

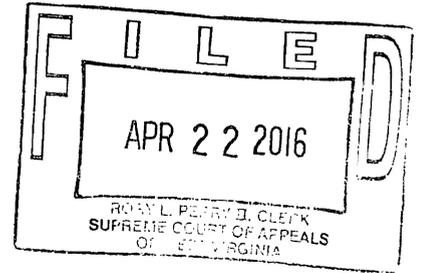
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 15-1213**

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

**vs.**

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



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**Hon. ROBERT CHAFIN, Senior Status Judge  
Circuit Court of Logan County  
Civil Action No. 13-C-165**

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**BRIEF OF RESPONDENT, JAMES H. BROWN, III**

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**STATEMENT OF THE CASE**

On November 9, 2012, Sheriff Eddie Hunter came to Deputy Brown’s house and stated to the him he had to “suspend” him (A. R. 56) and delivered him a “Notice of Internal<sup>1</sup> Investigation” which stated that he was being placed on paid “administrative leave” during the pendency of an internal investigation and until further notice he was: (a) to be at his place of residence each Monday through Friday from 8:30 A.M. to 4:30 P.M. until notified by the Sheriff; (b) that he was not to exercise any authority of the Sheriff’s Department or engage in any law enforcement investigations; (c) that he was to cease the secondary appointment previously approved by the Sheriff’s Department; (d) that he was to surrender all assigned equipment, uniforms, keys, etc., in his possession which are owned by the Sheriff’s Department; and (e) that he would be contacted and interviewed by Cpl. F. N. Ferrell related to the investigation. The November 9, 2012 “Notice

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<sup>1</sup>The word “internal” is not found in either West Virginia Code §7-14-17 or §7-14C-1 et seq.

of Internal Investigation” concluded with the statement, “This investigation could lead to punitive action up to and including termination of employment.” (A.R.16-17). (Emphasis Supplied). The Notice of Internal Investigation did not set forth a written statement of the reasons for Sheriff Hunter’s action. “Deputy Brown asked why he was being suspended....Sheriff Hunter.... responded that he could not say until the investigation was over.” (A.R.56). On or about the end of January, 2013, Corporeal F.N. Ferrell concluded his investigation and filed his investigative reports and turned his report over to Sheriff Porter. (A.R.57).

On April 26, 2013, Deputy Brown filed a Petition for Reinstatement with the Logan County Deputy Sheriffs Civil Service Commission. On May 3, 2013, the Sheriff filed a response with the Logan County Deputy Sheriff’s Civil Service Commission, sometimes hereinafter referred to as ‘Commission’, contending the words “removed”, "suspended" and “reduced in... pay” meant respectively “Dismissed” “suspended without pay” and “hourly pay reduced” and therefore the Commission had “no authority” to order the Sheriff to return Deputy Brown to active law enforcement citing West Virginia Code §7-14C-2(b). (A. R. 19-20). On May 23, 2013, Deputy Brown’s counsel sent a letter to the three Commissioners advising them if they did not forthwith convene and hold a hearing on the Petition for Reinstatement he would seek a Writ of Mandamus to compel the Commission to hold a hearing as required by West Virginia Code § 7-14-17.<sup>2</sup> The Commission did not schedule a hearing and therefore on June 27, 2013, Deputy Brown filed Logan County Civil Action No. 13-C-165 seeking Writs of Mandamus directing the Commission to have a hearing on his Petition for Reinstatement and seeking to compel the Sheriff to provide him the reasons for his suspension from his duties as a deputy sheriff which prevented him from performing his usual employment. (A.R.1-17).

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<sup>2</sup>The May 23, 2013, letter was attached to the Complaint as Exhibit E and is in the Circuit Clerk’s file but it was apparently inadvertently omitted from the Appendix prepared by the Petitioner.

On July 11, 2013, Judge Roger Perry issued separate Writs to Show Cause directed to the Commission and the Sheriff directing them to “show cause” why the relief requested in the Complaint should not be granted. The Sheriff was served with the Complaint on June 27, 2013, and no Answer to the Complaint was ever filed by said Defendant. The Circuit Court held a hearing on August 20, 2013, and ruled that the Complaint stated two separate causes of action for mandamus relief which were separate and distinct and Deputy Brown could proceed against the Sheriff for a Writ of Mandamus without proceeding against the Logan County Deputy Sheriff’s Civil Service Commission.<sup>3</sup> On September 4, 2013, the Sheriff moved for Judge Perry to recuse himself, which he did. Senior Status Judge Robert Chafin was appointed to hear the case and he set a hearing on the Rules to Show Cause for January 27, 2014. On December 16, 2015, more than 13 months after Deputy Brown was suspended, the Sheriff issued a statement of charges to him.

