

NO. 080956

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

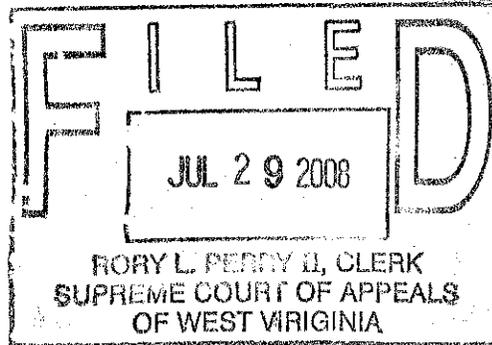
CITY OF BRIDGEPORT, a West Virginia
municipal corporation, and
BRIDGEPORT POLICE CIVIL SERVICE COMMISSION,

Appellee,

vs.

ROBERT MATHENY,

Appellant.



FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

BRIEF ON APPEAL
OF ROBERT MATHENY

Jerry Blair
Attorney At Law, WVSB No. 5924
Blair, Conner & McIntyre-Nicholson PLLC
354 W. Main Street
P. O. Box 1701
Clarksburg, WV 26302-1701
(304) 622-3334

Counsel for Appellant, Robert Matheny

TABLE OF CONTENTS

KIND OF PROCEEDINGS,
NATURE OF RULING OF LOWER COURT..... 3

STATEMENT OF THE CASE..... 3

ASSIGNMENTS OF ERROR 6

POINTS AND AUTHORITIES 7

DISCUSSION OF LAW 8

PRAYER FOR RELIEF 19

PETITION OF ROBERT MATHENY FOR APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I.

KIND OF PROCEEDINGS, NATURE OF RULING OF LOWER COURT

This case arises from a declaratory judgment action filed by the City of Bridgeport and the Bridgeport Police Civil Service Commission seeking a ruling that Robert Matheny, appointed by the local Fraternal Order of Police to the Bridgeport Police Civil Service Commission, is, solely by virtue of his service as a Clarksburg Police officer, ineligible to serve as a Bridgeport Police Civil Service Commissioner. The Harrison County Circuit Court in Civil Action No.: 07-C-554 found that Mr. Matheny was ineligible to serve because the Circuit Court found that police officers are holders of a "public office." The Appellant seeks review of that final "Memorandum Opinion and Order Concerning Declaratory Relief" entered on March 20, 2008. This Brief on Appeal is timely submitted within the time frames of the Appellate Rules of the Supreme Court of Appeals and the Court's Order entered on June 25, 2008.

II. STATEMENT OF THE CASE

Robert Matheny is a resident of the City of Bridgeport, West Virginia. He is currently, and has been for many years, employed as a police officer by the City of Clarksburg, West Virginia. Particularly, he is currently, and has been for some time, serving Clarksburg with distinction as a detective in the investigations division of the Clarksburg Police Department.

The Bridgeport Police Civil Service Commission is composed of three members, each appointed by a separate entity: the Mayor, the local Fraternal Order of Police (hereinafter, "the FOP"), and the local business association (Bridgeport Rotary Club). In February 2007, a vacancy occurred on the Commission of the slot filled by the FOP appointee. Robert Matheny was appointed by the FOP to fill the vacancy at that time.

On February 27, 2007, Jack Clayton, then Chief of Police of the City of Bridgeport, sent an email to Matthew Wilfong, the Secretary of FOP Mountaineer Lodge No. 78, stating that Robert Matheny was ineligible to serve as appointed because "[b]eing a police officer constitutes holding an office of a political subdivision and prohibits him from being a commissioner," and that Mr. Wilfong would be receiving an official letter to that effect from the mayor or the city attorney. Mr. Wilfong, months later, then received a letter from Mayor Christie dated June 25, 2007. Mr. Matheny, prior to that time, had attempted to convene a meeting of the Commission, but was denied that right by the alleged President of the Commission.

The matter of the appointment of Mr. Matheny was then brought to the attention of the Bridgeport City Council at a meeting held on August 27, 2007. On August 28, 2007, the Chief of Police and Mr. Matheny met and discussed, among other things, the issue of a criminal investigation of individuals impeding his assumption of his role as Commissioner pursuant to West Virginia Code § 8-14-22. Mr. Clayton composed a letter to Mr. Matheny dated September 13, 2007 regarding their meeting. That letter stated that Mr. Matheny's

"appointment has not been formally recognized by the Mayor." Further, it concedes that no further action or recognition by the Mayor or City Council is necessary regarding his appointment, and that "[y]our appointment is the sole responsibility of the FOP with no approval required by any City official." (All said correspondence is a part of the record below.)

