

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 071983**

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

APPELLANT

VS.

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

APPELLEE

**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 APPELLEE SERGEANT GLEN MESSER



C. CHRISTOPHER YOUNGER
Counsel for Appellee

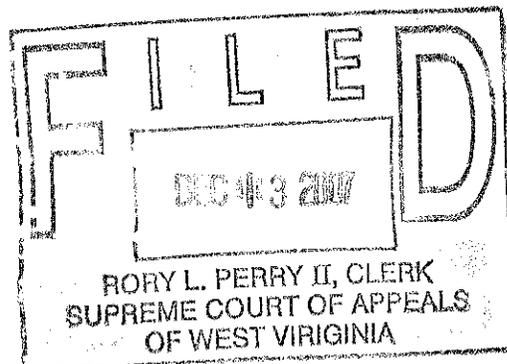


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INTRODUCTION

Comes the Appellee, Sergeant Glen Messer, by counsel, and would show this Court that the law and facts in this case demand that the Circuit Court's Order affirming the administrative body's ruling on this matter be affirmed. In support of this, Appellee would show the Court as follows:

COUNTERSTATEMENT OF FACTS

Appellant Lonnie Hannah's self-serving version of the circumstances underlying this appeal contain multiple factual errors. Appellee Sergeant Glen Messer would provide this Court the following corrections and a counterstatement to the "Statement of Facts" provided by Appellant Hannah.

Sergeant Messer is a Deputy Sheriff with the Mingo County Sheriff's Department. Messer and another Deputy Sheriff, Sgt. Justice, attended specialized training to improve their job-related skill, with the consent of Appellant Hannah, their employer. Appellee's Response to Sheriff Lonnie Hannah's Appeal of the Mingo Co. Civil Service Commission's Final Order, at para. 1. Sheriff Hannah told the officers they were entitled to overtime payment for all time spent training, and two hours of overtime, one way, for each time they traveled back or forth between Mingo County and Charleston.

Appellant Hannah claims that "he" provided a cruiser and intended the deputies to ride together to the training. Appellant's Brief, p. 2. In fact, the record shows that Deputy Justice drove his own cruiser to the training, and that traveling together would have been unworkable as Sgt. Messer lived a great distance out of Deputy Justice's way. Tr. 59-60. Additionally, Appellant Hannah fails to point out to the Court that Messer would have been entitled to the same amount of overtime whether he drove his own vehicle or rode with Deputy Justice. Id.

The Deputies were entitled to claim overtime incurred during such training, including time spent traveling to and from the training site. Id., Transcript of Hearing, (hereinafter "Tr.") at p. 26. Appellant stated under oath that even if the deputies chose to stay in Charleston for the multi-state training, they were entitled to claim travel overtime if they traveled back to Mingo County for any reason at any time during the day. Tr. 65. The training did not occupy a full work day during regular

business hours each day.

As the training was held less than two hours from home, Messer rented a cheap motel room in the local area. Tr. 120. On at least one occasion, he offered it for the use of the other Deputy attending the training. Id.; Final Order, p. 2, para. 5. That Deputy Justice, testified that he drank at least 6 beers after the training, and fell asleep, so he had no idea whether Messer spent the night in the room. Tr. 136. Messer was the athletic coach for his stepson, so he still had to travel back and forth to Kermit, but could use the room to rest when he needed it. Tr. 97. Messer did not charge the department for the motel room, his motor vehicle expenses, his meals or merely the time he spent driving back and forth.

During the State Police investigation of the overtime claims, Appellee Messer informed St. LaFauci that he had rented the motel room during the specialized training, and that he had used the room on some occasions during the training but had also needed to drive home. Final Order, p. 2, para. 7; Tr. 108. Trooper LaFauci testified that the Sheriff only asked him to determine whether Messer had rented a motel room, and not to determine whether Messer had driven back and forth to Mingo County. Tr. 115. The State trooper did not investigate whether Sgt. Messer drove back and forth and further testified that only four hours of overtime were in question based on his investigation. Tr. 113. Finally, LaFauci also testified that Sheriff Hannah called him and asked that he arrest Messer Tr. 117.