At the hearing held on January 27, 2014, the Circuit Court ruled that the Sheriff’s action on December 16, 2015, giving Deputy Brown a statement of charges rendered the Rule to Show Cause issued to the Sheriff “moot”(A. R. 139) and that he would hold Deputy Brown’s request for attorney fees and costs from the Sheriff in abeyance. (A.R.143)

On February 7, 2014, the Circuit Court entered an Order directing the Logan County Deputy Sheriffs Civil Service Commission to, on or before March 11, 2014, set a hearing and to hold a hearing on the Deputy Brown’s Petition for Reinstatement prior to May 11, 2014. (A.R.49).

In response to the Circuit Court’s February 7, 2014, Order, the Commission held a public hearing on April 4, 2014. The Sheriff did not call former Sheriff Hunter to testify as to the reasons

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<sup>3</sup> The Sheriff contended at the August 20, 2013, hearing that Deputy Brown had to jointly proceed against both the Sheriff and the Commission and that the Commission only had one member, which was Robert Baldwin. Later it was determined by that the Commission actually had two (2) members, which was evidenced by a letter written by the Sheriff dated July 9, 2013, stating that Jason Freeman had been placed on the Commission. (A.R.111).

for his actions on November 9, 2012, as was noted by the Commission in its “Findings of Fact, Conclusions of Law and Final Order” entered on June 19, 2014. (A.R.56). The Commission, based on the testimony of Lt. Dennis Brown, who was present with Sheriff Hunter on November 9, 2012, found as a matter of fact that Sheriff Hunter told Deputy Brown “he was being suspended pending investigation” (A.R.56) and “that the Sheriff’s inaction in issuing proper notice to Deputy Brown was unlawful...and the length of time that Deputy Brown was on administrative leave, without action being taken by the Sheriff, was unreasonable.” The Commission ordered the immediate reinstatement of Deputy Brown to his duties as a deputy sheriff and directed Deputy Brown to submit an itemized statement of his legal fees and costs within 10 days for the Commission’s consideration. (A.R.64-65). On June 23, 2014, Deputy Brown submitted an itemized statement to the Sheriff and Commission reflecting all legal fees and costs incurred by Deputy Brown related to securing a hearing by the Commission. No objection was filed by the Sheriff to the itemized statement of fees and costs and on July 22, 2014, the Commission wrote a letter to the Logan County Commission directing it to pay the requested fees and costs except those related to the mandamus action. (A.R. 68).

On September 8, 2014, Deputy Brown filed an appeal to the Commission’s actions for the reasons specified in his Administrative Appeals Docketing Statement. (A.R.52-78). On November 18, 2014, the Sheriff filed a motion to dismiss Deputy Brown’s appeal on the grounds the Commission’s June 19, 2014, Order was not a “Final Order”. By Order dated May 12, 2015, the Circuit Court ruled that the June 19, 2014, Order of the Logan County Deputy Sheriff’s Civil Service Commission was not a Final Order and therefore dismissed Deputy Brown’s Administrative Appeal. The Circuit further Ordered that the Logan County Deputy Sheriff’s Civil Service Commission enter a Final Order setting forth the Attorney fees it awarded Deputy Brown

for work related to the hearing before the Commission and directed Deputy Brown to submit an invoice to the Court for the legal work related to the subject mandamus action. (A.R.79-80).

On May 21, 2015, Deputy Brown's filed a Motion requesting Attorney Fees and Costs to be assessed against both the Sheriff and Commission related to the mandamus action. (A.R.81-95). A hearing was held on said Motion on July 16, 2015, at which time it was noted to the Court that Corporeal Ferrell had concluded his investigation by the end of January 2013, and submitted his report to the Sheriff and it was not until the Circuit Court ruled on August 20, 2013, that Deputy Brown could proceed with his mandamus action against the Sheriff, that the Sheriff resumed the investigation. (A R.156) The Circuit Court ruled Deputy Brown was entitled to attorney fees from the Sheriff and Commission as a result of his having to mandamus them to perform their duties prescribed by law because "nothing would have been done" if the mandamus action had not been filed. (A.R.158) The Circuit Court requested Deputy Brown to separate the legal fees into those that were solely related to each of the two defendants and those legal fees that were jointly related to both defendants and to submit the same to him and he would enter an order specifying what each defendant was to pay. The requested breakdown was sent to Judge Chafin on July 17, 2015. (A.R. 114). On November 19, 2015, Judge Chafin entered his Order specifying the amounts the Sheriff and Commission were to respectively pay. (A.R.120-130).<sup>4</sup> The Sheriff thereon filed the

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<sup>4</sup>The Sheriff in her Statement of the Case references a document dated September 21, 2015, which is not filed with the Circuit Court in this proceeding. The Sheriff correctly noted that counsel for Deputy Brown would not agree to allow that document to be placed in the Appendix as Rule 6 (b) of the Rules of Appellate Procedure provides that "Anything not filed with the lower tribunal shall not be included in the record on appeal unless the Court grants a motion for leave to supplement the record on appeal for good cause shown. The Circuit Court's Order of 11/19/2015 does not reference or incorporate the findings or conclusions contained in the Final Order of the Logan County Deputy Sheriff's Commission dated September 21, 2015, as it was filed in the Office of the Logan County Commission with the Clerk of the Logan County Deputy Sheriff's Civil Service Commission in a totally separate legal proceeding and Judge Chafin had no knowledge of the entry of that Order.

