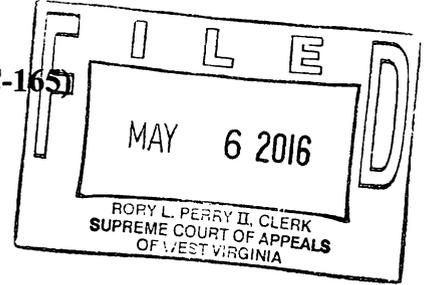


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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**

REPLY BRIEF OF

SONYA PORTER, SHERIFF OF LOGAN COUNTY

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SUMMARY OF REPLY

As discussed below, Respondent and Petitioner below, Deputy Brown¹ advances several issues in his Response Brief (“Response”) that are not supported by, and are contrary to, the record in this case. Deputy Brown states that he filed this action to determine the reasons for his “suspension”; that the Circuit Court found that the Sheriff would have done nothing to advance the investigations into Deputy Brown’s misconduct allegations; and suggested that the Sheriff moved to recuse Judge Perry from this case because he made a ruling adverse to the Sheriff.

To the merits of the appeal, the Sheriff contends now, and has at every step of this action, that the Logan County Deputy Sheriffs’ Civil Service Commission lacked the statutory jurisdiction to “reinstate” Deputy Brown to active service during the course of multiple investigations of alleged misconduct by Deputy Brown. The Sheriff had not charged Deputy Brown with violating any policy of the Sheriff’s Office nor had she imposed any disciplinary action when Deputy Brown sought “reinstatement” through the Civil Service Commission and later when he filed this action. Because the Civil Service Commission was without any authority to act on his request, the Circuit should have granted the Sheriff’s motion to dismiss Deputy Brown’s Petition and all resulting decisions and Orders are a legal nullity.

ARGUMENT

Judge Chafin did not make any finding that the Sheriff would not have acted absent the issuance of the Rule to Show Cause

Deputy Brown relies upon a comment made by Judge Chafin in open court on July 16, 2015 to represent “that the Circuit Court specifically found that without the mandamus action being filed ‘nothing would have been done’ by the Sheriff.” See Brown Response at page 18,

¹ Deputy Brown is no longer employed as a Logan County Deputy Sheriff. For clarity and convenience, the Sheriff refers to him as Deputy Brown, his status when the claims were filed.

citing to R158. *See also*, Brown's Response at pages 8, 10, 21, 22 and 24. This statement misrepresents the record. The Judge made no specific finding against the Sheriff; the Judge's remark, according to the transcript, was:

THE COURT: I am of the opinion that you're entitled to your attorney fees because nothing would have been done it looks like the way things were proceeding there if you had not been required to file your mandamus petition in this matter. Again, the only thing that concerns me is who should be charged with those fees? Whether it's the Civil Service Commission or the sheriff.

At that hearing, the Judge heard the arguments of counsel and reviewed the documents of record but took no evidence. While Deputy Brown's counsel argued that "no action had been taken to conclude the investigation" by the Sheriff, R149, he presented no testimony on the issue and his opinion amounted to pure speculation.²

By contrast, the undersigned counsel for the Sheriff informed the Court that there was investigative activity behind the scenes which would not have been obvious to either Deputy Brown or his counsel during the time that Deputy Brown suggests that the Sheriff was doing nothing to advance the multiple investigations. R156. But this representation is also not "evidence" as no testimony was presented under oath. Simply stated, there was no evidentiary record upon which the Court could have based such a finding, had it actually made one, that the Sheriff would have done nothing absent the mandamus action.

More to the point, Judge Chafin did not did not make any such finding against the Sheriff as represented. Particularly telling is the lack of any such finding in the Court's Final Order granting fees and costs to Deputy Brown. R120-25. It is a paramount principle of jurisprudence that a court speaks only through its orders. *Legg v. Felinton*, 219 W.Va. 478, ___, 637 S.E.2d

² On the other hand, the record does support the conclusion that had the writ not been granted, the Deputy Sheriff's Civil Service Commission would not have acted. The Civil Service Commission failed to respond to the Rule to Show Cause and has not contested any of Deputy Brown's allegations in any forum.

