 394 S.E.2d 879. The test “is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public.” *Id.* Here, not only did the evidence demonstrate by a preponderance that Messer submitted overtime charges which he did not incur, but the evidence also justifies the form of disciplinary action imposed by Sheriff Hannah – suspension.

- (a) Messer claimed travel overtime for the dates April 10 through April 13, 2006 while at the same time renting a motel room at the Motel 6 in Cross Lanes, West Virginia;
- (b) In the investigative report prepared by Sgt. LaFauci, Messer acknowledged that he had rented the motel room at Motel 6 while at the specialized training. Messer further stated that he had stayed at the motel "some" and that he had driven home a "few times;"
- (c) Justice testified that he drove back and forth on the first two days of the specialized training and claimed travel overtime for those two days. On April 12, 2006, however, Justice testified that both he and Messer were involved in low light shooting training from 6:00 p.m. to 10:00 p.m. at the Academy. Following the training, Justice and Messer stopped at a convenience store and purchased a 12-pack of beer and then went to the Motel 6 where Messer was staying. Deputy Justice stayed with Messer that evening and testified that Messer was present when Justice went to bed sometime after 11:00 p.m. and Messer was present when Justice awoke in the morning;
- (d) Justice's disinterested testimony contradicted Messer's payroll change notices for April 12, 2006 and April 13, 2006. In the payroll change notice for April 12, Messer claimed travel time from 9:00 p.m. to 11:00 p.m. Yet, Justice's testimony was clear in that the low light shooting training did not end until 10:00 p.m. and that he and Messer then went to the convenience store and to the Motel 6 after the training. Messer was still present in the Motel 6 room when Justice went to sleep at some time after 11:00 p.m. Messer's April 13, 2006 payroll change notice states that he drove from Mingo County to Institute from 6:00 a.m. to 8:00 a.m.; and,
- (e) Messer's invocation of his Fifth Amendment right against self incrimination. Unlike a criminal case, the Commission was permitted to and should have drawn an adverse inference from Messer's failure to testify since this was an administrative or civil proceeding. See State ex rel. Myers v. Sanders, 206 W.Va. 544, 526 S.E.2d 320 (1990); West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996). Messer has offered no evidence, other than the statement contained in Sgt. LaFauci's investigative report, as to what his actions were during the April 10 through April 13, 2006 time period. In fact, not one witness has verified that Messer drove back and forth and also stayed at the motel. Thus, there is an absence of evidence in the record to rebut the reasonable inferences drawn from the evidence presented by Sheriff Hannah.

Despite this overwhelming evidence that Messer did not travel on the days he submitted the payroll changes, counsel for Messer interpreted the evidence to argue that Messer traveled back and forth and still rented a motel room. Counsel for Messer argued that Messer could have left the motel room after Justice went to sleep and returned before Justice awoke. That incredibly weak argument didn't even contradict the fact that Messer claimed travel time from 9:00 p.m. to 11:00 p.m. on April 12, 2006 when by Justice's testimony Messer was still present in Cross Lanes after 11:00 p.m. In short, Messer simply could not escape the conclusion that he claimed overtime which did not incur. The Commission agreed that Messer may have overstated his overtime in the Final Order. Final Order at ¶ 10.

When Sheriff Hannah was questioned in the July 18, 2006 hearing as to why he felt a suspension of Messer was necessary pending further investigation of the payroll changes, Sheriff Hannah responded as follows:

Well, I thought there was some credibility issues involved here and there was a cloud over his credibility right at that time. Until that was resolved I didn't think he could function properly as a police officer.

(Tr. 49-50) Sheriff Hannah further testified that he received a letter on July 7, 2006 from Prosecuting Attorney Sparks, stating that he was not going to prosecute any cases in which Messer was the primary investigating officer as Messer's integrity and credibility as a law enforcement officer had been compromised. (Tr. 52-53) Prosecuting Attorney Sparks also stated that there was legally sufficient evidence that Messer committed the crime of false pretenses in violation of West Virginia Code in connection with Messer's employment as a public official. (Tr. 52) Sheriff Hannah testified that he had been orally advised by Prosecuting Attorney Sparks of these issues prior to the actual receipt of the letter on July 7, 2006. (Tr. 53)