On September 13, 2007, Mr. Matheny spoke with Robert V. Allen, alleged president of the Bridgeport Police Civil Service Commission, and Mr. Allen again refused to allow Mr. Matheny to call a meeting of the Commission and likewise refused to call one himself. Mr. Allen stated that Mr. Matheny's appointment "had not been confirmed." He further told Mr. Matheny that he had no knowledge that the Bridgeport Police Civil Service Commission was a party to the lawsuit below and that the Commission had not met in over a year.

The lower court found, by "Memorandum Opinion and Order Concerning Declaratory Relief" entered on March 20, 2008, that Mr. Matheny is not eligible to serve on the Bridgeport Police Civil Service Commission because he already holds a "public office" as a police officer in the City of Clarksburg, despite the fact that law enforcement officers serve on police civil service commissions statewide, and not merely of neighboring municipalities, but even deputies serve as commissioners on municipal police civil service commissions for which municipalities they have concurrent jurisdiction as law enforcement officers.

None of these foregoing facts are believed to be in dispute.

III.

ASSIGNMENTS OF ERROR

A.

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY FINDING THAT A CITIZEN OF A MUNICIPALITY WHO IS EMPLOYED AS A POLICE OFFICER BY A DIFFERENT, WHOLLY SEPARATE MUNICIPALITY IS PROHIBITED FROM SERVING AS A COMMISSIONER ON THE POLICE CIVIL SERVICE COMMISSION IN THE CITY OF HIS RESIDENCE BECAUSE HIS EMPLOYMENT CONSTITUTES HOLDING A "PUBLIC OFFICE" WHEN THERE ARE MANY OTHER SUCH LAW ENFORCEMENT OFFICER POLICE COMMISSIONERS SERVING IN MUNICIPALITIES STATEWIDE.

B.

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY NOT ADDRESSING THE TIMELINESS ISSUE RAISED, I.E., THE FACT THAT THE CITY OF BRIDGEPORT DID NOT FILE ITS ACTION UNTIL ON OR ABOUT SEPTEMBER 11, 2007, APPROXIMATELY SEVEN (7) MONTHS FOLLOWING MR. MATHENY'S APPOINTMENT CONTRARY TO CODE § 8-14-7 NOR OTHER COMPLIANCE WITH STATUTORY NOTICE REQUIREMENTS CONSTITUTING AN INCURABLE WAIVER OF ANY PROTESTATIONS PETITIONERS BELOW MAY HAVE HAD REGARDING THE APPOINTMENT.

**IV.
POINTS AND AUTHORITIES**

CONSTITUTION

Article IV, Section 4 of the West Virginia Constitution.....12

CASES

State v. Macri, 199 W.Va. 696; 487 S.E.2d 891 (1996)..... 11
Giles v. Bonar, 155 W.Va. 421; 184 S.E.2d 639 (1971). 11
Thomas And Milwaukee Police Assoc. v. Milwaukee City Bd. Of Fire And Police Commissioners,
Appeal No. 2007AP1771, Wisconsin Court of Appeals.....13
Aldine Independent School District v. Stundley, 280 S.W.2d 758 (Tex. 1955).....14
State ex rel Hill v. Pike, 887 S.W. 2d 921 (Tex. Crim. App. 1994).....14
Neigel v. Superior Court, 72 Cal.App.3d 373, at pp. 378-379 (1977).....15
Weaver v. Shaffer, 170 W.Va. 107; 290 S.E.2d 244 (1980).....16

STATUTES

West Virginia Code § 8-14-79
West Virginia Code § 8-14-19.....10
West Virginia Code § 8-14-23.....13
West Virginia Code § 8-14A-1.....9

AG OPINIONS

Kansas Attorney General Opinion No. 2003-1313
California Attorney General Opinion No. 99-102.....15

V.

DISCUSSION OF LAW

A.

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY FINDING THAT A CITIZEN OF A MUNICIPALITY WHO IS EMPLOYED AS A POLICE OFFICER BY A DIFFERENT, WHOLLY SEPARATE MUNICIPALITY IS PROHIBITED FROM SERVING AS A COMMISSIONER ON THE POLICE CIVIL SERVICE COMMISSION IN THE CITY OF HIS RESIDENCE BECAUSE HIS EMPLOYMENT CONSTITUTES HOLDING A "PUBLIC OFFICE" WHEN THERE ARE MANY OTHER SUCH LAW ENFORCEMENT OFFICER POLICE COMMISSIONERS SERVING IN MUNICIPALITIES STATEWIDE.

