

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 11-1206**

**LONNIE HANNAH, Sheriff of Mingo County
Appellant**

VS.

**On appeal from the Circuit Court of
Mingo County, West Virginia,
Civil Action No.: 11-AAA-1**

**MAX JEREMY MOUNTS,
Appellee**

BRIEF OF APPELLEE

**C. Christopher Younger
106 Logan St.
Williamson, West Virginia 25661
304-235-3555
Attorney for Appellee**

TABLE OF CONTENTS

STATEMENT OF CASE.....	Page	4
SUMMARY OF ARGUMENT.....	Page	6
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	Page	6
ARGUMENT.....	Page	7
CONCLUSION AND PRAYER FOR RELIEF.....	Page	13
CERTIFICATE OF SERVICE.....	Page	14

TABLE OF AUTHORITIES

Cases

Edwards v. U.S., 103 U.S.. 471. (1880)

Meadows v Hopkins, 211 W.Va. 382, 566 S.E.2d 269 (2002)

State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 145, 107 S.E. 2d 353, 358 (1958)

Watts v Lanham, 113 W.Va. 808. 169 S.E. 461 (1933)

Statutes

West Virginia Code 7-14-1

West Virginia Code 7-14-8

22 R.C.L, p. 556

STATEMENT OF THE CASE

On or about November 4, 2010, Deputy Max Jeremy Mounts submitted his resignation to Lonnie Hannah, Sheriff of Mingo County. The next day November 5, 2010, and prior to the acceptance of his resignation, Deputy Mounts withdrew the same by advising Sheriff Hannah in person of the withdrawal of his resignation. Sheriff Hannah advised Deputy Mounts he would take the matter into consideration over the weekend, and on Monday, November 8, 2010, Sheriff Hannah advised Deputy Mounts he was no longer employed by the Mingo County Sheriff's Department. The Mingo County Commission met on November 17, 2010, and considered Sheriff Hannah's request to accept the resignation of Max Mounts. The minutes of said meeting reflect that the Commission unanimously rejected the Sheriff's request to accept the resignation of Mounts. Commissioner Smith stated that he considered Deputies to be co-employees of the County Commission, and the Commission ordered Mounts to report to the Sheriff's Department for duty. Sheriff Hannah refused to allow Deputy Mounts to return to duty and thereafter Mounts filed a grievance and motion before the Deputy Sheriff's Civil Service Commission. The grievance concerned the acceptance of Mounts' resignation (see Appendix, hereinafter App, at page 9) and a motion (App. 12) seeking reinstatement pursuant to West Virginia Code 7-14-8.

The Civil Service Commission held a hearing on Mounts' grievance and motion on December 2, 2010. At the conclusion of the hearing, Commissioner Justice read the pertinent language of West Virginia Code 7-14-8 at App. 78 and incorrectly interpreted said statute by

stating “ we have the authority to have him put back on the roster and he will go to the top of the list”. (See App. 78 lines 17-22) The Civil Service Commission never made a ruling that Mounts should not be reinstated, only that the Commission believed they did not have the authority to reinstate him, even though he met all the requirements of West Virginia Code 7-14-8. (See App. 78 at lines 6 and 7) Counsel for the Sheriff prepared an order which incorrectly stated the rulings of the Civil Service Commission and submitted it to the Commission without a signature line for opposing counsel. Said order was entered before counsel for Mounts had an opportunity to review and/or object to the same.

That in regard to the issue of whether Deputy Mounts’ resignation had been accepted, the Civil Service Commission made no findings nor rulings concerning said issue, however, the Sheriff’s counsel in preparing the order for the Civil Service Commission made numerous findings in regard to Mounts’ resignation.

Deputy Mounts filed his petition for appeal of the rulings and order of the Civil Service Commission, on February 22, 2011. Senior Judge Robert Chafin was assigned to hear the appeal, after Mingo County Circuit Judge Michael Thornsby voluntarily recused himself. Judge Chafin heard oral arguments and entered his order on July 20, 2011, directing the Civil Service Commission to reinstate Deputy Mounts and ordering the Civil Service Commission to take testimony and evidence and make findings and ruling as to whether the resignation of Deputy Mounts was accepted, and if so, when. An amended order directing reinstatement was entered on August 16, 2011, solely because page 2 of the Court’s order of July 20, 2011, was misplaced or missing at the time of the entry of said order.