subject appeal to the Final Order of November 19, 2015, which ordered the Sheriff to pay Deputy Brown attorney fees and costs in the amount of \$7,262.23.<sup>5</sup>

### SUMMARY OF ARGUMENT

The gravamen of the Sheriff's appeal is that the Circuit Court lacked jurisdiction to order the Logan County Deputy Sheriff's Civil Service Commission to hold a hearing on the Petition for Reinstatement filed by Deputy Brown. In short, the Sheriff is attempting to appeal the February 7, 2014, ruling of the Circuit Court that did not order the Sheriff to do anything. The crux of the Sheriff's unique contention is that a deputy sheriff's civil service commission only has appellate jurisdiction over Hearing Board decisions and therefore since there was no Hearing Board decision the Circuit Court erred in granting the Writ issued to the Logan County Deputy Sheriff' Civil Service Commission to hold a hearing on Deputy Brown's Petition for Reinstatement. The Sheriff's argues that West Virginia Code §7-14C-1 et seq., empowered the Sheriff to conduct an investigation of Deputy Brown and during said investigation the Sheriff could suspend Deputy Brown's right to exercise any authority of the Sheriff's Department or engage in any law enforcement investigations, seize from him all his assigned equipment, uniforms, keys, etc., owned by the Sheriff's Department, order Deputy Brown confined to his home from 8:30 a.m. to 4:30 p.m. five days a week with no time off for holidays or vacation, and reduce the pay he was regularly receiving without providing Deputy Brown the reasons the Sheriff's was taking such drastic action and/or providing him an opportunity to respond to the allegations made against him. Most significantly, the Sheriff argues that regardless of how long her investigation may take neither Deputy Brown, the Logan County Deputy Sheriff's Civil Service Commission, nor the Circuit

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<sup>5</sup> The Circuit Court also ordered the Commission to pay Deputy Brown attorney fees and costs in the amount of \$10,744.22, related to the mandamus against it, which was paid without objection.

Court had any jurisdiction until the Sheriff provided notice on December 16, 2013, to Deputy Brown of the charges she was making against him and that she intended to discharge him.

Deputy Brown's argument is that West Virginia §7-14C-1 et seq. was enacted in 1995 to codify the required due process procedures outlined by this Honorable Court in *City of Huntington v. Black*, 187 W.Va. 675,421 S.E. 58 (1992), that must be followed before a sheriff can deprive a deputy of any significant protected interest. Deputy Brown submits that the Sheriff's actions on November 9, 2012, constituted a suspension in violation of West Virginia Code §7-14-17(a), deprived him of several significant protected interests and that the Sheriff's actions on November 9, 2012, manifestly meet the definition of "punitive action" which is defined in §7-14C-1(3) as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment" because the November 9, 2012.<sup>6</sup>

Deputy Brown submits that the subject mandamus action was the only remedy available to him to compel the Sheriff to provide him the reasons for his suspension and absent said action the Sheriff would have done nothing as ruled by the Circuit Court. (A.R.158). Accordingly, attorney fees and costs were properly assessed against the Sheriff for her blatant disregard of Deputy Brown's statutory and due process rights that necessitated him having to mandamus the Sheriff to comply with the Sheriff's statutory duty in West Virginia Code §7-14-17(a) to provide him the reasons for his suspension and an opportunity to respond to the allegations being made against him.

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<sup>6</sup> The "Notice of Internal Investigation" actually concludes with the statement, "This investigation could lead to punitive action up to and including termination of employment."(Emphasis Supplied).

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case can be decided without oral argument as it is doubtful oral argument would aid the decisional process. The Sheriff's appeal is wholly predicated on her tortured interpretation of West Virginia Code §7-14C-1 et seq. which will not stand scrutiny. There was an abundance of evidence and legal authority to support the Circuit Court's finding that the Deputy Brown's Mandamus action was necessary to compel the Sheriff to provide him with the reasons for his suspension, and attorney fees were appropriately assessed against the Sheriff.

### ARGUMENT

#### **A. STANDARD OF REVIEW**

The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is *de novo*. Syllabus Point 1, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995)." Syl. pt. 1, *O' Daniels v. City of Charleston*, 200 W.Va. 711, 490 S.E.2d 800 (1997).

