

12-0586

IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

STATE OF WEST VIRGINIA EX. REL
ROBERT SHIRLEY, SHERIFF
OF JEFFERSON COUNTY

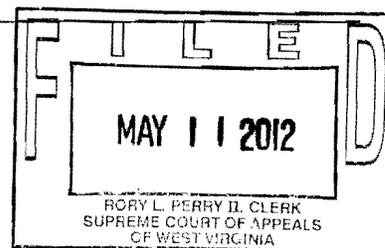
PETITIONER,

VS.

Docket Number:
Jefferson County Civil Action No.
09-AA-7

THE HONORABLE DAVID SANDERS, and
MICHAEL T. DODSON

RESPONDENTS.



WRIT OF PROHIBITION

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III. QUESTIONS PRESENTED

Did the Circuit Court exceed its authority when it did not allow the deputy sheriff's association and the sheriff to appoint a members to a hearing board authorized under W.Va. Code § 7-14C-1 and instead appointed a six member hearing board, of which half of the members were chosen from a list submitted by the deputy sheriff under investigation, when the relevant provisions of the code do not provide a deputy under investigation the right to appoint a representative to the hearing board and there was no evidence that the deputy sheriff's association was unable to appoint a member?

IV. STATEMENT OF THE CASE

This case is on remand from the West Virginia Supreme Court of Appeals. In that case the Sheriff had conducted an investigation, which revealed that the Respondent Sergeant had engaged in sexual intercourse on County property while on duty. During the investigation, the Sheriff also alleged that the deputy was not forthcoming about his actions and provided three different and inconsistent explanations for his behavior. The Sergeant was provided a hearing before the Civil Service Commission, which upheld the Sheriff's decision to terminate the deputy. The case was appealed to Circuit Court, which court upheld the decision of the Civil Service Commission. The deputy appealed the Circuit Court's decision to this Court. On appeal, the Court found that the Petitioner was entitled to pre-disciplinary hearing and that the Sheriff failed to provide such a hearing. Accordingly, this Court, by memorandum decision, remanded the case back to provide the Petitioner with a pre-termination hearing.

After this Court entered its opinion, the Petitioner wrote a letter to the Sheriff requesting a pre-termination hearing without first seeking an order from the Circuit Court, to which the case was remanded. (App. 8) The Sheriff, however, having received the request for the

hearing and in an attempt to provide the hearing without any further delay, convened a hearing board in accordance with the provisions of W.Va. Code § 7-14C-1(4). After the hearing board was chosen, the Sheriff provided the Respondent Sergeant with at least ten days notice as required by W.Va. Code § 7-14C-3(a), which section requires that the deputy receive no less than ten days notice prior to the hearing. (App. 14) When the Sheriff provided this notice to the Respondent Sergeant, he filed a preliminary injunction in circuit court, which injunction sought additional time to prepare for the hearing and alleged that the Deputy Sheriff's Association had not "operating under any recognized procedure in making it's appointment to the board." The Court granted this injunction and issued a rule to show cause against the sheriff. (App.3)

A hearing on the rule to show cause was held on November 14, 2011 before the Jefferson County Circuit Court. At that hearing, the Sheriff informed the Court of the manner in which the members of the hearing board were appointed. The Sheriff informed the President of the Department's Deputy Sheriff's Association that Sergeant Dodson had requested a pre-disciplinary hearing and requested that the Association chose a representative for the hearing board as required by W.Va. Code § 17-14C-1(4). Because the President was out of town at that time, he contacted the chief deputy of the department, Jesse Jones, who is also a member of the Deputy Sheriff's Association (hereinafter "DSA"). A ballot with all those deputies who were eligible to serve was prepared and all of the deputies in the department voted by secret ballot. As each deputy voted, Chief Jones checked each deputy's name as he or she placed the ballot into a sealed box. (App. 9-10) Some deputies within the department were out on leave. However, those deputies were contacted and informed that the DSA was voting to appoint a member to the hearing board, and asked if the deputy wished to cast a ballot. For example, Deputy Windle was on military duty but was contacted. He told the Chief that he wanted to Deborah Lowe, an

administrative assistant within the department who also is responsible for assisting the DSA, to fill out his ballot according to his vote and then have her turn it in for him. Deputy Windle informed Mrs. Lowe of his vote over the phone and she filled out the ballot according to his request.

