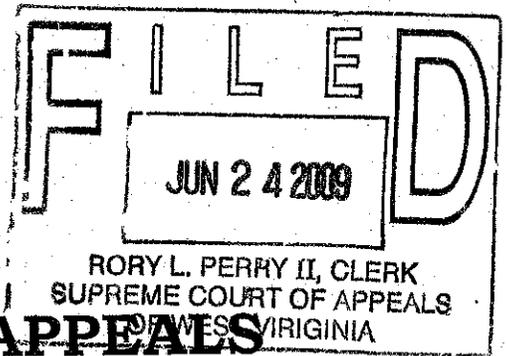


DOCKET NO. 34587



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

CORPORAL RANDY D. BURGESS,

Petitioner Below-Appellant,

v.

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

Respondent Below-Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY,
WEST VIRGINIA**

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND RULINGS BELOW

Sergeant James Byrd Miller is a thirteen (13) year member of the Raleigh County Sheriff's Department holding the rank of Sergeant from January 1, 2006. (Transcript of hearing, hereinafter "T.") T.32 Sergeant Miller is assigned to the court security division of the Sheriff's Department and as Sergeant within that division bears the responsibility for processing paperwork for the division including vacation requests, facilitating training, filling in when deputies are missing from duty due to illness and also is a full time bailiff for Judge Staton of the Family Court. T.34-35 Lieutenant Mitchell "Skee" Barley is the immediate supervisor of Sergeant Miller within the court security division of the Sheriff's Department. T.35 Captain Charles Darlington is the supervisor of the court security division. T. 36

Sergeant Miller's responsibilities with regard to vacation requests include facilitating the transfer of paperwork from individual deputies requesting vacations or sick time, maintaining in his office a copy of the scheduling listing people scheduled to be off, providing copies of dockets for different court hearings for particular days to evaluate personnel staffing. T.36 Lieutenant Barley has authority with regard to confirming requested days off by personnel in the court security division. T.36 Sergeant Miller makes up the work schedule for all deputies in the court security division in monthly increments. T.36

Sergeant Miller was working on the June work assignments on or before May 25, 2006 with the schedule being issued May 30, 2006. T.37 Policies and procedures require deputies' to request vacation days thirty (30) days in advance but that the thirty (30) day time period is not a rigid rule and flexibility is afforded to the deputies whenever possible. T.38 State holidays enjoyed by sheriff's department employees as state employees are required to be taken on the actual day of the holiday itself (such as July 4, June 20, December 25) by court security division personnel. T.38-39 During the month of June there was a holiday to-wit, June 20 which court security division personnel were required to take on the 20th of June. T.39

On or before May 22, 2006 Sergeant Miller issued an e-mail requesting deputies to give input regarding possible requested days off or vacation days. T.40 In e-mail communications to the members of the division, Sergeant Miller established Friday, May 26, 2006 as a deadline to request vacation days for the month of June so that the work schedule could be completed. T.41 On or about May 26 or May 27, 2006 Corporal Burgess submitted his request for vacation days for the month of June. T.42 Included in Corporal Burgess' vacation request was a request for a holiday on Friday, June 2, 2006. T.43 On Friday, June 2, 2006 the Raleigh County Courthouse facilities were scheduled to be open. T.43 On May 30, 2006 Sergeant Miller e-mailed to all courthouse security division personnel the June 2006 work schedule and assignments. T.43

The division had been using e-mail correspondence to establish work schedules and for other purposes since February or March of 2006. T.44-

45 Corporal Burgess had an e-mail address and received communications by e-mail. T. 45

Corporal Burgess' work schedule for June included an assigned post at the courthouse annex doors (Magistrate Court Family Court) on June 1, 2006 and an assigned post at the courthouse annex doors Friday, June 2, 2006 from 9:00 a.m. to 5:00 p.m. each day. T.46 Corporal Burgess was scheduled to be off on vacation June 5 through 9 and 12 through 16 scheduled to return on June 19, 2006. T.46 The determination to grant the two (2) weeks vacation as requested by Corporal Burgess was made by Lieutenant Barley. T.47 Sergeant Miller and Lieutenant Barley reviewed Corporal Burgess' vacation requests including the request for a holiday on June 2, 2006. T.47 Due to other personnel schedules and vacations requested, full days of hearings set for Friday, June 2 and the fact that June 2 was not a holiday, the request for holiday of Corporal Burgess was denied. T.48 Corporal Burgess never communicated with Sergeant Miller regarding the work schedule for June which was e-mailed on May 30, 2006 prior to a confrontation at the judicial annex doors on the afternoon of June 1, 2006. T.49