576, 581 (2006) *See also, State v. White*, 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992) ("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order." (citations omitted)); *State ex rel. Erlewine v. Thompson*, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973) ("A court of record speaks only through its orders[.]" (citations omitted))."

Deputy Brown filed his action to seek reinstatement, not to learn the reasons for his "suspension"

Deputy Brown claims he filed his writ of mandamus to determine the reasons for his suspension. Response at pp. 10 and 21. The record does not support this representation; rather Deputy Brown sought to compel the Sheriff to "forthwith pursue and conclude said 'Internal Investigation.'" R007. *See also*, Petition for Reinstatement, R013 ("forthwith reinstate the Petitioner as a deputy sheriff and award him reasonable attorney fees to be paid by the Sheriff from County Funds.").

Sheriff Porter did not seek the removal of Judge Perry due to an adverse ruling

Finally, an issue having absolutely no relevance to the substance of any issue in this appeal, and for some unknown reason, Deputy Brown's counsel represents to this Court, at page 24 of Deputy Brown's Response, that the Sheriff moved to recuse Judge Perry "after he ruled against her at the August 20, 2013 hearing." The clear implication is that the Sheriff and her counsel, the undersigned, sought the removal of Judge Perry in response to a ruling from the Judge. The truth of the matter is that Judge Perry suggested that recusal would be appropriate for reasons he discussed on the record and he invited a motion to recuse, even suggesting that the

parties would be doing him a service by making the motion.³ For this reason, and this reason only, Sheriff Porter, by her undersigned counsel, orally moved to recuse Judge Perry. Deputy Brown's suggestion to this Court that the Sheriff had an improper retaliatory or tactical motive to remove Judge Perry has no basis in fact.

Brown's claim that he is entitled to a hearing before being placed on administrative leave is inconsistent with the statutory framework.

Brown asserts that administrative leave does not exist, at least not in civil service matters, claiming instead that he was suspended or removed from office thereby entitling him to seek reinstatement pursuant to West Virginia Code §7-14-17. In relevant part, West Virginia Code §7-14-17(a) provides:

If the deputy demands it, the civil service commission shall grant a public hearing, which hearing shall be held within a period of **ten days from the filing of the charges in writing** or the written answer thereto, whichever shall last occur. At the hearing, the burden shall be upon the sheriff to justify his or her action, and in the event the sheriff fails to justify the action before the commission, then the deputy shall be reinstated with full pay, forthwith and without any additional order, for the entire period during which the deputy may have been prevented from performing his or her usual employment, **and no charges may be officially recorded against the deputy's record.** (Emphasis added).

The record is clear and undisputed that Sheriff Porter did not file any charges against Deputy Brown until he was served with a statement of charges and notice of right to a hearing on December 16, 2013. R113; R123 at paragraph 13. Since there were no charges against Deputy Brown he had no remedy to pursue with the Civil Service Commission and there were no charges that the Civil Service Commission could have been removed from the Deputy's record.

³ These issues are discussed in correspondence from Judge Perry to then Chief Justice Benjamin dated September 9, 2013, of record in the Office of the Clerk of the Circuit Court of Logan County as docket line 15 of the Docket Sheet, Exhibit 1 of the Appendix.

Moreover, Deputy Brown was informed on November 9, 2012, in writing, that he was being placed on paid administrative leave because he was the subject of an internal investigation and he was further informed that if the investigation resulted in a recommendation for punitive action, the specific allegations would be provided to him and that he was entitled to a hearing prior to any discipline more serious than counseling. R009. From the very outset of this legal journey, Deputy Brown knew that he had not been disciplined and he knew that he had not been disciplined at the time he filed his request for reinstatement and still had not been disciplined when he filed his petition in mandamus.

