

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN THE MATTER OF:

CORPORAL RANDY D. BURGESS' ANSWER AND OBJECTION TO
DEMOTION FROM RANK OF CORPORAL

AND

CORPORAL RANDY D. BURGESS' OBJECTION TO REFUSAL OF
RALEIGH COUNTY SHERIFF'S DEPARTMENT TO PROMOTE CORPORAL
BURGESS TO RANK OF SERGEANT

CIVIL ACTION NO. 07-AA-11-H

**ORDER AFFIRMING THE RULING OF THE RALEIGH COUNTY DEPUTY
SHERIFF'S CIVIL SERVICE COMMISSION AND
DENYING DEPUTY RANDY D. BURGESS' OBJECTIONS AND DENYING
PETITION FOR APPEAL**

This matter comes on before this Court pursuant to an Appeal and Objection filed by the Appellant Petitioner, Deputy Randy D. Burgess of the Action of the Raleigh County Deputy Sheriff Civil Service Commission wherein the said Commission affirmed the disciplinary action of Sheriff Danny Moore, which said disciplinary action reduced Randy D. Burgess from the rank of Corporal to the rank of Deputy. Said reduction in rank was accomplished on August the 3rd, 2006, when Sheriff Danny Moore provided to Deputy Burgess his "Notice of Demotion."

The parties in this case essentially agree on the salient facts and the Court having reviewed the Commission's Final "Order Denying Deputy Burgess' Objection to Demotion in Rank" adopts the findings of facts as set forth in Paragraphs 1 through 35.

In summary, the issues arising between Deputy Randy D. Burgess and the Sheriff grew out of an incident that occurred on or about May 30th, 2006. The Court Security Division commanded by Captain Charles Darlington and

administered by Lieutenant Mitchell P. "Skee" Barley, and the day-to-day administration of schedules was overseen by Sergeant James B. Miller.

A dispute arose when Deputy Burgess pursuant to the procedures adopted by the Court Security Division requested time off by e-mail which included "holiday time" and Deputy Burgess' requested time was to run from June 2nd, 2006 and for approximately 17 working days thereafter. His request for time off on June 2nd, 2006 as "holiday time" was not granted. An e-mail, as was the adopted procedure by the Court Security Division for notifying personnel of their schedule and assignments, was sent indicating to Deputy Burgess that his June 2nd request was denied. Thereafter, when reminded of the heavy court schedule on June 2nd, and that Deputy Burgess needed to be available, he, Deputy Burgess, objected and told Sergeant Miller that in effect he was not going to be there on June 2nd regardless of what the scheduled said.

Ultimately, the reason for Deputy Burgess' request for "holiday time" on June 2nd was for a medical appointment for his pregnant wife, which under normal circumstances would have been a bona fide reason to request the time. However, the record is abundantly clear that Deputy Burgess never communicated the medical appointment reason to Sergeant Miller, Lieutenant Barley or Captain Darlington. Instead, Deputy Burgess informed his superiors in graphic language that he would not be present and in fact called in sick on June 1st, anticipatorily for an absence on June 2nd. He did this without ever communicating to his superiors the basis for his request and his need to be absent on June 2nd. The Sheriff determined that his conduct was gross insubordination and conduct unbecoming a deputy in violation of the standards of conduct.

Distilled to its essence, the argument made by both Deputy Burgess and the Sheriff relate to an interpretation of the conduct of Deputy Burgess and whether that conduct regarded trivial or inconsequential matters or mere technical violations of statute or official duty without wrongful intention or

whether the conduct constituted misconduct of a substantial nature directly affecting the rights and interests of the public rather than a trivial or inconsequential or mere technical violation of statute or official duty without wrongful intention.¹

STANDARD OF REVIEW

The Johnson v. Ashley Case 441 S.E. 2nd 399 (1994) previously cited sets forth the standard of review, which is applicable in this case. Johnson v. Ashley found as follows:

“A Final Order of a Police Civil Service Commission based upon a finding of fact will not be reversed by a Circuit Court upon appeal unless it is clearly wrong or is based upon a mistake of law.” That Court went on to determine that “The principle issue on appeal is whether the Circuit Court erred in ruling that the Commission’s Final Order was clearly wrong.”²

The Petitioner herein, Deputy Burgess, alleges that Sheriff and subsequently the Raleigh County Deputy Sheriff Civil Service Commission erred as follows:

1. The Commission abused its discretion in affirming the Sheriff’s decision to demote Deputy Burgess in the absence of any evidence that Deputy Burgess had committed misconduct of a substantial nature directly affecting the rights and interests of the public.
2. The Sheriff violated Deputy Burgess’ statutory rights by failing to afford Deputy Burgess a hearing before an appropriate hearing board within 10 days of Deputy Burgess’ request for a hearing, requiring Deputy Burgess’ reinstatement to the rank of Corporal.

