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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

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

Petitioners,

vs.

Civil Action No. 07-C-554
Judge James A. Matish

ROBERT MATHENY,

Respondent.

MEMORANDUM OPINION AND ORDER
CONCERNING DECLARATORY RELIEF

Presently pending before the Court is Plaintiff's "Petition for Declaratory Judgment," filed September 11, 2007, the above title Petitioners. Respondent then filed "Respondent's Motion to Dismiss" on September 21, 2007, to which a response was filed by Petitioners on October 5, 2007. Said Motion was denied by Order entered, January 9, 2008. Said Motion ordered Respondent to file an Answer within ten (10) days and giving each counsel twenty (20) days to simultaneously file briefs upon the ultimate issues herein and ten (10) days thereafter to simultaneously file Responses to the respective briefs.

The Court having heard reviewed the parties' filings, studying pertinent legal and hearing arguments of counsel at the December 13, 2007 hearing, the Court finds as follows:

Findings of Facts

1. The city of Bridgeport is a Class II municipal corporation duly existing under the laws of the State of West Virginia.
2. The Bridgeport Police Civil Service Commission is a "Policeman's Civil Service Commission" create pursuant to the provisions of West Virginia Code § 8-14-7.
3. Robert Matheny is an individual residing in the City of Bridgeport, Harrison County, West Virginia.
4. Robert Matheny is currently employed by the City of Clarksburg as a police officer.
5. A vacancy exists on the Bridgeport Police Civil Service Commission.
6. The Local Fraternal Order of police appointed Robert Matheny to fill said vacancy on the Bridgeport Police Civil Service Commission.
7. On or about June 25, 2007, James R. Christie, Mayor of the City of Bridgeport sent a letter to Matthew Wilfong, Secretary of Fraternal Order of Police Mountaineer Lodge No 78, stating concerns regarding the Robert Matheny's position as a police officer would disqualify him for service on the Bridgeport Police Civil Service Commission.
8. On August 27, 2007, Robert Matheny attended a meeting of the Bridgeport City Council. At said meeting the Bridgeport City Mayor, James R. Christie refused to recognize the appointment of Robert Matheny by the Fraternal Order of Police to the Bridgeport Civil Service Commission.

Conclusions of Law

1. "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations." W. Va. Code § 55-13-1.

2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. W.Va. Code § 55-13-2.

3. Further, "[a] declaratory judgment action is a proper procedure for an adjudication of the legal rights and duties of parties to an actual, existing controversy which involves the construction or application of a statute or of statutes." Syl. Pt. 1, Arthur v. The County Court of Cabell County, 153 W.Va. 60, 167 S.E.2d 558 (1969).

4. "The commission shall consist of three commissioners, one of whom shall be appointed by the mayor of the city; one of whom shall be appointed by the local fraternal order of police; and the third shall be appointed by the local chamber of commerce, or if there be none, by a local businessmen's association." W. Va Code § 8-14-7.

5. "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." W. Va Code § 8-14-7.

6. "The police civil service act of 1937, as this Court said in Ebbert v. Tucker, 123 W.Va. 385, 390, 15 S.E.2d 583, provides for a complete and all-inclusive system for the appointment, promotion, reduction, removal and reinstatement of police officers (except chiefs of police) ...having a population of five thousand or more." Dougherty v. City of Parkersburg 138 W.Va. 1, 9, 76 S.E.2d 594, 598 (1952).

Discussion

This Court finds that Mr. Matheny is disqualified from service on the Bridgeport Police Civil Service Commission, by virtue of his holding an "office" with the City of Clarksburg as a Clarksburg City Police Officer.

The West Virginia Supreme Court of Appeals has not yet addressed the narrow issue of whether one's position as a police officer is an "office" as contemplated under W. Va. Code § 8-14-7. However, the Court has on limited occasions decided whether an assistant prosecuting attorney is a public officer and these cases give guidance when deciding whether particular positions qualify a person as a public officer. Additionally, there is precedent in other jurisdictions that this Court finds to be persuasive.

