

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34587

CORPORAL RANDY D. BURGESS, Petitioner Below,

v.

**DANNY MOORE, SHERIFF OF RALEIGH COUNTY,
WEST VIRGINIA, Respondent Below**

RANDY D. BURGESS, Petitioner

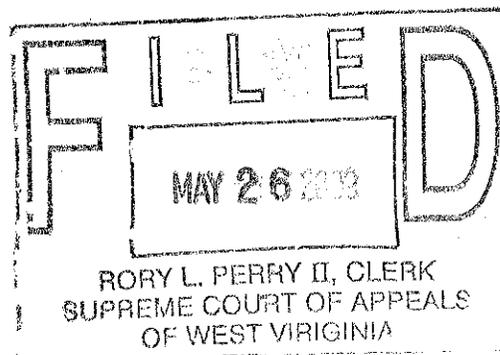
BRIEF OF THE APPELLANT

Counsel for the Petitioner

David S. Hart
West Virginia State Bar ID # 7976
Hayden & Hart, PLLC
102 McCreery Street
Beckley, West Virginia 25801
Telephone: (304)255-7700
Facsimile: (304)255-7001

Counsel for the Respondent

James R. Sheatsley, Esquire
West Virginia State Bar ID # 3359
Gorman, Sheatsley & Co., LC
Post Office Box 5518
Beckley, West Virginia 25802-5518
Telephone: (304)252-5321
Facsimile: (304)252-1155



**KIND OF PROCEEDING AND NATURE OF THE
RULING IN THE LOWER TRIBUNAL**

This is an appeal from an Order of the Raleigh County Deputy Sheriffs' Civil Service Commission that upheld the demotion of the petitioner, Corporal Randy D. Burgess, to the rank of Deputy for alleged insubordination and conduct unbecoming a Raleigh County Deputy Sheriff. On March 21, 2008, the Circuit Court of Raleigh County affirmed the Commission's action in the Circuit Court's Order Affirming the Ruling of the Civil Service Commission and Denying Deputy Randy D. Burgess' Objections and Denying Petition for Appeal. In this appeal, Corporal Burgess presents two assignments of error. First, Corporal Burgess asserts that the Sheriff violated Corporal Burgess' statutory rights by failing to afford Corporal Burgess a hearing before an appropriate hearing board within ten days of Corporal Burgess' request for a hearing, as required by West Virginia Code § 7-14C-3. Although both the Commission and the Circuit Court acknowledge this statutory violation, they refused to grant Corporal Burgess relief from the disciplinary action imposed by the Sheriff, as this Court has required for municipal police officers under a similar statutory procedure in Alden v. Harpers Ferry Police Civil Service Commission, 209 W.Va. 83, 543 S.E.2d 364 (2001). Second, Corporal Burgess asserts that the Commission and the Circuit Court abused their discretion in affirming the Sheriff's decision to demote Corporal Burgess, despite the fact that Corporal Burgess' alleged misconduct fits within the Sheriff's written definition of minor misconduct and despite the fact that the Sheriff failed to use progressive discipline, as required by his own written policies, against a Deputy that had never been previously disciplined during a fifteen-year career. Corporal Burgess seeks remand of this matter with instructions for his reinstatement to the rank of Corporal and such other relief that is justified as a result of that reinstatement.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

As indicated in the petition for appeal filed herein, there is no great dispute between the parties regarding the circumstances that led to this appeal, although there is substantial dispute regarding the legal implications of those facts. During June 2006, Corporal Burgess was assigned, as part of his employment duties, to work in the Court Security Division of the Raleigh County Sheriff's Department. (See Order, FOF # 2.) The Court Security Division is the Division within the Sheriff's Department that is charged with providing security to the Circuit, Family and Magistrate Court Judges; providing security at the entry points to the Raleigh County Courthouse and Raleigh County Judicial Annex; and for providing security for prisoners brought to hearings in Raleigh County. (See id. at FOF # 3.) In June 2006, twelve deputies, supervised by Captain Charles T. Darlington and overseen by Lieutenant Mitchell P. Barley, made up the staff of the Court Security Division. (See id. at FOF ## 3-4.) Corporal Burgess had been assigned to the Court Security Division in April 2006. (See Tr., p. 204.)

This disciplinary action stems from a request for certain vacation and holiday time-off submitted by Corporal Burgess on May 26, 2006 for the months of June 2006 and July 2006. (See Order, FOF # 1.) Under General Order 1-18, adopted by the Sheriff on April 1, 2006, the Raleigh County Sheriff's Department recognizes four types of authorized absences from a Deputy's scheduled work time that are implicated in this action:

"A. Vacation time is paid time off that accrues for each Deputy within the Raleigh County Sheriff's Department at a monthly rate depending on the Deputy's length of service. Vacation time may not be taken in a manner that exceeds seventeen consecutive days per Deputy and approval of vacation is within the discretion of the Sheriff or his Chief Deputy based on adequate staffing levels at times of peak demand. While the Sheriff will make every (sic) effort to accommodate a vacation request, the balancing of work schedules takes (sic) precedence over vacation requests.

B. Holiday time is paid time off that may be utilized by each Deputy, typically in conjunction with a schedule of legal holiday as set forth by the West Virginia Code and as adopted on an annual basis by the Sheriff. While holiday time is typically to be taken on the date of each legal holiday, General Order 1-18 provides exceptions to that general rule. Where a Deputy is required to work a legal holiday, the Sheriff may allow the Deputy to take paid time at a later time or may choose to pay the Deputy at the rated of not less than one and one-half the Deputy's regular rate of pay for the holiday time when the Deputy was required to work. **A Deputy may also choose to take his holiday time as part of an extended vacation (not to exceed seventeen consecutive days), extended days off or individual holiday.** (Emphasis supplied and citations omitted). Although it was never formally adopted as an administrative regulation by the Sheriff, it was the practice within the Court Security Division to require that Deputies assigned to that Division take holiday time in conjunction with a scheduled legal holiday so that Deputies within that Division do not work on days when security for the Courts is unnecessary due to their closing on the legal holiday. The additional rule regarding the scheduling of holiday time was further necessary so that Deputies from other Divisions are not required to fill in for Deputies within the Court Security Division who take holiday time on a day when the Courts are otherwise open and in need of security.

