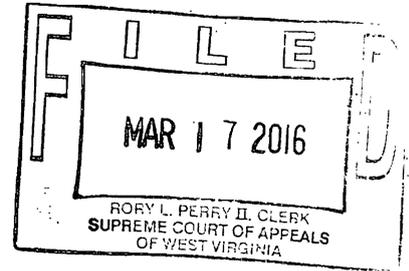


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 15-1213

(Logan County Circuit Court Civil Action No. 13-C-165)



**SONYA PORTER,
SHERIFF OF LOGAN COUNTY, WEST VIRGINIA,
RESPONDENT BELOW, PETITIONER**

VS.

**JAMES H. BROWN III,
PETITIONER BELOW, RESPONDENT**

OPENING BRIEF OF

SONYA PORTER, SHERIFF OF LOGAN COUNTY

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ASSIGNMENTS OF ERROR

I. The Circuit Court committed error when it held that Deputy Brown was entitled to a hearing before the Deputy Sheriffs' Civil Service Commission to challenge his continued placement on paid administrative leave while being investigated for official misconduct.

II. The Circuit Court committed error when it adopted findings, made by the Civil Service Commission, in support of the ultimate determination to award attorneys' fees against the Sheriff.

III. The Civil Service Commission Final Order imposed requirements upon the Sheriff beyond the authority of the Civil Service Commission, interfering with the lawful authority and discretion of the Sheriff to investigate allegations of misconduct by her Deputy. The Circuit Court committed error by apparently adopting and incorporating those erroneous procedures in its own Final Order.

IV. There is no statutory or other basis for an award of attorneys' fees in favor of Deputy Brown.

STATEMENT OF THE CASE

The Final Order entered by the Circuit Court of Logan County is the culmination of several proceedings in both the Logan County Deputy Sheriffs' Civil Service Commission ("Civil Service Commission") and the Circuit Court. Logan County Sheriff W. E. Hunter ("Sheriff Hunter")¹ was informed of allegations of misconduct against Logan County Deputy Sheriff James Brown ("Deputy Brown") and the Sheriff decided, based upon the nature of the allegations, to place Deputy Brown on paid administrative leave while the matters were

¹ Sheriff Hunter's term of office expired on December 31, 2012 and Sonya Porter ("Sheriff Porter") became Sheriff on January 1, 2013.

investigated pursuant to the statutory requirements of West Virginia Code §7-14C-1 through 5. Sheriff Hunter provided written notice to Deputy Brown that he was being placed on leave for investigative purposes on November 9, 2012. Appendix (“R. __”) R009. During the investigation of the original complaints, other allegations surfaced which required additional investigation. R055-58.

On April 26, 2013, Deputy Brown filed a motion for immediate “reinstatement” with the Civil Service Commission. R011. The Sheriff responded to the motion on May 3, 2013 noting that the Civil Service Commission lacked jurisdiction over the complaint and had no authority to grant Deputy Brown the relief he requested. R018. Deputy Brown made additional demands for a hearing but the Civil Service Commission neither granted relief, nor ruled on, either the motion or Sheriff Porter’s objection.

Deputy Brown filed his petition for Writ of Mandamus against the Civil Service Commission and Sheriff Porter in the Circuit Court on June 27, 2013 and a Rule to Show Cause was issued by the Court. R028. Deputy Brown sought a writ of compelling the Civil Service Commission to conduct a hearing on his request for immediate reinstatement and a writ compelling the Sheriff to conclude the internal investigation of Deputy Brown. The Sheriff moved to dismiss the Petition. R032. The matter came on for hearing on January 27, 2014. The Civil Service Commission failed to appear in response to the Rule to Show Cause while the Sheriff appeared and argued her motion to dismiss for lack of jurisdiction. R131.