There was a difference in the hours of overtime requested by the Officers attending the training. Id., para. 3. Rather than asking Messer about the discrepancy or dealing with the matter in the approved administrative manner, Appellant Hannah requested a State Police investigation of Messer and suspended Messer for over five months without pay. Id., paras. 5-7. Sergeant Messer asserts that the Sheriff's actions were retaliatory in nature, designed to punish him for a grievance filed against Sheriff Hannah several months earlier. Appellee's Response to Sheriff Lonnie Hannah's Appeal of the Mingo Co. Civil Service Commission's Final Order, para. 13.

Sgt. Messer took the entire specialized training, but drove back and forth to Mingo County as needed to fulfill his family responsibilities. His stepson was a ball player and the training was taking place during the ball season. The record shows that Messer also paid for a cheap motel room in Charleston to provide himself with a place to rest during breaks from the training. Messer paid

for this room himself and did not request reimbursement for it. See: Final Order, para. 10. Messer claimed 20 hours of travel overtime for the training period. Tr. P. 55. The total amount of overtime claimed (20 hours), but Sgt. Messer was only paid for 16 hours.

Appellant Hannah claims that Messer did not actually work all those overtime hours. Appellant failed to conduct an investigation of his claims, failed to question Sgt. Messer about the overtime claimed, and failed to follow required or suggested administrative procedures for dealing with such issues. Instead, as Appellant's Brief shows, Hannah reported an alleged "theft" to the State Police and demanded that they arrest and charge Sgt. Messer.

The State Police conducted an investigation as demanded by Appellant Hannah. The state police found no grounds to arrest Messer or charge him with wrongdoing. After complete investigation of the overtime claimed, the state police stated that it was possible that 4 hours of the overtime may have been incorrectly billed if Messer, in fact, did not travel back to Mingo County on one of the days of training. The state police reported that there was no evidence that Messer did not travel back and forth each day, and that Messer had informed the investigating officer that he did, in fact, travel back and forth. The financial value of the overtime would be approximately seventy five dollars. (\$75.00). Final Order, pa. 3, para. 10.

Messer brought his claims of improper disciplinary action before the Mingo County Deputy Sheriff's Civil Service Commission. Appellant Hannah contested the claims, and asserted that Messer had engaged in "criminal activity." After a full hearing on the matter the Commission found that the claim that Messer may have asked for three or four hours more overtime than he was entitled to, even if true, did not constitute just cause for the imposition of the indefinite suspension without pay. The Commission further found that "the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interests of the public." Id. The Commission held that the allegations, even if true, were "trivial and inconsequential and a mere technical violation of a statute or official duty without wrongful intention." Final Order, p. 4 para. 11. The Commission found the suspension inappropriate. Final Order, para. 11. The Commission ordered Messer reinstated with full back pay, and mandated that no charges be placed on Messer's record. Id., para. 13. Additionally, knowing about the discrepancy in overtime claimed and knowing of the State Police investigation, at Sheriff Hannah's request, concerning the same, some weeks later

Sheriff Hannah did nothing to stop the issuance of a check for the overtime claimed. Tr. 71-73, 75

Appellant Hannah then appealed the Commission's ruling to the Circuit Court, alleging that evidence existed of misconduct of a substantial nature. Sheriff Lonnie Hannah's Appeal of the Mingo Civil Service Commission for Deputy Sheriffs' Final Order Relevant to Indefinite Suspension of Sergeant Glen Messer, p. 7. At that time, Appellant made the same argument, that the overtime was in error and that Glen Messer did not travel back and forth to Mingo County on one day. The Sheriff provided no new evidence in support of his claims, which had previously been found to be without merit by the West Virginia State Police and the Civil Service Commission. Based on the clear evidence in the record, the Circuit Court affirmed the Civil Service Commission's ruling, and denied the appeal. See: Circuit Court's Ruling.