This appeal is an appeal of an Administrative Action, and as such, this Court believes that to prevail, the Petitioner Randy D. Burgess must show to this

¹ See State of West Virginia Ashley v. Civil Service Commission for Deputy Sheriffs of Kanawha County 395 S.E. 2nd 787 and Johnson v. Ashley 441 S.E. 2nd 399.

² See Johnson ¶ 681

Court and this Court must find in addition to the requirements as set forth in the previously referenced cases, that:

- a. The Sheriff's conduct and actions and the actions of the Commission are or were arbitrary, capricious, an abuse of discretion or not otherwise in conformance with law;
- b. Contrary to constitutional right, power, privilege or immunity;
- c. An excess of statutory jurisdiction authority or limitations or short of statutory right;
- d. Without observance of procedures required by law;
- e. Unsupported by substantial evidence;
- f. Unwarranted by the facts.

The case of Ashley v. Civil Service Commission 395 S.E. 2nd 787, makes it abundantly clear that "A Final Order of a police Civil Service Commission based upon a finding of fact will not be reversed by a Circuit Court upon appeal unless it is clearly wrong or is based upon a mistake of law.³

The Petitioner Randy Burgess in his appeal relies heavily upon Syllabus Point 2 of Mangum, Sheriff v. Lambert 394 S.E. 2nd 879, wherein the Supreme Court held at Syllabus Point 2, that "West Virginia Code Section 7-14-17 (1981) 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 wrongful intention."

In Syllabus Point 3 of the Mangum case, the Court had also clearly indicated "seriously wrongful conduct by a civil service employee can lead to dismissal even if it is not a technical violation of any statute. The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public."

³ See Ashley at Page 365, Syllabus Point 1.

The Raleigh County Deputy Sheriff Civil Service Commission heard the evidence in this matter and the Court has reviewed the entire 247 page transcript of that hearing. During the hearing, the Commission heard from seven witnesses, which said witnesses were subjected to direct and cross examination testimony. The witnesses questioned were Sergeant James Byrd Miller, Deputy Bobby Stump, Corporal Mark McCray, Lieutenant Mitchell Paul "Skee" Barley, Chief Deputy, Steve Tanner, Deputy Randy Burgess, and Danny Moore, Sheriff.

Based upon the entire record, the Raleigh County Civil Service Commission issued an Order consisting of 23 pages containing findings of fact and conclusions of law and the decision rendered by the Raleigh County Deputy Sheriff Civil Service Commission was signed by Stephen P. New, Chairman. The conclusion of said Order was for the Commission to unanimously sustain the action of the elected Sheriff and to confirm the demotion of Corporal Randy D. Burgess to the rank of Deputy.

The first specific complaint of Deputy Burgess is to challenge the Sheriff's and the Commission's finding that Deputy Burgess had committed misconduct of a substantial nature directly affecting the rights and interests of the public. Deputy Burgess argues that less punitive measures were available to the Sheriff in dealing with Burgess' alleged misconduct, however, the Sheriff contends that the conduct of Deputy Burgess amounted to a gross breach of discipline sufficient to justify the imposition of more harsh sanctions.

The essential question here relates to whether or not the Sheriff should have resorted to demotion as a method of discipline, as opposed to letters of reprimand, counseling and/or improvement periods.

Deputy Burgess would have the Commission and this Court find that the alleged misconduct was merely a technical issue related to the use of vacation and or "holiday time" and that the conflict between Deputy Burgess and his superiors did not arise to a level of substantial misconduct which would warrant the imposition of a demotion.

The case law is replete with statements by the West Virginia Supreme Court of Appeals that in these types of cases, the Law precludes and otherwise forbids reviewing judges from substituting their preferences regarding an outcome but require that the judge, rather than substituting his opinion as to how the case should be resolved, determine whether based upon a review of the entire record, there was substantial evidence to support that conclusion.

This Court having reviewed the entire transcript, having reviewed the Petitions, Replies and Memoranda provided **FINDS** that it cannot make a finding that the decision by the Sheriff of Raleigh County and subsequently the decision by the Raleigh County Deputy Sheriff's Civil Service Commission is not supported by substantial facts. The testimony of all the officers including Deputy Burgess clearly indicate that his handling of his dispute with regard to his days off was inappropriate, crude, public and wholly without justification.

A review of the record indicates that Deputy Burgess may well have had legitimate reasons for Sergeant Miller, Lieutenant Barley and Captain Darlington to review and reconsider his request for the time off that he had requested, however, Deputy Burgess did not do that. He essentially, in a public setting, loudly and disrespectfully indicated to his superiors that regardless of what their demands were, he we do as he chose, without attempting, in an appropriate manner, to resolve the conflict.