After it was determined that all of the deputies within the department had voted, Mrs. Lowe unsealed the box and tallied the votes. Deputy Doug Fletcher received 18 votes out of 24 votes cast. (App. 11) The next highest vote getter was Deputy Windle with 2 votes. (App. 11) Accordingly, Deputy Doug Fletcher was appointed to the hearing board as the deputy sheriff's association. Thereafter, the Sherriff appointed Sergeant Ronald Fletcher (no relation to Deputy Doug Fletcher) as his representative on the hearing board. Those two members then chose the third member, Corporal Vincent Tiong.

At the hearing before the Circuit Court, the Respondent Sergeant argued that the Deputy Sheriff's Association appointee was not appointed according to any procedure. Because of this alleged faulty procedure, the Respondent Sergeant argued that the appointment should be invalidated, and the court should allow the Sherriff to appoint his representative and the Court should appoint the remaining two members. (App. 6-7) The sergeant alleged that the Sheriff exercised undue influence over the appointment of the board because of the involvement of Chief Jones and Deborah Lowe in the balloting process. (App. 7) Sergeant Dodson further argued that the DSA had not had a formal meeting in over two years and that two retired members who are no longer with the department were not informed of the vote on the appointment and as such did not have the opportunity to vote. (App. 6) The Sergeant argued that all of these factors created a taint that could not be removed and as such, the DSA was unable to choose a member to represent it on the board. (App. 7)

In response, the Sheriff argued that there are no requirements either in the State Code or in the Code of State rules which prescribe the manner in which the DSA is to vote on any matter, including the appointment of members to a hearing board. (App. 9) Members of the association pay annual dues which continue to be collected and paid even though no formal meetings have been held. (App. 15) Additionally, the Sheriff proffered that although the DSA has not met for a formal meeting, throughout the year, they continue to vote on several issues, including the allocation of charitable donations and the appointment of members to other hearing boards. (App. 16) Additionally, the Jefferson County DSA pays its dues every year and is listed as a current non-profit organization with the Secretary of State and continues to file annual reports with that office. (App. 15) Furthermore, the law does not require that the DSA hold regular meetings nor is it defined anywhere in any code any other state law. Finally, the Sheriff argued that if the Court found that the secret balloting process was not an acceptable procedure for the DSA to appoint its member of the board and somehow violated Sergeant Dodson's due process, then the Court could simply order the DSA to re-appoint members using the process outlined by the Court. (App 11-12) However, the idea that the DSA was unable to choose a representative as they are entitled to do under the statute because the process had been perpetually tainted with there being no conceivable remedy to cure the defect was not tenable, and the appropriate remedy would be to order the DSA to vote again using the process outlined by the Court.

After the hearing, the circuit court issued an order ruling that the DSA was unable to appoint a member to the hearing, and as such it was the role of the Chief Judge to appoint members to the pursuant to § 7-14C-1(4). (App. 59-61) The Court then ordered that the parties provide the Court with a list of five potential board members so that the court could appoint "the