SUMMARY OF ARGUMENT

The failure of the Civil Service Commission to reinstate Deputy Mounts to his employment as a Mingo County Deputy Sheriff was based on their misunderstanding of the law as set forth in West Virginia Code 7-14-8. The order entered by the Civil Service Commission contained findings unsupported by the record of the proceeding before the Civil Service Commission and was prepared by Sheriff Hannah's counsel. That further, the Commission made an order for which it had no authority by placing Deputy Mounts at the top of the existing list of eligibles without competitive examination, in direct contravention of the legislative intent to leave the sole discretion for reinstatement in the hands of the Civil Service Commission.

That the failure of the Sheriff of Mingo County to allow Deputy Mounts to withdraw his resignation resulted in a de facto firing of Deputy Mounts which clearly and properly places said issue before the Civil Service Commission for hearing. The same would require the Commission to take testimony and evidence regarding the issue whether Mounts' resignation was accepted or not, in order to determine the issue of whether his firing was justified. The Circuit Court of Mingo County ruled that the record of the proceeding before the Civil Service Commission on the issue of Mounts' resignation was unclear and further evidence and testimony needed to be taken.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Deputy Mounts does not believe that oral argument is necessary regarding the issues

before the Court on appeal. The record clearly supports the Circuit Court's findings and rulings regarding the Civil Service Commission's misunderstanding of the law regarding reinstatement of former Deputies and the unsupported findings placed in the Civil Service Commission's order by Sheriff Hannah's counsel.

It would be most helpful for this honorable Court to enunciate its position as to when the resignation of a Deputy Sheriff is accepted and/or what acts are necessary on behalf of the Sheriff to signify his/her acceptance of a resignation

ARGUMENT

The primary issue in this case is not the interpretation of the statute (West Virginia Code 7-14-8) but the Mingo County Deputy Sheriff's Civil Service Commission's understanding of said statute. While the Civil Service Commission's determination of the acceptance of Deputy Mount's resignation is an issue which must be decided in light of Sheriff Hannah's refusal to allow Mounts to withdraw the same and return to work (even though said resignation had not been accepted) which resulted in the de facto firing of Deputy Mounts.

The Circuit Court clearly found that the Civil Service Commission's failure to reinstate Deputy Mounts was based on their misunderstanding of the law and findings which were unsupported by the record. The Circuit Court further found that as to the issue of Deputy Mounts' resignation that the record was unclear as to support the findings by the Civil Service Commission.

I. The Circuit Court committed clear legal error by exercising appellate jurisdiction to review the Civil Service Commission's Order and by substituting its judgment for the

judgment of the Civil Service Commission's which has the sole discretionary authority over matters of reinstatement.

The Sheriff attempts to divert this Court's attention from the real issue at hand. When reviewing the transcript of the proceeding held before the Civil Service Commission (See App. pages 77-85) it is clear that the Commission did not understand the authority vested in them by West Virginia Code 7-14-8. At App. 78 line 17-19 Commissioner Justice states "Now, as I understand, we have the authority to have him put back on the roster, and he will go at the top of the list." to which statement Commissioner Bush agreed.. This misunderstanding was compounded by Commissioner Justice's statement at App. 79 lines 7-13 wherein he stated "he goes back on the roster. The hiring list, and it is the Sheriff's to hire from that roster. The Sheriff is mandated to hire from that roster, so he goes back on the roster to be reconsidered for reemployment." Giving the Sheriff the authority to reinstate or reappoint a Deputy Sheriff is in direct contravention to this Court's written position in *Meadows v Hopkins*, 211 W.Va. 382, 566 S.E.2d 269 (2002), wherein this court stated that the legislature has given general authority to Sheriffs to appoint Deputy Sheriffs under specific statutory guidelines. See W.Va. Code 7-14-1 et seq. Through W.Va. Code 7-14-8, though, the legislature has chosen to give the Civil Service Commission exclusive authority to reinstate or reappoint a Deputy Sheriff. This Court has continually stressed, on numerous occasions, that it is not the province of the Courts to make or supervise legislation, and a statute, may not under guise of interpretation be modified, revised, amended, distorted, remodeled or rewritten. See *State v. General Daniel Morgan Post No. 548*,

V.F.W., 144 W. Va. 137, 145; 107 S.E. 2d 353, 358 (1958) Thus, clearly the position of the Civil Service Commission in attempting to give Sheriff Hannah the authority to reappoint Deputy Mounts is in clear contravention of not only the Court's position, but legislative intent.