Deputy Burgess' outburst in a public setting and in direct defiance to his superior officers placed the entire Department in the position of appearing to not have control of its officers and employees on the one hand, or on the other, not being mindful of the needs of those same employees. In either case, the public confrontation had the unwanted benefit of placing the entire Department in question with regard to its administration, management and operation and clearly portrayed the Department in the view of the public in a very negative manner. The outburst also served to directly challenge, without using available avenues of appeal, the necessary command structure of the Department.

It is therefore the finding of this Court that there is substantial evidence upon which the Sheriff and the Raleigh County Deputy Sheriff Civil Service Commission could base their findings that the conduct of Deputy Burgess was in fact substantial misconduct and it did directly affect the rights and interests of the public, in that the confidence in the Sheriff's Department by the public was substantially damaged by Deputy Burgess' conduct and that the evidence further is more than sufficient for the Sheriff and the Raleigh County Deputy Sheriff Civil Service Commission to conclude that the conduct was not trivial or inconsequential.

The second objection filed by Deputy Burgess relates to West Virginia Code Section 7-14C-3(d). Essentially, Deputy Burgess contends that Sheriff Moore did not grant his request for a hearing board as contemplated under West Virginia Code Section 7-14-C-3. The above-referenced Code Section contemplates a hearing board of officers from the Department consisting of three members. One member to be appointed by the Sheriff and one to be appointed by the Deputy Sheriff's Association and those two members by mutual agreement should appoint the third member of the board, provided; in the event of the failure of those two members to agree on a third member, a list of four qualified candidates is required to be submitted to the Deputy Sheriff Civil Service Commission and the Commission would then appoint the third member from that list of four eligible candidates.

That Code specifically states in Section 5 that either the Sheriff or the Deputy may appeal any decision made by the hearing board to the Deputy Sheriff Civil Service Commission. In the present case, the Deputy was notified of the results of the investigation and of the proposed action by the Sheriff and the Deputy was given, according to the record, appropriate opportunity to reply to the Sheriff's findings and then he subsequently demanded a review. That review was done before the Raleigh County Deputy Sheriff Civil Service Commission and was conducted under West Virginia Code Section 7-14-17.

The Court **FINDS** in this matter that the Department conducted an adequate predetermination hearing, granting unto the officer the right to respond to the Sheriff's findings and proposed action. The Court further **FINDS** that that process essentially granted to Deputy Burgess the rights which he claims under West Virginia Code Section 7-14-C-3 and that the procedure used by the Sheriff of Raleigh County in this procedure was in fact constitutionally adequate.

Hereafter, the Court **FINDS** that the proceeding held before the Raleigh County Deputy Sheriff Civil Service Commission complied with the requirements of Code, specifically, West Virginia Code Section 7-14-1 et seq.

This Court **FINDS** as a matter of law that the decision made by the Raleigh County Deputy Sheriff Civil Service Commission was not clearly wrong and was not based upon a mistake of law. The Court further **FINDS** that as a matter of law, Deputy Sheriff Randy D. Burgess was afforded complete, sufficient and constitutionally adequate due process with regard to written findings, notice of the findings prior to the actual adverse employee action taken by the Sheriff, and that Deputy Burgess was given full and complete opportunity to challenge the Sheriff's conduct and decision and to have a full and complete evidentiary hearing on all matters pertinent to the case.

WHEREFORE, this Court **FINDS** and **RULES** that the Sheriff's conduct and actions and the actions of the Raleigh County Deputy Sheriff Civil Service Commission were **NOT**:

- a. Arbitrary, capricious and abuse of discretion or not otherwise in conformance with law;
- b. Contrary to constitutional right, power, privilege or immunity;
- c. An excess of statutory jurisdiction authority or limitations or short of statutory right;
- d. Without observance of procedures required by law;
- e. Unsupported by substantial evidence or;

f. Unwarranted by the facts.

The Court further concludes that the decision of the Raleigh County Deputy Sheriff Civil Service Commission was **NOT** clearly wrong or based upon a mistake of law. The Court concurs and **FINDS** that the conduct as found by the Raleigh County Deputy Sheriff Civil Service Commission was conduct of a substantial nature and that the conduct directly affected the rights and interest of the public.

WHEREFORE, it is the judgment of this Court that the decision of the Raleigh County Deputy Sheriff Civil Service Commission is hereby **AFFIRMED** and that this matter is **ORDERED DISMISSED** and **STRICKEN** from the **DOCKET**.

ENTER:



John A. Hutchison, Judge

3-21-08

Remove from docket
BY Clerk of Court

The foregoing is a true copy of an order
entered in this office on the 21 day
of March 2008
JANICE B. DAVIS, Clerk of Court
Raleigh County, West Virginia
By: 