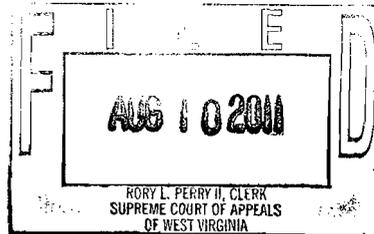


Docket No. 11-1035



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.,
County Commission of Greenbrier County, West Virginia,

Petitioner,

v.

Honorable John L. Cummings and James W. Childers,
Sheriff of Greenbrier County, West Virginia,

Respondents.

**RESPONSE OF SHERIFF CHILDERS TO
PETITION FOR WRIT OF PROHIBITION**

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**RESPONSE OF SHERIFF CHILDERS TO
PETITION FOR WRIT OF PROHIBITION**

I. QUESTIONS PRESENTED

The questions presented, as framed by the Petitioner, the County Commission of Greenbrier County, West Virginia ("County Commission") are:

A. WHETHER A COURT EXCEEDS ITS JURISDICTION BY ORDERING A COUNTY COMMISSION TO REVISE ITS BUDGET IN ACCORDANCE WITH THE SHERIFF'S BUDGETARY REQUESTS EVEN WHERE THE ORDER INCLUDES A MANDATE TO MEET AND CONFER AND DETERMINE A "FAIR AND REASONABLE" AMOUNT FOR THE SHERIFF'S BUDGET WHERE THE COURT DOES NOT CONTEMPERANEOUSLY ORDER THE SHERIFF TO MEET AND CONFER?

B. WHETHER A COURT EXCEEDS ITS JURISDICTION WHERE IT ORDERS A COUNTY COMMISSION TO AFFIRMATIVELY REVIEW ITS BUDGET AND MAKE ADDITIONAL ALLOCATIONS TO FIVE ITEMS OF THE SHERIFF'S BUDGET?

C. WHETHER A COURT MAY AWARD ATTORNEY FEES AGAINST A COUNTY COMMISSION WHERE THE COUNTY COMMISSION HAS PERFORMED ITS DUTIES IN ACCORDANCE WITH WEST VIRGINIA CODE § 7-7-7?

The Respondent, James W. Childers, Sheriff of Greenbrier County, West Virginia ("Sheriff") respectfully suggests that the issues are more properly framed:

A. WHETHER A CIRCUIT COURT HAS JURISDICTION TO ORDER A COUNTY COMMISSION TO REVISE ITS BUDGET TO GIVE DUE CONSIDERATION TO THE SHERIFF'S BUDGETARY REQUESTS WHEN THE CIRCUIT COURT HAS FOUND THAT THE COUNTY COMMISSION ACTED UNDER MISAPPREHENSION OF LAW AND ACTED ARBITRARILY AND CAPRICIOUSLY BY REDUCING THE SHERIFF'S BUDGET BY HUNDREDS OF THOUSANDS OF DOLLARS WHEN THE COUNTY COMMISSION PROJECTED AN INCREASE IN REVENUE AND DID NOT REDUCE THE BUDGETS OF OTHER CONSTITUTIONAL OFFICERS AND OFFICIALS.

B. WHETHER THE CIRCUIT COURT COMMITTED ERROR BY FINDING THAT THE COUNTY COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY WHEN THE COUNTY COMMISSION REDUCED FUNDING FOR THE SHERIFF BY HUNDREDS OF THOUSANDS OF DOLLARS WHEN THE COUNTY COMMISSION PROJECTED AN INCREASE IN REVENUE AND DID NOT REDUCE THE BUDGETS OF OTHER CONSTITUTIONAL OFFICERS AND OFFICIALS?