On February 10, 2014, the court entered an Order overruling the Sheriff’s jurisdiction argument and remanded the case to the Civil Service Commission to “make a determination of the issues contained in the Petitioner’s Petition for Reinstatement . . . and further make a determination of whether the actions of the Sheriff, placing the Petitioner on paid administrative

leave and restricting his daytime movements constitute a “suspension” or punishment triggering the requirements of either 7-14-1 *et seq.* and or 7-14C-1 *et seq.*, and if so, the appropriate remedy to correct the violation . . .” R049-50. The Civil Service Commission conducted an investigatory hearing on April 4, 2014 and entered an Order on June 19, 2014, R054, directing the Sheriff to immediately reinstate Deputy Brown and directed Deputy Brown to submit documentation in support of his claim for attorneys’ fees.²

The President of Civil Service Commission, acting unilaterally, without any hearing on the motion for fees, directed the County Commission of Logan County to pay Deputy Brown’s counsel the sum of \$10,757.48. Neither the Sheriff, her counsel, Deputy Brown’s counsel nor the other Commissioners were copied on the “award.” The Sheriff learned that the County Commission paid the award only after Deputy Brown filed an appeal with the Circuit Court seeking additional compensation for fees and costs. R161-62.

Deputy Brown’s appeal of the fee award was dismissed for lack of a final appealable Order and was remanded to the Civil Service Commission for entry of a final order which was entered on September 21, 2015.³ Before the statutory appeal period expired the Circuit Court adopted the findings of the Civil Service Commission into its own final order entered November 19, 2015, effectively precluding the Sheriff from appealing any of the findings to the Circuit Court.

Sheriff Porter filed her timely Notice of Appeal with this Court on December 17, 2015.

² The Civil Service Commission order provided a remedy to Deputy Brown without deciding the underlying legal questions posed by the Circuit Court in its Order of remand.

³ Deputy Brown objected to this Order being included in the record provided to the court. Deputy Brown appealed that order to the Circuit Court of Logan County and it is assigned Case No.: 15-AA-2-W.

SUMMARY OF ARGUMENT

The Writ was improperly issued because Deputy Brown did not and could not establish that the Civil Service Commission owed him a non-discretionary duty to grant him relief and Deputy Brown had an adequate remedy at law. The Civil Service Commission has no jurisdiction over internal investigative matters arising under West Virginia Code §§7-14C-1 through 5. The Civil Service Commission has only appellate jurisdiction over issues decided by a Hearing Board. West Virginia Code §7-14C-5. The Civil Service Commission also has investigative authority limited to matters arising under Article 14 of Chapter 7. The Circuit Court's Order directed the Civil Service Commission to act beyond its statutory authority.

Deputy Brown's remedy at law arises under both Articles; he is entitled to a pre-disciplinary hearing if he is subjected to disciplinary action pursuant to West Virginia Code §7-14C-3 and he is entitled to appellate review of any disciplinary action imposed pursuant to West Virginia Code §7-14C-5. *See generally, Burgess v. Moore*, 224 W. Va. 291, 685 S.E.2d 685 (2009); *Alden v. Harpers Ferry Police Civil Service Commission*, 209 W.Va. 83, 543 S.E.2d 364 (2001). If Deputy Brown were, in fact, suspended without good cause, he would be entitled to back pay and other legal relief. West Virginia Code §7-14-17.

Finally, the Circuit Court granted fees and costs against the Sheriff related to the Circuit Court mandamus action even though no writ was issued against the Sheriff. The Court did not identify its reasoning or the authority for its award of fees and costs in its' Final Order. Deputy Brown clearly prevailed against the Civil Service Commission but obtained no relief against the Sheriff by virtue of the writ of mandamus. Any award of attorneys' fees against the Sheriff is not justified for the failure of the Civil Service Commission to act. At best, the Circuit Court's

fee award punishes the Sheriff for contesting the jurisdiction of both the Civil Service Commission and the Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Sheriff suggests that this appeal is appropriate for Rule 20 Argument and the issuance of syllabus points to resolve issues of first impression; such as whether administrative leave with pay during an internal investigation of allegations of misconduct by a civil service Deputy Sheriff constitutes disciplinary action under either West Virginia Code § 7-14C-1 or West Virginia Code §7-14-17; whether a Civil Service Commission has any jurisdiction over internal investigations conducted in compliance with West Virginia Code § 7-14C-1 *et seq.*; whether attorneys' fees are available against a Civil Service Commission for its failure to rule on a motion filed with the Commission; and whether a Sheriff is exposed to attorneys' fees for contesting the jurisdiction of the Civil Service Commission or the Circuit Court when both bodies exceeded their statutory jurisdiction.

ARGUMENT

I. The Circuit Court committed error when it held that Deputy Brown was entitled to a hearing before the Deputy Sheriffs' Civil Service Commission to challenge his continued placement on paid administrative leave while being investigated for official misconduct.