C. Sick leave is paid time off that may be used by a Deputy when illness on the part of or injury to the Deputy incapacitates him for duty. The purpose of sick leave time is to help Deputies cope with the financial burden of lost work incurred due to personal illness.

D. Deputies are further permitted to take time off, paid or unpaid, as necessary to deal with family medical emergencies and as provided for in the Family Medical Leave Act of 1993. Under General Order 1-18, family medical leave time must first be taken as vacation time and then as time without pay. Family medical leave time may be taken for a variety of reasons, including, but not limited to, caring for the employee's spouse, son, daughter or parent who has a serious health condition. Federal law and General Order 1-18 prohibit the discharge of or discrimination against any Deputy that attempts to utilize family medical leave time."

(See Order, FOF # 5 (citations omitted, emphasis supplied).)¹

¹ Although Deputies are required, under General Order 1-18, to submit requests for vacation time thirty days prior to the requested time off, the undisputed testimony presented during the hearing in this matter indicated that the thirty-day requirement was not strictly adhered to by the Raleigh County Sheriff's Department. (See Tr., p. 38-41.)

A. Corporal Burgess' request for time off in June 2006.

On or before May 22, 2006, Sergeant James B. Miller circulated an email requesting that Deputies within the Court Security Division provide their vacation requests for June 2006 and July 2006 so that a work schedule could be completed that accounted for requests for time off by Deputies within the Court Security Division. (See Order, FOF # 1.) Sergeant Miller was the Deputy that was assigned to oversee the scheduling of vacation and other time off for Deputies within the Court Security Division by Captain Darlington and Lieutenant Barley. (See id. at FOF # 4.) After additional prompting from Sergeant Miller, Corporal Burgess submitted a written request for time off during the month of June 2006 on May 26, 2006. (See id. at FOF # 1.) In his request, Corporal Burgess requested time off for a period of eleven consecutive work days, beginning with a holiday on June 2, 2006 and continuing with ten consecutive vacation days to end on June 16, 2006. (See Leave Request – Approval Form.)² After Corporal Burgess' request for time off was submitted, Lieutenant Barley approved all of the time off requested by Corporal Burgess with the exception of the holiday requested on June 2, 2006. (See Order, FOF # 7.) Testimony established that Corporal Burgess' request for time off on June 2, 2006 was denied because Lieutenant Barley, the complaining officer, and Sergeant Miller had both scheduled personal time off on that date, leaving the Court Security Division understaffed. (See Tr., pp. 82-84.)

On May 30, 2006, Sergeant Miller sent an electronic message to all of the Deputies working within the Court Security Division that contained the June 2006 work schedule and assignments. (See Order, FOF # 7.) The e-mail sent by Sergeant Miller reflected

² Due to intervening weekend days, on which Corporal Burgess was not scheduled to work, the time off requested by Corporal Burgess actually lasted for a period of fourteen days. (See Leave Request – Approval Form.)

Lieutenant Barley's denial of Corporal Burgess' requested vacation day on June 2, 2006 and provided that Corporal Burgess would be working at the Raleigh County Judicial Annex on that day. (See id.) This schedule further included the requested vacation time that had been submitted by Corporal Burgess between June 5 and June 16. (See id.) Although Sergeant Miller's electronic message was sent to Corporal Burgess' email address, Corporal Burgess testified that he did not see the e-mail until after June 2, 2006. (See Tr., p. 204.) Lieutenant Barley and Sergeant Miller both testified that Corporal Burgess' request for time off on June 2, 2006 was denied because June 2, 2006 was not a holiday and because both Sergeant Miller and Lieutenant Barley had previously scheduled time off for that day. (See Order, FOF # 8.) Corporal Burgess did not receive a copy of the Leave Request – Approval Form that he had submitted and that contained Lieutenant Barley's denial until after June 2, 2006. (See Tr., p. 195.)

Although the schedule was sent to Deputy Burgess electronically, the evidence taken at the disciplinary hearing in this action established that e-mail was not the preferred manner of communication by the Sheriff (or his designee) with the Deputies. (See Tr., p. 217.) Because Deputies that work the Court Security Division are required to provide Courthouse security from 8:00 a.m. until 5:00 p.m., they do not have time to check their assigned mail boxes at the Raleigh County Sheriff Department's headquarters on a daily basis. (See Tr., p. 195.) To ensure that Deputies within the Court Security Division receive their mail, Captain Darlington would deliver interoffice mail to the Court Security Division's Deputies. (See id.) Corporal Burgess' unchallenged testimony indicated that he did not receive the form denying his requested vacation time from Captain Darlington, but that it was in his

interoffice mail box when he was first able to check the mail box after June 2, 2006. (See id.)

During the mid-afternoon of June 1, 2006, Sergeant Miller passed through the doors of the Judicial Annex and mentioned to Corporal Burgess that he should be at work on time June 2, 2006 because that day was scheduled to be very busy for Court Security Division personnel. (See Order, FOF # 10.) Upon hearing Sergeant Miller's message, Corporal Burgess indicated that he would not be at work on the following day and referenced his earlier vacation/holiday request. (See id.) Sergeant Miller responded by informing Corporal Burgess that Lieutenant Barley had denied his request for holiday time off on June 2, 2006. (See id.) After Corporal Burgess indicated that he had not had an opportunity to review the work schedule or received a copy of the denial of his leave request, Corporal Burgess advised Sergeant Miller that he would not be present for work on June 2, 2006. (See id.) When Sergeant Miller inquired of Corporal Burgess as to what he should tell Lieutenant Barley regarding the work schedule for June 2, 2006, Corporal Burgess replied that Sergeant Miller should "tell [Lieutenant Barley] he's fucked because I'm not going to be here

tomorrow.” (See id.)³

After Sergeant Miller contacted Lieutenant Barley and advised him of the conversation between Sergeant Miller and Corporal Burgess, Lieutenant Barley contacted Corporal Burgess to discuss the matter. (See Order, FOF ## 16-18.) During that conversation, Corporal Burgess reiterated that he could not be at work on June 2, 2006 because he had a scheduled trip to Charleston and that, if it was necessary, he would use a sick day as time off for that date. (See id.) In response to his conversation with Corporal Burgess, Lieutenant Barley immediately contacted the supervising officer with the Road Patrol Division to ensure that an extra Deputy could be available to assist with in the Court Security Division, if necessary, on June 2, 2006. (See id. at FOF # 19.) At approximately 5:30 p.m. on June 1, 2006, Corporal Burgess anticipatorily called in a sick day for June 2, 2006. (See id. at FOF # 19.) The undisputed evidence presented to the Commission during hearings held below indicated that Corporal Burgess was unable to attend work on June 2, 2006 because Corporal Burgess had a scheduled doctor’s appointment and because Corporal Burgess had to transport his pregnant wife to a doctor’s appointment in Charleston, West