C. WHETHER THE CIRCUIT COURT COMMITTED ERROR BY FINDING THAT THE COUNTY COMMISSION ACTED UNDER A MISAPPREHENSION OF LAW WHEN IT ELIMINATED FUNDING FOR THE HIRING DEPUTIES WHEN THE COUNTY COMMISSION REPRESENTED THAT IT WANTED THE SHERIFF TO HIRE DEPUTIES, THAT IT HAD MONEY TO HIRE DEPUTIES AND THAT ONE COMMISSIONER ALLEGEDLY AND INFORMALLY TOLD THE SHERIFF, OUTSIDE OF ANY OFFICIAL MEETING AND WITHOUT ANY VOTE OF THE COMMISSION, THAT THE COMMISSION WOULD FUND THE POSITIONS AFTER THE SHERIFF ACTUALLY HIRES DEPUTIES?

D. DID THE CIRCUIT COURT EXCEED ITS JURISDICTION BY ENTERING AN ORDER GRANTING ATTORNEYS FEES IN FAVOR OF THE DULY ELECTED SHERIFF WHEN THE FEES WERE INCURRED TO COMPEL THE COUNTY COMMISSION TO APPROPRIATELY FUND THE OFFICE OF SHERIFF IN ORDER TO CARRY OUT HIS CONSTITUTIONAL AND STATUTORY DUTIES AND TO CORRECT THE COUNTY COMMISSION'S MISAPPREHENSION OF LAW AND/OR TO REMEDY ARBITRARY AND CAPRICIOUS FUNDING DECISIONS?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Sheriff agrees with the procedural history outlined in the Petition with the following addition: The "Court finds that the Respondent County Commission did act arbitrarily and capriciously by reducing the Sheriff's budget while increasing funding for other County Officers and projects. Such cuts interfere with the Sheriff's ability to fulfill his constitutional and statutory duties." Writ of Mandamus, R-7.

The Sheriff also notes that the Petitioner has included in the Appendix the Sheriff's Motion for Contempt, R-76-81 and the County Commission's Motion to Alter, Amend and Dissolve Order and for Stay, R-82-96.¹ The County Commission filed its Petition with this Court the day after it filed its Motion to Alter, Amend and Dissolve Order and for Stay. The Circuit Court took no action on either motion before the pending Petition was filed and are therefore not presently before this Court.

B. STATEMENT OF THE FACTS

The following facts related to the budget calculations are either undisputed or stipulated as accurate upon the record.

- The County Commission stipulated to the accuracy of the budget figures in the Petition filed with the Circuit Court. R-103.
- The levy estimate increased from 4,516,752 to 4,600,000. R-112; 137-38.
- The Sheriff has 1 existing vacancy in his Tax Office. R-110-11
- The Sheriff – Treasurer's Salary and Wage budget for Fiscal Year 2010-11 was \$208,300. The Sheriff requested \$218,500. The County Commission approved \$190,885, or \$17,415 less than the prior year's budget. R-25.
- The Sheriff has 4 existing vacancies in his Law Enforcement Division. R-104.²
- The Sheriff – Law Enforcement Salary and Wage budget for Fiscal Year 2010-11 was \$1,275,904. The Sheriff requested \$1,338,965. The County Commission approved \$1,131,090 or \$144,814 less than the prior year's budget. R-25; 43.
- The County Commission testified that it has the funds, and will appropriate funds, for additional Deputies when the Sheriff actually hires Deputies. R-149-50.

¹ In addition to the documents included in the Appendix, the Sheriff filed his Fee Petition, and his response to the County Commission's Motion to Alter, Amend and Dissolve Order and for Stay. The Sheriff does not believe that these documents are necessarily relevant to the issues presented to this Court in this proceeding, but the Sheriff will supplement the record should the Court determine that it wishes to review those documents.

² In addition to existing vacancies, two Law Enforcement Deputies are on active military duty overseas and are not available for duty.