additional members of the Board.” (emphasis added). (App. 61) Both parties complied with this Order; the Sheriff under the impression from the language in the order that he would still be entitled to appoint a representative to the Board. However, after the parties presented a list of five candidates, the Judge appointed a six member board, comprised of three individuals from Sergeant Dodson’s list and three individuals from the list submitted by the Sheriff. (App. 68) This process in effect allowed the deputy against whom disciplinary action was pending to, in effect, appoint half of the Board members. Thereafter, the Court held a scheduling conference between the two parties, and the Sheriff inquired whether he was still entitled to appoint a member to the Hearing Board in accordance with the statute and pursuant to the language in the Court’s previous order. Sergeant Dodson, who had argued at the previous hearing that the Sheriff would still be entitled and in fact had a right to appoint a member to the Board, later opposed the Sheriff’s appointment during the conference call. (App 52) The Court then informed the parties that the Hearing Board would be comprised of the members chosen by the Chief Judge and the Sheriff would not be entitled to appoint an additional member. The Sheriff now seeks this writ of prohibition to prevent the Circuit Court from appointing the members of the Hearing Board, allowing the Deputy who is never entitled to appoint a representative to the Board, to appoint half of the Board, when both the DSA and the Sheriff are perfectly capable and willing to appoint members to Hearing Board.

V. SUMMARY OF THE ARUGMENT

The circuit court erred when it allowed the sergeant under investigation to appoint half of the pre-disciplinary hearing board and replaced a hearing board that had already been constituted in accordance with the statute. It is clear that the statute favors a board which is comprised of members within the sheriff’s department, and that the Sheriff is entitled to appoint

a representative to the hearing board. Additionally, all the members of the board could have been appointed as provided by W.Va. Code § 7-14C-1 without the circuit court appointing the board. The Jefferson County Sheriff's Association is an active non-profit corporation. The relevant code sections do not defined the requirements for a Deputy Sheriff's association or the procedure to be followed when making an appointment to the hearing board. The DSA and the Sheriff were both willing and able to make appointments to the hearing board. Accordingly, the Circuit Court exceeded its authority by appointing the hearing board members because a circuit court is only permitted to appoint citizens to the hearing board only in the event that the members cannot be appointed as provided by W.Va. Code § 7-14C-1(4). Additionally, the Court exceeded its authority when it created a procedure to allow the sergeant under investigation to nominate citizens to serve on the board, and appointed half of the members of the hearing board from the list of nominees submitted by the sergeant under investigation, when the deputy is never entitled to appoint any member of the hearing board.

VI. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a)(3) and (4) of the West Virginia Rules of Appellate Procedure, oral argument is not required in this case. The procedure of appointment of a hearing board is adequately outlined in W.Va. Code § 7-14C-1 and do not require further interpretation. In addition, the legal arguments and facts can be adequately set forth in the briefs and records, and oral argument would not aid the Court in reaching a decision.

VII. ARGUMENT

A. Standard of Review

“Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction or in which, having jurisdiction, they are exceeding their

legitimate powers, and may not be used as a substitute for a petition for appeal or certiorari.” Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) quoting Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). The Court has developed a five factor analysis in determining whether to entertain a writ of prohibition when the only claim is that a lower court has exceeded its legitimate powers. The Court will examine: 1) whether the party seeking the writ had no other adequate means, such as direct appeal, obtain the desired relief; 2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; 3) whether the lower tribunal’s order is clearly erroneous as a matter of law; 4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and 5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. The Court has stated that not all five factors need to be satisfied to merit a grant of the writ of prohibition. However, the court has held the existence of a clear error as a matter of law will be given substantial weight. *Id.* at Syl. Pt 4.

In the instant case, the party seeking the writ, the Sheriff, has no other adequate remedy at law. The order of the lower court is not a final order in the matter. Furthermore, if the Court order is permitted to stand until such time as an appeal can be taken, it will result in needless delay and perhaps another appeal and an additional pre-disciplinary hearing. If the case moves forward, a pre-disciplinary hearing will be held, and possible an appeal to the civil service commission and then another appeal to the circuit court before the Sheriff can appeal the unlawful composition of the hearing board. If the Petitioner is successful on appeal, then it could result in the case being remanded back for another pre-disciplinary hearing, resulting in further delay. The only manner in which to provide the relief from the circuit court’s order, ensuring that the pre-disciplinary hearing is heard by a properly constituted board is through writ of

prohibition. Additionally, the Petitioner Sheriff will be damaged by further delay and resolution of a process which began in January 2009, and if the prohibition isn't granted, additional hearings and delay will result.