A law enforcement officer's position is sensitive and there is a strict need for both propriety and the appearance of propriety. See McAtee v. Mentzer, 174 W.Va. 49, 321 S.E.2d 699 (1984). This Court has previously noted circumstances sufficient to demonstrate just cause for dismissal of a law enforcement officer are those activities which cast aspersions or doubt on a law enforcement officer's honesty and integrity and which directly affect the public's rights and interests. See State ex rel. Ashley v. Civil Service Commission, 183 W.Va. 364, 395 S.E.2d 787 (1990). Here, the evidence preponderated that Messer submitted payroll change notices for travel overtime that were not legitimate. It makes no difference how many hours were submitted, whether it be twenty hours or four. Both Sheriff Hannah and Prosecuting Attorney Sparks expressed the view that the credibility of Messer was detrimentally affected by the overtime issue. In fact, Attorney Sparks testified that not only was there legally sufficient evidence that Messer did commit attempt (false pretenses), a violation of W.Va. Code § 61-11-8(3) and § 61-3-24(A)(3), in connection with his employment as a public official, but that Messer's integrity and credibility as a law enforcement officer had been irreparably compromised to the point where the Attorney Sparks would not prosecute any case in which Messer was the primary investigating officer. Likewise, Sgt. LaFauci, the investigating officer, concluded that there was legally sufficient evidence to support a charge of attempt to obtain money under false pretenses. Attorney Sparks has indicated that he believes he would be duty bound to turn over information concerning Messer's conduct to defense attorneys in criminal cases pursuant to the obligation the State of West Virginia has to provide exculpatory material to criminal defendants. However, the Commission failed to consider this significant and irrefutable aspect of the problem in the Final Order.

Although the Commission held that “it appears that Messer may have overstated his overtime[.]” the Commission focused on the amount of untruthful overtime claimed rather than the effect of Messer’s untruthfulness on his ability to perform his job as a law enforcement officer. Final Order at ¶ 10. The Commission failed to consider that the indefinite suspension of Messer was not based on the amount of overtime untruthfully claimed by Messer, but the fact that Messer had untruthfully claimed overtime at all. As a result, the Commission “entirely failed to consider an important aspect of the problem[.]” Syl. Pt. 2, In re Queen, 196 W.Va. 442, 472 S.E.2d 483. Moreover, the Circuit Court, although acknowledging the evidence presented to the Commission regarding the effect of Messer’s actions on future criminal prosecutions, ignored this evidence and affirmed the Final Order. The Circuit Court failed to consider that the Commission ignored this important evidence in the Final Order as well as skirted over the fact that the evidence showed that Messer, most likely, submitted untruthful payroll change notices. Not only will the public be affected by the ramifications of Messer’s untruthfulness, but Messer will go completely unpunished as he was ordered reinstated with full back pay. A law enforcement officer’s integrity and credibility is of the utmost importance and invade every aspect of his or her job. Therefore, the Commission’s decision is clearly wrong and should have been reversed by the Circuit Court as Sheriff Hannah shouldered his burden of proving “just cause” for the suspension of Messer and the Commission “entirely failed to consider an important aspect of the problem[.]” See Syl. Pt. 2, In re Queen, 196 W.Va. 442, 472 S.E.2d 483.

II. THE CIRCUIT COURT ERRED IN FAILING TO REVERSE THE FINAL ORDER AS THE COMMISSION'S RULING THAT MESSER'S MISCONDUCT OF OVERSTATED OVERTIME WAS NOT OF A SUBSTANTIAL NATURE THAT DIRECTLY AFFECTED THE RIGHTS AND INTERESTS OF THE PUBLIC WAS CLEARLY ERRONEOUS.

- A. The Final Order was clearly erroneous as the Commission, though acknowledging Messer's submission of untruthful payroll change notices, failed to recognize the importance of credibility of a law enforcement officer.**

The Commission concluded that "... Messer's conduct, in claiming an additional three to four hours of overtime was trivial and inconsequential and a mere technical violation of statute or official duty without wrongful intention, as Messer indicated to Sgt. LaFauci that he felt that charging for overtime driving to and from the Academy would cost the Sheriff's Office less than the cost of his motel room." Final Order at ¶ 11. Therefore, the Commission ruled that "... the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interest of the public." *Id.* However, Messer's misstatement of overtime is damaging to the rights and interests of the public not only as it is a documented instance in which Messer was untruthful, but also exemplified by the fact that Prosecuting Attorney Sparks opined that he would not prosecute cases in which Messer was the primary investigating officer. *See Mangum*, 183 W.Va. 184, 394 S.E.2d 879.

Whether Messer improperly claimed four hours or twenty hours is of no consequence. To suggest otherwise is to believe that there may be some permissible amount of dishonesty or misconduct which should be tolerated from a law enforcement officer. Nothing could be further from the truth. A law enforcement officer's position is sensitive and there is a strict need for propriety. Nothing less can be tolerated. Messer's conduct and its consequences – casting doubt on his honesty and integrity as a law enforcement officer – required Sheriff Hannah to take the disciplinary action he took. Even Prosecuting Attorney Sparks believed that Messer's integrity

had been so compromised as to affect the ability to prosecute cases in which he would be a primary investigator. (Tr. 52-53) Therefore, Messer's alleged submission of untruthful payroll changes had the ultimate effect on the public's rights and interests as criminal cases will not be prosecuted since Messer's credibility is in question. There is no doubt that the public has a right and interest in seeing that persons breaking the law are punished accordingly and taken off the streets. The fact that persons alleged to have committed a crime may be given a "get out of jail free card" based on Messer's untruthfulness severely affects the rights and interests of the public.