- The Sheriff - Law Enforcement Uniform³ Budget last year was 98,999. The Sheriff requested \$80,000 (an 18% reduction). The County Commission budgeted 45,000, or \$35,000 less than the Sheriff's already reduced request. R-43; 144.
- The Sheriff – Law Enforcement Travel Budget for Fiscal Year 2010-11 was \$12,000. The Sheriff requested \$12,000. The County Commission approved \$4,000 or \$8,000 less than the prior year's budget. R-43.
- The Sheriff – Law Enforcement Training & Education Budget for Fiscal Year 2010-11 was \$90,000. The Sheriff requested \$75,000 (a reduction of 17%). R-126; 144. The County Commission budgeted \$25,000, or \$50,000 less than the Sheriff's already reduced request. R-43.
- The Sheriff – Law Enforcement Contributions to Other Gov Budget for Fiscal Year 2010-11 was \$85,000, the customary line item for vehicle purchases. The Sheriff requested \$125,000 for Fiscal Year 2011-12. The County Commission budgeted \$0, or \$85,000 less than the prior year's budget. R-43.
- The Sheriff – Service of Process Salary and Wage budget for Fiscal Year 2010-11 was \$22,000. The Sheriff requested \$22,000. The County Commission approved \$18,781, or \$3,219 less than the prior year's budget. R-44.
- The Sheriff's Jail – Non Reimbursable Costs (used to pay for Courthouse Security Officers) Salary and wage budget for Fiscal Year 2010-11 was \$94,000. The Sheriff requested \$96,400. The County Commission approved \$74,040, or \$19,960 less than the prior year's budget. R-25; 45.
- The County Commission budgeted \$185,408 less for Salary and Wage line items across the Sheriff's 4 Budgets in 2011-12 than it did in the 2010-11 Budget. R-25; 43-45.
- Only the Sheriff had his Salary and Wage Budget allocations reduced by the County Commission. R-153.

The following facts regarding the Constitutional and statutory duties of the Sheriff, and his work load, are undisputed in the record below.

³ The budget line item designated "Uniforms" may be somewhat misleading. In addition to uniform shirts, trousers, hats and related uniform clothing items, this line item includes duty gear, weapons, vests, radar, laptop computers, training and qualification ammunition, and is generally a catch-all for a whole host of items used by law enforcement that do not fit into any other line item. "Uniforms" also includes about \$600.00 a year for the dry cleaning of duty uniforms. R-129.

- The population of Greenbrier County is increasing. R-106; 154.
- Sheriff's calls for service have increased. R-107.
- Crime in Greenbrier County has risen. R-106-07; 154-55.
- There is a drug problem in Greenbrier County. R-155.
- The shortage of sworn Law Enforcement Deputies requires existing Deputies to work overtime at premium rates. R-112.
- The shortage of sworn Law Enforcement Deputies creates a safety issue for the working Deputies in a time when law enforcement officers are being killed in record numbers. R-113; 126; 135.
- The County Commission has no expertise in law enforcement management; running a tax office, dealing with mental hygiene issues, or the service of legal process. R-154.

III. SUMMARY OF ARGUMENT

- A. THE CIRCUIT COURT DID NOT EXCEED ITS JURISDICTION BY ORDERING THE COUNTY COMMISSION TO REVISE ITS BUDGET TO GIVE DUE CONSIDERATION TO THE SHERIFF'S BUDGETARY REQUESTS WHEN THE CIRCUIT COURT FOUND THAT THE COUNTY COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY BY REDUCING THE SHERIFF'S BUDGETS BY HUNDREDS OF THOUSANDS OF DOLLARS WHEN THE COUNTY COMMISSION PROJECTED AN INCREASE IN REVENUE AND DID NOT REDUCE THE BUDGETS OF OTHER CONSTITUTIONAL OFFICERS AND OFFICIALS.**

The Circuit Court did not exceed its authority by issuing the requested writ of mandamus.

“Mandamus lies to compel a county commission to ‘give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees’ of a county officer, as required by W. Va. Code, 7-7-7, as amended, where the county commission has arbitrarily fixed the overall budget of a county officer without having consulted with the county officer as to the amount of funds which is ‘reasonable and proper’ for the performance of the statutory

duties of his or her office.” Syllabus point 1, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989).