#### **B. DEPUTY BROWN'S RESPONSE TO SHERIFF'S ASSIGNMENT OF ERROR NO. I THAT 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 SAID ADMINISTRATIVE LEAVE WHILE BEING INVESTIGATED FOR OFFICIAL MISCONDUCT**

This Assignment of Error relates to the Circuit Court's Order dated February 7, 2014, which mandamus the Logan County Deputy Sheriff's Civil Service Commission to hold a hearing on the Deputy Brown's Petition for Reinstatement. (A.R.49-50). The February 7, 2014, Order did not direct the Sheriff to do anything as the Court had ruled on January 27, 2014, that the Rule to Show Cause issued to the Sheriff was "moot" since the Sheriff had finally provided Deputy Brown with a statement of charges on December 16, 2013. (A.R.139). The Sheriff's Counsel advised the Circuit Court that while he did not represent the Civil Service Commission (A.R.34)

that any Order compelling the Commission to hold a hearing impacted her, and she therefore advanced the same jurisdictional arguments set forth in this Assignment of Error which arguments were rejected by the Circuit Court. Deputy Brown submits that an appeal to the February 7, 2014 order does not lie in favor of the Sheriff and that the proper manner for the Sheriff to have attacked said Order would have been to seek a writ of prohibition from this Honorable Court if she wanted to prevent the enforcement of said Order.

Logan County Civil Action No. 13-C-165 involved demands for mandamus relief against the Logan County Sheriff and the Logan County Deputy Sheriff's Civil Service related to Deputy Brown being told by Sheriff Hunter on November 9, 2012, that he had to "suspend" him as he was being investigated for unspecified reasons and directing Deputy Brown to be at his place of residence each Monday through Friday from 8:30 A.M. to 4:30 P.M., not to exercise any authority of the Sheriff's Department or engage in any law enforcement investigations, to cease his previously approved secondary employment, and to surrender all uniforms, keys to the courthouse etc., without providing Deputy Brown a statement of reasons for his suspension and an opportunity to respond to the allegations against him.

The Circuit Court at a hearing held on August 20, 2013, specifically ruled that the Complaint stated two causes of action for mandamus relief against the two defendants which were separate and distinct and Deputy Brown could proceed against the Sheriff for a Writ of Mandamus without simultaneously proceeding against the Logan County Deputy Sheriff's Civil Service Commission.<sup>7</sup>

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<sup>7</sup> The Sheriff contended at the August 20, 2013, hearing that the Deputy Brown had to jointly proceed against both the Sheriff and the Commission and that the Commission only had one member, which was Robert Baldwin. Later it was determined that the Commission actually had two (2) members, which was evidenced by a letter written by the Sheriff to the Commission dated July 9, 2013, stating that Jason Freeman had been placed on the Commission. (A.R. 111).

The Sheriff argued then and now that if a deputy files a petition for reinstatement with a deputy sheriff's civil service commission alleging she/he is improperly being prevented from performing his or her usual employment that the pronouncement by a sheriff that she/he has placed a deputy on paid "administrative leave" because of an internal investigation deprives a Deputy Sheriff's Civil Service Commission of the power/authority/jurisdiction to in any way consider or hold a hearing on the petition for reinstatement. That is a fallacious contention.

A Deputy Sheriff's Civil Service Commission owes its creation and existence to statute and has the powers conferred upon the Commission by statute, either expressly or by necessary or fair implication. *City of Huntington v. Lombardo*, 149 W., Va. 671,681, 143 S.E. 2d 535,542 (1965). West Virginia Code §7-14-6 grants a deputy sheriff's civil service commission the authority to make investigations "concerning all matters touching the enforcement and effect of the provisions of this article ....or concerning the action....of any person in the public service concerning the execution of this article...." Clearly the Commission was empowered to hear and determine whether the Sheriff had violated the provisions of 7-14-17(a) when the Sheriff informed Deputy Brown he was suspended and issued him the Notice on November 9, 2012. West Virginia Code §7-14-17(a) provides:

**"No deputy sheriff of any county subject to the provisions of this article may be removed, discharged, suspended or reduced in rank or pay except for just cause, which may not be religious or political, except as provided in section fifteen of this article; and no such deputy may be removed, discharged, suspended or reduced in rank or pay except as provided in this article and in no event until the deputy has been furnished with a written statement of the reasons for the action. In every case of such removal, discharge, suspension or reduction, a copy of the statement of reasons therefor and of the written answer thereto, if the deputy desires to file such written answer, shall be furnished to the civil service commission and entered upon its records. 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. The deputy, if reinstated or exonerated, shall, if represented by legal counsel, be awarded reasonable attorney fees to be determined by the commission and paid by the sheriff from county funds. A written record of all testimony taken at the hearing shall be kept and preserved by the civil service commission, which record shall be sealed and not be open to public inspection unless an appeal is taken from the action of the commission.” (Emphasis Supplied).

West Virginia Code §7-14-17(a) as enacted only provides a deputy sheriff may not be removed, discharged, suspended or reduced in rank or pay except for just cause, and in no event until the deputy has been furnished with a written statement of the reasons for the action. Said statute when it was enacted in 1971 did not set forth the procedural due process requirements that must be adhered to establish prima facie “just cause” before a deputy can be deprived of a significant employment protected interest.