During the mid afternoon of June 1, 2006 Sergeant Miller passed through the doors of the judicial annex and mentioned to Corporal

Burgess that June 2 was scheduled to be a busy date and that he should be sure to be on time. T.50 Corporal Burgess indicated that he was not planning to be at work on that day. T.50 Sergeant Miller reminded him that Lieutenant Barley had denied the request for a holiday on that day. T.50 Corporal Burgess indicated he had not seen or reviewed the schedule to include a denial of his request for vacation day on June 2, 2006. T.50 Sergeant Miller specifically directed Corporal Burgess to be present at his position on June 2. T.50 Corporal Burgess advised Sergeant Miller he would not so be present and in response to Sergeant Miller's inquiry of Corporal Burgess as to what the Sergeant should report to Lieutenant Barley, Corporal Burgess responded "Tell Skee he's fucked because I am not going to be here tomorrow". T.50-51 The conversation between Corporal Burgess and Sergeant Miller occurred in the presence of Corporal Mark McCray and Deputy Bobby Stump at the sole public entrance to the judicial annex being the means by which the public gains access to all magistrate offices, magistrate clerk's office, probation departments and the family court judges' offices and hearing chambers. T.51-53 Sergeant Miller and Deputy Stump testified that sound travels very easily in the uncarpeted linoleum floors of the hallway of the judicial annex and both were unsure as to whether members of the public heard the discussion although they believed that the public could have heard the conversation. T. 54 and 110-111, respectively. Both

Corporal McCray and Deputy Stump felt that the words and attitude of Deputy Burgess was insubordinate. T. 119 and 109-110, respectively.

Immediately after the confrontation with Corporal Burgess, Sergeant Miller called Lieutenant Barley to advise him of the confrontation and the apparent indication that Corporal Burgess would not be at work on June 2, 2006 as scheduled. T. 60 Within two (2) to three (3) minutes after his conversation with Sergeant Miller, Lieutenant Barley contacted Corporal Burgess. T.136 In that conversation Corporal Burgess restated that he was not going to be at work on June 2, 2006 and would call in sick. T. 137 In that conversation Lieutenant Barley specifically directed Corporal Burgess to report to work on June 2, 2006. T. 137 At no time in the conversation with Lieutenant Barley did Corporal Burgess indicate that he had been joking with Sergeant Miller when he used the phrase "tell Skee he's fucked". T. 138

Corporal Burgess did in fact call in sick on June 1, 2006 anticipatorily with regard to June 2, 2006 at approximately 5:30 p.m. on June 1, 2006. T. 140 As a result of Corporal Burgess' failure to attend work on June 2, 2006 as assigned, Deputy Brian Stump from the patrol division was assigned to cover the post and work that day which decreased by one (1) deputy the deputies on duty for road patrol in Raleigh County. T. 140

Lieutenant Barley filed a formal complaint with the Sheriff based on the actions of Corporal Burgess, alleging gross insubordination and

conduct unbecoming of an officer and member of the department. T. 143 Chief of Detectives, Steven Tanner, conducted the internal investigation into the complaint filed by Lieutenant Barley because at the time he was one of two departmental members certified in internal investigations and in fact at that time was the primary investigator for internal affairs and internal investigations. T. 173 The investigation of Chief Detective Tanner substantiated the alleged actions of Corporal Burgess. T. 178

Sheriff Moore demoted Corporal Burgess as a result of his conduct because of the severity of his actions leading to breakdown of communications among the rank structures in the police department which is a military type organization. T. 233-234 Sheriff Moore elected to demote Corporal Burgess as the demotion carried less of a monetary punishment than a significant suspension without pay or than termination. T. 234 The demotion of Corporal Burgess was not permanent nor was there a prohibition from him seeking promotion at any time he would be eligible. T. 235 Sheriff Moore made a determination to demote based upon the effect on the rank structure within the department that the conduct of Deputy Burgess caused and the need to make it clear to Deputy Burgess and other members of the department that that nature of insubordination and misconduct could not be tolerated. T. 239