The Sheriff attempts to assert that the Civil Service Commissioners decided not to reinstate Deputy Mounts, however the proper position is that the Commission did not understand that they had the authority to reinstate. The Commission's position is clearly illustrated at App. 80 lines 12-19 wherein Mounts' counsel states "The Sheriff does not have any discretion here." and Commissioner Justice replied, "That's not what we as a Commission understand. We understand that we have the authority to put him back on the roster. He goes back on the roster in the top position, but its not at our discretion to reemploy him." Further at App. 81 lines 16-20 the misunderstanding and or misinterpretation of West Virginia Code 7-14-8 is clearly illustrated wherein Commissioner Justice states "Maybe; Our position is that we don't have the authority to hire. We don't hire anybody for the Sheriff's department. We create a roster and the Sheriff is mandated by legislation to hire from that roster."

The Mingo County Circuit Court in its amended order of August 11, 2011, which is found at App. pages 5-8, found that the record did not support the finding and there was no basis for the finding included by the Sheriff's counsel at paragraph 18 of the Civil Service Commission's order of December 6, 2010, wherein the Civil Service Commission declined to immediately reinstate Deputy Mounts to his former employment. The court also found that the Civil Service Commission had no authority to reinstate Mounts to the top of the existing list of eligibles. Most importantly, the Court found that the law^f was clear in regard to the authority

vested in the Civil Service Commission by West Virginia Code 7-14-8 and their council should have advised them of their clear authority to appoint Mounts by reinstatement, and that the only options available to the Commission were to reinstate or not reinstate.

The Civil Service Commission clearly failed to exercise their statutory obligation to either reappoint or refuse to reappoint Mounts pursuant to West Virginia Code 7-14-8, after finding at App 84 lines 16-23 and page 70 lines 1 and 2 that "I think you're right as far as Max meeting all the criteria of being a Deputy Sheriff ... This criteria right here gives him the right to go back to the top of the list. He goes right back to the main top of the list to be hired as a Deputy Sheriff when one is deemed necessary."

II. The Circuit Court erred by not giving deference to the fact-finding of the Civil Service Commission and by ordering that new facts be established for the record.

The Circuit Court did not fail to give deference to the fact finding of the Civil Service Commission, instead the Circuit Court found that the Sheriff's counsel created findings of fact which were not supported by the record and without approval by counsel for Mounts.

The acceptance of Mount's resignation is also completely at issue. Sheriff Hannah asserts that he accepted Mount's resignation and endorsed it to his resignation on November 4, 2010. Mounts' testimony directly contradicts the Sheriff's position, wherein at App. 44 Mounts states on Friday November 5, 2010, at about 6 P.M. he went and talked to the Sheriff at his house about withdrawing his resignation and the Sheriff said "Just come on in Monday and we'll talk about it. Further, at App. 42 lines 10-20 Mounts testified that his resignation letter was turned in

on November 4, 2010, a Thursday at 4 P.M. and that he was contacted by the Sheriff's office on Friday November 5, 2010, at 11:30 A.M. because his resignation letter had been misplaced and he was asked to send another copy. In light of Mounts' testimony, one must question whether the Sheriff actually placed his signature and the date on Mount's resignation letter on November 4, 2010, or at some later date to buttress his position as to the acceptance of Mounts' resignation.

III. The Circuit Court erred in remanding to the Civil Service Commission for findings of fact regarding the validity of the Respondent's resignation, because the Civil Service Commission has no authority to hear the issue.

The issue of the acceptance of Mounts' is clearly an issue which the Civil Service Commission has the authority to hear. The acceptance of Mounts' resignation is in controversy as to if it was accepted, and if so, when. A further issue is what act or acts are necessary to accept the resignation of a Deputy Sheriff.