In *City of Huntington v. Black*, 187 W. Va. 675, 677, 421 S.E.2d 58, 60 (1992), this Honorable Court, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Zinerman v. Burch*, 494 U.S. 113 (1990), ruled that even though there was no statutory requirement in W.Va. Code §8-14A-3 for a pre-deprivation hearing, the principles of due process required that a municipal police officer subject to civil service protection must be afforded an opportunity to respond<sup>8</sup> to any charges at a pre-deprivation hearing. The Court noted it had applied the *Eldridge* factors in *Major v. DeFrench*, 169 W. Va. 241, 286 S.E.2d 688 (1982) which involved the termination of a police officer

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<sup>8</sup> One of the most important aspects of a deputy being timely informed of the allegations made against him is the deputy's ability to locate witnesses to an incident and obtain statements of what witnesses saw while it is fresh in their memories. At the point in time Deputy Brown was informed of the Heidi Stump allegation two and one-half years had elapsed. A year and a half had elapsed from the time the alleged disrespect to the Maryland Police officer allegedly occurred.

at the conclusion of her probationary period, and the Court ruled that the “appointment as a police officer is a substantial right which guarantees the employee job security, and enables her to function as an officer without fear of arbitrary treatment from superiors.”

This Court observed in the *Black* case that a pre-deprivation hearing is an initial check against mistaken decisions--essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. *City of Huntington v. Black*, 187 W. Va. at 680. Shortly after this Court rendered the *Black* decision various efforts were undertaken to delineate the required due process procedures that must be followed before a person could be deprived a significant protected interest. This Honorable Court took the lead and in 1993 promulgating Rule 2.14 of the Rules of Judicial Disciplinary Procedure which set forth the required due process procedures that must be followed before a judicial officer could be deprived a significant protected interest.<sup>9</sup> Shortly thereafter the Legislature enacted West Virginia Code §7-14C-1 et seq. which codified the required due process procedures that must be followed before a sheriff can deprive a deputy of any significant protected interest<sup>10</sup>. The statute was not enacted to provide the Sheriff the broad discretion to strip Deputy Brown (or any other deputy) of his usual employment duties, confine him to his home and reduce the pay he was regularly receiving so the Sheriff could do a secret investigation over an unlimited period of time

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<sup>9</sup> If a Judge/Justice were advised she/ he was being investigated and directed not to exercise any authority as a Judge/Justice and, took her/his robe, gavel, keys to the court house, directed her/him to be at her/his house from 8:30 a.m. to 4:30 a.m., and allowed no time off for vacation without providing any reason for the action, there can be no doubt that such action would be extremely embarrassing to the Judge/Justice and deemed by them to be adverse to their good name. It is axiomatic that a Judge/Justice would want to be informed of the reasons for said action so that he/she could respond to the complaints against him/her. Obviously said actions would contravene the due process requirements of Rule 2.14 of the Rules of Judicial Disciplinary Procedures. The actions in this case are even more egregious in that the Sheriff's action on November 9, 2012, reduced Deputy Brown's 2013 income by a minimum of \$4,146.00, which amounted to 15% of what he had been paid in the two prior years and compelled him to terminate his secondary employment for the Town of Oceana.

<sup>10</sup> The various protected interests as noted by the Court in *Black* are those rights delineated in the civil service statute as well as a liberty interest in a person's good name.

without the slightest hint to Deputy Brown as to the alleged reasons for the Sheriff's action. The provisions of West Virginia Code §7-14C-1, *et seq.*, clearly reflect the legislative intent that during an investigation a deputy is to remain on duty as it is provided in §7-14C-2(a), that a deputy is to be interrogated on duty if possible and in §7-14C-2(e) that a deputy is not to be relieved of his duties prior to being provided with information of any charges against him and being provided a timely hearing to allow the deputy to respond to the charges except that a Sheriff may order the "immediate temporary suspension from duty, pending an investigation, of any deputy sheriff who reports for duty under the influence of alcohol or a controlled substance which would prevent the deputy from performing his or her duties...or under the influence of an apparent mental or emotional disorder."<sup>11</sup>

The Sheriff in her Brief does not address the issue of whether the Sheriff's actions on November 9, 2012, deprived Deputy Brown of any significant protected interest which is the issue she should have addressed. The Sheriff's seemingly total ignorance of the due process rights that must be accorded to a deputy under civil service is illustrated by her reliance on *Brown v. City of Montgomery*, 233 W.Va. 119, 755 S.E.2d 653 (2014), to support of the Sheriff's actions in this case. The Police Officer in *Brown v. City of Fry* was an "at will" employee and therefore not entitled to the due process requirements that must be accorded a police officer under civil service. Deputy Brown was not an "at will" employee whose due process rights could be trampled on by the Sheriff at his and her will and pleasure.

The Sheriff has throughout these proceedings incredibly asserted that Deputy Brown was not suspended even though it is an established fact that Sheriff Hunter told Deputy Brown on

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<sup>11</sup>There is no allegation that the Deputy Brown reported for duty under the influence of alcohol or a control substances which would prevent him from performing his duties or was under an apparent mental or emotional disorder.