The circuit court's composition of the hearing board was clearly erroneous as it does not follow the plain provisions of the statute, which statute is clear on the manner in which a pre-disciplinary hearing board is to be constituted. Furthermore, this Court has never addressed the manner in which a deputy sheriff's association must appoint its member to the hearing board and whether there are procedural requirements beyond those contained in the code. The circuit court's order places additional requirements upon the DSA that are not contained in the statute without defining the procedure that should have been followed. If the issue is not addressed, it is possible that the DSA and the Sheriff could again be denied the opportunity to appoint representatives to a hearing board because of perceived additional requirements which have not been clearly identified by the Court. Accordingly, for all of these reasons, the instant case is appropriate for a writ of prohibition.

B. The circuit court exceeded its legitimate powers when it replaced a duly appointed hearing board with its own appointments to the board, half of which appointments were chosen by the deputy under investigation.

A deputy under investigation is never entitled, pursuant to W.Va. Code §7-14C-1(4) to appoint members to a hearing board, which board conducts a hearing on the Sheriff's recommendation for punitive action. West Virginia Code § 7-14C-1(4) provides the definition of a hearing board as well as the procedure for choosing its members.

“Hearing board” means a board which is authorized by the sheriff to hold a hearing on a complaint against a deputy sheriff and which consists of three members, all to be selected from deputy sheriffs within that agency, or law-enforcement officers or firefighters of another agency with the approval of the sheriff and who have had

no part in the investigation or interrogation of the deputy sheriff under investigation. One of the members of the board shall be appointed by the sheriff, one shall be appointed by the deputy sheriff's association and these two members of the board shall, by mutual agreement, appoint the third member of the board: Provided, That if the first two members of the board fail to agree upon the appointment of the third member of the board within five days, they shall submit to the sheriff's civil service commission a list of four qualified candidates from which list the commission shall appoint the third member of the board: Provided, however, That in the event one or more members of the board cannot be appointed as otherwise provided in this section, then the chief judge of the circuit court of the county shall appoint a sufficient number of citizens of the county as may be necessary to constitute the board. At least one member of the hearing board shall be of the same rank as the deputy sheriff against whom the complaint has been filed. *Id.*

According to the plain provisions of the statute, the members of the hearing board are to be chosen from deputy sheriffs within the Sheriff's department unless the Sheriff authorizes the appointment of members outside the department. Additionally, the three members are appointed by the Sheriff and the Deputy Sheriff's Association, and the procedure by which the DSA is to appoint a member is not provided in the statute in any other rule of law. Finally, the statute is clear that a deputy under investigation is not entitled, under any circumstances, to appoint a representative to the hearing board and that the Court is may only appoint the members of the board when one of the members cannot be chosen as otherwise provided.

In the instant case, the Jefferson County DSA appointed its representative to the hearing board using the same procedure it has always used when a hearing board is authorized by the Sheriff: all deputies in the department voted by secret ballot, which ballot was placed into a sealed box and counted by an administrative assistant within the department. (App.9-10) As each deputy cast his or her ballot, their name was marked as having cast the ballot. Furthermore, there is absolutely no evidence, other than the sheer conjecture of the Respondent Sergeant, that

there was any foul play or conspiracy involved either in the voting or counting of the ballots. The deputy who was selected as the DSA representative of the Board, Deputy Doug Fletcher, received 18 out of the 24 votes cast, and the next highest vote getter, Deputy Windle, received 2 votes. (App. 10-11) Accordingly, Deputy Doug Fletcher was clearly the overwhelming choice of the DSA. After the DSA appointed its members, the Sheriff appointed Sergeant Ronald Fletcher (no relation to Deputy Doug Fletcher), and the two appointees chose the third member of the Board, Corporal Vincent Tiong.