Deputy Burgess filed an Objection to the demotion. A hearing was held on September 19, 2006 before the Commission on Deputy Burgess'

Objection. Both sides were given the opportunity to present witnesses and cross-examine the same. By written Order, the Commission made substantial findings of fact and conclusions of law and sustained and affirmed the decision of the Sheriff in demoting Deputy Burgess.

On February 28, 2007, Deputy Burgess appealed the decision of the Civil Service Commission to the Circuit Court of Raleigh County, West Virginia. Pursuant to the briefing order of the Circuit Court, both sides were given the opportunity to present written arguments and authority for their positions on the issues on appeal. Additionally, the parties were allowed oral argument before the Circuit Court on June 4, 2007. The Circuit Court of Raleigh County, West Virginia denied the relief sought by Deputy Burgess and affirmed the decision of the Commission. It is from this order that Deputy Burgess now appeals.

STATEMENTS TO ALLEGED ERRORS

1. The Sheriff of Raleigh County had statutory authority pursuant to West Virginia Code § 7-14C-3(b) to discipline deputies by termination, suspension or demotion without a pre-disciplinary hearing. The actions of the Sheriff and the subsequent affirmations of the Civil Service Commission and the Circuit Court of Raleigh County were proper and within the requisites of the statute. Deputy Burgess was afforded a full hearing before both the Commission and the Circuit Court.
2. The Civil Service Commission properly affirmed the decision of the Sheriff based on substantial evidence of misconduct as found by the Commission as a result of extensive testimony.

POINTS AND AUTHORITIES CITED

Statutes:

West Virginia Code § 7-14-17

West Virginia Code § 7-14C-1

West Virginia Code § 7-14C-1(2)

West Virginia Code § 7-14C-3

West Virginia Code § 7-14C-3(b)

West Virginia Code § 8-14A-3(b)

Cases:

Alden v. Harpers Ferry Police Civil Service Commission, 209 W.Va. 83, 543 S.E.2d 364 (2001)

Appeal of Prezkop, 154 W.Va. 759, 179 S.E. 2d 331 (1971)

Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995)

Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985)

Davis Memorial Hospital v. W.Va. State Tax Comm'r, 2008 W.Va. LEXIS 74, 671 S.E.2d 682 (2008)

Johnson v. Ashley et al., 190 W.Va. 678 441 S.E.2d 399 (1994)

Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990)

Mangus v. Ashley, 199 W.Va. 651, 487 S.E.2d 309 (1997)

Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 503 S.E.2d 676 (1999)

Messer v. Hannah, 2008 LEXIS 56, 668 S.E. 2d 182 (2008)

State ex rel. Johnson v. Robinson, 162 W.Va. 579, 251 S.E.2d 505 (1979)

Swiger v. Civil Service Comm'r, 179 W.Va. 133, 365 S.E.2d 797 (1987)

ARGUMENT OF LAW

A. Standard of Review.

Final orders of the civil service commission are subject to defined review. Questions of law involving the interpretation of a statute are reviewed de novo. See Mangus v. Ashley, 199 W.Va. 651, 487 S.E.2d 309 (1997) citing Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). This Court has ruled that a final order of a deputy sheriffs' civil service commission based upon a finding of fact will not be reversed upon appeal unless it is clearly wrong or based upon a mistake of law. See Id., citing Appeal of Prezkop, 154 W.Va. 759, 179 S.E. 2d 331 (1971). Most recently, this Court has defined that standard by holding that an appellate court may reverse a decision of the civil service commission for deputy sheriffs as clearly wrong or arbitrary or capricious only if the commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the commission, or offered an explanation that was so implausible that it could not be ascribed to a difference in view or the product of commission expertise. See Messer v. Hannah, 2008 LEXIS 56, 668 S.E. 2d 182 (2008).

B. The Sheriff of Raleigh County had statutory authority pursuant to West Virginia Code § 7-14C-3(b) to discipline deputies by termination, suspension or demotion without a pre-disciplinary hearing.