Further, Deputy Brown engages in circular reasoning, stating that administrative leave constitutes a suspension because the alleged suspension of Deputy Brown may lead to his suspension. Response at p. 10. This reasoning is inconsistent with this court's reasoning in *Burgess v. Moore*, 685 S.E.2d 685, 224 W.Va. 291 (2009) ("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.") (emphasis added). The provisions of West Virginia Code §§7-14C-3 and 7-14-17 apply to disciplinary actions, not investigative procedures. Investigative requirements are found at Code §7-14A-2. The record demonstrates that all statutory procedures were followed.

Simply put, Brown's view of the law would require Sheriffs and Chiefs of Police to keep any law enforcement officer who is under investigation for misconduct working at the officer's normal duties, with full access to the all law enforcement powers and authority, without any

regard for the seriousness of the allegations, the impact on public confidence in the agency and its officers and the potential risk to the public at large because doing otherwise would constitute punitive action requiring the consent of his peers pursuant to West Virginia Code §7-14C-3.⁴

Consider, for example the hypothetical situation involving a Deputy Sheriff who stops a car with four occupants for a relatively minor traffic code violation. Within minutes the Deputy shoots and kills the driver of the vehicle and the three passengers report to the Sheriff that the driver was cooperative, unarmed and that the shooting of the driver was unprovoked and completely without justification. The Deputy reports that the driver attacked him, reached for the Deputy's weapon and the Deputy shot the driver in self-defense while struggling for the weapon. Ordinarily, the Deputy would be placed on paid administrative leave while the Sheriff investigated the incident.⁵ Deputy Brow's view, however, would require the Sheriff to return the Deputy to active duty; moreover, the Sheriff would have to give the Deputy written notice at least ten days before a hearing before three of his peers to determine whether the Sheriff would be authorized to place the Deputy on paid leave while the shooting incident was investigated.

The Circuit Court should have granted the Sheriff's motion to dismiss Deputy Brown's Petition

A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). Deputy Brown did not have a clear legal right to the relief he sought, the Sheriff did not have a duty to reinstate him

⁴ The same requirements apply to Chiefs of Police pursuant to West Virginia Code §8-14A-3.

⁵ Critical incidents such as this often result in paid administrative leave for the health, safety and welfare of the Deputy after such an event and also to evaluate and determine when the whether the Deputy is psychologically ready to resume his duties.

to full duty while he was under investigation and Deputy Brown had an adequate remedy at law once he was charged by the Sheriff. For each of those reasons, the Court should have granted the Sheriff's motion to dismiss.

The Circuit Court erred when it awarded Deputy Brown attorneys' fees and costs

The Court committed error when it ordered the Sheriff of Logan County to pay Deputy Brown's legal fees and expenses without any statutory basis to do so; without any finding by the Circuit Court that the Sheriff acted in bad faith or engaged in a vexatious, wanton, or oppressive manner; particularly in light of the Sheriff's strict compliance with the statutory procedures for the investigation of a Deputy Sheriff.

Because the Civil Service Commission had no jurisdiction over the subject matter of the matter of Deputy Brown's Complaint, and the Circuit Court had no jurisdiction to compel any such hearing, all actions of the Civil Service Commission are a legal nullity and cannot form the basis, in whole or in part, for an award of attorneys' fees and costs against the Sheriff. Such an award would unnecessarily chill future good faith objections to the jurisdiction of the Commission and/or the Circuit Court.

Finally, Deputy Brown's request that this Court award him attorneys' fees related to the Sheriff's appeal to this Court upon his allegation the Sheriff's contentions are frivolous. Jurisdiction is not frivolous nor is statutory compliance. Should this Court determine that the Sheriff's position is incorrect the Sheriff should not be responsible for Deputy Brown's attorneys' fees for the same reasons discussed above. See also Rule 24(c) of the West Virginia Rules of Appellate Procedure. If, however the Court determines that the Sheriff's objections to jurisdiction were well founded, the public funds paid to Deputy Brown's counsel, without a valid

Civil Service Commission Order and without jurisdiction in either the Court or the Commission, should be disgorged. *See*, R068, R162. Deputy Brown would be potentially liable to the Sheriff for her attorney's fees if the Court found that Deputy Brown acted in bad faith or engaged in a vexatious, wanton, or oppressive manner. The frivolousness of his position, standing alone, would be insufficient to require him to pay the Sheriff's attorney's fees and costs except as provided in Rule 24 of the Rules of Appellate Procedure. *Kincaid v. Morgan*, 188 W.Va. 452, 459, 425 S.E.2d 128, 135 (1992).