B. THE CIRCUIT COURT DID NOT COMMIT ERROR BY FINDING THAT THE COUNTY COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY WHEN THE COUNTY COMMISSION REDUCED FUNDING FOR THE SHERIFF BY HUNDREDS OF THOUSANDS OF DOLLARS WHEN, AT THE SAME TIME, THE COUNTY COMMISSION PROJECTED AN INCREASE IN REVENUE AND DID NOT REDUCE THE BUDGETS OF OTHER CONSTITUTIONAL OFFICERS AND OFFICIALS.

The Court did not commit error when it determined that the County Commission acted arbitrarily and capriciously when it reduced the Sheriff’s budget. The County Commission has the obligation to provide the Sheriff with sufficient staff to perform his statutory and constitutional duties. *Ginsberg v. Naum*, 173 W. Va. 510, 318 S.E.2d 454 (1984). The County Commission is obligated to appropriate funds from the general county fund to administer constitutionally required functions of county government, including the functions of the Sheriff/Treasurer. Adequate funding of those constitutional required duties is mandatory, and takes precedence over funding required for general relief. See, syl. Pt. 2, *Kenny v. Webster County Court*, 124 W. Va. 519, 21 S.E.2d 385 (1942).

C. **WHETHER THE CIRCUIT COURT COMMITTED ERROR BY FINDING THAT THE COUNTY COMMISSION ACTED UNDER A MISAPPREHENSION OF LAW WHEN IT ELIMINATED FUNDING FOR THE HIRING DEPUTIES WHEN THE COUNTY COMMISSION REPRESENTED THAT IT WANTED THE SHERIFF TO HIRE DEPUTIES, THAT IT HAD MONEY TO HIRE DEPUTIES AND THAT ONE COMMISSIONER ALLEGEDLY AND INFORMALLY TOLD THE SHERIFF, OUTSIDE OF ANY OFFICIAL MEETING AND WITHOUT ANY VOTE OF THE COMMISSION, THAT THE COMMISSION WOULD FUND THE POSITIONS AFTER THE SHERIFF ACTUALLY HIRES DEPUTIES?**

Mandamus lies to control the exercise of discretion when there is a showing of " 'caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or **misapprehension of law**[.]" *Allen v. State Human Rights Commission*, 174 W. Va. 139, 147, 324 S.E.2d 99, 106-07 (1984) (emphasis added). The Circuit Court heard the testimony from the County Commission that it told the Sheriff that it wanted him to hire Deputy Sheriffs and that if he hired Deputy Sheriffs the County Commission would move funds into the Sheriff's Law Enforcement Salary and Wage line item. R. 132; 134; 136; 147-48. The Commission also testified that the "promise" was made by the Commission President; that the Commission never voted on the issue; and that the "promise" was made in passing in an informal setting away from any scheduled meeting of the Commission. R. 150-52. The Sheriff disputed the Commission's testimony that the "promise" had ever been made to him. R. 155.

The Circuit Court correctly concluded that the County Commission acted under a misapprehension of law when it believed that it could authorize the Sheriff to hire for positions not included in his budget without a formal, on the record, vote of the County Commission to fund the positions. The Court acted within its jurisdiction when it issued the challenged writ to correct the County Commission's clear misapprehension of law.

D. THE CIRCUIT COURT DID NOT EXCEED ITS JURISDICTION BY ENTERING AN ORDER GRANTING ATTORNEYS FEES IN FAVOR OF THE DULY ELECTED SHERIFF WHEN THE FEES WERE INCURRED TO COMPEL THE COUNTY COMMISSION TO APPROPRIATELY FUND THE OFFICE OF SHERIFF IN ORDER TO CARRY OUT HIS CONSTITUTIONAL AND STATUTORY DUTIES AND TO CORRECT THE COUNTY COMMISSION'S MISAPPREHENSION OF LAW AND/OR TO REMEDY ARBITRARY AND CAPRICIOUS CONDUCT.

In Syllabus point 2, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989) this Court held: "Where a county commission arbitrarily fixes a county officer's budget without complying with the provisions of W. Va. Code, 7-7-7, as amended, the county commission is responsible for the county officer's reasonable attorney's fees incurred in a mandamus proceeding to compel compliance with that statute."