³ Although the Commission’s Order devotes nearly three pages to the brief conversation between Corporal Burgess and Sergeant Miller, including a specific recount from each of the other two Deputies as to how the conversation made each Deputy feel (including such descriptive words as angry, defiant, hurtful, disrespectful, uncomfortable, bothersome and not jovial), each of the Deputies that were present during the conversation essentially recounted the conversation in a manner identical to Sergeant Miller’s testimony at the hearing before the Commission. (See Order, FOF ## 11-15.) Although Corporal Burgess testified that he cannot specifically recall making the statement attributed to him by Sergeant Miller, he indicated that he could not deny making such a statement to Sergeant Miller based on the fact that the two had known each other since they were children and that the use of such language was common among police officers. (See Tr., pp. 190, 193.) Moreover, although both the Sheriff and the Commission have placed great emphasis on the fact that the statement was made in the public entrance to the Raleigh County Judicial Annex, no evidence has been adduced to suggest that any member of the general public was nearby at the time of the conversation or that any member of the general public overheard the conversation. (See Tr., pp. 70-71, 110-111, 123, 194.)

Virginia.⁴ (See Tr., p. 191.) As a result of Corporal Burgess' absence on June 2, 2006, Deputy Brian Stump was assigned to cover a Court Security Division post from his normal assignment on the Road Patrol Division in the Raleigh County Sheriff's Department. (See id. at FOF # 19.)

B. Complaint against and demotion of Corporal Burgess.

On June 7, 2006, Lieutenant Barley filed a Complaint Against Police Personnel against Corporal Burgess as a result of the incidents of June 1 and June 2, 2006. (See Complaint.) According to Lieutenant Barley's Complaint, Corporal Burgess violated the Raleigh County Sheriff's Department Rules and Regulations, under Standard of Conduct 1-2, General Duties, by (1) using profane language to Sergeant Miller on June 1, 2006 in violation of Section V.2.b and V.3.g of Standard of Conduct 1-2 and by (2) failing to report for work on June 2, 2006 in violation of Section V.3.d and V.3.t of Standard of Conduct 1-2. (See id.) Following the filing of Lieutenant Barley's Complaint, the Sheriff initiated an

⁴ The Commission's Order makes detailed findings of fact related to the issue of whether or not Corporal Burgess had advised anyone else within the Court Security Division that he needed time off on June 2, 2006 to take his wife to a doctor's appointment. (See Order, FOF # 26.) Although the Commission concluded that Corporal Burgess had not informed anyone else of the need to take his wife to her doctor's appointment, the undisputed testimony provided at the Commission hearing indicated that this was the reason that Corporal Burgess needed time off on June 2, 2006. (See Tr., p. 191.) Moreover, Corporal Burgess' un rebutted testimony established that he had indicated to Lieutenant Barley that he had to go to Charleston on June 2, 2006, and that Corporal Burgess believed it was common knowledge among his fellow Deputies that such a trip involved taking his wife to the doctor because the number of times he had been required to make the trip during his wife's difficult pregnancy. (See Tr., pp. 226-227.) Inasmuch as the Sheriff requires that family medical leave time be taken in the form of vacation days (of which Corporal Burgess had an abundance) and inasmuch as Corporal Burgess did not become aware of the denial of his request for time off on June 2 until the day prior, it is difficult to imagine why Corporal Burgess would have needed to inform the Sheriff of the scheduled doctor's appointments. It is even more difficult to understand the decision to sanction Corporal Burgess in such a harsh manner given that the Sheriff was aware of the reason for the absence during the investigation of the underlying complaint. (See Tr., p. 220.)

investigation into the Complaint that included interviews of relevant witnesses and Corporal Burgess by Chief Detective Major Steven Tanner.⁵ (See Tr., p. 173.) Prior to requesting that Major Tanner undertake an appropriate investigation of the Complaint filed by Lt. Barley, the Sheriff spoke directly to Corporal Burgess about the Complaint. (See *id.*, p. 197.) At that meeting with the Sheriff, Corporal Burgess requested a hearing on the Complaint made against him by Lt. Barley.⁶ (See *id.*) Following the conclusion of Major Tanner's investigation, on August 3, 2006, the Sheriff advised Corporal Burgess that he had been demoted to the rank of Deputy with an appropriate reduction in pay. (See Notice of Demotion.) As the basis for the demotion, the Sheriff provided the following:

"This demotion is a direct result of your actions on June 1 and 2, 2006. On June 1st, spurred by your dissatisfaction at being scheduled to work on June 2nd, while on duty, in uniform, in the presence of fellow officers and in public, you expressed coarse profanity to your immediate supervisor, directed at a higher ranking supervisor. You then failed to report for duty as scheduled on the date in question, June 2nd.

Said actions were deemed to be (1) Conduct Unbecoming a Deputy Sheriff, and (2) Insubordination, in violation of Rules and Regulations of the Raleigh County Sheriff's Office; more specifically – Standards of Conduct,

⁵ Major Tanner was promoted to Chief Deputy by the Sheriff following the initiation of the complaint against Corporal Burgess, but before formal discipline was imposed. (See Tr., p. 172.)

⁶ Prior to the start of the hearing in this matter on September 19, 2006, there was substantial discussion about Corporal Burgess's request for a hearing under West Virginia Code § 7-14C-3 and the legal effect of the Sheriff's failure to provide such a hearing. (See Tr., p. 14.) Counsel for the Sheriff proffered that evidence would be presented that no such hearing was requested by Corporal Burgess. (See *id.* at pp. 20-21.) Consistent with the proffer of his counsel, Corporal Burgess testified that he had in fact requested a hearing. (See *id.* at p. 197.) Corporal Burgess argued prior to the hearing that the failure of the Sheriff to provide such a hearing made his demotion defective and that the matter should be summarily dismissed with an appropriate return to rank. (See *id.* at pp. 12-20.) No evidence was offered by the Sheriff, however, to support his proffer that no request for a hearing was made by Corporal Burgess, requiring that the Commission accept the undisputed testimony of Corporal Burgess regarding his request.