The Legislature has established two separate and distinct mechanisms for the discipline of Deputy Sheriffs, but only one mechanism for the investigation⁴ of Deputy Sheriffs. Deputy Brown, the Civil Service Commission and the Circuit Court have disregarded those distinctions and created an unmanageable quagmire which resulted in much confusion, delay and expense to

⁴ This case does not implicate the situation where a Deputy is under criminal investigation, only internal, administrative investigation for violations of Departmental Rules, Policies and standards.

the both the Sheriff and the Deputy Sheriff. The investigation and discipline of a Deputy Sheriff involves several statutory steps to be completed in sequence. When the steps are taken out of sequence the process fails.

A. The investigative process

The procedures for the investigation of complaints against Deputy Sheriff is found at Article 14C of Chapter 7 of the Code of West Virginia and is titled “Deputy Sheriffs; Procedure For Investigation.” An internal investigation necessarily begins with a complaint of misconduct against one or more Deputy Sheriffs. The complaint may originate internally within the Department or by citizen complaint. Once the Complaint is received it would normally be directed to the Sheriff to determine how to proceed. Assuming that the Complaint of misconduct was not directly witnessed by the Sheriff, the Sheriff would normally assign the complaint to a member of his Department to investigate and make a determination of the validity of the accusation.

In many investigations it is appropriate to interview witnesses, take statements, potentially conduct surveillance, obtain and review records and other documentary evidence before conducting an interview or interrogation of the involved Deputy. If the Sheriff’s investigator wishes to interview the Deputy Sheriff, the Deputy is entitled to be informed of the nature of the investigation before being interviewed. West Virginia Code §7-14C-2(b). The statute does not require for any notice of investigation unless and until the Deputy is subject to interrogation.

At the conclusion of the investigation, the investigating officer will ordinarily report his findings to the Sheriff. “If the investigation or interrogation of a deputy sheriff results in the recommendation of some punitive action, 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 a hearing board.” West Virginia Code § 7-14C-3(a).

B. The disciplinary process

If the internal investigation substantiates an allegation of misconduct, the Sheriff may decide that discipline is warranted and issue a statement of administrative charges along with notice of the Deputy’s due process hearing rights. West Virginia Code §7-14C-3(a). The accused Deputy is then entitled to a hearing before a Hearing Board normally made up of three Deputy Sheriffs from his own Department. The Hearing Board is required to make findings which are binding on both the Deputy and the Sheriff.

C. The appeal process

After a Hearing Board imposes discipline upon a Deputy Sheriff the Deputy has a right to appeal that disciplinary action to the Civil Service Commission. West Virginia Code §7-14C-5; West Virginia Code §§7-14-17. Likewise, a Sheriff may appeal an adverse decision to the Civil Service Commission. In either event, the decision of the Civil Service Commission is subject to judicial review, initially in the Circuit Court on the Civil Service record below and ultimately to this court.

D. Deputy Brown was subjected to punitive action when he filed his Petition with the Civil Service Commission or the Court.

The controlling statutory process for the investigation of a Deputy Sheriff was followed by the Sheriff in all respects. At the time Deputy Brown filed his Complaint with the Civil Service Commission, and also at the time he filed his Petition for Writ of Mandamus, Deputy Brown was under investigation pursuant to West Virginia Code §7-14C-2. R134, line 20. Deputy Brown was not, however, “accused of any misconduct by the Sheriff. *See, Brown v. City*

of Montgomery, 233 W.Va. 119, 755 S.E.2d 653 (2014); West Virginia Code §7-14C-3(a) (“If the investigation or interrogation of a deputy sheriff results in the recommendation of some punitive action, 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 a hearing board.”)(emphasis added). “The language of W.Va.Code, 7-14-17(a), relates to disciplinary proceedings initiated against deputy sheriffs. This is quite evident when the entire text of W.Va.Code, 7-14-17(a) is read. Historically, in matters of statutory construction, we have held that the complete text of a statute should be considered in order to determine its meaning.” *Darlington v. Mangum*, 192 W.Va. 112, 114, 450 S.E.2d 809, 811 (1994). For this reason, Deputy Brown was not entitled to the civil service hearing he requested.