Deputy Burgess argues in this appeal that the demotion ordered by the Sheriff is void because the Sheriff allegedly violated statutory procedure. Deputy Burgess takes the position that 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 any sanction. Such a hearing, however, is not required in all cases under the law.

Chapter 7, Article 14C of the West Virginia Code provides a statutory procedure for the investigation of a deputy sheriff in the state of West Virginia. The article encompasses any situation in which a deputy sheriff becomes the focus of inquiry regarding any matter which may result in discipline. See West Virginia Code § 7-14C-1(2). West Virginia Code § 7-14C-3 provides that if the investigation of a deputy sheriff results in the recommendation of some punitive action, then before taking action, the sheriff shall give the deputy notice that he is entitled to a hearing on the issues by a hearing board. The hearing board is made up of three members selected from deputy sheriffs with the agency or from another agency with the approval of the sheriff. See West Virginia Code § 7-14C-1.

The statute makes exception for serious punitive action. West Virginia Code § 7-14C-3 further provides in subsection (b) that 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.**” (emphasis added). Section seventeen, article fourteen of chapter seven requires a written statement of reasons be furnished to the deputy and a hearing before the civil service commission if demanded. The statute provides an aggrieved deputy with direct access to the civil service commission.

A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word, or part of a statute. See Davis Memorial Hospital v. W.Va. State Tax Comm’r, 2008 W.Va. LEXIS 74, 671 S.E.2d 682 (2008); Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 503 S.E.2d 676 (1999). This Court consistently recognizes that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning. See State ex rel. Johnson v. Robinson, 162 W.Va. 579, 251 S.E.2d 505 (1979). Therefore, the phrase in the statute at issue must be construed to furnish an exception to the requirement of a hearing board. The Legislature in forming the statute that provides for the hearing board clearly carves out

situations involving "discharge, suspension or reduction in rank or pay."¹ The language used in the statute is clear and subject to no ambiguity. The statute provides "**except**" in the event of discharge, suspension or demotion "**and**" that action has been taken, the source for review is before the civil service commission. Clearly, these terms make exception from the use of the hearing board and vest the sheriff with authority to issue such recommended punitive action without a pre-termination hearing.

In his appeal brief, Deputy Burgess makes the argument that the quoted language is applicable "only in cases where it was necessary for the Sheriff to take immediate disciplinary action against a Deputy." Appellant Brief, page 18. However, that qualifier is not located anywhere in the statute. If the Legislature intended to make the exception for only "immediate" or "emergency" situations, they would have written the statute to so specify and define those exact situations. No speculation is necessary. The statute is clear in defining or limiting the situations which involve the specific exception. Those situations include any action of dismissal, suspension or demotion.

Deputy Burgess further asserts that this case is an issue of first impression in the state of West Virginia. Granted, there are not many

¹ West Virginia Code § 7-14C-1 defines punitive action as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment." The exception provided in § 7-14C-3(b) does not allow the sheriff to take any of these actions without a pre-termination hearing. If the investigation results in a recommendation of reprimand or transfer, the sheriff would be required to give notice of the right to a hearing board.

cases that involve or analyze West Virginia Code § 7-14C-3(b), because the statute is clear in its language; however, the issue has been addressed. Of interest is the case of Johnson v. Ashley et al., 190 W.Va. 678 441 S.E.2d 399 (1994). In the Johnson case, Deputy Johnson was terminated for off-duty misconduct. He requested and was granted a hearing before the civil service commission, which was appealed to the Kanawha County Circuit Court and later the West Virginia Supreme Court of Appeals. In its opinion, the Supreme Court of Appeals notes that Deputy Johnson also asserted that his due process rights were violated when he was not given a pre-termination hearing. The issue had not been raised before the civil service commission or in the petition for appeal before the circuit court. The issue was first raised in the brief before the circuit court; however, the circuit court did not address the issue. The Supreme Court found that the Department conducted a constitutionally adequate pre-termination hearing. Deputy Johnson was called into the office and apprised of the complaint against him. He was given an opportunity to respond prior to his termination. Also, post-termination procedures, including a hearing before the Civil Service Commission, were provided pursuant to West Virginia Code § 7-14-17. See Johnson v. Ashley et al., 190 W.Va. 678 441 S.E.2d 399 (1994), citing Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985) and Swiger v. Civil Service Comm'r, 179 W.Va. 133, 365 S.E.2d 797 (1987).