1-2, General Duties: Section 'D' – General Conduct, Subsections 1 & 2, and Section "C" – Disciplinary/Personal Actions, Subsections 2b & 3g."⁷

(Id.) Although there had been prior complaints filed with the Sheriff against Corporal Burgess during his fifteen-year career, there had never been any prior findings of misconduct by the Raleigh County Sheriff's Department or any formal discipline against Corporal Burgess on August 3, 2006. (See Tr., p. 237.)

On August 10, 2006, Corporal Burgess filed an Answer and Objection of Corporal Randy D. Burgess to Demotion from Rank of Corporal by Raleigh County Sheriff's Department and the Objection of Corporal Randy D. Burgess to Refusal of Raleigh County Sheriff's Department to Promote Corporal Burgess to Rank of Sergeant by the Respondent, Corporal Randy D. Burgess, protesting the Sheriff's decision to demote him from the rank of Corporal and objecting to the Sheriff's refusal to promote him to the rank of Sergeant. (See Answer and Objection of Cpl. Burgess; Objection to Refusal to Promote.) On September 19, 2006, a hearing was held on Corporal Burgess's Answer and Objection of Corporal Randy D. Burgess to Demotion from Rank of Corporal by Raleigh County Sheriff's Department and the Objection of Corporal Randy D. Burgess to Refusal of Raleigh County Sheriff's Department to Promote Corporal Burgess to Rank of Sergeant by the

⁷ At the time of his demotion, Corporal Burgess was the highest ranking Corporal on the promotional eligibility list certified by the Commission to govern promotions to higher ranks within the Raleigh County Sheriff's Department on February 13, 2006. (See Tr., p. 201; Promotional Eligibility List.) Corporal Burgess testified that he had been told by the Sheriff, prior to July 1, 2006, that he would soon be promoted to the rank of Sergeant. (See Tr., p. 221.) Following the filing of the complaint and the ascension of Major Tanner to Chief Deputy, however, Deputy Burgess was demoted. (See Tr., pp. 201-202.) Immediately after the Sheriff dismissed Corporal Burgess from his office after advising Corporal Burgess of the demotion, the Sheriff promoted the three Deputies, who were waiting outside the Sheriff's office, that were immediately behind Corporal Burgess on the promotional eligibility list from the rank of Corporal to the rank of Sergeant. (See id.)

Respondent, Corporal Randy D. Burgess at which both sides were given the opportunity to present all appropriate evidence on the issues raised by the pleadings filed in this matter. (See Order, p. 1.) Following an approximately six-hour hearing at which Corporal Burgess and multiple other witnesses offered testimony, the Commission issued an Order Denying Deputy Burgess' Objection to Demotion in Rank, in which the Commission affirmed the disciplinary action taken by the Sheriff in demoting Corporal Burgess. (See Order.) Claiming that the "severity of [Corporal Burgess'] actions [were] leading to a breakdown of communications among the rank structures in the police department which is a military type organization," the Commission found that the actions of the Sheriff were appropriate, emphasizing that it was not the place of the Commission to second-guess the disciplinary actions of the Sheriff. (Order, FOF # 31, COL # 29.)

On February 28, 2007, Corporal Burgess appealed his demotion to Raleigh County Circuit Court, asserting that the Sheriff had violated Corporal Burgess' statutory rights by failing to afford him a hearing before a deputy sheriffs' hearing board within ten days of Corporal Burgess' request for a hearing and that the Raleigh County Deputy Sheriffs' Civil Service Commission had abused its discretion in approving the severe sanction imposed upon Corporal Burgess. (See Pet. for Appeal.) Finding that it was not the place of the Circuit Court to substitute its judgment for that of the Commission (and making factual findings about the underlying facts that were contrary to the testimony at the Commission's hearing, such as the volume of the discussion between Corporal Burgess and Sergeant Miller (See Tr., p. 69, where Sergeant Miller testified that the statement was not made in a loud, but rather conversational tone)) and finding that the investigatory process undertaken by the Sheriff was sufficient (regardless of the fact that it ignored the hearing board process

set forth in West Virginia Code § 7-14C-3), the Circuit Court denied Corporal Burgess' petition for appeal. (See Order Affirming Ruling.) It is from this affirmation that Corporal Burgess now appeals.

ASSIGNMENTS OF ERROR

1. The Sheriff of Raleigh County violated Corporal Burgess' statutory rights by failing to afford Corporal Burgess a hearing before an appropriate hearing board within ten days of Corporal Burgess' request for a hearing as required by West Virginia Code § 7-14C-3, requiring Corporal Burgess' reinstatement to the rank of Corporal. The Circuit Court determined that the process afforded to Corporal Burgess below was substantially similar and that the failure to hold a hearing before an appropriate hearing board was "constitutionally adequate."

2. The Commission abused its discretion in affirming the Sheriff of Raleigh County's decision to demote Corporal Burgess in the absence of any evidence that Corporal Burgess had committed misconduct of a substantial nature directly affecting the rights and interests of the public and in the absence of any evidence that Corporal Burgess was subjected to progressive discipline as required by the Sheriff's written policies. The Circuit Court affirmed the Sheriff's disciplinary actions, holding that it would not substitute its judgment for that of the Commission.

DISCUSSION OF LAW AND POINTS OF AUTHORITY RELIED UPON

A. Standard of review.

This Court has noted that appeals from a decision of a deputy sheriffs' civil service commission, appealed through a circuit court, are subject to a multi-pronged standard of review. Questions of law shall be reviewed by this Court *de novo*. See Mangus v. Ashley, 199 W.Va. 651, 655, 487 S.E.2d 309, 313 (1997). A final order of a police civil service commission based upon a finding of fact, however, will not be reversed on appeal unless it is clearly wrong or is based upon a mistake of law. See id.