The first case to address whether a assistant prosecuting attorney holds a "public office" was Carr v. Lambert, 179 W.Va 277, 367 S.E.2d 255 (1988). The Carr Court held that the office of assistant prosecuting attorney is a public office within the context of W.

Va Code § 18-5-1(a). In said opinion the Court looked at several indicia of whether an position is a "public office":

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.

Carr v. Lambert, 179 W.Va 277, 367 S.E.2d 255 (1988) (citing, syllabus point 5 of State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E.2d 482 (1970)).

The Carr decision was later modified by State v. Macri 199 W.Va. 696, 487 S.E.2d 891 (1996), in which the Court gives a more thorough treatment of the issue. In Macri the court held that an assistant prosecuting attorney is not a "public officer" in the context of a Article IV, Section 4 of the West Virginia Constitution. The Court clearly distinguished Macri and Carr and found that the Carr decision decided only a narrow issue and was not controlling beyond that issue. The Court also observed, citing State ex rel. Crosier v. Callaghan, 160 W.Va. 353, 236 S.E.2d 321 (1977), 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."

In the case at bar, it is necessary to examine the factors set forth in Macri. First, a police officer is a statutorily created position created pursuant to W. Va. Code § 8-14-1 et seq. The second criterion is not at clear. Although a police officer is designated an "officer" under the statute, the designation of the title officer does not seem to militate that said title makes the individual an office holder as contemplated by a particular code section. Thought not yet addressed by the West Virginia

Supreme Court of Appeals, this distinction has been addressed by the Ohio courts, “[w]e think it follows logically that, if one is a public officer, he is such because he occupies a public office. The duties of the police officers concern the public, and, in this matter, public officer and public office ought to be considered inseparable. State ex rel. Mikus v. Hirbe 5 Ohio App.2d 307, 309, 215 N.E.2d 430, 432 (Ohio App. 1965). This Court finds the Ohio Courts opinion to be persuasive, but is unnecessary for this Court to find that an “officer” necessarily holds an “office” in order to make the ultimate determination.

Third, the law prescribes the qualifications for a police officer. The criteria are set forth in W. Va. Code § 8-14-6 et seq. Prescribed qualifications include rigorous testing and fitness requirements. The West Virginia Supreme Court of Appeal has addressed the purpose of the police civil service act, in Daugherty v. City of Parkersburg, “[t]he police civil service act of 1937, as this Court said in Ebbert v. Tucker, 123 W.Va. 385, 390, 15 S.E.2d 583, provides for a complete and all-inclusive system for the appointment, promotion, reduction, removal and reinstatement of police officers (except chiefs of police) ...having a population of five thousand or more.” Dougherty v. City of Parkersburg 138 W.Va. 1, 9, 76 S.E.2d 594, 598 (1952). Thus, it is apparent that the law does prescribe police officer qualifications.

Fourth, Code § 8-14-1 et seq. does prescribe or require the duties, tenure, salary, bond, and oath of a police officer.

Finally, the a police officer is a representative of the sovereign. A police officer is vested with the power to enforce the laws of the state:

It shall be the duty of the mayor and police officers of every municipality and any municipal sergeant to aid in the enforcement of the criminal laws of the state within the municipality, independently of any charter provision or any ordinance or lack of an ordinance with respect thereto, and to cause the arrest of or arrest any offender and take him before a magistrate to be dealt with according to the law. Failure on the part of any such official or officer to discharge any duty imposed by the provisions of this section shall be deemed official misconduct for which he may be removed from office. Any such official or officer shall have the same authority to execute a warrant issued by a magistrate, and the same authority to arrest without a warrant for offenses committed in his presence, as a deputy sheriff.

W. Va. Code § 8-14-3. (emphasis added). Not only does the law vest police officers with the power to enforce the laws of the state, it imposes penalty for failure to do so. Additionally, an officer is not relieved of his/her vested power even during "off-duty" hours. State v. Phillips, 502 W. Va 673, 520 S.E. 2d 670 (1990).