In the present case, the Sheriff requested an investigation after a complaint was made based upon Deputy Burgess' unprofessional and damaging behavior. As a result of that investigation, the recommended punitive action was demotion.² Deputy Burgess was presented with a written statement of the action taken and the reasons therefore. He was given this information in a meeting with the Sheriff of Raleigh County and was afforded at that time an opportunity to respond to the allegations. Deputy Burgess requested and received a proper hearing before the civil service commission. Under the terms of West Virginia Code § 7-14C-3, Deputy Burgess was provided the procedural due process due to him under this statute.

Ignoring the findings made in the Johnson case, Deputy Burgess instead attempts to point this Court to a wholly inapplicable case. The Appellant seeks to make comparison to the case of Alden v. Harpers Ferry Police Civil Service Commission, 209 W.Va. 83, 543 S.E.2d 364 (2001). That case, however, involves Chapter 8, Article 14A of the West Virginia Code. The statutes of the two chapters are dissimilar in both their language and construction. The Alden case does address the need for a pre-disciplinary hearing; however, that case involves a municipal police officer subject to an entirely different procedure. West Virginia

² Sheriff Moore elected to demote Deputy Burgess rather than institute any other sanction because a demotion carried less of a monetary punishment than a significant suspension without pay or termination. The dollar value of the demotion was equivalent to \$100.00 per month. The demotion was not permanent and there was no prohibition from seeking promotion at any time he would be eligible for the same.

Code §8-14A-3(b) provides for a pre-disciplinary hearing unless there are exigent circumstances. The wording and therefore the application are clearly different.³ In fact, the parties involved, though both in law enforcement, are also vastly different. In reviewing the two chapters there are many differences in procedure. Only that procedure that applies to deputy sheriffs should be relevant in this review. Chapter 8 of the West Virginia Code is completely inapposite. As noted hereinabove, under the correct statutory scheme of Chapter 7, Articles 14 and 14C, the Sheriff of Raleigh County was authorized to take disciplinary action without the use of the deputys' hearing board in a case of demotion. Deputy Burgess was properly given a hearing before the Civil Service Commission and his rights were adequately protected. The language of the Legislature can not be ignored nor can it be interpreted where as here it is entirely clear and without ambiguity.

C. The Civil Service Commission properly affirmed the decision of the Sheriff of Raleigh County based on substantial evidence of misconduct.

West Virginia Code § 7-14-17 states that "[n]o deputy sheriff of any county subject to the provisions of this article may be removed,

³ It is important to note that the statutes of chapter 8, article 14A were enacted in 1982 and amended in 1997. The statutes of chapter 7, article 14C were enacted in 1995. If the Legislature intended both statutes to operate in the same manner, they could have written those statutes with the same language, or amended them to be identical. It must be presumed that the Legislature intended the difference in wording and therefore, application.

discharged, suspended or reduced in rank or pay except for just cause...". Just cause is defined as misconduct of a substantial nature directly affecting the rights and interests of the public. Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990).

The Sheriff has the authority to impose standards and discipline upon his deputies to ensure order and stability within the department for the benefit of the public with whom the employees of the Sheriff's department deal personally and protect professionally. The Sheriff of Raleigh County, West Virginia has issued certain rules and regulations governing the department. On May 1, 2004 the Sheriff issued Rules and Regulations Number 1-2 concerning the Standards of Conduct of all employees within the Sheriff's department. The Rules address disciplinary actions in section V. stating in subsection C, in pertinent part:

1. Disciplinary actions may include a warning, an oral or written reprimand, suspension with or without pay, reduction in pay, demotion or termination....
2. As appropriate, disciplinary or personnel action may be taken for any of the following reasons...
 - b. Insubordination, discourteous treatment of the public or a fellow employee, or an act of omission or commission of similar nature which discredits or injures the department and/or public...