The Respondent Deputy opposed the composition of the hearing board, arguing that the DSA did not follow the appropriate procedure to appoint a member to the hearing board. However, the Respondent Deputy did not provide the procedure by which the DSA appointee should be chosen, and instead argued that the process was tainted by the involvement of the Chief Deputy, even though the Chief Deputy was a member of the DSA, and a department administrative assistant. However, there is no evidence of wrong doing by either of these individuals. Moreover, secret ballots tabulated by a department administrative assistant have always been the method employed by the Jefferson County DSA, when appointing a member to a hearing board.

The Respondent Sergeant maintained that the DSA's faulty procedure created an irreversible taint, although he was unable to articulate what irreparable harm resulted. However if the Circuit Court found an error in the method used by the DSA, the court could have ordered the DSA to appoint another member using the appropriate procedure as outlined by the Court. Furthermore, allowing the DSA to appoint a member to the hearing board using a Court prescribed procedure, would have had the resulted in the selection of the hearing board according to the provisions of the statute.

Instead, the Circuit Court created its own procedure, which does not comply with W.Va. Code § 7-14C-1(4). The Circuit Court ordered the Respondent Sergeant and the Sheriff each submitted a list five names to the Court. The Court then appointed three individuals from each list to serve on the hearing board. This process, in effect, provided the Respondent Sergeant with three appointees to the hearing board, when the statute does not provide a deputy under investigation the right to appoint any member to the hearing board. Furthermore, the Circuit Court's procedure for appointing the members of the hearing board does not follow the procedure for circuit court appointments, which procedure is provided in W.Va. Code § 7-14C-1(4). Under that section, a circuit court is only permitted to appoint the hearing board when "one or more members of the board cannot be appointed as otherwise provided in this section. . ." It is clear that the members of the DSA were able and willing to appoint a member to the hearing board.

Additionally, the circuit court is to "appoint a sufficient number of citizens of the county as may be necessary to constitute the board." W.Va. Code § 7-14C-1. However, the law contains no provision that permits the deputy under investigation to influence the Court's appointment by providing a list of names from which the court will appoint the members. This process results in the deputy appointing members to the hearing board, to which appointment the deputy is never entitled under the statute. Additionally, because the sergeant was free to name any citizen and did not have nominate members within the department, it is possible that half of the board could be comprised of individuals who were predisposed to decide in the Sergeant's favor because of their personal relationship with the sergeant. Furthermore, it is clear that the Sheriff is the only party to the investigation that is entitled to appoint a representative to the hearing board. The Court's previous orders and the argument of the Respondent Sergeant at the

hearing indicated that Sheriff Shirley would still be entitled to appoint a representative to the hearing board after the judge had nominated the board. However, the Sheriff was denied the opportunity to appoint the representative of his specific choosing and instead the court nominated the Sheriff's appointment from a submitted list in contravention of the its prior order which stated that the court would appoint "the additional members of the Board." (App. 60-62)

The Respondent Sergeant argued that the faulty appointment of the DSA violated his due process right to a fair hearing. However, the law of both this Court and the United States Supreme Court indicates that the pre-disciplinary hearing is not a proceeding which requires extensive due process. In Syllabus Point 3 of *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987), the West Virginia Supreme Court held that an employee protected by the Civil Service is entitled to some kind of hearing prior to discharge. The Court went on to state that those "essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given oral or written notice of the charges against him an explanation of the employer's evidence, and an opportunity to present his side of the story prior to termination." *Id.* at 732, 356 S.E.2d at 486 quoting *Cleveland Board of Education v. Loudermill*, 720 U.S.532 (1985). Additionally, in *City of Huntington v. Black*, 187 W.Va. 675, 421 S.E.2d 58 (1992), which case also involved a police officer who did not receive a pre-disciplinary hearing before he was terminated, the West Virginia Supreme Court, quoting a United States Supreme Court case ruled that "[i]n general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action.' The Supreme Court explained the limited function of a pre-disciplinary hearing in *Loudermill*, stating that 'the pretermination hearing need not definitively resolve the propriety of the discharge. It should be 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.” *Id.* at 680-681 quoting *Cleveland Bd. Of Education v. Lourdermill*, 470 U.S. 532, 545, 105 S.Ct. 1487, 1495 (1985).