After the Circuit Court action was filed the Sheriff issued a detailed statement of charges against Deputy Brown before the date of the first hearing, January 27, 2014. R123, ¶13. The filing and service of the Sheriff’s statement of charges against Deputy Brown was not related to the Circuit Court action, but was the culmination of the numerous investigations. R156-57. Deputy Brown remained on paid status until the Hearing Board made its findings of fact and ultimate ruling.

Deputy Brown uses the terms “suspension” and “removal” interchangeably but they are very different concepts. Neither of those terms was applicable to Deputy Brown at the time his Petitions were filed however. The Sheriff suggests that the terms “removal”, “discharge”, and “suspension” are separate and independent terms of art reflecting different adverse employment actions for which the Code prescribes a hearing process.

Administrative leave with pay during an internal investigation does not constitute removal from office pursuant to West Virginia Code §7-14-17 nor does it constitute a

disciplinary suspension subject to West Virginia Code 7-14C-3 or §7-14-17. To the contrary, “removal from office” is the permanent and final removal from the payroll by competent authority. *See, e.g., Hall v. Protan*, 158 W.Va. 276, 210 S.E.2d 475 (1974). A Deputy Sheriff is subject to removal, instead of termination, for violation of West Virginia Code §7-14-15 which provides: “Any deputy sheriff violating the provisions of this section **shall have his appointment vacated and he shall be removed**, in accordance with the pertinent provisions of this section.” *Id.* at §7-14-15(d)(emphasis added). Further:

(e) Any three residents of the county may file their written petition with the thereof setting out therein the grounds upon which a deputy sheriff of such county should be **removed** for a violation of subsection (a) of this section. . . . If such answer is filed within the time stated, or any extension thereof for cause which in the discretion of the may be granted, the accused deputy may demand within such period a public hearing on the charges, or the may, in its discretion and without demand therefor, set a date and time for a public hearing on the charges, which hearing shall be within thirty days of the filing of said answer,. . . . In the event the charges are sustained in whole or in part, the order shall also declare the appointment of such deputy to be vacated and thereupon the sheriff shall immediately **remove the deputy from his office** and from the payroll of the county. Notice of the action of the commission shall be given by registered letter to the county court and the sheriff. If the sheriff fails to immediately comply with the order of the commission, he shall be punished for contempt, upon application of the commission to the circuit court of the county.

Id. at §7-14-15(e). An appeal from the “removal” ruling mirrors the manner and time specified for hearings conducted pursuant to West Virginia Code §7-14-17. *Id.* at §7-14-15(f).

Discharge does not expose a Deputy Sheriff to having his original appointment vacated as required if removed. If a Deputy’s appointment is vacated, it is void *ab initio* and has more significant consequences than dismissal alone. *See, Martin v. Pugh*, 175 W. Va. 495, 334 S.E.2d 633(1985)(civil service fireman with void appointment was never legally a fireman and not entitled to any benefits for the years worked); West Virginia Code §5-10-49 (pension plan member “removed” or having appointment “vacated” is forever barred from participation in the

pension plan or receiving any benefit other than refund of contributions). A Deputy Sheriff terminated from employment who is otherwise qualified to receive a pension by credited service is entitled to earned pension benefit unless discharged for “less than honorable service.”

Deputy Brown also takes the position that paid administrative leave constituted a suspension for purposes of West Virginia Code §7-14-17 and 7-14C-3. Sheriff Porter suggests the term “suspension” is so well understood that it was not necessary for the Legislature to define it. Suspension as commonly understood, at least within the law enforcement community, as an unpaid temporary prohibition from working imposed for disciplinary purposes. This understanding is consistent with the Rules of the West Virginia Division of Personnel which defines “suspension” as a “[d]isciplinary action taken by an agency to temporarily relieve an employee of his or her duties and place the employee in unpaid status. 142 WVCSR § 1.3.83.

E. The Civil Service Commission had no authority to grant Deputy Brown any relief.

The Commission's duties, rights, and responsibilities are statutorily-granted, and it has only those powers that are conferred by statute; it has no inherent jurisdiction. *Pugh v. Policemen's Civil Serv. Comm'n*, 214 W.Va. 498, 590 S.E.2d 691 (2003); *City of Huntington v. Lombardo*, 149 W.Va. 671, 143 S.E.2d 535, (1965); *Bays v. Police Civil Serv. Comm'n*, 178 W. Va. 756, 364 S.E.2d 547 (1987).