3. Examples of behavior specifically prohibited...include:

- g. Use of unnecessary rude, profane or obscene language to any member of the department or to the public.

In subsection D, the Rules further address the standards of general conduct expected from employees of the department, stating in pertinent part:

1. Employees shall display respect for their supervisors, subordinates, and associates. The department expects all employees to display good and moral character in on- and off-duty contexts and to apply their judgment accordingly. When on duty and in the presence of the public, supervisors shall be addressed or referred to by rank.
2. Employees shall address their subordinates, associates, supervisors or members of the general public courteously and shall not use unnecessary abusive, violent, insulting or provoking language.

Obviously, the actions of all employees of the Sheriff's department reflect upon the Sheriff. The public looks to the Sheriff to provide honest and fair protection of the laws and public good through his employees and representatives.

The Sheriff not only provides guidelines for the proposed conduct of his employees, but also provides for the proposed discipline of his employees when those standards of conduct are not met or willfully violated. On June 15, 2004, the Sheriff of Raleigh County, West Virginia issued General Order Number 1-7 concerning the issue of employee discipline and dismissal. The Order sets forth certain penalties for discipline including demotion. Section IV, in subsection G states "[i]f the situation warrants, the sheriff may demote an employee..." and "[d]emotion shall be to the next lowest rank."

Unacceptable behavior is divided in three categories according to severity of misbehavior. Each category contains conduct at issue in the present case.

1. Category I
 - c. Abusive or obscene language.
2. Category II
 - a. Failure to follow supervisor's instructions, perform assigned work, or otherwise comply with policy.
 - d. Failure to report to work without proper notice to a supervisor.
3. Category III
 - d. Serious insubordination or breach of discipline.

t. Willful disobedience of a lawful command of a supervisor.

v. Taking any action which will impair the efficiency or reputation of the department, its members or employees.

For each category of unacceptable behavior, the order sets forth disciplinary measures as "normally results" from such offenses. In Section V., the Order states that supervisors shall begin employee discipline with the least punitive measures, except in the cases of gross breaches of discipline or moral turpitude. Therefore, it is clear in the order that such measures are tentative only and may be adjusted per severity of the facts.

In the facts of the present case, the Commission found, based upon the testimony presented at the hearing, that Deputy Burgess spoke in a heated tone to his immediate superior officer in telling Sergeant Miler that he should tell Lieutenant Barley "he's fucked." See Order Denying Deputy Burgess' Objection to Demotion in Rank, Finding of Fact #14 ("Corporal McCray and Deputy Stump testified that Corporal Burgess' tone of voice was angry, defiant, hurtful, and disrespectful when he told Sergeant Miller to "tell Skee he's f__d". T 55-56. The witnesses testified that there was no joviality in Corporal Burgess' tone when he made the statement to Sergeant Miller regarding Lieutenant Barley.") The Commission further found based upon the testimony that Deputy

Burgess failed to appear for work on his designated day despite the command of Lieutenant Barley to so appear. See Order Denying Deputy Burgess' Objection to Demotion in Rank, Findings of Fact #18 ("...In that conversation, Lieutenant Barley specifically directed Corporal Burgess to report to work on June 2, 2006...") and #20("Corporal Burgess in fact called in sick on June 1, 2006 anticipatorily with regard to June 2, 2006 at approximately 5:30 p.m. June 1, 2006.") Clearly, Deputy Burgess used profane and obscene language, a category I offense. Deputy Burgess failed to follow Lieutenant Barley's command and failed to appear for work, category II offenses. The totality of all the facts constitutes serious insubordination, a category III offense.

The conduct of Deputy Burgess was conduct unbecoming of an officer and member of the Sheriff's department. Disrespecting superior officers is an action which has a negative effect on the morale of other officers as well as the chain of command. The police organization maintains a military type structure. The rank configuration is structured to provide a configuration of order and authority. The profane statements made by Deputy Burgess were made in the presence of other officers to a superior officer.⁴ The conduct of Deputy Burgess led to a

⁴ The witness officers testified not only to the inappropriate nature of the statement but also their reluctance or refusal to employ such language, that Deputy Burgess characterizes in his brief as commonplace.

Deputy Stump testified:

Q: You testified that it was - it was uncomfortable, that you felt that it was trouble going on?