The role of the pre-disciplinary hearing board is to act as a gate keeper against mistaken decisions, essentially fulfilling a role similar to that of grand jury in criminal cases, and as such a deputy is not entitled to extensive due process at the pre-disciplinary hearing level. Due process requirements do not entitle a deputy to appoint a representative to the board or even participate in the selection of the board. However, the Sheriff, by the express provisions to the statute is entitled to appoint 1/3 of the hearing board members. As long as the deputy under investigation is given the opportunity to respond to the charges against him, the due process requirements of the pre-disciplinary hearing have been satisfied. Additionally, the pre-disciplinary hearing is only the initial stage where a board must determine if there is sufficient evidence to support the charges and merit proceeding with the disciplinary process. Accordingly, the only due process to which the Respondent Sergeant was entitled was an opportunity to be heard by a board which is chosen by the Sheriff and the Sergeant’s peers within the department.

VIII. CONCLUSION

Wherefore, for all the above stated reasons, the Petitioner respectfully requests that this Court issue a writ of prohibition to the Circuit Court, prohibiting it from appointing the members of the hearing board and order that the members of the board be appointed as required by the W.Va. Code § 7-14C-1(4).

Respectfully Submitted,

Robert Shirley, Sheriff of
Jefferson County

By Counsel:

A handwritten signature in cursive script that reads "Stephanie F. Grove". The signature is written in black ink and is positioned above a horizontal line.

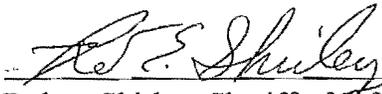
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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF JEFFERSON COUNTY, to wit:

Robert Shirley, Sheriff of Jefferson County, the Petitioner in the foregoing Writ of Prohibition after being duly sworn, said that the facts and allegations contained in this Affidavit are true, except insofar as they are therein stated to be upon information and belief, and that insofar as they are therein stated, are believed to be true.



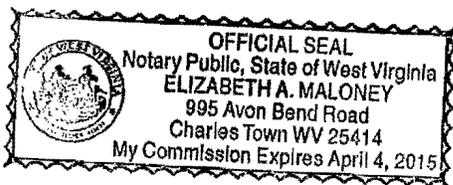
Robert Shirley, Sheriff of Jefferson County

Taken, subscribed and sworn to before the undersigned authority this 19 day of April, 2012.



Notary Public

My Commission expires: April 4 2015



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON

STATE OF WEST VIRGINIA EX. REL
ROBERT SHIRLEY, SHERIFF
OF JEFFERSON COUNTY
PETITIONER,

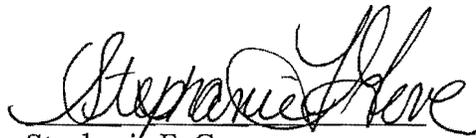
VS.

Docket Number:
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09-AA-7

THE HONORABLE DAVID SANDERS, and
MICHAEL T. DODSON
RESPONDENTS.

CERTIFICATE OF SERVICE

I, Stephanie F. Grove, Assistant Prosecuting Attorney, Counsel for the Petitioner do hereby certify that I have served a true copy of the "Writ of Prohibition" upon Respondent's counsel, Mark McMillian, Boulevard Tower – Suite 900, 1018 Kanawha Boulevard, East by United States mail and to the Honorable David Sanders at the Jefferson County Courthouse, 100 East Washington Street, Charles Town, WV 25414 by hand delivery this 10th day of May, 2012.



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