The Circuit Court found that the County Commission arbitrarily set the Sheriff's budget in violation of West Virginia Code §7-7-7. The Court clearly had the jurisdiction to award attorneys fees and costs.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The County Commission suggests that Oral Argument pursuant to Rule 19 is appropriate. The Sheriff does not necessarily disagree. The matter before the Court is not one of first impression, does not present constitutional questions regarding the validity of a statute or require resolution of a conflict among the Circuit Courts of this State. The Sheriff believes that this case involves a narrow issue of law which has been decided by this Court on prior occasions, that the evidence supports the jurisdiction and the decision of the Circuit Court. Rule 19 argument is appropriate, but perhaps unnecessary, to determine whether the Circuit Judge's exercise of discretion was unsustainable given the evidence of record. The Sheriff does not object to the Petitioner's request for oral argument.

V. ARGUMENT

A. THE CIRCUIT COURT DID NOT EXCEED ITS AUTHORITY BY ISSUING THE REQUESTED WRIT OF MANDAMUS.

The Circuit Court did not exceed its authority by issuing the requested writ of mandamus.

“Mandamus lies to compel a county commission to ‘give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees’ of a county officer, as required by W.Va. Code 7-7-7, as amended, where the county commission has arbitrarily fixed the overall budget of a county officer without having consulted with the county officer as to the amount of funds which is ‘reasonable and proper’ for the performance of the statutory duties of his or her office.” Syllabus point 1, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989).”

The Circuit Court did not Order the County Commission to include any specific dollar amount of funding in the 2011-12 budget. Order, R-7 (“the County Commission is required to allocate sufficient funds in the fiscal year 2011-12 budget for the Sheriff to fill any necessary vacant positions, if such allocation can be made without cutting other constitutional or statutory duties.”) The Sheriff did not request specific dollar relief. Petition, R-9 (“compel the Respondent County Commission to fulfill its mandatory legal obligation to budget the amount of funds which is ‘reasonable and proper’ for the performance of the constitutional and statutory duties of the Sheriff.”) See also R-101.

The Circuit Court did no more than it had the jurisdiction to do; it simply Ordered the County Commission to give fair consideration to the demonstrated needs of the Sheriff. In syllabus point 2 of *State ex rel. Canterbury v. County Court of Wayne County*, 151 W. Va. 1013, 158 S.E.2d 151 (1967), the Court stated:

In the absence of arbitrary action on the part of a county court [now, county commission] in the exercise of its discretion as to the sum to be allotted to the office of the county clerk for the compensation of deputies and assistants for the ensuing fiscal year, in accordance with the provisions of Code, 7-7-7, as amended, mandamus will not lie.

The *Lambert* Court stated the positive corollary of the same proposition in syllabus point 1:

Mandamus lies to compel a county commission to "give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees" of a county officer, as required by W.Va. Code, 7-7-7, as amended, where the county commission has arbitrarily fixed the overall budget of a county officer without having consulted with the county officer as to the amount of funds which is "reasonable and proper" for the performance of the statutory duties of his or her office.

The Circuit Court, after considering the live testimony presented by the Sheriff and the County Commission during the Rule to Show Cause hearing, concluded that the County Commission acted in an arbitrary and capricious manner. This finding, unless overturned by this Court, provides the jurisdictional basis for the Court's mandamus order.

The County Commission believes that it cannot be held to have acted in an arbitrary and capricious manner because it met with the Sheriff before fixing his budget. This reasoning exalts form over substance. This Court has recognized that the Sheriff is an important constitutional officer and the County Commission should give some deference to, or respect, the Sheriff. See *Webster County Com'n v. Clayton*, 206 W. Va. 107, 113, 522 S.E.2d 201, 207, n. 9 in part, (1999) ("in light of the constitutional nature of the office of sheriff, we encourage county commissions to defer to a sheriff's selections for potential appointees and employees in recognition of the esteemed status of this office.") See, e.g., Syl. pt. 6, *State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 507 S.E.2d 376 (1998) ("A county commission has the authority to employ individuals to perform security functions for the county judiciary, but this authority is limited insofar as it cannot properly be exercised in a manner which impairs or supplants the power and duty of the county sheriff, under W. Va. Code § 51-3-5 (1923) and Rule VII of the

West Virginia Trial Court Rules (1960), to select one or more deputy sheriffs to serve as court bailiff and to provide a sufficient number of bailiffs for every court of record in the county." (emphasis added)).