November 9, 2012, he was suspended. (A.R.56) In support of her assertion that Deputy Brown was not suspended but only placed on paid "administrative leave" the Sheriff has advanced her own definitions for the words "removed", "suspended", and "reduced in... pay". The Sheriff argues that "removed" means "removed from office" or "dismissed" as opposed to meaning "removed from being allowed to perform his or her usual employment". The Sheriff contends that "suspend" means "suspend without pay".<sup>12</sup> Lastly, the Sheriff argues that "reduced in... pay" means "hourly pay reduced". (A.R.19-20). "Removed" is nowhere defined in the Code as "removed from office" or "dismissed" as contended by the Sheriff. Similarly, "suspended" is not defined in the Code as being relieved from duty "without pay". Suspensions are well recognized in the law to be with or without pay as is evidenced by this Honorable Court's own Rules of Judicial Disciplinary Procedure which provides in Rule 2.14 (d) and (e) that suspensions can be with or without pay. The word "pay" is not defined in West Virginia Code §7-14-17, but "pay" is general defined as "money that is due for work done, goods received, or a debt incurred."

The Sheriff argues that the Circuit Court and the Logan County Deputy Sheriff's Civil Service Commission lacked the power to review the actions taken by the Sheriff on November 9, 2012, because the provisions of West Virginia Code §7-14-17(a) and §7-14C-1 et seq., only come into play after the Sheriff completes her "internal investigation" of a deputy and notifies the deputy that she is going to discipline him/her. The Sheriff argues that until the "internal investigation" is completed that a sheriff is empowered to place a deputy on "paid administrative leave" and take the other actions taken on November 9, 2012, and such actions do not constitute a suspension from his/her duties or discipline of the deputy. The Sheriff cites no authority for her unfounded

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<sup>12</sup>The Sheriff cites 142(sic) WVCSR § 1.3.83 to support this contention. The regulation (143 WVCSR § 1.3.83) was promulgated pursuant to W. Va. Code §29-6-1 which clearly provides at 29-6-4(c) (3) that said provisions are not applicable to a Sheriff's employees since she is an elected official.

assertions. The words "discipline", "administrative leave", nor "internal" are contained in West Virginia Code §7-14-17 or §7-14C-1 et seq. The Sheriff especially seems to believe there is some magical significance to the words "internal investigation" that allows her to violate those statutory provisions. In Footnote 4 of the Sheriff's Brief she states 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." That contention is belied by the Sheriff's action in issuing her December 16, 2013, Statement of Charges wherein she sets forth the allegation that Deputy Brown violated the law by impersonating a West Virginia State Trooper which allegation was derived from the call Sheriff Hunter allegedly received from Captain Nelson prior to Sheriff Hunter suspending Deputy Brown on November 9, 2012. See *infra* Footnote 15.

The Sheriff's contends in Assignment of Error No. I that since she was not mandamus to provide the statement of charges there is no basis for the Circuit Court to award attorney fees and costs against her. The fact that a defendant in a mandamus action complies with a statutory mandate prior to a Court issuing a Writ of Mandamus does not deprive the Court of jurisdiction to award attorney fees and costs if the Court determines that but for the mandamus action being filed the defendant would not have complied with the law. The Circuit Court specifically found that without the mandamus action being filed "nothing would have been done" by the Sheriff. (A.R.158).

**C. DEPUTY BROWN'S RESPONSE TO SHERIFF'S ASSIGNMENT OF ERROR NO. II THAT 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**

In this assignment of error the Sheriff is requesting this Honorable Court to review a Final Order of the Logan County Deputy Sheriff's Civil Service Commission dated September 21, 2015,

that is not in the record on appeal. The Sheriff erroneously asserts on Page 13 of her Brief “The Court acknowledged that the Final Order of the Civil Service Commission was a matter of record in its Final Order. R.123 at ¶15.” It is beyond question that Circuit Court only referenced the Logan County Deputy Sheriff’s Civil Service Commission’s interlocutory Order of June 19, 2014, in Paragraph 15 of its Order. (A.R. 83-84). The Circuit Court’s reference to the June 19, 2014, interlocutory Order of the Commission had nothing to do with the Circuit Court holding the Sheriff liable for attorney fees and costs. The patent reason the Circuit Court referenced the Commission’s June 19, 2014, Order in Paragraph 15 of its November 19, 2015, Order was to establish the factual basis for the Circuit Court awarding attorney fees and costs against the Logan County Deputy Sheriff’s Civil Service Commission’s related to Deputy Brown having to compel the Commission by a mandamus to perform its statutory duty to hold a hearing on his Petition for Reinstatement.

