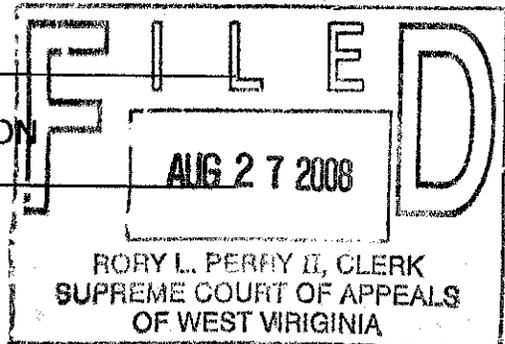


NO. 08-09-56

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,

Petitioners below,
Appellees

vs.

No.: 34220

ROBERT MATHENY,

Respondent below,
Appellant

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

BRIEF OF APPELLEES CITY OF BRIDGEPORT AND
BRIDGEPORT POLICE CIVIL SERVICE COMMISSION

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I.

**KIND OF PROCEEDINGS
NATURE OF RULING OF LOWER COURT**

Appellant, Robert Matheny, appeals a Memorandum Opinion and Order granting declaratory relief entered by the Circuit Court of Harrison County, West Virginia on March 20, 2008. In its Memorandum Opinion and Order the Circuit Court reached the well founded conclusion that in the context of W. Va. Code §8-14-7 (Rep. Vol. 2007) a police officer is a holder of an "office". Therefore, because Robert Matheny is a Clarksburg City Police Officer he is ineligible to serve on the Bridgeport Police Civil Service Commission by virtue of his holding an "office" within the context of W. Va. Code §8-14-7. The Order is based upon relevant finds of fact and conclusions of law which are supported by the Court's analysis of the applicable law.

II.

STATEMENT OF THE CASE

The City of Bridgeport is a corporation, incorporated pursuant to the laws of the State of West Virginia found in Chapter 8 of the W. Va. Code. Pursuant to the provisions of W. Va. Code §8-14-7, the City has created a police civil service commission. W. Va. Code §8-14-7 sets forth specific substantive and procedural guidelines for creating such a commission. The specific substantive provision relevant to the question presented before this Court is "[n]o 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...." W. Va. Code §8-14-7 (Rep. Vol. 2007).

Robert Matheny is currently, and at all times relevant to these proceedings, has been a police officer for the City of Clarksburg. As noted by appellant, Officer Matheny is an investigative officer. He resides in Bridgeport, West Virginia. He is a member of the FOP, Mountaineer Lodge No. 78.

Under the pertinent enabling statute, the Bridgeport Police Civil Service Commission is to be comprised of three members, one member appointed by the Mayor of the City, one member appointed by the Local Fraternal Order of Police and another member appointed by a local business association, in this instance, the Bridgeport Rotary Club. After the FOP Mountaineer Lodge No. 78 appointee stepped down from his position in early 2007, the FOP notified the City of Bridgeport that it was naming Robert Matheny as its appointee to fill the vacancy created on the commission. Correspondence ensued between the City of Bridgeport and local FOP officials addressing whether Officer Matheny was eligible for appointment as a commissioner in light of his position as a police officer for the City of Clarksburg. The Mayor of the City of Bridgeport referred the FOP to W. Va. Code §8-14-7, requesting an opinion from the FOP on the eligibility of Officer Matheny for appointment as commissioner. The FOP failed to respond to this request. Officer Matheny subsequently accused the City and its Mayor of willful failure to comply with the provisions of the Police Civil Service Act by refusing to call a meeting of the commission and allowing him to act as a commissioner. By letter of September 13, 2007 to Officer Matheny, the Chief of Police again raised the issue of Officer Matheny's eligibility to serve on the Bridgeport Police Civil Service Commission, noting that the failure to convene a commission meeting is not an obstruction of justice.

When it became apparent that the parties would not resolve the issue in advance of Mr. Matheny taking action as a commissioner, the City of Bridgeport directed that its counsel seek a declaratory opinion from the Circuit Court of Harrison County, West Virginia as to whether the W. Va. Code § 8-14-7 would preclude Mr. Matheny from serving as a commissioner. The Bridgeport Police Civil Service Commission joined as a party seeking a declaratory opinion. The sole issue presented to the Circuit Court below is whether the position of municipal police officer constitutes an "office" within the meaning of W. Va. Code §8-14-7 rendering Robert Matheny ineligible to serve on the Bridgeport Police Civil Service Commission. The Circuit Court in its thorough opinion declared that Officer Matheny is disqualified from service on the Bridgeport Police Civil Service Commission by virtue of his holding an "office" within the meaning of W. Va. Code §8-14-7 as a Clarksburg City Police Officer.