The Sheriff did not and does not argue that the County Commission was obligated to fully fund his every budget request simply because he is a constitutional officer, rather he suggests that the County Commission has to do more than simply meet with the Sheriff to fulfill its statutory obligations under Code §7-7-7. The County Commission can meet with the Sheriff as required, but then slash his budget for political reasons, personality conflicts, personal animosity and/or to "teach the Sheriff a lesson" for exercising his lawful prerogatives contrary to the wishes of the County Commission. The Sheriff believes that Code §7-7-7 contemplates a meaningful and thoughtful consideration of all requests giving appropriate deference to areas within the expertise and knowledge of the Sheriff, especially when members of the County Commission do not, themselves, have such knowledge and expertise.

B. THE COURT DID NOT COMMIT ERROR WHEN IT DETERMINED THAT THE COUNTY COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT REDUCED THE SHERIFF'S BUDGET, AND ONLY THE SHERIFF'S BUDGET, AT A TIME WHEN COUNTY REVENUES WERE PREDICTED TO INCREASE.

The County Commission has the obligation to provide the Sheriff with sufficient staff to perform his statutory and constitutional duties. *Ginsberg v. Naum*, 173 W. Va. 510, 318 S.E.2d 454 (1984). The County Commission is obligated to appropriate funds from the general county fund to administer constitutionally required functions of county government, including the functions of the Sheriff/Treasurer. Adequate funding of those constitutional required duties is mandatory, and takes precedence over funding required for general relief. See, Syl. pt. 2, *Kenny v. Webster County Court*, 124 W. Va. 519, 21 S.E.2d 385 (1942). See also, Syl. pt.1 and pt. 2,

State ex rel Board of Educ. v. Rockefeller, 167 W. Va. 72, 281 S.E.2d 131 (1981) (related to state funding of constitutional mandates in education).

The Circuit Court had evidence that, and concluded that, the County Commission did not cut the salary budget of any constitutional officer other than the Sheriff. R-153. See, Finding of Fact No. 11. The Salary and wage line items for the offices of the County Commission, the Prosecuting Attorney and the Assessor all were increased in the 2011-2012 Budget. Every employee in the Courthouse, other than the elected officials, received a salary increase. R – 152.

The Circuit Court heard live testimony regarding the County Commission's stated reasons for cutting the Sheriff's Budget. The Court also heard testimony regarding increasing crime rates, increasing illegal drug activity and the Sheriff's concerns for his Deputies' physical safety in an environment where "line of duty" law enforcement murders and deaths have increased dramatically in recent years. The Court concluded that the cuts imposed by the County Commission interfered with the Sheriff's ability to fulfill his constitutional and statutory duties. R-7. The Court also found that the County Commission did not make budget cuts across the board and that the County Commission did not reduce the salary and wage budget for any official other than the Sheriff. Order, Finding of Fact Nos. 9 and 11. R-4. The Court's writ is supported by both the evidence and the law.

Although the County Commission now contends before this Court that it is projecting less revenue than in past years, the evidence before the Circuit Court was that the County Commission projected revenues to **increase** by approximately \$100,000. R-137-38. See Finding of Fact No. 8. The County Commission also represented to the Circuit Court that it had the funds available to fund the Deputy positions. R 149-50.

The Circuit Court heard live testimony regarding the County Commission's stated reasons for cutting the Sheriff's Budget. The Court also heard testimony regarding increasing crime rates, increasing illegal drug activity and the Sheriff's concerns for his Deputies' physical safety in an environment where law enforcement murders and deaths have increased dramatically in recent years. The Court concluded that the cuts imposed by the County Commission interfered with the Sheriff's ability to fulfill his constitutional and statutory duties. R-7. The Court's writ is supported by both the evidence and the law.