CONCLUSION

In summary, Deputy Brown is incorrect, as a matter of law, when he claims that he suffered a punitive action by being placed on paid administrative leave; paid administrative leave is not a punitive action. Deputy Brown is incorrect, as a matter of law, when he argues that he was entitled to a hearing before the Civil Service Commission⁶ before he suffered any punitive action; he is entitled to that hearing only after being provided with a statement of charges, a notice of right to a Hearing Board, and an adverse ruling by the Hearing Board.

The Circuit Court was wrong, as a matter of law, when it denied the Sheriff's motion to dismiss and committed error when it determined that the Civil Service Commission had investigative jurisdiction over Article 14C of Chapter 7 of the Code of West Virginia; that jurisdiction was limited to matters arising under Article 14A of Chapter 7 by the Legislature. The Circuit Court committed error when it concluded that the Civil Service Commission owed Deputy Brown a non-discretionary duty to provide him a hearing on his premature reinstatement

⁶ The sheriff believes, however, that Deputy Brown was entitled to a response from the Civil Service Commission to his request for a hearing; that response should have been an appealable order denying his request on the grounds that the requested relief was beyond the jurisdiction of the Commission.

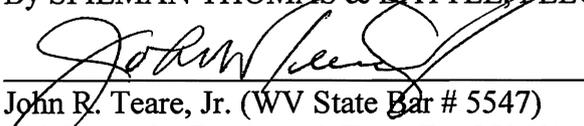
request.⁷ Finally, the circuit Court had no basis to order the sheriff to pay attorneys' fees and costs to Deputy Brown.

For the reasons advanced in the Sheriff's opening brief and discussed herein, the Sheriff respectfully requests that this Court reverse the Order of the Circuit Court of Logan County entered on February 10, 2014 (R049) which overruled the Sheriff's motion to dismiss for lack of jurisdiction; thereby invalidating all subsequent rulings, findings, decisions and Orders of the Circuit Court and the Civil Service Commission. The Sheriff also asks this Court to Order Deputy Brown to disgorge attorneys' fees improperly paid to him.

The Sheriff also respectfully urges this Court to hold, as a matter of law, that paid administrative leave does not constitute punitive action pursuant to West Virginia Code §7-14C-1 or West Virginia Code §7-14-17.

The Sheriff also respectfully urges this Court to hold, as a matter of law, that the investigative authority of the Deputy Sheriffs' Civil Service Commission does not extend to matters covered by West Virginia Code §§7-17C-1 et seq.

SONYA M. PORTER, Sheriff of Logan County
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⁷ Interestingly, despite the fact that the Circuit Court issued no writ against the Sheriff, Deputy Brown suggests, at page 12 of his Response, that the Sheriff should have sought a Writ of Prohibition in this Court to prevent enforcement of the Order directed to the Civil Service Commission if the Sheriff continued to believe that jurisdiction was lacking. Standing issues and the interlocutory nature of the Order suggested that this was a matter best handled on appeal.

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.**

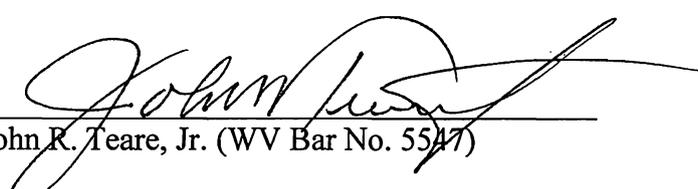
CERTIFICATE OF SERVICE

I, John R. Teare, Jr., do hereby certify that on this 6th day of May, 2016, I served the foregoing "Reply 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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