STANDARD OF REVIEW

The Circuit Court, sitting in review of an administrative determination, must affirm the ruling unless it is shown to be unsupported by the law or facts. Syllabus Pt. 1, Mangum v. Lambert, 394 SE2d 879 (W.Va. 1990). As this Court has noted: "On appeal of an administrative (decision)...findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syllabus Point 2 (in part), Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996). In the present case, the Commission made clear findings as to the evidence in the record, and provided a demand for prompt reinstatement and payment by Appellant Hannah.

With particular regard to the actions of a civil service commission, this Court has found that "(a) final order of a police civil service commission based upon a finding of fact will not be reversed by a Circuit Court upon appeal unless it is clearly wrong or is based upon a mistake of law." In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996). In that case the Court held that 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. Similarly, the Court should not reverse the Commission's Final Order in this case, which was made after an administrative hearing and a thorough review of

all applicable evidence.

A higher Court, sitting in review of the Circuit Court's ruling affirming an administrative determination, shall make a *de novo* determination only where the issue on appeal is clearly a question of law or one involving interpretation of a statute. Syllabus Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

ARGUMENT

1. THE ACTION WAS UNSUPPORTED BY LAW

The law did not permit Appellant Hannah to suspend Sgt. Messer indefinitely, without pay, or to attempt to terminate his employment. The clear facts in the record show that Sgt. Messer did not engage in any wrongdoing sufficient to allow that disciplinary action. W.Va. Code, 7-14-17 (1981), requires that dismissal of a deputy sheriff covered by civil service be for just cause, which means 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. "Syllabus point 2, Mangum v. Lambert, 183 W.Va. 184, 394 S.E. 2d 879 (1990). The applicable statute puts the burden on the Sheriff to show just cause for the disciplinary action or dismissal. Montgomery v. West Virginia State Police, 600 S.E.2d 223 (W.Va. 2004), holding that just cause cannot be mere technical violations of official duty without a wrongful intention. The Sheriff must prove that the alleged misconduct "directly affects the rights and interests of the public." 394 S.E.2d at 881.

Substantial misconduct is defined in the same manner as gross misconduct. This Court can look to caselaw on unemployment decisions to see that this is so. See: UB Services, Inc. v. Gatson, 207 W.Va. 365, 532 S.E.2d 365 (2000). No evidence of gross or substantial misconduct was found by either the West Virginia State Police or the Mingo County Civil Service Commission, despite a thorough review of all evidence and an extensive hearing. Obviously, Appellant's claims of substantial misconduct are in error.

Appellant Hannah asserts that “there is an absence of evidence in the record to rebut the reasonable inferences” he drew from the overtime requests, that being that Sgt. Messer was claiming hours of overtime for traveling to and from Mingo County while he also had a cheap motel room in Charleston, that he had paid for himself. Sheriff Hannah’s Appeal to Circuit Court of Commission’s Order, at p. 10. This assertion is false, as the record clearly shows NO evidence supporting Appellant’s erroneous and misleading claims.

Appellant then makes a fantastical leap to claim that there was “overwhelming evidence that Messer did not travel on the days he submitted the payroll changes.” Id. This claim was made despite the fact that the only evidence in the record regarding the travel is Messer’s own testimony to the investigating officer, which clearly shows that he did travel back and forth each day. The record demands a finding that Messer did not engage in substantial misconduct of any kind, and that the suspension without pay was in error.

As the Commission and the state police noted, the record contains no evidence whatsoever tending to show that Messer did not travel back and forth. This was illustrated by Messer in his Response to Respondent’s Findings of Fact and Conclusions of Law, where Messer showed the Commission that “there is not shred of evidence that Sgt. Messer did not travel back and forth to Charleston in accordance with the overtime claimed on his payroll charges. Id., at para. 2.