The evidence establishes that the County Commission reduced the Sheriff's Salary and Wage line items by \$185,408 at a time that no other elected official suffered a reduction in Salary and Wage allocations. The evidence also establishes that the Sheriff voluntarily reduced his budget request for Uniforms and Training by 18% and 17% respectively and that the County Commission reduced the Sheriff's other budget items by \$178,000 more than the Sheriff's already reduced budget requests. The evidence and the law supports the Circuit Court's finding that the County Commission acted arbitrarily and capriciously by slashing the Sheriff's budget by more than \$350,000 when the County levy estimated revenues increased by approximately \$100,00 and no other official's budget was cut.

C. THE CIRCUIT COURT DID NOT COMMIT ERROR BY FINDING THAT THE COUNTY COMMISSION OPERATED UNDER MISAPPREHENSION OF LAW BY INFORMALLY PROMISING TO REVISE THE BUDGET TO FUND DEPUTY SHERIFFS IF AND WHEN THE SHERIFF ACTUALLY HIRED THOSE DEPUTY SHERIFFS.

In *State ex rel. West Virginia Bd. of Ed. v. Miller*, 153 W. Va. 414, 168 S.E.2d 820 (1969), this Court noted:

It is true that mandamus will not ordinarily lie to control the performance of a discretion on the part of an administrative or executive office but it has been repeatedly held that when the act of such officer is capricious or arbitrary or under

the misapprehension of law on the part of such officer the exercise of discretion may be controlled by mandamus. *Dillon v. Bare and Carter*, 60 W. Va. 483, 56 S.E. 390 (1906); *State ex rel. Noyes v. Lane*, 89 W. Va. 744, 110 S.E. 180 (1921); *State ex rel. Hoffman v. Town of Clendenin*, 93 W. Va. 618, 115 S.E. 583, 29 A.L.R. 37 (1923); *Beverly Grill, Inc. v. Crow*, 133 W. Va. 214, 57 S.E.2d 244 (1950).

State ex rel. West Virginia Bd. of Ed. v. Miller, 153 W. Va. 414, 421, 168 S.E.2d 820, 825 (1969); *Accord, State ex rel. Human Res. v. Board of Risk*, 214 W. Va. 460, 590 S.E.2d 653 (2003).

The Court found that the County Commission acted under a misapprehension of law when it concluded that it could informally authorize the Sheriff to hire Deputy Sheriffs in excess of his budget allocation even though the County Commission removed funding for those positions from the Budget which was formally approved and sent to the State Auditor for final approval. The Court did not commit error by determining that the County Commission could not informally authorize, through the oral approval of one of the three Commissioners without a formal vote or a decision at a public meeting, the hiring of employees contrary to the formal unanimous votes in public meeting removing the positions from the Sheriff's Budget. Such an authorization violates the Open Government Proceedings Act and is void or voidable. See W. Va. Code §6-9A-6.

Moreover, it has long been established that a single Commissioner has no authority to act unilaterally and bind a County Commission to the promises of one Commissioner. See *Goshorn's Ex'rs v. County Court of Kanawha County*, 42 W. Va. 735, 26 S.E. 452 (1896); *Accord, State ex rel. Cabell County Deputy Sheriff's Ass'n v. Dunfee*, 163 W. Va. 539, 258 S.E.2d 117 (1979) ("The fact that Sheriff Barr testified that he spoke informally with two persons who were then members of the county commission and those members approved the pay raises is irrelevant. There is no evidence that the county commission ever acted as an entity under Chapter

7, Article 1 of the Code, and there is no statutory authority for action by individual members.”); *State Ex Rel. Tyler County Court v. Morris*, 91 W. Va. 269, 112 S.E. 519 (1922)(Neither section 3a(21, c. 39. Barnes' Code 1918 (Code 1913, § 1529), nor any other provision of the law gives the president of the county court right to institute and prosecute suits and employ counsel therefor. Nor can any such power be implied from any of the other provisions of said chapter. Nor could the court or any of the commissioners act or transact such business except when in session and in the manner provided by law—that is, by record of its proceedings).