B. Standard for demotion of a Raleigh County Deputy Sheriff.

West Virginia Code § 7-14-17 sets forth the legal standard for the demotion of a deputy sheriff and provides that no deputy sheriff “may be removed, discharged, suspended or reduced in rank or pay except for just cause.” W.Va. Code § 7-14-17 (1996). “W.Va. Code § 7-14-17 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.” Syl. pt. 2, Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990). The West Virginia Supreme Court of Appeals has repeatedly held that any punitive action against a deputy sheriff, like removal, discharge or a demotion, must be based upon substantial misconduct. See McMillian v. Ashley, 193 W.Va. 269, 455 S.E.2d 921 (1995)(dismissal of deputy sheriff who took guest on trip to extradite a felony fugitive to state and sought reimbursement for expenses of guest was appropriate); Lambert, supra, (dismissal of deputy sheriff was appropriate where he illegally requested that another deputy dismiss criminal charges for driving under the influence against friend); Mounds v. Chafin, 186 W.Va. 156, 411 S.E.2d 481 (1991)(dismissal was appropriate where deputy sheriff committed fraud or misrepresentation on law enforcement licensure).

In addition to the requirements imposed upon county sheriffs’ departments by West Virginia law, the Sheriff of Raleigh County has adopted specific administrative regulations relating to the conduct and discipline of Deputies employed by the Raleigh County Sheriff’s Department. (See General Order 1-7.) General Order 1-7 provides the policy statement for the Raleigh County Sheriff’s Department relating to the discipline of Deputies:

"It is the department's policy to impose disciplinary action fairly and impartially and to offer adequate appeal procedures to ensure that the rights of employees are protected.

Discipline is a process of imposing formal sanctions which will help train or develop an employee, preferably through constructive rather than punitive measures. Discipline in the department involves reward of employees, training, counseling, and as a last resort, punishment.

...

Except for gross breaches of discipline or moral turpitude, supervisors shall begin employee with the least punitive measures. If these do not work, then increasingly more severe measures may be required. While the process may take some time, it is important that each employee be dealt with justly and in a manner which clearly indicates that positive, constructive measures to change behavior or performance preceded the imposition of more negative sanctions."

(General Order 1-7, pp. 1, 6.)

Unacceptable conduct is divided into three categories according to the severity of misbehavior. Category I offenses are of minor severity yet require correction in the interest of maintaining a productive and well-managed department. (See General Order 1-7, p. 6.) Category I offenses normally result, in the first offense, in informal measures such as counseling or a reprimand. (See id.) Category I offenses include misconduct such as excessive absences or tardiness, abusive or obscene language and disruptive behavior. (See id.) Category II offenses include more severe acts and misbehavior, such as failure to follow a supervisor's instructions, refusal to work overtime based on a state of emergency and failure to report to work without proper notice to a supervisor. (See id. at p. 7.) Category II offenses normally result, in the first instance, in the issuance of a written reprimand. Subsequent offenses could result in suspension, demotion or dismissal. (See id.) Category III offenses include acts of such severity as to merit suspension or dismissal at a single occurrence. (See id. at p. 9.) Category III offenses include violating safety rules

where there is a threat to life, criminal convictions occurring during employment, use of public office for private gain and absence for in excess of three days without any notice to a supervisor. (See id.)

C. Procedure when punitive disciplinary action is recommended following an investigation into conduct by a deputy sheriff.

Under West Virginia Code § 7-14C-3, if an investigation or interrogation of a deputy sheriff results in the recommendation of some punitive action against the deputy sheriff, “then, before taking punitive action the sheriff shall give notice to the deputy sheriff that he or she is entitled to a hearing on the issues by the hearing board. The notice shall state the time and place of the hearing and the issues involved and be delivered to the deputy sheriff not less than ten days prior to the hearing.” W.Va. Code § 7-14C-3(a) (1995). An official record, including testimony and exhibits, must be kept of the hearing. See id. “The hearing shall be conducted by the hearing board of the deputy sheriff except that in the event the recommended punitive action is discharge, suspension or reduction in rank or pay, and the action has been taken, the hearing shall be pursuant to the provisions of section seventeen, article fourteen of this chapter, if applicable. Both the sheriff and the deputy sheriff shall be given ample opportunity to present evidence and argument with respect to the issues involved.” W.Va. Code § 7-14C-3(b) (1995). Any decision, order or action taken as a result of the hearing shall be in writing and shall be accompanied by findings of fact. See W.Va. Code § 7-14C-3(d) (1995). The findings shall consist of a concise statement upon each issue in the case. See id. A copy of the decision or order and accompanying findings and conclusions, along with written recommendations for action, shall be delivered or mailed promptly to the deputy sheriff or to his or her attorney of record. See id. Either

party that is aggrieved by the results of the hearing may appeal the hearing board's decision to the deputy sheriffs' civil service commission. See W.Va. Code § 7-14C-5 (1995).

D. The Sheriff violated Corporal Burgess' statutory rights by failing to afford Corporal Burgess a hearing before an appropriate hearing board within ten days of Corporal Burgess' request for a hearing, requiring Corporal Burgess' reinstatement to the rank of Corporal.

The first assignment of error asserted by Corporal Burgess appears to raise an issue of first impression.⁸ The general provisions of West Virginia law that govern the regulation of county deputy sheriffs by a deputy sheriffs' civil service commission are contained within Chapter 7, Article 14 of the West Virginia Code, and have existed, subject to amendment, since 1971. See W.Va. Code § 7-14-1 et seq. In 1995, the West Virginia Legislature adopted additional statutory protections for deputy sheriffs, contained within Chapter 7, Article 14C of the West Virginia Code. See W.Va. Code § 7-14C-1 et seq. Research by counsel has not located any cases decided by this Court that have considered the provisions of Chapter 7, Article 14C.