A: Yes, sir.

Q: Was it embarrassing?

breakdown of communications among the rank structure. Sheriff Moore made a determination to demote based upon the effect on the rank structure within the department, the conduct of Deputy Burgess and the problems it caused and the need to make it clear to Deputy Burgess and other members of the department that such a nature of insubordinate misconduct would not be tolerated.⁵ The rights and interests of the public are affected by the rank structure and respect for superior

A: It is to me.

Q: Why is that?

A: I guess just old school around authorities - authority. I mean, I would never say that to one of my supervisors in any way.

Q: Do you consider using that type of language to a supervisor disrespectful?

A: In that way, yes, sir.

Q: As a member of this force, do you consider using language in that fashion to be insubordinate towards the supervisor?

A: Absolutely in that scenario, sir.

Q: In that scenario that you viewed and you observed, did you consider that to be conduct unbecoming an officer?

A: Yes, sir.

Transcript of hearing pages 109-110.

Deputy McCray testified:

Q: Why did you feel uncomfortable?

A: I just - it wasn't a situation that I wanted to be a part of. I knew when it was said, it took Sergeant Miller by surprise. He wasn't expecting that. I don't think anybody was expecting that. It was just a uncomfortable situation, and we, you know, went back inside.

Q: Were they not expecting it because it was an inappropriate comment?

A: That's why I didn't expect it, yes, not that that word, I mean, you know, that - not the word itself, but just right then in the way that that word was used.

Q: The context of the situation?

A: And the person it was being used towards, I guess that's the context of the situation.

Q: Meaning it was corporal using that terminology to a sergeant with regard to a lieutenant?

A: That, and - I mean, I don't use that language. I never have and I never plan on doing that, and I don't want - I mean, that type of language always offends me; but, in that context, I guess it was more so.

Transcript of hearing, page 118.

⁵ There was no evidence presented to the Commission that Deputy Burgess had told Sergeant Miller or any other party on June 1 or anytime prior thereto that his wife had a scheduled doctor's appointment in Charleston on June 2. In fact, even when Sergeant Miller had a conversation with Deputy Burgess prior to May 26 concerning anticipated scheduling difficulties and manpower shortages, Deputy Burgess did not indicate that he was going to need time off in June due to his wife's pregnancy.

officers.⁶ The standards of conduct of the Sheriff's department rely upon and require that the deputies follow the orders of their superior officers. Failure to do so could potentially cause risk of harm to the members of the public. The law of the state of West Virginia does not require that a sheriff prove immediate danger to the public to establish misconduct directly affecting the rights and interests of the public. The law requires that the sheriff show that the wrongful conduct is "potentially damaging to the rights and interests of the public." See Mangum v. Lambert, *supra*. Insubordination leading to the breakdown of the chain of command clearly affects the interests of the public and poses a potential risk.

The Sheriff of Raleigh County was within his right to discipline Deputy Burgess for his actions. The Sheriff made a proper investigation of the complaint and made the determination that the conduct of Deputy Burgess constituted serious insubordination. The Sheriff determined that an incident of serious insubordination was cause for the imposition

⁶ Sheriff Moore in his testimony before the Commission testified that

"It has to do with what your department stands for, what you stand for, respect that you have of others, respect you have of your supervisors because, in this job, without it, somebody is going to get hurt."

Transcript at page 239, lines 19-22. He further testified that

"The rights of the public would come into effect, let's say we had a domestic. Myself and Deputy Burgess went to that call, and I gave him a order to subdue an individual, and the individual maybe felt like he was a threat to him and he told me "Heck no, I'm not going to do it." That individual commits a violent act against someone. Then we're all in trouble. That's how something of this nature affects the welfare of the public. When you cannot have people to obey orders, then you have a major problem." Transcript at page 242-243, lines 22-24 and lines 1-7, respectively.

of punitive discipline.⁷ Such action safeguarded department policies and procedures to ensure public safety. The Commission made significant findings of fact based upon the lengthy testimony of numerous witnesses.⁸ In light of the significant (and largely undisputed) evidence, the Commission found proper grounds to uphold the decision of the Sheriff.