Mandamus lies to control the exercise of discretion when there is a showing of " 'caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of law [.]'" *Allen v. State Human Rights Commission*, 174 W. Va. 139, 147, 324 S.E.2d 99, 106-07 (1984). The Circuit Court correctly concluded that the County Commission acted under a misapprehension of law when it believed that it could authorize the Sheriff to hire for positions not included in his budget without a formal, on the record vote of the County Commission to fund the positions and the Circuit Court acted within its jurisdiction when it issued the challenged writ.

D. THE COURT DID NOT EXCEED ITS JURISDICTION BY AWARDING ATTORNEYS FEES AND COSTS AGAINST THE COUNTY COMMISSION BECAUSE ATTORNEY’S FEES AND COSTS ARE PROPERLY AWARDED IN MANDAMUS PROCEEDINGS.

In Syllabus point 2, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989) this Court held: "Where a county commission arbitrarily fixes a county officer's budget without complying with the provisions of W.Va. Code, 7-7-7, as amended, the county commission is responsible for the county officer's reasonable attorney's fees incurred in a mandamus proceeding to compel compliance with that statute."

An award of attorney fees in a mandamus action is reviewed under an abuse of discretion standard. *State ex rel. Hicks v. Bailey*, No. 35646 (W. Va., May 26, 2011); *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W. Va. 613, 616, 486 S.E.2d 782, 785 (1997)(citing *State ex rel. Bd. of Educ. v. McCuskey*, 184 W. Va. 615, 617, 403 S.E.2d 17, 19 (1991)). The Circuit Court found that the County Commission arbitrarily set the Sheriff's budget in violation of West Virginia Code §7-7-7. The Court did not abuse its discretion and clearly had the jurisdiction to award attorneys fees and costs.

VI. CONCLUSION

The Sheriff suggests to the Court that the Circuit Court had the jurisdiction to take testimony, evaluate the testimony, make findings of fact and render conclusions of law related to the subject matter of the litigation in the Circuit Court of Greenbrier County. The Court had the jurisdiction to find, and did find, that the County Commission acted arbitrarily, capriciously, and with a misapprehension of law. Based upon the record and the findings of the Court, the Circuit Court had the jurisdiction to issue the writ which it issued.

The Sheriff requests that this Court deny the requested writ and remand this case to the Circuit Court of Greenbrier County to enforce its order.

JAMES W. CHILDERS
Sheriff of Greenbrier County, West Virginia

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.,
County Commission of Greenbrier County, West Virginia,

Petitioner,

v.

Honorable John L. Cummings and James W. Childers,
Sheriff of Greenbrier County, West Virginia,

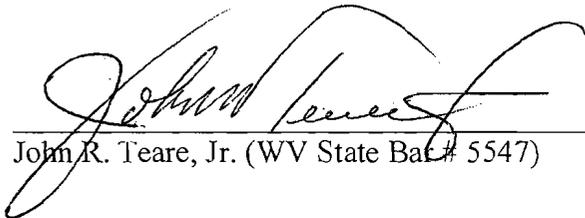
Respondents.

CERTIFICATE OF SERVICE

I, John R. Teare, Jr., do hereby certify that I have served the foregoing
“RESPONSE OF SHERIFF CHILDERS TO PETITION FOR WRIT OF MANDAMUS”
upon the following counsel of record by depositing the same in the United States mail, postage
prepaid, on this 10th day of August, 2011, addressed as follows:

Marvin W. Masters, Esquire
April Ferrebee, Esquire
The Master Law Firm
181 Summers Street
Charleston, WV 25301

Honorable John L. Cummings
2255 Nelson Court
Milton, WV 25541



John R. Teare, Jr. (WV State Bar # 5547)