III.

ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT OF HARRISON COUNTY CORRECTLY RULED THAT ROBERT MATHENY IS NOT ELIGIBLE TO SERVE ON THE BRIDGEPORT POLICE CIVIL SERVICE COMMISSION BECAUSE HE HOLDS AN OFFICE AS CONTEMPLATED UNDER W. VA. CODE §8-14-7.

B. THE CIRCUIT COURT TIMELY AND PROPERLY RENDERED DECLARATORY RELIEF ADJUDICATING THE LEGAL RIGHTS AND DUTIES OF THE PARTIES TO AN ACTUAL, EXISTING CONTROVERSY WHICH INVOLVED CONSTRUCTION AND APPLICATION OF W. VA. CODE §8-14-7.

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V.

DISCUSSION OF LAW

A. THE CIRCUIT COURT OF HARRISON COUNTY CORRECTLY RULED THAT ROBERT MATHENY IS NOT ELIGIBLE TO SERVE ON THE BRIDGEPORT POLICE CIVIL SERVICE COMMISSION BECAUSE HE HOLDS AN OFFICE AS CONTEMPLATED UNDER W. VA. CODE §8-14-7.

The issue presented before the Circuit Court of Harrison County, West Virginia in the Petition for Declaratory Judgment is whether the position of police officer is an "office" as contemplated under W. Va. Code §8-14-7 (Rep. Vol. 2007). The Court after a careful application of the five part criteria constituting indicia of a "public office" as set forth in State v. Macri, 199 W.Va. 696, 487 S.E. 2d 891 (1996) and Carr v. Lambert, 179 W.Va. 277, 367 S.E. 2d 255 (1988) concluded that a police officer is the holder of an office within the meaning of W. Va. Code §8-14-7 (Rep. Vol. 2007)

In his appeal, the Appellant inappropriately interjects facts which are either unsubstantiated by the evidence or irrelevant to the very narrow issue before this Court. In particular, the Appellant suggests that there are "many other such law enforcement officer police commissioners serving in municipalities statewide". There is no evidence in the record to support such an assertion, and even if such evidence had been adduced, it is irrelevant inasmuch as the qualifications of those commissioners may not have been challenged. Furthermore, the decisions, votes and actions of those commissioners may not have been the subject of judicial scrutiny. Appellant asserts that the City of Bridgeport and the Bridgeport Police Civil Service Commission relied (solely) upon the case of Giles v. Bonar, 155 W.Va. 421, 184 S.E.

2d 639 (1971). This is a misrepresentation and contrary to the detailed analysis under Carr v. Lambert, 179 W.Va. 277, 367 S.E. 2d 255 (1988) and State v. Macri, 199 W.Va. 696, 487 S.E. 2d 891 (1996) presented by Appellees to the Circuit Court and detailed below.

It can unequivocally be stated that those who hold "public office" are public officers. But, all those who are in the public employment are not public officers and do not hold public office. The West Virginia Supreme Court has on many occasions wrestled with the distinction between a "public officer" and "public employee". In State of West Virginia v. Macri, 487 S.E. 2d 891 (W. Va. 1996), the Court provides a thorough treatment of the issue. In Macri, the Court ultimately recognized that "one might be an officer for one purpose and not for another" and "that the term public officer is vague, at best, and must be interpreted within the context of each statute in which it is employed". Macri, 487 S.E. 2d at page 898, citing dissent in State ex rel. Crozier v. Callaghan, 160 W. Va. 353, 236 S.E. 2d 321 (1977). The Court concluded that it must analyze whether an officer is a "public office" or a "mere employee" on a case by case basis in light of the specific statutory provisions involved.

The issue before the Court in Macri was whether an assistant prosecuting attorney is a public officer and subject to the citizenship requirement contained within Article IV, Section 4 of the West Virginia Constitution. The operative constitutional provision provides that "no person, except citizens entitled to vote, shall be elected or appointed to any state, County or Municipal Office...." In Macri, the appellees, defendants below, had been indicted by a grand jury of Ohio County, West Virginia, with the participation of Randy Dean Gossett, a full time Assistant Prosecuting