Boiled to its essence, this case is actually about a deputy who disrespected the chain of command, an act detrimental to the proper functioning of a public safety department. His actions were offensive not only to the other deputies involved as parties and witnesses, but it was equally offensive to the system that the laws and regulations strive to maintain. Deputy Burgess argues that the Sheriff incorrectly punished him as if he had committed a Category III offense. In fact, the acts of insubordination of Deputy Burgess do constitute a Category III offense, properly disciplined by demotion.⁹ As noted above, even lower category offenses are subject to harsher punishment if the facts justify the same. It is essential to a functioning department that the command structure be maintained.

⁷ Again, Sheriff Moore elected to institute punishment that would have the least financial impact upon the Deputy's personal income. See footnote #2 hereinabove.

⁸ The testimony before the Civil Service Commission lasted for 2 days, the 11th and 19th of September, 2006. Seven witnesses testified at length and the transcript totaled 248 pages.

⁹ There were no mitigating facts with regard to the acts of misconduct and resulting discipline as Deputy Burgess neither apologized to any party for his actions nor attempted to explain the reasons for his actions or absence until the time of the hearing before the Commission.

Despite the argument of Deputy Burgess, there is no threat to the other deputies in the employ of the Sheriff of unfounded or retaliatory discipline on the part of the Sheriff or of inadequate review on the part of the Commission. The employees of the Sheriff's department are fully aware that gross insubordination is clearly defined by the Sheriff's rules and policies as conduct which will subject any party to discipline.¹⁰ The Rules and Regulations of the Sheriff serve an important purpose and must be upheld to maintain that purpose in the interest of all employees and the public in general. Discipline is necessary to preserve structure. Deputy Burgess was statutorily entitled to review of the discipline decision of the Sheriff before the Deputy Sheriffs' Civil Service Commission. The Commission held a lengthy hearing on the issues presented and took hours of testimony from both sides. The findings made by the Commission were supported by and based upon that testimony. The Commission used the standards of law set forth above and appropriately held that there existed ample evidence upon which to base the demotion. The decision of the Civil Service Commission is not clearly wrong. The Commission correctly applied the law of the state.¹¹ The Commission considered every aspect of the problem and offered a plausible explanation based upon the evidence before it. The

¹⁰ The witnesses testifying in the hearing before the Commission testified that they believed the misconduct of Deputy Burgess to be insubordinate and further believed that prior sheriffs holding office in Raleigh County would have undertaken similar action in disciplining the same.

¹¹ The Commission examined and applied both the statutory law as well as the relevant case law to the facts. See Order Denying Deputy Burgess' Objection to Demotion in Rank, Conclusions of Law 1-29.

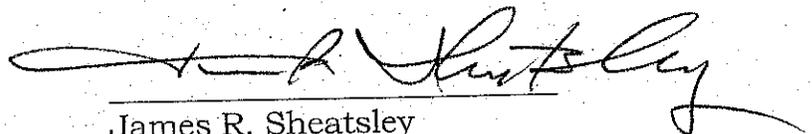
Commission made its review in accordance with the legal standards and there exists no basis to reverse that decision.

CONCLUSION

Wherefore, the Appellee/Respondent-Below, the Sheriff of Raleigh County, West Virginia, respectfully prays that the Honorable Court affirm the decision of the Raleigh County Deputy Sheriffs' Civil Service Commission which affirmed the decision of the Sheriff of Raleigh County, West Virginia and denied the objection of Deputy Burgess to his demotion in rank, as upheld by the Circuit Court of Raleigh County, West Virginia and dismiss this appeal of the Appellant.

SHERIFF DANNY MOORE

By Counsel:



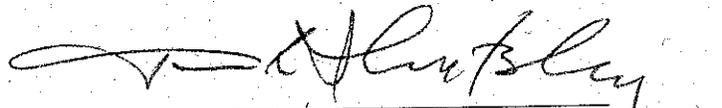
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CERTIFICATE OF SERVICE

I, James R. Sheatsley, counsel for Sheriff Daniel W. Moore hereby certify that service of the BRIEF OF APPELLEE has been made upon the following person(s) by mailing a true and exact copy thereof in a properly stamped and addressed envelope this the 22nd day of June, 2009.

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