West Virginia Code 7-14C-3 provides a clear procedure that must be followed where, as here, a county sheriff initiates an investigation or interrogation of a deputy sheriff that results in the recommendation of some punitive action against the deputy sheriff. In such a circumstance, the county sheriff is required to provide a deputy sheriff notice that he is entitled to a hearing before an appropriate hearing board prior to the imposition of such sanction. See id. As stated previously, the only evidence presented on this issue during the hearing before the Commission was that Corporal Burgess requested a hearing before a

⁸ Inasmuch as the issue is one of first impression, the petitioner would argue that this Court should decide this appeal so that appropriate guidelines could be established in the application of Chapter 7, Article 14C for Sheriffs seeking to discipline Deputy Sheriffs to follow in future cases.

hearing board in a meeting with the Sheriff prior to his demotion. No hearing was provided to Corporal Burgess. Accordingly, the Sheriff failed to adhere to the clear statutory mandates of West Virginia Code § 7-14C-3, rendering his disciplinary action against Corporal Burgess void. On that ground alone, the Commission should have upheld the objection of Corporal Burgess to his demotion and restored him to his appropriate rank.

In response to Corporal Burgess' claim that he was not provided with a disciplinary hearing before an appropriate hearing board prior to his demotion, the Sheriff claimed that the language of West Virginia Code § 7-14C-3 does not require a hearing before the hearing board in every instance where the resulting sanction is demotion and that the appropriate procedure is a hearing before the Commission. In support of his position, the Sheriff relies on the provisions of West Virginia Code § 7-14C-3(b), which provides:

“The hearing shall be conducted by the hearing board of the deputy sheriff except that in the event the recommended punitive action is discharge, suspension or reduction in rank or pay, and the action has been taken, the hearing shall be pursuant to the provisions of section seventeen, article fourteen of this chapter, if applicable. Both the sheriff and the deputy sheriff shall be given ample opportunity to present evidence and argument with respect to the issues involved.”

W.Va. Code § 7-14C-3(b) (1995)(emphasis supplied).

While neither party had been given an opportunity to fully research the above-quoted language when argument was made on the issue during the September 19, 2006 hearing, Corporal Burgess countered that the quoted language only applied in cases where it was necessary for the Sheriff to take immediate disciplinary action against a Deputy prior to

the initiation of an investigation into the alleged misconduct.⁹ Having now been afforded appropriate time to research that issue, Corporal Burgess would point out that West Virginia Code § 7-14-2 provides that nothing contained in Chapter 7, Article 14C “prohibits the immediate temporary suspension from duty, pending an investigation, of any deputy sheriff who reports for duty under the influence of alcohol or a controlled substance which would prevent the deputy from performing his or her duties as defined in chapter sixty-a of this code, or under the influence of an apparent mental or emotional disorder.” As the quoted portions of West Virginia Code § 7-14C-2 do not apply to this case, inasmuch as there was an investigation and time for a hearing before the hearing board prior to Corporal Burgess’ demotion, the failure to adhere to the statutory procedure outlined in West Virginia Code Chapter 7, Article 14C is fatal to the Sheriff’s disciplinary action. The Sheriff may not simply pick and choose which of the statutory procedures contained within Chapter 7 with which he wishes to comply. A deputy sheriff, facing disciplinary action, is granted certain statutory procedural protections that must, in the absence of a statutorily-acknowledged reason for departure, be strictly adhered to by a Sheriff seeking to impose discipline.

While this Court has not had an opportunity to consider the effect of a sheriff’s failure to adhere to the statutory procedure set forth in West Virginia Code § 7-14C-3 in imposing discipline on a deputy sheriff, this Court has had an opportunity to consider a nearly-identical statutory provision governing the imposition of discipline against municipal

⁹ The oral argument by the parties to the Commission on this issue is contained at pages 11 through 32 of the transcript of the hearing before the Commission. During that discussion, the Sheriff indicated that no notice was given to Corporal Burgess of his right to a hearing before the hearing board because the Sheriff did not believe that West Virginia Code § 7-14C-3 required such a hearing (although Corporal Burgess expressly indicated, without dispute, that he requested such a hearing). The lack of notice, conceded by the Sheriff, would obviously constitute another defect in the statutory procedure that was to be provided to Corporal Burgess.

police officers subject to civil service protection. See Alden v. Harpers Ferry Police Civil Service Commission, 209 W.Va. 83, 543 S.E.2d 364 (2001)(“Alden I”). In Alden I, a municipal police officer was terminated for unsatisfactory job performance by the Harpers Ferry Police Department without the predisciplinary hearing required for municipal police officers by West Virginia Code § 8-14A-3. See id., 209 W.Va. at 85, 543 S.E.2d at 365. After the officer raised the lack of a predisciplinary hearing on appeal, this Court reversed the circuit court’s order upholding the officer’s termination and remanding the case for the conduct of a predisciplinary proceeding. See id., 209 W.Va. at 89, 543 S.E.2d at 370. In announcing its decision, this Court held that a predisciplinary hearing was required by statute in the absence of exigent circumstances:

“West Virginia Code § 8-14A-3(b) requires that, before a civil service officer may be disciplined through discharge, suspension, or reduction in rank or pay, he/she must be afforded a predisciplinary hearing before a hearing board unless there exist exigent circumstances that require the recommended disciplinary action to precede such hearing. To the extent our prior decision in the Syllabus of City of Huntington v. Black, 187 W.Va. 675, 421 S.E.2d 58 (1992), is inconsistent with this holding, it is hereby expressly modified.”

Id. at syl. pt. 4. The statute governing predisciplinary procedures for municipal police officers (and municipal firefighters) are nearly identical. See W.Va. Code §§ 7-14C-3 (1995); 8-14A-3 (1997). Accordingly, there is no substantive reason for the Court to depart from the manner in which it resolved Alden I in resolving this case, unless the Court deems it necessary to require dismissal of a disciplinary action against a deputy sheriff not afforded a predisciplinary hearing (in the absence of exigent circumstances) as a means of deterring sheriffs around the State from refusing to acknowledge the statutory protections afforded their deputies.

The record in this case is devoid of any evidence to suggest that the statutory procedures requiring a predisciplinary hearing were followed prior to Corporal Burgess' demotion. To ensure that deputy sheriffs receive the same statutory protections afforded to municipal police officers and firefighters, as set forth in Alden I, this Court should, at a minimum, apply its holding in Alden I to the facts of this case. Accordingly, the Circuit Court's Order affirming the Commission's Order Denying Deputy Burgess' Objection to Demotion in Rank should be reversed and this matter should be remanded to the Commission for the entry of an appropriate Order restoring Corporal Burgess to his appropriate rank and providing Corporal Burgess with all other appropriate relief.