The Logan County Deputy Sheriff’s Civil Service Commission’s Order dated September 21, 2015 was filed in the Office of the Logan County Commission and was not filed in the Circuit Clerk until Deputy Brown filed an appeal to said Order on December 18, 2015. Accordingly, the Circuit Court could not adopt or incorporate anything from the Final Order of the Logan County Deputy Sheriff’s Civil Service Commission dated September 21, 2015, in its Order of November 19, 2015, since the Commission’s Order of September 21, 2015, was not filed in the Circuit Clerk’s office until 30 days after the entry of the Circuit Court’s order of November 19, 2015, directing the Sheriff to pay Deputy Brown attorney fees and costs of \$7,262.23. Manifestly, there is no validity to the Sheriff’s assertion that the Circuit Court adopted and incorporated anything from the Final Order entered by the Logan County Deputy Sheriff’s Civil Service Commission on September 21, 2015, because Senior Status Judge Robert Chafin never saw said Order.

The Court's attention is further directed to the invoice of the attorney fees and costs Deputy Brown requested to be assessed against the Sheriff and were approved by the Circuit Court. (A.R. 126-130). The Court will observe that Deputy Brown, except for the legal work related to filing the motion for Attorney fees and securing a ruling on said motion, only requested attorney fees and costs against the Sheriff for work extending to January 27, 2014, which was months prior the Hearing held by the Logan County Deputy Sheriff's Civil Service Commission and the entry of its Order dated June 19, 2014.

**D. DEPUTY BROWN'S RESPONSE TO SHERIFF'S ASSIGNMENT OF ERROR NO. III THAT 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.**

In this Assignment of Error the Sheriff argues that the Logan County Deputy Sheriff's Civil Service Commission erred in its interlocutory Order of June 19, 2014, finding Deputy Brown had been suspended (A.R.56) and "that the Sheriff's inaction in issuing proper notice to Deputy Brown was unlawful...and the length of time that Deputy Brown was on administrative leave, without action being taken by the Sheriff, was unreasonable." (A.R.64-65). In short, the Sheriff wants this Court to review and reverse the June 19, 2014, interlocutory Order of the Commission notwithstanding the fact that the Sheriff successfully argued that Order was a non-final Order of the Logan County Deputy Sheriff's Civil Service Commission. (A.R.79).

Assignment of Error III also alleges, "The Circuit Court committed error by apparently adopting and incorporating those erroneous procedures and findings in its own Final Order" but fails to discuss that contention in the text under that assignment of error. This issue was briefed and addressed by the Respondent under Assignment of Error No. II. As noted, *supra*, the

Commission's interlocutory Order of June 19, 2014, was incorporated by reference by the Commission into its Final Order dated September 21, 2015,<sup>13</sup> which Deputy Brown appealed to the Circuit Court on December 18, 2015. That appeal (Case No. 15-AA-2-W) has been stayed by the Circuit Court on the Sheriff's motion.<sup>14</sup>

**E. DEPUTY BROWN'S RESPONSE TO SHERIFF'S ASSIGNMENT OF ERROR NO. IV THAT THERE IS NO STATUTORY OR OTHER BASIS FOR AN AWARD OF ATTORNEYS' FEES IN FAVOR OF DEPUTY BROWN**

A writ of mandamus is appropriate when three elements coexist: (1) the existence of a clear legal right to the relief sought, (2) the existence of a legal duty on the part of the respondents to do the thing which the petitioner seeks to compel, and (3) the absence of another adequate remedy at law. *Hall v. Protan*, 156 W.Va. 562, 195 S.E. 2d 380 (1973); *Fairlawns Homes, Inc. v. The City of Morgantown, W. Va.*, 155 W.Va. 172, 182 S.E.2d 48 (1971). The Sheriff had a clear duty under West Virginia Code § 7-14-17(a) to provide Deputy Brown the reasons for his suspension on November 9, 2012, which he refused to do. Deputy Brown then sought to obtain the reasons for his suspension through the Logan County Deputy Sheriff's Civil Service Commission and was unable to get the Commission to act on his Petition for Reinstatement. Deputy Brown's only recourse was to file his Complaint against the Sheriff and Commission seeking mandamus relief to ascertain the reasons for his suspension. It was only after the Circuit Court issued a Rule to Show Cause to the Sheriff and ruled at the August 20, 2013, hearing that Deputy Brown could proceed with the subject mandamus action against the Sheriff that the Sheriff took any action related to his suspended status,<sup>15</sup> which ultimately led to Deputy Brown being furnished on

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<sup>13</sup>As noted, *supra*, this document is not in the record of this appeal and was never filed in the office of the Circuit Clerk until December 18, 2015, when Deputy Brown filed his appeal to the Commission's Final Order.

<sup>14</sup> The Sheriff filed a Motion to stay Deputy Brown's appeal in Case No. 15-AA-2-W pending this Court's decision in this case, which was granted on April 5, 2016.

<sup>15</sup> A.R.112

December 16, 2013, with the alleged two reasons for his suspension on November 9, 2012.<sup>16</sup> The Circuit Court held at the July 16, 2015, hearing that Deputy Brown was entitled to attorney fees and costs as a result of his having to mandamus both the Commission and the Sheriff to perform their duties prescribed by law because “nothing would have been done” if the mandamus action had not been filed. (A.R.158).