There are two assignments of error in this matter. This first one involves broadly applicative substantive issues of statutory application, and the following one involves procedural defects in carrying out the "removal" of Lt. Robert Matheny by the City of Bridgeport of limited application to this matter alone.

Though this case could clearly be decided in favor of Lt. Matheny upon the procedural defects alone, as shall be seen below, the substantive issues are very important because there are currently a number of law enforcement officers serving upon (not their own department's) municipal police civil service commissions statewide. The lower court's ruling in this case finds all such officers ineligible to serve because it found that municipal police officers hold a "public office." The honorable lower court's ruling calls into question all decisions, votes and actions these

commissioners have made during their service as commissioners. In Harrison County alone, since the lower court's decision in this instant matter regarding a police civil service commission, a similar action has been filed in circuit court by the City of Shinnston (having a non-civil service police department) applying the decision to the investigative "Hearing Board" provisions of Code § 8-14A-1 *et seq*, but having the same timeliness procedural issues involved.

Does a Police Officer Hold a "Public Office?"

The question of whether a police officer holds a public office has not been expressly decided in West Virginia by this High Court, nor by legislative enactment. However, it is a question that has arisen in several other jurisdictions. It is first necessary to consider the two statutes in question in this case, to then consider this Court's decisions which have a bearing upon their interpretation, to look at the persuasive authority of other jurisdictions, and to finally reach the reasoned conclusion that municipal police officers in this State do not, in fact, hold a "public office" for purposes of precluding them from serving upon a different municipality's police civil service commission.

The City of Bridgeport relied upon the following statute below:

"No commissioner shall hold any other office (other than the office of notary public) under the United States, this state, or any municipality, county or other political

subdivision thereof; nor shall any commissioner serve on any political committee or take any active part in the management of any political campaign." West Virginia Code § 8-14-7, in pertinent part.

However, effective June 8, 2007 is the following statute, in pertinent part:

§8-14-19. Political activities of members prohibited; exceptions.

(a) A member of a paid police department may not:

(1) ...

(2) ...

(3) ...; or

(4) Be a candidate for or hold any other public office ***in the municipality in which he or she is employed***: *Provided*, That any municipal police officer that is subject to the provisions of 15 U. S. C. §1501, *et seq.*, may not be a candidate for elective office." Emphasis added.

The Appellant does not concede that an ambiguity in these statutes exist.

However, construing the alleged ambiguity between these two statutes and their application in this instant matter in this matter is a case of first impression in West Virginia. Code § 8-14-19, amended to take effect June 2007, is clearly the most recent legislative intent expressed, and the rules of statutory construction require that the phrase "in the municipality in which he or she is employed" cannot be ignored. An attempt must first be made to give those words their plain meaning, and the rules of construction also must yield the conclusion that the restriction expressed must therefore only apply to holding public office in the municipality where the officer is employed, i.e., that holding office in other municipalities must be permissible or the

statute would not be worded as it is. These are basic rules of statutory construction without which our entire edifice of legal hermeneutics would crumble.

The City of Bridgeport argued below that a police officer is a holder of an "office" and a "public office." The City relied upon the case of *Giles v. Bonar*, 155 W.Va. 421; 184 S.E.2d 639 (1971) to declare that Mr. Matheny, by virtue of being a municipal police officer, is the holder of an "office" or "public office." The *Giles* case only held that West Virginia State Troopers were not subject to minimum wage and hour laws because they are public officers. The *Giles* case does nowhere state that State Troopers are holders of an "office" or a "public office."

So, is there a clear difference under the law of this State between the holder of a "public office" and a "public officer"? Yes, there is. In Syl. Pt. 3 of *State v. Macri*, 199 W.Va. 696; 487 S.E.2d 891 (1996), our High Court held that:

"Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated [as] an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign." Syl. Pt. 5, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970)."