E. The Commission abused its discretion in affirming the Sheriff's decision to demote Corporal Burgess in the absence of any evidence that Corporal Burgess had committed misconduct of a substantial nature directly affecting the rights and interests of the public.

Assuming the Court does not simply remand this action for the conduct of a predisciplinary hearing or for a dismissal of the disciplinary charges against Corporal Burgess based upon the lack of a predisciplinary hearing, a review of the record in this case shows that the Circuit Court and the Raleigh County Deputy Sheriffs' Civil Service Commission abused their discretion in upholding Corporal Burgess' demotion. In adopting General Order 1-7, the Sheriff provided each Deputy employed by the Raleigh County Sheriffs' Department with clear guidance as to the types of punitive sanction that might be employed by the Sheriff to punish misconduct by a Deputy and the type of misconduct that might subject an individual Deputy to such punitive sanctions. General Order 1-7 provides this guidance by grouping types of misconduct into three separate classes and provides an ascending scale of misbehavior within each class. Examples of misconduct given for each class place individual Deputies on notice as to how specific infractions might be punished

by the Sheriff. These specific examples of misconduct are given as part of the overall scheme of the Sheriff's disciplinary policy, which provides that the dual purpose of the Sheriff's disciplinary system is to provide a system of discipline that discourages inappropriate conduct of individual Deputies while maintaining the integrity of the Department and ensuring the safety of the public. This dual purpose is succinctly the Sheriff's policy statement contained in General Order 1-7:

"It is the department's policy to impose disciplinary action fairly and impartially and to offer adequate appeal procedures to ensure that the rights of employees are protected.

Discipline is a process of imposing formal sanctions which will help train or develop an employee, preferably through constructive rather than punitive measures. Discipline in the department involves reward of employees, training, counseling, and as a last resort, punishment.

...

Except for gross breaches of discipline or moral turpitude, supervisors shall begin employee with the least punitive measures. If these do not work, then increasingly more severe measures may be required. While the process may take some time, it is important that each employee be dealt with justly and in a manner which clearly indicates that positive, constructive measures to change behavior or performance preceded the imposition of more negative sanctions."

(General Order 1-7, pp. 1, 6.) Although both the Sheriff and Lieutenant Barley acknowledge that there were less punitive measures available to deal with Corporal Burgess' claimed misconduct, the Sheriff maintains that Corporal Burgess' conduct on June 1 and 2, 2006 amounts to a "gross breach of discipline" sufficient to justify the imposition of a more harsh sanction against him. Such a position is simply unsupported by the facts of this case.

Those facts are almost completely undisputed. In May 2006, Corporal Burgess submitted a request for time off that included a holiday on June 2, 2006 and ten vacations

days during the following two weeks. Corporal Burgess had requested time off on June 2 to attend a doctor's appointment and to take his then-pregnant wife for prenatal care, although he did not inform his superior officers of the reason for the time off requested for June 2. Corporal Burgess' request for time off was then denied by his supervising officer, although Corporal Burgess did not become aware of the denial until the afternoon of June 1. When Sergeant Miller (whom Corporal Burgess had served with for over ten years) made Corporal Burgess aware of the denial of his request for time off on June 1, Corporal Burgess informed Sergeant Miller that Corporal Burgess could not be at work on June 1 and, in response to Sergeant Miller's question, indicated that he should tell Lieutenant Barley, his supervising officer, that the Lieutenant Barley was in a bind (in the sweet prose of hardened, veteran law enforcement officers) because Corporal Burgess could not be at work on June 2 because of prior commitments. Corporal Burgess did not inform any of his superior officers of what those commitments were, although Department policy recognizes his right to time off to attend to medical appointments for his family and further requires that such family medical time off be taken in the form of vacation time (of which Corporal Burgess had an abundance).

Although Corporal Burgess' request for time off in the form of a holiday on June 2 was inconsistent with the general policy of the Court Security Division that all holiday time be taken on actual legal holidays, Corporal Burgess had only recently been transferred to the Court Security Division and his request for holiday time off at the beginning of a longer period of vacation time was otherwise consistent with a specific directive from the Sheriff about the scheduling of time off. (See Order, FOF # 5.) When he became aware of the scheduling conflict created by his need to take time off on June 2, Corporal Burgess

immediately spoke with his supervising officer and advised his supervising officer that he would not be able to attend work on June 2. There is no evidence to suggest that Corporal Burgess was insubordinate or profane during this conversation. Although the Sheriff now claims that Corporal Burgess disobeyed a direct order by failing to appear and that Lieutenant Barley expected Corporal Burgess to be at work on June 2, this claim is contradicted by the fact that Lieutenant Barley contacted another Division within the Sheriff's office to supply an additional Deputy to cover Corporal Burgess' post on June 2 shortly after he spoke with Corporal Burgess. While the evidence indicated that securing assistance from another Division within the Department was disfavored, manpower shortages admittedly made such assistance necessary on occasion. Moreover, the Commission's and Circuit Court's Order ignores the fact that Corporal Burgess had an absolute right to take time off to attend to his and his family's medical appointments by focusing on the fact that he did not inform his superior officers of the scheduling of those appointments on or before June 1. Whether or not such information was given, Corporal Burgess still would have been required to take the time off on June 2 and the Department would have still been under a manpower shortage in the Court Security Division as a result. While such information may not have been available to the Sheriff prior to June 2, this information was not disputed during the hearing below and the information was available to the Sheriff at the time of the investigation of Corporal Burgess. The harshness of the penalty and the unprofessional manner in which the Sheriff chose to announce this discipline, parading Corporal Burgess out of his office past the Deputy Sheriffs who had taken his place on the promotion list and were then being promoted to the rank of Sergeant,

is even more severe when one considers that it is unquestioned that Corporal Burgess had a clean disciplinary record prior to the instant proceeding.