No matter how slight the Commission felt Messer's misconduct to be, the ramifications of Messer's conduct are huge and gravely adverse to the rights and interests of the public at large. The evidence showed that Messer submitted untruthful payroll change notices and that his untruthfulness affected the rights and interests of the public. Moreover, the Commission's decision reversing Messer's suspension and the affirmation of the Commission's decision by the Circuit Court meant that Messer went unpunished for his action despite its gravity. Therefore, the Final Order was clearly erroneous as the Commission erred in ruling that Messer should not have been suspended as the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interests of the public. Accordingly, the holding of the Commission as to this issue should have been reversed by the Circuit Court.

B. This Court and other state courts hold that issues of credibility give rise to "just cause" for termination or suspension.

Sheriff Hannah's position regarding the suspension of Messer is supported by case law from West Virginia and other states addressing misconduct of law enforcement officers. Issues affecting a law enforcement official's credibility properly give rise to the suspension or termination of a law enforcement official from his or her position is applicable to the current situation involving Messer. In other words, it is not the seriousness of the law enforcement

official's action that is particularly relevant, but rather the fact that the law enforcement official engaged in any action compromising his or her credibility.

For example, in McMillan v. Ashley, 193 W.Va. 269, 455 S.E.2d 921 (1995), this Court upheld the dismissal of a deputy sheriff who took an unofficial guest on an official extradition assignment. The court found that taking an unofficial guest on the extradition assignment needlessly and seriously endangered public safety and that the officer had committed misconduct by seeking reimbursement from public funds for additional expenses occasioned by the unofficial guest's travel even though the guest was an employee of the Sheriff's Department. Initially, the Deputy Sheriff's Civil Service Commission overturned the sheriff's termination of the deputy, but this finding was reversed by this Court. This Court held that the deputy's actions clearly cast aspersions and doubt as to his honesty and integrity. The actions also directly affected the public's rights and interests, including, but not limited to, the right to public safety and the interests in fiscal integrity.

This Court has also affirmed decisions from Civil Service Commissions dismissing police officers for untruthfulness in general, though on other grounds.² See e.g. Cline v. Roark, 179 W.Va. 482, 370 S.E.2d 138 (1988) (upholding Commission's decision not to reinstate police officer who lied to another police officer during an internal investigation); Wasemann v. Roman, 153 W.Va. 320, 168 S.E.2d 548 (1969) (upholding Commission's decision not to reinstate police officer who submitted two opposing affidavits as a defendant in court proceeding in violation of internal regulations with regard to truthfulness when giving testimony).

² These cases were not appealed on the issue of whether the Commission erred in finding just cause for the dismissal of a police officer or the Circuit Court's affirmation of the ruling, but rather procedural issues regarding the proceedings before the Commission and review of the Commission's ruling on appeal in the Circuit Court. However, Sheriff Hannah submits these cases as proof that untruthfulness of a police officer constitutes grounds justifying dismissal of the police officer from the department.

Other courts consider tarnished police officer credibility to be appropriate grounds for terminating or suspending a police officer as well. In Justice v. City of Casa Grande, 567 P.2d 1195 (Ariz. App. Div. 2 1977), an Arizona appellate court upheld a finding of just cause for dismissal of an officer whose polygraph test results indicated that he was not telling the truth in denying that he took money from intoxicated arrestees at booking. In Justice, the total amount of money claimed missing totaled one hundred ten (\$110) dollars over a six-week period. Id. at 1196.

In Martin v. Civil Service Commission of Chicago, 129 N.E.2d 248 (Ill. App. 1 Dist. 1955), an Illinois appellate court upheld the discharge of a police officer for neglecting to turn over an arrestee's property promptly and signing another officer's name in the inventory log. The Martin court specifically noted that these offenses were "not trivial and did not amount to mere 'foolishness.'" Id. at 254.

In Mobley v. Conlisk, 376 N.E.2d 247 (Ill. App. 1 Dist. 1978), an Illinois appellate court affirmed the discharge of a police officer who had accepted money from a person after threatening to arrest him in exchange for his release. Considering the case largely to resolve disputes as to the weight and sufficiency of the evidence, the Mobley court found no grounds to reverse the substantive decision to dismiss the officer for wrongfully taking money from a suspect. Similarly, in Oster v. Police Board of Chicago, 318 N.E.2d 34 (Ill. App. 1 Dist. 1974), an Illinois appellate court upheld the Board's discharge of an officer for wrongfully obtaining the sum of fifty dollars from a teacher and his girlfriend under the pretense that the money was necessary to expunge their record.