In *Darlington v. Mangum*, 192 W.Va. 112, 114, 450 S.E.2d 809, 811 (1994) this Court explained that West Virginia Code §7-14-17 (1976) related only to disciplinary proceedings instituted against Deputy Sheriffs. *See also, Boggess v. City of Charleston, Va. Mun. Corp.*, 234 W.Va. 366, 765 S.E.2d 255 (2014)(applying municipal fire civil service law). Deputy Brown had not been accused of any violation or disciplined and was therefore not entitled to be “reinstated” or entitled to a hearing on his request.

The Civil Service Commission should have denied Deputy Brown's motion for lack of jurisdiction and the Circuit Court should have done the same. Because the Civil Service Commission and the Circuit Court were without jurisdiction over the subject matter all of their rulings must be vacated and the award of fees and costs overturned.

F. The Circuit Court committed error by compelling a hearing before the Civil Service Commission.

The Circuit Court granted Deputy Brown's Petition and issued the writ, styled "Order," compelling the Civil Service Commission to hold a hearing on Deputy Brown's Petition for immediate reinstatement. The issuance of the writ was clearly erroneous because Deputy Brown did not have a clear legal right to the relief he sought; the Civil Service Commission did not owe Deputy Brown a legal duty to convene the hearing⁵ that he sought to compel; and he had another adequate remedy at law. Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

The Writ was improperly issued because Deputy Brown did not and could not establish that the Civil Service Commission owed him a non-discretionary duty to grant him relief and Deputy Brown had an adequate remedy at law. The Civil Service Commission has no jurisdiction over internal investigative matters arising under West Virginia Code §§7-14C-1 through 5. The Civil Service Commission has only appellate jurisdiction over issues decided by a Hearing Board. West Virginia Code §7-14C-5. The Circuit Court erroneously believed that the Civil Service Commission had the jurisdiction under its authority to investigate almost all Deputy Sheriff's matters. R0143. This statutory authority is limited to matters arising under Article 14, not 14C, of Chapter 7. The Civil Service Commission has no authority to investigate whether the Sheriff was complying with Article 14C; only whether Deputy Brown was being

⁵ The Sheriff does not dispute that the Civil Service has the authority to convene a hearing to determine its own jurisdiction, but no authority to grant the relief sought.

deprived of his Article 14 rights. The Circuit Court's Order directed the Civil Service Commission to act beyond its statutory authority.

Deputy Brown's remedy at law arises under both Article 14 and Article 14C; he is entitled to a pre-disciplinary hearing if he is subjected to disciplinary action pursuant to West Virginia Code §7-14C-3 and he is entitled to appellate review of any disciplinary action imposed pursuant to West Virginia Code §7-14C-5. *See generally, Burgess v. Moore*, 224 W. Va. 291, 685 S.E.2d 685 (2009); *Alden v. Harpers Ferry Police Civil Service Commission*, 209 W.Va. 83, 543 S.E.2d 364 (2001). If Deputy Brown were, in fact, suspended without good cause, he would be entitled to back pay and other legal relief. West Virginia Code §7-14-17.

Finally, the Circuit Court granted fees and costs against the Sheriff related to the Circuit Court mandamus action even though no writ was issued against the Sheriff. The Court did not identify its reasoning or the authority for its award of fees and costs in its Final Order. Any award of attorneys' fees against the Sheriff is not justified for the failure of the Civil Service Commission to act. At best, the Circuit Court punished the Sheriff for contesting the jurisdiction of both the Civil Service Commission and the Court.

Moreover, the Circuit Court does not identify any precedent or statutory basis for the awarding of fees against the Sheriff. The Court noted that it determined that an award of fees and costs was appropriate in a hearing held July 16, 2015. During that hearing the Court directed Deputy Brown's counsel to submit billing statements broken down to show Brown's perception of which party should pay which portion of the fees and costs but noted that it had not yet made any determination as to who should bear which, if any, fees and costs. R158.

In summary, the Sheriff asserts that the Civil Service Commission should have considered its own jurisdiction and denied any and all relief to Deputy Brown based upon the

lack of jurisdiction and the prematurity of his request for relief. The Civil Service had no subject matter jurisdiction over the dispute and the Circuit Court did not have jurisdiction to compel the Civil Service Commission to act beyond its jurisdiction. Without any jurisdiction to grant relief, there was no jurisdiction to award fees and costs.