Boiled to its essence, this case is nothing more than a Deputy who took time off (which he was absolutely entitled to take) at a time when his superior officers did not approve because they were also scheduled to take time off, coupled with the fact that the Deputy uttered an expletive within the hearing of other Deputies when he was informed that his superior officers were attempting to deny him the time off that he requested (and which he was absolutely entitled to take). If Corporal Burgess's behavior amounts to misconduct, it would seem to fall squarely within the Category I offenses listed in the Sheriff's General Order 1-7, which include such offenses as excessive absences or tardiness and abusive or profane language. According to the Sheriff's own written policy, however, Category I misconduct is generally punishable in the first instance by informal measures such as counseling or a reprimand. Category II offenses, which include behavior that appears more severe than Corporal Burgess's, such as failure to follow a supervisor's instructions, refusal to work overtime based on a state of emergency and failure to report to work without proper notice to a supervisor, generally are only punishable in the first instance by the issuance of a written reprimand. Corporal Burgess's exemplary disciplinary record, built up during fifteen years of service, would certainly suggest that such a moderate sanction would have had the intended effect.

If such behavior continued after an initial sanction, more severe discipline, like that imposed on Corporal Burgess, would be appropriate. Instead of punishing Corporal Burgess' alleged misconduct in accordance with the categories of offenses that would seem to be similar, the Sheriff instead chose to punish Corporal Burgess as if he had committed a

Category III offense, such as violating safety rules where there is a threat to life, criminal convictions occurring during employment, use of public office for private gain and absence for in excess of three days without any notice to a supervisor, and demote him from his rank without first determining whether a less severe sanction might have achieved the change in behavior sought by the Sheriff. In short, the Sheriff's actions in this case are clearly inconsistent with his own disciplinary policy. The record in this case simply fails to provide any justification for the Sheriff's abandonment of his own written policy of progressive discipline.

Moreover, in affirming the decision of the Sheriff to demote Corporal Burgess, the Commission abdicated its function under Chapter 7, Article 14 of the West Virginia Code. Under Chapter 7, Article 14, the Commission is specifically required to ensure that any punitive disciplinary action taken against a deputy sheriff that results in termination, suspension, demotion or a reduction in pay is taken in accordance with West Virginia law and that such punitive action is based on "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention." Syl. pt. 2, Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990). In the instant case, however, the Commission essentially deferred to the conclusions reached by the Sheriff regarding Corporal Burgess' alleged misconduct and failed to provide any legal justification for its determination that Corporal Burgess' actions were substantial misconduct affecting the rights and interests of the public, in spite of the Circuit Court's unsupported attempts to make Corporal Burgess' statements louder and more confrontational than the evidence established they were.

Corporal Burgess does not dispute that it is important that orders given by superior officers to lower-ranking deputies be followed. General Order 1-7 sets forth an intricate system of discipline designed to ensure that an appropriate command structure is maintained and that Deputies that are unable to operate within that command structure can be purged from the Department. There is nothing about the facts of this case, however, to suggest that Corporal Burgess has been or will be unable to maintain his position within the command structure of the Raleigh County Sheriffs' Department, whether with or without discipline resulting from the alleged misconduct that forms the basis of this action. Although the Sheriff, the Commission and now the Circuit Court have speculated on the possible effects to the public of Corporal Burgess' conduct if such severe discipline is not imposed, there is nothing beyond this speculation to suggest that any public interest was harmed in any way by Corporal Burgess' alleged misconduct. When the Sheriff's feet begin to slip down the slippery slope, the necessity for harsher discipline can be considered. Discipline that is directly contrary to the Sheriff's own written policy should not be affirmed merely because such a slippery slope might one day be encountered.

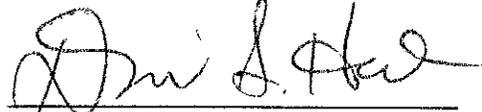
The Commission's and Circuit Court's failure to act as a check on the power of the Sheriff to take disproportionate disciplinary action against Corporal Burgess is a threat to all other Deputy Sheriffs, that similar minor acts of alleged misconduct might be used to purge from the Department Deputies that are not favored by the Sheriff or his Chief Deputy or that act in a manner that is inconsistent with the political leanings of an elected Sheriff. This is the exact type of discipline that the civil service system was enacted to prevent. By failing to properly enforce Chapter 7, Article 14 (and Chapter 7, Article 14C) of the West Virginia Code, the Commission and the Circuit Court have rendered the protections afforded to

deputy sheriffs by Chapter 7, Article 14 (and Chapter 7, Article 14C) meaningless. As the Commission's Order Denying Deputy Burgess' Objection to Demotion in Rank was based upon findings not supported by the evidence, based upon findings contrary to the evidence and based upon mistakes of law, the Commission's and Circuit Court's Order should be reversed and this matter should be remanded to the Commission for the entry of an appropriate Order restoring Corporal Burgess to his appropriate rank and providing Corporal Burgess with all other appropriate relief.

WHEREFORE, the petitioner, Corporal Randy D. Burgess, prays that this Court reverse the Raleigh County Deputy Sheriffs' Civil Service Commission's Order Denying Deputy Burgess' Objection to Demotion in Rank and the Circuit Court's Order Affirming the Ruling of the Raleigh County Deputy Sheriffs' Civil Service Commission and Denying Deputy Randy D. Burgess' Objections and Denying Petition for Appeal; that this matter be remanded to the Raleigh County Deputy Sheriffs' Civil Service Commission for the entry of an appropriate Order restoring Corporal Burgess to his appropriate rank and providing Corporal Burgess with all other appropriate relief; and for such other and further relief as the Court may deem just.

CORPORAL RANDY D. BURGESS
By Counsel

HAYDEN & HART, PLLC

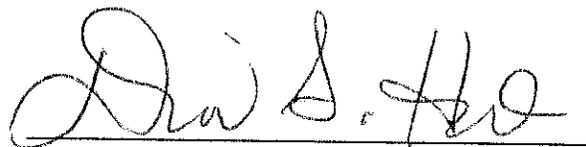


David S. Hart
Counsel for the Petitioner
West Virginia State Bar ID # 7976
102 McCreery Street
Beckley, West Virginia 25801

CERTIFICATE OF SERVICE

I, David S. Hart, hereby certify that I have served a true and correct copy of the foregoing Brief of the Appellant upon the following parties or their counsel by United States mail, first-class, postage prepaid on the 19th day of May, 2009, to the following:

James R. Sheatley, Esquire
Gorman, Sheatsley & Co., LC
Post Office Box 5518
Beckley, West Virginia 25802-5518

A handwritten signature in cursive script, appearing to read "David S. Hart", written over a horizontal line.

David S. Hart