The primary argument made by Appellant Hannah in support of the unwarranted suspension without pay of Sgt. Messer is “substantial evidence” that Messer’s alleged wrongful actions undermined his credibility with the public or brought the Sheriff’s Office into disrepute. Appellant Hannah cites the local novice prosecutor’s assertion that he would not be able to prosecute an action in which Sgt. Messer was the investigating officer. Appellant’s Brief, pp. 9, 12, 16.

II. APPELLANT’S DEMAND THAT THIS COURT “PUNISH” MESSER IS UNWARRANTED

Astonishingly, Appellant Hannah demands that this Court “punish” Sgt. Messer, The Sheriff claims that Sgt. Messer “has gone completely unpunished.” Appellant’s Brief, pp. 9, 17. This argument is shocking in light of the fact that both the civil service commission and the West Virginia

State Court system expressly stated that no grounds for any disciplinary action exist. Hannah's demand for retribution is far outside the realm of the remedies offered by this Court. The often repeated demand for "punishment" is particularly inappropriate where the Sheriff has improperly and illegally deprived Sgt. Messer of pay due for hours worked for months, denied him his uncontested overtime, and suspended him without pay in violation of his employment contract. Even the state police urged that Messer be promptly paid. Losing five months of work without pay, even disregarding the public humiliation and stress of extended litigation, is a great deal of punishment, particularly where, as here, no "punishment" was justified. No grounds exist upon which this Court could reverse the Civil Service Commission, and certainly there is no showing that this Court should exact a "punishment" upon Sgt. Messer.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGE OR THE DISMISSAL

As the Civil Service Commission and the Circuit Court noted, no just cause existed for the adverse employment actions taken by Appellant Hannah. W.Va. Code Section 7-14-17 holds that a showing of "just cause" is required for any suspension without pay. Sheriff Hannah asserts that he had just cause for his failure to follow administrative procedures, failure to properly investigate the matter, failure to keep the claims of illegal action private and the suspension of Messer. See: Appellant's Brief, pp. 7-8. The record does not support Appellant Hannah's claims.

This Court should note that Appellant Hannah admits that the burden he bears is to show just cause by a preponderance of the evidence. Montgomery v. West Virginia State Police, 600 S.E.2d 223 (W.Va. 2004); cited in Response of Sheriff Lonnie Hannah to Final Order Submitted by Sgt. Roy Glen Messer Relative to Indefinite Suspension, at p. 2. The Sheriff has been unable to show any cause for his actions.

In his appeal before the Circuit Court, Sheriff Hannah claimed that Messer's overtime charges were "false", Hannah's Circuit Court Appeals Brief, p. 4. He contended that the overtime requests "compromised Messer's credibility." Id., at p. 5. The record shows that the state police declined to charge Messer with an offense, and the claims were never brought before a Mingo

County grand jury resulted in no true bill. Although the local prosecutor claimed that there was "legally sufficient evidence" that Messer committed a crime, (Tr. 52), no such evidence was presented below, and no charges were ever brought. In fact, the prosecutor admitted under oath at the hearing before the Commission that the state police investigation showed that Messer had driven back and forth to Mingo County, that no evidence disproved that statement, and that Messer's having driven back and forth would be a complete and total defense to the charges of improper overtime. Tr. 149.

Appellant makes much of the fact that the local prosecutor, acting with just a few months experience in his office, overreacted, providing Sheriff Hannah with a letter that claimed that in his eyes, Messer's credibility was compromised and that he would not prosecute any case in which Messer was the investigating officer. Defense Exhibit 14. Under oath, the prosecutor was unable to show why he would not work with Sgt. Messer, merely claiming that "he could not in good faith" put Messer on the stand, and that he intended to disclose the substance of the investigation to all criminal defense attorneys appearing in the courtroom with him. Tr. 144-145. Obviously, such action would be a clear violation of legal ethics and courtroom demeanor, as Messer had not been charged with any crime, and the administrative claims against him were found to be unsupported by fact.

This Court has held that it is improper to bring in evidence of prior bad acts in an attempt to prove the charged offense. The Court stated that "trial by innuendo and inference is not the American way. State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994). The attempts by Sheriff

Hannah to demean Sgt. Messer and to ruin his career by negative inference are clearly improper, and this Court should not support those attempts.