Rather than decide the purely legal issue of whether paid administrative leave constituted a disciplinary event triggering relief under Article 14 or 14C, which was squarely before the Court in the first instance, the Circuit Court sent the Sheriff and Deputy Brown to the Civil Service Commission to resolve a purely legal issue beyond its authority. The Court should have decided the legal issue and granted the Sheriff's motion to dismiss.

II. The Circuit Court committed error when it adopted findings, made by the Civil Service Commission, in support of the ultimate determination to award attorneys' fees against the Sheriff.

The Civil Service Commission was without jurisdiction over Deputy Brow's petition generally. Beyond that, the Civil Service Commission made certain and specific *ultra vires* rulings which are adopted/approved by the Circuit Court in its Final Order. The Court acknowledged that the Final Order of the Civil Service Commission was a matter or record in its Final Order. R123 at ¶15.

The Circuit Court relied upon the Civil Service Commission's finding that a Deputy Sheriff placed on administrative leave must be given notice of each allegation against him without delay. In addition, the Circuit Court relied upon the decision of the Civil Service Commission to reinstate Deputy Brown during the investigation. *Id.* The Court also relied upon the Civil Service Commission ruling granting attorneys' fees and cost to Deputy Brown. *Id.*, at ¶16.

Not only are the rulings of the Civil Service Commission beyond its jurisdiction, they are contrary to the statute and impermissibly interfere in the Sheriff's investigative authority and discretion. The Civil Service Commission ordered a problem Deputy to active service, among the public despite the Sheriff's judgment that Deputy Brown should not be working during the investigation.

The Circuit Court committed clear legal error by failing to give the Sheriff her right to appeal the Civil Service Commission decision and object to the substance of the Civil Service Commission decision and its award of attorney's fees. West Virginia Code §7-14-17(b) provides the Sheriff a ninety day period to appeal an adverse civil service decision. The Circuit Court incorporated the Civil Service Commission's September 21, 2015 Final Order⁶ in its own Final Order entered November 19, 2015; more than a month before Sheriff Porter's appeal period expired. The Court's Final Order is procedurally wrong due to the denial of statutory due process to the Sheriff; it is substantively wrong in that it impliedly approved of all of the Civil Service Commission's substantive legal errors.

As discussed in the next section, a number of the Civil Service Commission's determinations were incorrect as a matter of law and interfered with the lawful authority and discretion of the Sheriff. By adopting and incorporating the Civil Service Commission findings in its Final Order without providing the Sheriff her statutory right to appeal the Civil Service Commission's Final Order to the Circuit Court, the Court effectively made those finding the law of this case. The Court compounded the Civil Service Commission's errors and set standards for investigation and disciplinary process which are not required or contemplated by controlling law in its Final Order.

⁶ The Civil Service Commission's Order of June 19, 2014, R054, was not an appealable Final Order. R079. It was not appealable until the Civil Service Commission entered its appealable order on September 21, 2015.

III. The Civil Service Commission Final Order imposed requirements upon the Sheriff beyond the authority of the Civil Service Commission; interfering with the lawful authority and discretion of the Sheriff to investigate allegations of misconduct by her Deputy. The Circuit Court committed error by apparently adopting and incorporating those erroneous procedures and findings in its own Final Order.

Article 14C requires for notice only upon a determination that the Deputy will be subject to interrogation and a notice of the right to a Hearing Board with statement of charges if disciplinary proceedings are instituted. The Civil Service Commission has no inherent power to require this Sheriff to provide any notice other than that required by law. Moreover, premature notice of a matter to be investigated may compromise any investigation; administrative or criminal. Requiring notice before an interrogation preserves the investigative process while also protecting the due process rights of the Deputy Sheriff.

The Civil Service Commission also ruled that: “The controlling statute does not place any time limitations on how long an investigation shall last, but this board shall.” R160, ¶8. The Civil Service Commission also determined that the Sheriff was required to prosecute each violation when the investigation of that specific violation was concluded instead of exercising her discretion by completing the investigation of all allegations, interviewing Deputy Brown once instead of exposing him to multiple interrogations, and deciding to hold one hearing instead of the seven or eight hearings that would have been required to meet the Civil Service Commission new and novel standards. R061, ¶¶ 10,11. Based upon all of the above, the Civil Service Commission directed the Sheriff to immediately return Deputy Brown to full duties. R065, ¶5.