The question in *Macri* was whether an indictment was defective because the assistant prosecuting attorney was a resident of the State of Ohio rather than West Virginia. This High Court found after a lengthy analysis, in effect, that he was a public officer but not

holding a public office. Applying the analysis of that case is dispositive of the issue before this Honorable High Court demonstrating that the honorable lower court was incorrect in its holding. The two statutes quoted above (as all statutes) must be applied in light of the State Constitution. Article IV, Section 4 of the West Virginia Constitution provides:

"No person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of thirty, and the attorney general and senators the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the State for five years next preceding their election or appointment, or be citizens at the time this Constitution goes into operation."

Since the Supreme Court ratified that indictment (and therefore the sufficiency of the status of the assistant prosecuting attorney therein) and since that prosecuting attorney was not eligible to vote in his employment county, he was **not** holding a public office. If he were holding a public office, then his employment (and the indictment) would have been defective because he was not eligible to vote. However, Syl. Pt. 5 of *Macri* held that he was a "public officer." Therefore, being a "public officer" and holding a "public office" are definitely, two separate and distinct species in the law of this State, or *Macri* is turned on end.

An important consideration in that case, which is echoed by other jurisdictions, is whether the officer acts on behalf of the sovereign, or acts on behalf of a superior

(who may act on behalf of the sovereign). An assistant prosecuting attorney was held to be an employee acting on behalf of the prosecuting attorney.

The District I Court of Appeals of the State of Wisconsin (an intermediate appellate court immediately below the Wisconsin Supreme Court), in a February 5, 2008 decision in the case of *Thomas And Milwaukee Police Assoc. v. Milwaukee City Bd. Of Fire And Police Commissioners*, Appeal No. 2007AP1771, that Ms. Thomas, a police officer, was not the holder of a public office reasoning that the Wisconsin statutes designated the police chief as the holder of an "office" and not the police personnel themselves who were referred to in the statutes as being appointees to the "position" of police officer, which that court interpreted as an "employee." (Please see, for the full opinion, <http://www.wisbar.org/res/capp/2008/2007AP001771.htm>).

In West Virginia, we have a similar situation. Our statutes refer to the chief of police as holding an "office." See, for example, Code §§ 8-14-23, 8-14-17 ("office of chief"); while our statutes only refer to a police officer as a "member" (§ 8-14-19, § 8-14-17), or like Wisconsin, as a "position" (§ 8-14-17). The chief of police holds a public office acting directly for the sovereign, and the police officers, under the supervision of the chief, do not act directly for the sovereign, just as our assistant prosecuting attorney in *Macri*. See Kansas Attorney General Opinion No. 2003-13 ("While it is clear that both highway patrol troopers and deputy sheriffs are vested with some degree of

sovereign governmental power exercised for the benefit of the public, they do not perform their duties without supervision. They are under the control of a superior. While troopers and deputy sheriffs are officers of the law, it cannot be said they hold a public office in the strictest sense. Rather, they are public employees who are hired and commissioned to enforce the law.”) (available at <http://ksag.washburnlaw.edu/opinions/2003/2003-013.htm>).

See also *Aldine Independent School District v. Stundley*, 280 S.W.2d 758 (Tex. 1955). “In *Aldine*, the Court addressed whether a tax assessor-collector employed by a school board was a “state officer.” 280 S.W.2d at 580. According to the Court, “the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public ***largely independent of the control of others.***” *Id.* at 583 (emphasis by Court). This test was applied by the Texas Court of Criminal Appeals in *State ex rel Hill v. Pike*, 887 S.W. 2d 921 (Tex. Crim. App. 1994) . The Court concluded that an assistant attorney general is a public employee, but not a public officer because he or she operates under, the direct supervision of the Attorney General and exercises no independent executive power; therefore, the constitutional provisions in Section 40 against holding more than one “civil office of emolument” do not apply. *Id.* at 923.” (As referenced in Texas Attorney General Opinion No. GA-0365

(2005), available at

<http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2005/htm/qa0365.htm> .

Further, see California Attorney General Opinion No. 99-102 ("Policemen, however, are employed pursuant to open competitive civil service examinations and are referred to in the charter as classified employees. They do not serve either for a definite 'term' or at the pleasure of the appointing authority; their duties are not prescribed by the charter; nor are they clothed with policy-making authority. In these circumstances, we do not deem a policeman to be a 'person holding a salaried office of this City' in the context of section 225." (Citing *Neigel v. Superior Court*, 72 Cal.App.3d 373, at pp. 378-379 (1977)) (available at <http://www.scribd.com/doc/266439/Opinion-of-the-California-Attorney-General-99102>).