Attorney for Ohio County. Mr. Gossett was a citizen of the State of Ohio. The Circuit Court had dismissed the indictments against the appellees, without prejudice, holding that Article IV, Section 4 of the West Virginia Constitution requires assistant prosecuting attorneys to be citizens of the State of West Virginia. The appellant argued that the relevant constitutional provision did not apply to assistant prosecuting attorneys. The question before the Macri Court was thus framed as whether an assistant prosecuting attorney is a "public officer" as contemplated by Article IV, Section 4 of the West Virginia Constitution and therefore subject to its citizenship requirement. The Court adhered to appellant's argument that the citizenship requirement applies only to those who are **elected public officials** (emphasis added) or to those appointed to fill vacancies in elected or constitutionally created public office. The position of assistant prosecuting attorney was created by the legislature, and the legislature did not include citizenship in the statute itself. Macri, 487 S.E. 2d at 896. Thus, the Court narrowly concluded that assistant prosecuting attorneys are not public officers within the context of Article IV, Section 4 of the West Virginia Constitution.

The Macri Court went to extraordinary lengths to analyze whether an assistant prosecuting attorney is a public officer under the subject constitutional provision in order to distinguish its holding in Carr v. Lambert, 179 West Virginia 277, 367 S.E. 2d 225 (1988). The holding in Macri, may be readily distinguished from the holding in Carr and from the case at bar because the constitutional requirement in Macri applied to "elected public officers" or persons appointed to fill elected or constitutionally created offices. In Carr, an assistant prosecuting attorney sought election to the

county board of education. However, W. Va. Code §18-5-1a (1967) prohibits a board of education member or member elect from being a public officer. W. Va. Code §18-5-1a specifically provides "no member or member-elect of any county board of education shall be eligible for nomination, election or appointment to any public office...." The Carr Court held that the office of assistant prosecuting attorney is a public office within the context of W. Va. Code §18-5-1a. Carr v. Lambert, 197 W.Va. 277, 367, S.E. 2d 225 (1988).

The Macri Court and the Carr Court agreed that in determining whether a position is a public office or a mere employment, the Court must analyze the criteria creating a "public office" set forth in State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E. 2d 482 (1970) with respect to the specific position. Those criteria are 1) whether the position was created by law; 2) whether the position was designated as an office; 3) whether the qualifications of the appointee have been prescribed; 4) whether the duties, tenure, salary, bond and oath have been prescribed or required; and 5) whether the one occupying the position has been constituted a representative of the sovereign. State v. Macri, 487 S.E. 2d at 897; Carr v. Lambert, 367 S.E. 2d at 227.

Applying the five part criteria set forth in Macri and Carr to the specific position of police officer leads to the unavoidable conclusion that a police officer is an "office" within the meaning of W. Va. Code §8-14-7 (Rep. Vol. 2007).

1. A police officer is a statutorily created position created pursuant to W. Va. Code §8-14-1 et seq.

2. A police officer is designated an "officer" under the statute. See W. Va. Code §8-14-3 (Rep. Vol. 2007). Not just the chief, but a police officer is clothed with

the police power of the State in being authorized to carry deadly weapons, make arrests, enforce traffic and other municipal ordinances, and perform other duties which are within the scope of active general law enforcement. W. Va. Code §8-14-6 (Rep. Vol. 2007)

3. The qualifications for a police officer are prescribed by law. Indeed, the criteria and system for making selections for appointment includes rigorous testing and fitness requirements. See W. Va. Code §8-14-6 et seq. The Police Civil Service Act provides a complete and all-inclusive system for the appointment, promotion, reduction, removal and reinstatement of all officers of a paid police department. Dougherty v. City of Parkersburg, 138 W. Va. 1, 76 S.E. 2d 594 (1952).

4. The duties, tenure, salary, bond and oath of police officers are prescribed and required under W. Va. Code §8-14-1 et seq. All selections, promotions and appointments are governed solely by the civil service statutes.

5. It is axiomatic that a police officer has been constituted a representative of the sovereign. A police officer is clothed with the police power of the State. See W. Va. Code §8-14-3 (Rep. Vol. 2007) and W. Va. Code §8-14-6 (Rep. Vol. 2007). Indeed, not only does the law vest police officers with the power to enforce the laws of the State, it imposes a penalty for failure to do so. Additionally, an off-duty police officer is not relieved of his/her vested power as an officer to protect the public in general; indeed, such police officers are considered to be under a duty to act in their lawful and official capacity 24 hours a day. State v. Phillips, 520 S.E. 2d 670 (W. Va. 1990). It is disingenuous for the Appellant to suggest that the exercise of sovereign

power by a police officer is subject to supervision by the chief police in light of these provisions.