By creating a great public spectacle of Sgt. Messer, and inviting public knowledge of what should have been a private administrative proceeding, Appellant Hannah and his cohorts created an appearance of impropriety which reflected poorly on the entire Department. Avoiding the appearance of impropriety is important to the proper operation of the justice system. Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 108-109, 459 S.E.2d 374, 384-85 (1995).

Sgt. Messer argued that his actions were proper and in accordance with departmental procedure. He contended that he had been suspended and deprived of pay in error. The Commission

found Sgt. Messer's position credible and ruled that he be reinstated with back pay. The Circuit Court affirmed the decision by the Civil Service Commission. This Court should affirm the lower rulings.

The law provides that "(a) reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." Michael D. C. v. Wanda L. C., 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997). *Accord*, Gum v. Dudley, 202 W. Va. 477, 505 S.E.2d 391, 398 (1997). Both the Civil Service Commission and the Circuit Court found that the witness' testimony showed that, at most, this was a minor administrative matter, and that no offense had been committed. Both ordered Sgt. Messer reinstated immediately and found that he was entitled to prompt payment of his back wages and overtime.

Appellant Hannah's reliance on foreign caselaw in an attempt to support his untenable position, (Appellant's Brief, pp. 18-20), is in error. The cases cited are clearly differentiable from the present action. For example, the cases cited by Hannah include officers who lied to other officers to affect the outcome of the police investigation of a crime, officers who stole money from intoxicated persons during arrests, and officers who accepted bribes in exchange for freeing prisoners. Clearly, these cases bear no relation to the facts in this case and provide no guidance to the Court.

This Court should find that the rulings below must be affirmed.

IV. APPELLANT FAILED TO FOLLOW PROPER ADMINISTRATIVE PROCEDURES

As noted by the Mingo County Civil Service Commission in its Final Order at p. 2, para. 6 and p. 3, para. 8, Appellant Hannah admits that he took no internal or administrative review of Messer's actions. This was so even though Appellant had a practice of investigating such matters himself and handling them administratively. See: Testimony of Sheriff Hannah, Tr. Pp. 79-82. Instead, for retaliatory or otherwise improper reasons, the Sheriff demanded that the state police investigate the matter and file criminal charges to justify Messer's suspension. See: State Police report, p. 8,

referenced at Tr. P. 95. The state police officer refused to do so. Sheriff Hannah harassed Officer LaFauci during his investigation, repeatedly demanding that Messer be arrested. The officer refused to do so. Tr. Pp. 117-120.

Application of proper administrative procedures provides safeguards for an officer's interest in his work and reputation. As the United States Supreme Court recognized in Mathews v. Eldridge, 424 U.S. 319 (1976), the following considerations must be examined to determine what procedural protections are constitutionally required in a given case: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." See also: Major v. West Virginia, 169 W.Va. 257-58, 286 S.E.2d at 698.

The standard contained in W.Va. Code § 8-14-11...is designed to prevent an erroneous or arbitrary decision. Procedural protections can only help...reduce the risk of an erroneous deprivation of the probationer's protected interests. Principles of due process mandate that a police officer subject to civil service protection must be afforded administrative remedies prior to discharge, suspension, or reduction in rank or pay notwithstanding the provisions of West Virginia Code § 8-14A-3 unless exigent circumstances preclude such protections.

Nationally courts have held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property. See, e.g., Cleveland Board of Education v. Loudermill, 470 US 532, 542, 84 L Ed 2d 494, 105 S Ct 1487 (1985) ("The root requirement' of the Due Process Clause" is "that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest"; hearing required before termination of employment (emphasis in original));...Goss v. Lopez, 419 US 565, 579, 42 L Ed2d 725, 95 S Ct 729 (1975) (at minimum, due process requires "some kind of notice and...some kind of hearing" (emphasis in original)...494 U.S. at 127 (some citations omitted).