IV. There is no statutory or other basis for an award of attorneys’ fees in favor of Deputy Brown.

West Virginia Code §53-1-8 authorizes the Court to grant writs of mandamus, with or without costs, as the judge may determine. The Circuit Court entered an Order which is the functional equivalent of a writ of mandamus against the Civil Service Commission directing it to hold a hearing on Deputy Brown's grievance. No such writ was awarded against the Sheriff.

To the extent that Deputy Brown is entitled to reimbursement of attorneys' fees and costs, it should be borne by the Civil Service Commission and not the Sheriff. Any other result would penalize the Sheriff for making a good faith, and legally sustainable, challenge to the jurisdiction of the Civil Service Commission to afford any relief to Deputy Brown. The chilling impact of such an award for a good faith challenge in a time of shrinking fiscal resources and tight public budgets could easily cause Sheriffs and other public officers to forego legitimate challenges to improper assertions of jurisdiction for fear of the assessment of fees and costs.

The only other statutory basis to award fees and costs against the Sheriff is West Virginia Code § 7-14-17(a) if a disciplined Deputy Sheriff is reinstated or exonerated after an evidentiary hearing. Deputy Brown was not removed, discharged or suspended; he was not charged with any disciplinary offenses during the relevant time frame; there had been no pre-disciplinary hearing before the Article 14C Hearing Board and there had been no evidentiary hearing and no evidentiary hearing or final determination as to disciplinary charges by the Civil Service Commission. Code §7-14-17(a) provides no basis for an award of fees.

"There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. pt. 3, *Sally-Mike Props. v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986). The Circuit Court made no finding of misconduct which might justify an award of fees against the Sheriff.

The Circuit Court's Final Order is devoid of any citation to authority to award fees against the Sheriff. The only reference is found at Paragraph 17 of the Final Order which recites that the Court determined that fees and costs were appropriate at the July 16, 2015 hearing. At the hearing, though, the Judge asked Deputy Brown's counsel to submit a new billing statement indicating what fees and costs he believed were chargeable to the Sheriff and what would be chargeable against the County Commission. The court continued to be undecided on the issue at that date. R0158.

CONCLUSION

The Sheriff of Logan County, for the reasons discussed above, respectfully requests that this Court reverse the decisions of the Circuit Court of Logan County and order the Circuit Court to dismiss Deputy Brown's Petition, with prejudice, and enters final judgment in favor of Sheriff Porter. Sheriff Porter further requests that this Court decide, as a matter of law, that paid administrative leave during the course of an internal investigation does not constitute a punitive action under either West Virginia Code §7-14-17 or West Virginia Code §§7-14C-1 through 5. In addition, Sheriff Porter asks this Court to hold that the Civil Service Commission has no jurisdiction over the Sheriff's investigative activities conducted pursuant to West Virginia Code §§7-14C-1 *et seq.* and that the Civil Service Commission's jurisdiction does not extend to Chapter 7 Article 14C matters at all.

SONYA M. PORTER, Sheriff of Logan County
By SPILMAN THOMAS & BATTLE, PLLC



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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**SONYA M. PORTER,
Sheriff of Logan County
Respondent below
Petitioner,**

**Appeal from decision of the
Circuit Court of Logan County
Case No.: 13-C-165**

v.

**JAMES H. BROWN. III
Petitioner
Respondent.**

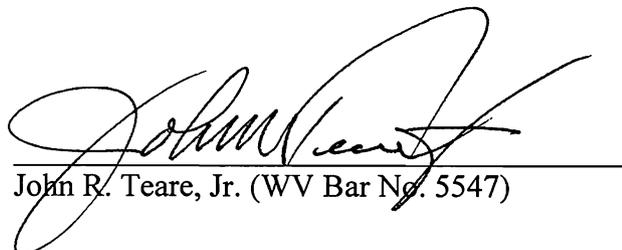
CERTIFICATE OF SERVICE

I, John R. Teare, Jr., do hereby certify that on this 17th day of March, 2015, I served the foregoing "Opening Brief of Sonya Porter, Sheriff of Logan County" upon the following by depositing the same in the United States mail, postage prepaid, addressed as follows:

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Steven S. Wolfe, President
Jason Freeman, Member
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In care of
John A. Turner, Clerk of the
Logan County Civil Service Commission
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Logan County Courthouse
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