The Sheriff had a clear duty under West Virginia Code §7-14-17(a) to provide the reasons for Deputy Brown’s suspension on November 9, 2012, and it was only as a result of Deputy Brown filing the Petition for Writ of Mandamus against the Sheriff that finally, some thirteen (13) months after his suspension, he was furnished a statement of charges that reflected the two double hearsay allegations<sup>17</sup> that precipitated his suspension on November 9, 2012. (A.R.113).

### CONCLUSION

When the Sheriff advised Deputy Brown that he was suspended and issued him the directives contained in the November 9, 2012, notice he deprived Deputy Brown of the following significant protected interests:

1. His right to leave his place of residence from Monday through Friday from 8:30 A.M. to 4:30 P.M. for more than 13 months;
2. His right to take time off for holidays or vacation during said 13 months;

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<sup>16</sup> The Sheriff has testified concerning two double tiered hearsay complaints that Sheriff Hunter received prior to November 9, 2012. She testified the initial complaint related to Deputy Brown, III that came to Sheriff Eddie Hunter’s attention was from David Maynard, Chief of Operations for Logan County Emergency Ambulance Service, who told Sheriff Hunter he had been told by Heidi Stump, one of his paramedics, that she had felt threatened by Deputy Brown in an incident that occurred on July 9, 2011, which was one year and four months prior to November 9, 2012. The Sheriff also testified that Sheriff Hunter received a call from Captain Dave Nelson of the West Virginia State Police who stated he had received a call from a Maryland State Trooper, stating that a West Virginia State Trooper by the name of James Brown had acted very disrespectful and that Captain Nelson had determined that the person alleged to have acted in a very disrespectful manner was Deputy James H. Brown, III. (A.R.172).

<sup>17</sup> See footnote 15.

3. His right to exercise any authority of the Sheriff's Department or continue any law enforcement investigations that he might then be conducting during said 13 months;<sup>18</sup>
4. His secondary employment with the Town of Oceana that had previously been approved by the Sheriff's Department;
5. His overtime pay that he had continually received for the two prior years which amounted to 15% of his pay;
6. His uniforms, equipment, and courthouse access; and
7. To suffer the loss of his good name in the eyes of the community at large as well as family and friends.

The most troubling aspect of the Sheriff's unlawful actions on November 9, 2012, is that the Sheriff took his action predicated on hearsay statements provided in two phone calls from persons that stated they had been told an EMS worker had felt threaten by Deputy Brown a year and four months earlier and that Deputy Brown on an off duty night had acted disrespectful to a visiting Maryland police officer.

Deputy Brown attempted to exercise his administrative remedy related to the Sheriff's actions on November 9, 2012 and when that failed his only recourse left open to him was to file the subject mandamus action. The Sheriff then did everything possible to delay the proceedings in this case arguing the Circuit Court had no Jurisdiction, arguing that the Commission was not

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<sup>18</sup> If a sheriff could lawfully declare he/she was initiating an investigation of a deputy for unspecified allegations, confine the deputy to his/her residence for a year or so while the alleged investigation is undertaken and deny a deputy the right to continue an investigation of one of the sheriff's friends or cohorts that would be quite some power. For example, the sheriff directs a deputy to do something that the deputy believes is inappropriate, if not illegal, and the sheriff says "do what I say or I will do you just like I did James Brown". The civil service provisions at issue set forth substantial rights which guarantee a deputy job security, and enables a deputy to function as an officer without fear of arbitrary treatment from a superior as observed by this Court in *Major v. DeFrench, supra* at 698.

properly constituted when in fact she knew it was properly constituted<sup>19</sup>, and requesting the sitting Judge to recuse himself after he ruled against her at the August 20, 2013 hearing. Then when the newly appointed Judge set a hearing date for the Sheriff to show cause for her failure to provide Deputy Brown a statement of reasons for his suspension the Sheriff grudgingly submitted a statement of charges to Deputy Brown. The Sheriff's contention that since she was not mandamus to provide the statement of charges there is no basis for the Circuit Court to award attorney fees and costs against her. The fact that a defendant in a mandamus action complies with a statutory mandate prior to a Court issuing a Writ does not deprive the Court of jurisdiction to award attorney fees and costs if the Court determines that but for the mandamus action being filed the defendant would not have complied with the law. The Circuit Court specifically found that without the mandamus action being filed "nothing would have been done" by the Sheriff. (A.R.158).

Deputy Brown requests this Honorable Court to award him his attorney fees related to responding to the frivolous contentions in this appeal.

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<sup>19</sup> See Footnote 3.

CERTIFICATE OF SERVICE

I, George L. Partain, do hereby certify that on the 21<sup>st</sup> day of April, 2016, I served the foregoing **BRIEF OF RESPONDENT** upon the following, by mailing a true copy thereof in the United States Mail, Postage prepared and addressed as follows:

John R. Teare, Jr.  
300 Kanawha Boulevard, East  
P. O. Box 273  
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