Also relevant in this consideration is the lower court's belief that since a notary public is even regarded as the holder of an office, it is all the more persuasive that a police officer holds a public office. However, that is easily distinguished as follows: a notary public certainly *acts independently on behalf of the sovereign, without supervision*. A notary affixes the seal of the sovereign on official documents without answering to any supervisor. Though a notary may be an employee, a notary must follow their own conscience, applicable regulations and statutes in affixing a seal, regardless of whether a supervisor advises for or against it. Notaries are independent agents of the sovereign, while police officers are not.

In the instant case then, Mr. Matheny does not hold a public office, though he may be a public officer. This makes good sense because we must consider the *purpose* of these statutes. It is to prevent political corruption while maintaining the integrity of law enforcement – not to restrict a law officer’s scope of citizen service. See generally *Weaver v. Shaffer*, 170 W.Va. 107; 290 S.E.2d 244 (1980). When one considers that the newer Code § 8-14-19 limits the municipal police officer-citizen’s scope of public office to only those offices outside of the municipality where he or she is employed, the analysis fits like a glove.

Therefore, the lower court acted erroneously in this regard and deprived your Appellant of significant rights, making a ruling that has statewide repercussions.

B.

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY NOT ADDRESSING THE TIMELINESS ISSUE RAISED, I.E., THE FACT THAT THE CITY OF BRIDGEPORT DID NOT FILE ITS ACTION UNTIL ON OR ABOUT SEPTEMBER 11, 2007, APPROXIMATELY SEVEN (7) MONTHS FOLLOWING MR. MATHENY'S APPOINTMENT CONTRARY TO CODE § 8-14-7 NOR OTHER COMPLIANCE WITH STATUTORY NOTICE REQUIREMENTS CONSTITUTING AN INCURABLE WAIVER OF ANY PROTESTATIONS PETITIONERS BELOW MAY HAVE HAD REGARDING THE APPOINTMENT.

The lower court does not address the fact that the City of Bridgeport did not file its action until on or about September 11, 2007, approximately Seven (7) Months following Mr. Matheny's appointment. This is not a mere technicality, but a significant event. Code § 8-14-7 requires the Mayor to act within Ten (10) days if he or she has a problem with the appointment of a police civil service commissioner. That same Code section even goes as far to say that "In the event that the mayor shall fail to file his petition in the office of the clerk of the circuit court, as hereinbefore provided, within ten days after the removal of said commissioner or commissioners, such commissioner or commissioners shall immediately resume his or their position or positions as a member or members of the policemen's civil service commission." That means that the failure of the Mayor to cause an action to be timely filed herein is jurisdictional. Mr. Matheny should be permitted to assume his position immediately.

The fact that Mr. Matheny was never served a notice of removal as required by said statutes is also jurisdictional. The fact that the Bridgeport Police Civil Service Commission has been made a Petitioner below herein without its knowledge or approval is illegal and has given the City of Bridgeport tainted hands in this matter. The fact that the City Council has not ratified the actions of the Mayor in this matter by consideration in any meeting is also a violation of the Open Meetings laws and policies of the State of West Virginia and likewise gives the City tainted hands.

The Bridgeport Police Civil Service Commission has not been acting in accordance with statute by filing annual reports and by holding open meetings for some time. As far as can be discerned, prior to the initiation of the litigation below, all meetings of the Bridgeport Civil Service Commission for many years have been heretofore held at the Eat-N-Park restaurant on Emily Drive in the City of Clarksburg.

Therefore, the lower court acted erroneously by ignoring the procedural due process and statutory timeliness issues involved and deprived your Appellant of significant rights, making a ruling that has statewide repercussions.

Conclusion

In conclusion, the Appellant has demonstrated by reasoned analysis and precedent that he is entitled to relief in this matter from the honorable High Court.

PRAYER FOR RELIEF

WHEREFORE, your Appellant respectfully requests that his appeal be found meritorious, that the particular rulings of the circuit court be reversed, that the matter be remanded, and in any event, for whatsoever other relief may be necessary.

YOUR APPELLANT, ROBERT MATHENY,

By Counsel,

A handwritten signature in black ink, appearing to read "Jerry Blair", is written over a horizontal line.

JERRY BLAIR, WWSB # 5924

BLAIR, CONNER & McINTYRE-NICHOLSON PLLC

ATTORNEYS AT LAW

P.O. BOX 1701

CLARKSBURG WV 26302

(304) 622-3334