While there is a split of persuasive authority from other jurisdictions, the majority of jurisdictions addressing the issue, hold that a police officer is a "public officer" and likewise holds a "public office." Police officer of municipal corporation is public officer and occupies public office. State ex rel. Brenders v. Hall, 71 Ohio St. 3d 632, 646 N.E.2d 822 (1995). Duly appointed city policeman was an officer, and his position was an office within statute making county, city, or town officer who wilfully and 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 municipal corporation is public officer and as such occupies public office within statute authorizing civil action in quo warranto against person unlawfully holding public office. R.C. §§ 2733.01, 2733.02, 2733.04, 2733.05. State ex rel. Mikus v. Hirbe, 5 Ohio App. 2d 307, 34 Ohio Op. 2d 490, 215 N.E.2d 430 (9th Dist. Lorain County 1965). Hanley v. Cofran (1915) 94 Kan. 332, 146 Pac. 1027,

Ann. Cas. 1917B, 600 (overruled in part in (1915) 95 Kan. 335, 148 Pac. 640), it was held that a policeman held an "office" within the meaning of § 2, art. 15, of the state Constitution, relating to tenure of "office," and, being a conservator of the peace and exercising many of the functions of sovereignty, was a public officer. (For additional cases with similar holdings see, 84 A.L.R. 309 and 156 A.L.R. 1356).

Additionally, a critical analysis of the language of W. Va. Code § 8-14-7 implicitly indicates that the legislature intended a police officer to be an "office" holder pursuant to the statute. The disqualification as an "office" holder is written very broadly, so broadly that the legislature thought that a notary public would fall within its purview and felt it necessary to exclude notaries. Logic dictates that if the legislature thought a notary public would qualify as an office holder, then certainly a police officer, whose duties and authority extend far beyond that of a notary, would fall within the definition of an "office" holder for the purposes of this code section. As explained supra, interpretation of the definition of an "office" holder must be done on a case by case basis.

This case is distinguished from Macri and more closely follows the reasoning of Carr. In Macri a great deal of emphasis was placed on the fact that an assistant prosecuting attorney was appointed by the prosecuting attorney, that "the role of an "assistant" is to help the prosecuting attorney fulfill the "official duties" vested in the prosecutor." Macri at 704. In the case at bar, police officer is vested with official duties by the State and is not simply an assistant to the police chief. Also the Macri Court emphasized the assistant prosecutor's service at the will and pleasure of the prosecutor. This simply is not the case with a police officer, a police officer cannot simply be fired or removed from service.

This case is more similar to the holding in Carr. In Carr it was recognized and confirmed in Macri that the Carr Court relied on the appearance of impropriety and potential conflict of interest. Although there is not the direct conflict of interest and appearance of impropriety found in Carr, in the case at bar, there is the potential for conflicts of interest when an officer from an adjoining municipality has administrative authority over fellow officers. For the same reason this Court finds that there exists significant potential for the appearance of impropriety.

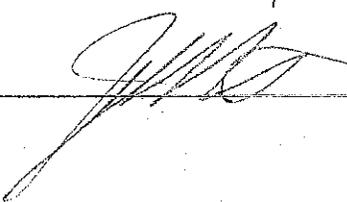
Accordingly, for the reasons set forth above, this Court finds that in the context of W. Va. Code § 8-14-7 a police officer is the holder of an "office" that precludes service on a Policeman's Civil Service Commission.

The Clerk of this Court shall provide a certified copy of this Order to the following:

Kathryn K. Allen
Counsel for Petitioners
West & Jones
360 Washington Avenue
P.O. Box 2348
Clarksburg, WV 26302

Jerry Blair
Counsel for Respondent
P.O. Box 1701
Clarksburg, WV 26302

ENTER: 03/20/2008



James A. Matish