Sheriff Hannah admits that he suspended Messer without a hearing, investigation, or even asking him about the overtime request. This suspension was made without providing him with past

due pay. Hannah's Circuit Court Appeals Brief, p. 5. This suspension was for a period of over five months. Tr. 96. The state police officer investigating the matter requested that Appellant Hannah pay Sgt. Messer his back pay without the contested amount of overtime, in accordance with law and proper procedures, but the Sheriff refused to do so. Tr. 105.

The Commission found that Messer had failed to follow appropriate administrative procedures in dealing with the alleged discrepancy in hours claimed. Final Order, p. 4, para. 11. Officer LaFauci, the state trooper who investigated the Sheriff's charges, noted under oath that the matter was really an administrative, rather than criminal incident. Tr. P. 114. Where administrative procedures exist, an agency must follow them. United States v. Nixon, 418 U.S. 683, 695-97, 94 S. Ct. 3090, 3101-02, 41 L. Ed.2d 1039, 1057-58 (1974). Appellant failed to follow such procedures. The Commission reinstated Messer to his position and determined that he was entitled to receive all pay lost while he was prevented from working. Id., para. 13. The Commission ordered that no charges are to be put on Messer's record. Id.

Administrative regulations only permit a temporary suspension without pay for good cause. Once the matter has been resolved, reinstatement is supposed to be promptly made. In the underlying case, the matter was final and the state police investigation was complete months before the Commission met. Tr. At p. 5. No good cause for the suspension was found. In fact, the ruling below showed that the dispute was over a "trivial" matter. Despite this fact, the Sheriff had failed to reinstate Messer or provide him with the back pay he was owed. Similarly, Appellant Hannah failed to pay Sgt. Messer the uncontroverted overtime hours claimed, which was overtime worked of 16 hours, a payment in excess of \$300. When questioned about this failure, Appellant Hannah claimed that he had never talked to the Trooper about whether the investigation was final, or the results of the investigation. Tr. 68. This false assertion was refuted by the testimony of the other witnesses including the state trooper.

This Court should affirm the findings made below.

V. THE ACTION WAS RETALIATORY

In McClung v. Marion County Commission, 178 W.Va. 444, 360 S.E.2d 221 (1987), this

Court explained as follows:

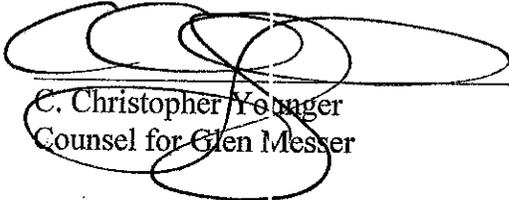
One of the fundamental rights of an employee is the right not to be the victim of a "retaliatory discharge," that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy...Certainly it is in contravention of substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances (*W. Va. Const. Art. III, § 16*) and to seek access to the courts of this State (*W. Va. Const. Art. III, § 17*) by filing an action... for overtime wages.

Id. At 450, 360 S.E.2d at 227. Appellee Messer showed the Commission and the Circuit Court that the attacks against his conduct and credibility occurred shortly after Messer filed a grievance against Sheriff Hannah. There is no showing that the underlying charges here were supported by fact. The attempt by the Sheriff to have Sgt. Messer arrested and criminally charged was wholly inappropriate and retaliatory in nature. This Court must affirm the Circuit Court ruling finding Messer entitled to immediate reinstatement and pay.

CONCLUSION

For the foregoing reasons, Appellee Glen Messer respectfully requests that this Honorable Court AFFIRM the rulings of the Mingo Circuit Court and the Civil Service Commission below.

Respectfully submitted,
Glen Messer


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APPELLANT

VS.

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

APPELLEE

CERTIFICATE OF SERVICE

I, C. Christopher Younger, counsel for Appellee, do hereby serve the foregoing **BRIEF OF APPELLEE SERGEANT GLENN MESSER**, by mailing a true and exact copy to the following:

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on this the 12th day of December, 2007

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