Mounts disputes the fact that his resignation was accepted and therefore the refusal of the Sheriff to allow Mounts to return to employment, results in a de facto firing which is clearly an issue which the Civil Service Commission has the authority to hear.

West Virginia case law regarding the acceptance of resignations seems to revolve around the resignation of public officials. In *Watts v Lanham*, 113 W.Va. 808. 169 S.E. 461 (1933), this court stated "A written resignation of a public office does not take effect until it has been accepted by an officer or a tribunal having authority to accept it, and therefore may be repudiated and revoked at any time before acceptance thereof." The Court went on to cite 22 R.C.L, p. 556, sec. 260 "... the better opinion is that a public officer does not have the privilege of resigning,

since the public has a right to the services of all citizens, and may demand them in all civil departments as well as in the military. Therefore, to be effective, the resignation must be accepted by competent authority, either in terms, or by something tantamount to an acceptance, such as the appointment of a successor." The "better opinion" was supported by the United States Supreme Court in *Edwards v. U.S.*, 103 U.S.. 471. (1880) which stated that the common law rule that the resignation of a public officer is not complete until the proper authority accepts it or does something tantamount thereto such as to appoint a successor. Mounts would argue that the equivalent action by the Sheriff to accept his resignation would be the announcement of a vacancy or a request for the County Commission to accept a new Deputy for hire. In that the Sheriff requested that the resignation of Mounts be approved by the Mingo County Commission, it is clear that Sheriff Hannah felt further action was necessary for the resignation of Mounts to be accepted. At App. 26 lines 14-24, Commissioner Greg Smith of the Mingo County Commission testified as to the Sheriff's usual procedure concerning the resignation of Deputy Sheriffs. Smith further testified that following a vote to accept a resignation, the Sheriff usually submitted a name to be hired to fill that position. At App. 27 lines 9-18, Smith explained the Commission always requests the Sheriff present something in writing to the Commission concerning a resignation so it can be voted upon. At lines 19-23, Smith testified he was not aware of any Deputy resigning without the matter being brought before the County Commission for acceptance of the resignation. He further explained that this procedure was followed so there would be no question as to whether or not there was a resignation.

Certainly the failure of the Civil Service Commission to make any findings or rulings

concerning the resignation of Mounts, provides an insufficient basis for this Court to conclude that the Civil Service Commission believed Mounts' resignation had been accepted. The only findings made by the Civil Service Commission are those the Sheriff's counsel created and even those fail to provide any basis for what acts are necessary to constitute acceptance of a resignation.

CONCLUSION AND PRAYER FOR RELIEF

Deputy Max Mounts hereby requests that this Court uphold the rulings of the Mingo County Circuit Court regarding the reinstatement of Deputy Mounts and further uphold said Court's rulings in regard to further hearings before the Civil Service Commission on the issue of Mounts' resignation.

MAX JEREMY MOUNTS
By counsel


C. CHRISTOPHER YOUNGER

Prepared by:
C. Christopher Younger
106 Logan St.
Williamson, WV 25661
WV BAR NO. 4317

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 11-1206

LONNIE HANNAH, Sheriff of Mingo County
Appellant

VS.

**On appeal from the Circuit Court of
Mingo County, West Virginia,
Civil Action No.: 11-AAA-1**

MAX JEREMY MOUNTS,
Appellee

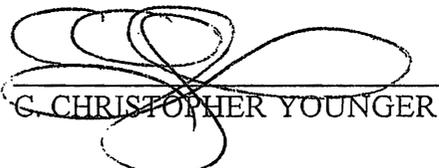
CERTIFICATE OF SERVICE

I, C. Christopher Younger, counsel for Appellee, do hereby certify that a copy of the foregoing **BRIEF OF APPELLEE**, by first class mail to the following:

John R. Teare, Jr.
300 Kanawha Blvd. East
Charleston, WV 25321

on this the 3rd day of January, 2012

MAX JEREMY MOUNTS
By counsel


C. CHRISTOPHER YOUNGER

Prepared by:
C. Christopher Younger
106 Logan St.
Williamson, WV 25661
WV BAR NO. 4317