The essential element of a "public office" is that the duties to be performed shall involve the exercise of some portion of the sovereign power. This Court has distinguished a "police officer" from a mere employee of the police department as any individual employed in a paid police department who is clothed with the police power of the State in being authorized to carry a deadly weapon and make arrests. Mason v. City of Welch, 375 S.E. 2d 572 (W. Va. 1988) (parking meter attendant is a mere employee and not a "member of a paid police department").

In State ex rel West Virginia Citizens Action Group v. West Virginia Economic Development Authority, 580 S.E. 2d 869 (W. Va. 2003), our Supreme Court held that the members of the Economic Grant Committee of this State were public officers because they exercise the sovereign power of the state; this follows from the fact that the committee exercised independent discretion and judgment on behalf of the state. The Court deemed the exercise of sovereign power an overriding factor in discerning whether a position is a "public office".

Based upon the foregoing, there can be no doubt that the position of police officer falls squarely within the criteria creating a public office.

This case is factually similar to Carr v. Lambert, because in Carr the operative statute prohibited a board of education member from holding a public office. In the case at bar, the operative statute prohibits a police civil service commissioner from holding "office." The Carr Court relied on the appearance of impropriety and potential for conflict of interest. The policy considerations present in Carr are also present in

the case at bar. Membership on the police civil service commission and the position of active police officer are incompatible. The cities of Clarksburg and Bridgeport share a common boundary. Police officers from these adjoining municipalities routinely cooperate in investigations and official duties with other officers. Civil service commissioners are charged with the application of a merit system to the employment, tenure, promotions and discipline of police officers. The civil service system is designed to establish a system for appointment, promotion, discipline and removal of officers free from political forces, partisanship and favoritism. The officer/commissioner's working relationship with the very officers appearing before the commission for appoint, promotion, discipline or removal may create the appearance of partiality; the opportunity for favoritism is apparent. A foreseeable conflict is created by concurrent occupation of the two offices. In addition, a police officer as commissioner would be in a position to circumvent legislative process and create precedent for personal job benefits.

Many jurisdictions addressing this issue have held that a police officer is a "public officer" and likewise a "public office." These jurisdictions have generally stressed the statutory creation of the office and the exercise of sovereign power as creating the public office. A police officer of a municipal corporation is a public officer and occupies public office. State ex. rel. Brenders v. Hall, 71 Ohio St. 3d 632, 646 N.E. 2d 822 (1995). A duly appointed city policeman is an officer and his position is an office within a Statute making county, city, or town officers who willfully or corruptly neglects or refuses to discharge his official duties guilty of misbehavior in office and punishable by removal therefrom, fine and imprisonment. G.S. §14.230. State v.

Fesperman, 264 N.C. 168, 141 S.E. 2d 252 (1965). Police officer of a municipal corporation is a public officer and as such occupies public office within the statute authorizing civil action in quo warranto against person unlawfully holding public office. State ex rel. Mikus v. Hirbe, 6 Ohio App. 2d 307, 34 Ohio Op. 2d 490, 215 N.E. 2d 430 (1965). Police officer holds a public office in the context of a law that bars concurrent holding of a seat on the county legislature and "any other salaried or elective public office." Held et al. v. Hall, 191 N.Y. Misc. 2d 427, 741 N.Y.S. 2d 648 (2002).

Appellant Matheny notes that effective June 8, 2007, W. Va. Code §8-14-19 was revised to provide "[a] member of a paid police department may not [4] Be a candidate for or hold any other public office in the municipality in which he or she is employed...". W. Va. Code §8-14-19 (a)(4) (Rep. Vol. 2007). Matheny argues that this statute must contravene the express language found in W. Va. Code §8-14-7, and since he is an officer in Clarksburg he may be appointed to the commission of Bridgeport.

It is a recognized rule of statutory construction that where an article has two distinct sections dealing with related matters, amendment to one section is not an amendment to the other because it is presumed that if the legislature intended an amendment to apply to both sections it would have expressed such intent. (Emphasis added). State ex rel Rist v. Underwood, 524 S.E. 2d 179 at 194 (W.Va. 1999) citing IA Norman J. Singer, Sutherland Statutory Construction, §22.34 at 298 (5th ed. 1991).

Moreover, the purpose and intent behind the two statutory enactments are different. W. Va. Code §8-14-19 addresses political activities of police officers. W. Va. Code §8-14-7 creates standards for appointees to a police civil service commission in

order to promote independent, unbiased and efficient implementation of the civil service laws.