In Bromund v. Board of Fire and Police Commissioners of the Village of Schaumburg, 391 N.E.2d 74 (Ill. App. 1 Dist. 1979), an Illinois appellate court affirmed the fifteen-day

suspension of a police officer for accepting one hundred dollars in "restitution" from a person he had previously arrested. According to the testimony presented to the Board, the money involved in Bromund supposedly served as part of a plea agreement. Nevertheless, the suspension was upheld because the conduct of the officer in avoiding the department's policy on restitution was found to have, "brought discredit to the police department." Id. at 79.

In Perez v. Ward, 157 A.D.2d 609 (N.Y. App. Div. 1 Dept. 1990), a New York appellate court upheld the dismissal of a New York City undercover narcotics officer for misappropriating twenty dollars in "marked" money by falsely recording the purchase price of the narcotics. The Perez court specifically noted that the sanction of dismissal was not "so disproportionate to the offense as to be shocking to one's sense of fairness." Id. (citations omitted).

In re Renna, 256 A.D.2d 219 (N.Y. App. Div. 1 Dept. 1998), directly considered whether the penalty of dismissal was an appropriate sanction for stealing money recovered during a raid on a gambling location. In a very brief opinion, the Renna court found the penalty not so disproportionate to the misconduct as to warrant reversal. Id. at 220.

Given the evidence submitted to the Commission and the high standard to which law enforcement officials are held, there could have been no other meaningful recourse for Sheriff Hannah but to suspend Messer. Claiming overtime pay to which one is not entitled is not only wrong but goes directly to the credibility and integrity of the officer. A law enforcement agency cannot properly function in a community if there are clouds of suspicion over the integrity of the officers. Successful law enforcement, including the prosecution of criminals, requires that officers be above reproach since the results of their investigations and their testimony are absolutely critical to successful prosecutions. Therefore, Final Order issued by the Commission was clearly erroneous and should have been reversed by the Circuit Court.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, Sheriff Lonnie Hannah requests this Honorable Court reverse Appeal Order issued by the Circuit Court of Mingo County, West Virginia, and hold that the following rulings of the Mingo County Civil Service Commission for Deputy Sheriffs were clearly erroneous:

1. Based upon the foregoing facts, it is the ruling of the Commission that Sheriff Hannah did not have "just cause" for the imposition of indefinite suspension of Messer without pay, under West Virginia Code, § 7-14-17, and that Messer should not have been suspended without pay, as the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interests of the public. Rather, it is the conclusion of this Commission that Messer's conduct, in claiming the additional three to four hours of overtime was trivial and inconsequential and a mere technical violation of statute or official duty without wrongful intention, as Messer indicated to the investigating State Police Officer that he felt that charging for overtime driving to and from his training would cost the Sheriff's Office less than the cost of his motel room. Again, this Commission feels that the Sheriff should have attempted to handle this discrepancy in overtime charges in an administrative manner rather than through a State Police investigation of Messer.
2. Based upon the foregoing Findings of Fact and Conclusions of Law, it is the order of this Commission that the grievance filed by Sergeant Roy Glen Messer relative to his indefinite suspension is hereby sustained and that the Sheriff failed to justify his action before this Commission.
3. Deputy Messer shall be reinstated to his former rank and position with full pay, forthwith and without any additional Order, for the entire period during which he was prevented from performing his usual employment, and no charges may be officially recorded against his record.
4. Deputy Messer's legal counsel shall be awarded reasonable attorney fees to be determined by this Commission and paid by the Sheriff from County funds.

As a result thereof, Sheriff Hannah requests that this Court determine that (1) Sheriff Hannah had just cause, pursuant to W.Va. Code § 7-14-17, for suspending Hannah; (2) reverse the Commission's reinstatement of Messer and uphold the indefinite suspension imposed by

Sheriff Hannah; and, (3) absolve Sheriff Hannah of the obligation of awarding Messer reasonable attorneys fees from the County funds or otherwise.

SHERIFF LONNIE HANNAH,

By Counsel,



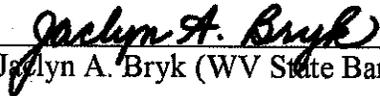
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CERTIFICATE OF SERVICE

I, Jaclyn A. Bryk, counsel for Appellant, Sheriff Lonnie Hannah, Sheriff of Mingo County, West Virginia, do hereby certify that true and accurate copies of the foregoing "**BRIEF OF APPELLANT SHERIFF LONNIE HANNAH**" were served upon the following counsel of record, via first class United States Mail, postage prepaid, this 14th day of November, 2007:

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