Finally, the breadth of the language in W. Va. Code § 8-14-7 cannot be overlooked. The legislature mandated that no commissioner can hold any other office (other than the office of notary public) (emphasis added). There is no uncertainty about the language employed by the legislature in its enactment of W. Va. Code §8-14-7 (Rep. Vol. 2007). Indeed, the Attorney General for the State of West Virginia has opined that a person may not serve both on the city planning and zoning commission and on a city police civil service commission. 50 Op. Att'y Gen. 529 (1963). Likewise, a person is prohibited from simultaneously serving as a municipal police civil service commissioner and jury commissioner for the circuit court. Op. Att'y Gen. July 30, 1974. The operative language in the case at bar is not limiting to "elected" or "constitutionally created" or even "public office". It is all inclusive. Surely this language was intended to include a municipal police officer.

B. THE CIRCUIT COURT TIMELY AND PROPERLY RENDERED DECLARATORY RELIEF ADJUDICATING THE LEGAL RIGHTS AND DUTIES OF THE PARTIES TO AN ACTUAL, EXISTING CONTROVERSY WHICH INVOLVED THE CONSTRUCTION AND APPLICATION OF W. VA. CODE §8-14-7.

The timing of the filing of the Petition for Declaratory Relief is immaterial to the validity and enforceability of the Circuit Court's Memorandum Opinion and Order. Likewise, it is irrelevant that Officer Matheny was neither sworn in as a commissioner nor removed from the commission. The City of Bridgeport and the Bridgeport Police Civil Service Commission appropriately and legally sought an opinion from the Circuit

Court construing Officer Matheny's eligibility to serve as a commissioner. Declaratory relief prior to his removal or official action was prudent. An actual controversy existed requiring construction and application of W. Va. Code §8-14-7 to Officer Matheny's status as a police officer. A declaratory judgment action is a proper procedure for an adjudication of the legal rights of parties to an existing controversy which involves the construction of a statute. Mongold v. Mayle, 192 W.Va. 353, 452 S.E. 2d 444 (1994). Resolution of this controversy by way of declaratory relief clearly falls within the spirit and intent of the Uniform Declaratory Judgments Act. W. Va. Code §55-13-1 et. seq. (Rep. Vol. 2000).

Moreover, Officer Matheny's appointment as commissioner may be deemed void ab initio. If Officer Matheny is prohibited from holding the office of commissioner for the Bridgeport Police Civil Service Commission while holding office as a municipal police officer, his continued service as a police officer for the City of Clarksburg effectively rendered his appointment void. Nevertheless, the Bridgeport Police Civil Service Commission has not taken official action since this controversy surfaced therefore removal was not necessary. A declaratory opinion as to his legal status prior to removal was appropriate.

Based on the foregoing, the Memorandum Opinion and Order of the Circuit Court is not vulnerable to attack on the grounds that it was untimely. Declaratory relief is available either before or after there has been a breach or violation. The matter was clearly ripe for decision by the Circuit Court, and the Court correctly and appropriately adjudicated the rights of the parties to the controversy.

IV.

RELIEF PRAYED FOR

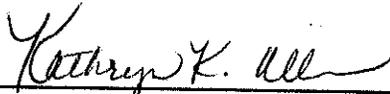
An exhaustive review of the relevant case law from West Virginia and other jurisdictions led the Circuit Court to the conclusion that a municipal police officer holds an "office" within the context of W. Va. Code §8-14-7 (Rep. Vol. 2007). Thus, Robert Matheny, a Clarksburg Police Officer, is not eligible to serve as a commissioner on the Bridgeport Police Civil Service Commission.

Based upon the foregoing, Appellees respectfully request that this Court affirm the ruling of the Circuit Court of Harrison County, West Virginia.

Dated this 26th day of August, 2008,

CITY OF BRIDGEPORT AND
BRIDGEPORT POLICE CIVIL
SERVICE COMMISSION

By Counsel

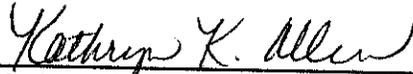


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CERTIFICATE OF SERVICE

I, Kathryn K. Allen, counsel for Appellees, CITY OF BRIDGEPORT, a municipal corporation and BRIDGEPORT POLICE CIVIL SERVICE COMMISSION, a commission duly constituted under the laws of the State of West Virginia, do hereby certify that I did, on this 26th day of August, 2008, serve the foregoing and hereto appended BRIEF OF APPELLEES BRIDGEPORT AND BRIDGEPORT POLICE CIVIL SERVICE COMMISSION, upon the following person by placing a true copy thereof in the facilities of the U.S. postal Service, postage pre-paid addressed as follows:

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