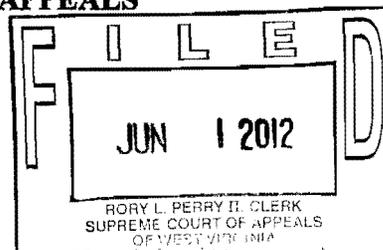


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



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

Petitioners,

v.

Docket No.: 12-0586

**HONORABLE DAVID SANDERS, JUDGE OF
THE CIRCUIT COURT OF JEFFERSON COUNTY,
WEST VIRGINIA AND MICHAEL T. DODSON,**

Respondents.

SUMMARY RESPONSE OF RESPONDENT MICHAEL T. DODSON

Submitted by Respondent by counsel:

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TABLE OF AUTHORITIES

Codes

West Virginia Code § 7-14C-1 1, 2, 3, 4

West Virginia Code § 53-1-1 2

West Virginia CSR § 158-13-4.2 3

Cases

State ex. rel Peacher v. Snaders (Docket No.:11-1615) S.E.2d (W.Va 2012) 2

State ex. rel Peacher v. Scencindiver 233 S.E.2d 425 (W.Va. 1977) 2

State ex. rel Kaufman v. Zakaib, 535 S.E.2d 727 (W.Va. 2000) 4

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**SUMMARY RESPONSE OF
RESPONDENT MICHAEL T. DODSON**

Comes now Michael T. Dodson, Respondent in the above entitled action, by counsel Mark McMillian, and as provided by Rule 16(h) of the *West Virginia Revised Rules of Appellate Procedure*, submits his *Summary Response* to the Petitioner's action for *Writ of Prohibition*.

INTRODUCTION

The Petitioners assert, in essence, that the court below exceeded its legitimate powers by the manner in which it ordered the constitution of a predisciplinary hearing board in the underlying administrative action. The Petitioners' complaint is based upon the fact that after finding that the processes involved were legally flawed, the court below exercised its powers under West Virginia Code §7-14C-1(4) in constituting a board that included a total of six members, after permitting the Petitioner and Respondent Sergeant Michael Dodson to submit an equal number of proposed hearing board members. While the applicable authority requires a board composed of three members, it is silent as to whether a greater number may be appointed.

For reasons more fully discussed below, even were this Court to find disagreement with the reasons or precise methods used in the constituting of said board, “[a] writ of prohibition will not issue to prevent a simple abusive discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. West Virginia Code, 53-1-1.” *State ex rel. Piper v. Sanders* (Docket No.: 11-1615) ___ S.E.2d ___ (W.Va. 2012), citing *State ex rel. Peacher v. Scencindiver* 233 S.E.2d 425 (W.Va. 1977). Because neither of the predicate abuses apply to the instant case, prohibition relief is not proper in this case.

LEGAL DISCUSSION

As noted by the Petitioners, this matter was most recently remanded by this Court for the Petitioner’s failure to afford Respondent Sgt. Michael T. Dodson (sometimes hereinafter “Sgt. Dodson”) a predisciplinary hearing in advance of his termination. In order to compose such a board, West Virginia Code §7-14C-1(4) requires that one member of the predisciplinary board “. . . shall be appointed by the Deputy Sheriff’s Association[.]”

The Petitioner, through counsel, conceded during a hearing below the following regarding the Deputy Sheriff’s Association:

Ms. Grove: . . . Although they have not met, that is true, it is correct they have not met.

The Court: For five years?

Ms. Grove: It has been five years but they vote every year by secret ballot on other issues. Although they haven’t met, that is true, there is no requirement in law they meet Mr. McMillian said we couldn’t find the by-laws. That is true until late Thursday at the end of business I was presented with by-laws of the association so we have found those by-laws of the association.

(Appendix Pgs. 15-16)

Among the requirements of the referenced by-laws are that officers are elected “at the first meeting of the association in June of each year. (By-laws § III) Article VII of those by-laws include the following language.” The newly-elected officers shall assume their officer (sic) the first regular meeting in July of each year. A quorum consists of not less than five (5) members in good standing, which would include president or vice president to conduct the meeting.”

As noted, *ante*, the Petitioners concede that no meetings have been conducted by the association for at least five (5) years.

As noted in Petitioners’ Brief, pages 4-5, a chief deputy of the Sheriff’s Department, Jesse Jones, along with the Sheriff’s administrative secretary Debra Lowe conducted the “balloting” of candidates for the Deputy Sheriff’s Association’s representative to the predisciplinary hearing board, the results of which was a landslide victory in favor of a particular candidate. The Petitioners also concede that the list of candidates was composed by someone other than the Deputy Sheriff’s Association. It is undisputed that among the last known members of the Deputy Sheriff’s Association, some were excluded from the balloting.

Those facts considered together, certainly served as an appropriate basis under 7-14C-1 for the Circuit Court to exercise its discretion in appointing the board. This is particularly so in that while the Sheriff has but one appointment and the Deputy Sheriff’s Association also one, the remaining third member is appointed by agreement of the original two. Since there was at least the extreme appearance of the Sheriff’s hand in the deputy sheriff’s appointment, it cannot follow that a third could be appointed without the associated taint or appearance of impropriety. See e.g. West Virginia CSR § 158-13-4.2 “state administrative law judge shall avoid impropriety and

the appearance of impropriety in all activities.”

It is clear that the Court below acted in an effort in furtherance of the objectives set forth in the provisions of §7-14C-1. The policy clearly underlying that statute is to provide the parties to the action a voice in the selection of predisciplinary board members. In the typical case, the Sheriff has an appointment to the board. The Deputy Sheriff’s Association of the county would presumably appoint a member that would adequately consider the interests of one of its members - and through the collaborative efforts of those two, appoint a third. The Court below clearly permitted the Sheriff to have an adequate voice in the appointment to the board, as now constituted, in that three of the present members were derived from his list. As discussed, *ante*, the Deputy Sheriff’s Association in this case had clearly fallen into a state of desuetude.¹ Accordingly, it was proper, under any reasonable interpretation of the statute, that the court was not only in exercise of a legitimate power, but was legally compelled to make an alternate appointment for that position. While it is undisputed that the names from which the Court’s ultimate selections were made were in part supplied by the Respondent, the statute not only provides great latitude in the court’s decision, but provides no specified criterion under which that decision is to be made. Judicial officers may not be compelled to disclose their mental processes employed in formulating official judgments or the reasons that motivated them and their official acts. See, State ex. rel Kaufman v. Zakaib, 535 S.E.2d 727 (W.Va. 2000).

Finally, the Sheriff demonstrates no prejudice suffered as a result of the decision of the court below. While the Petitioner is by statute entitled to select one-third of board membership,

¹The term *desuetude* was inaccurately reported in the hearing transcripts as “dissolute” - i.e. appendix page 6.

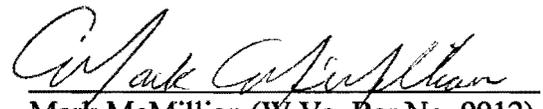
the court afforded him selection of one-half of its membership. While Sgt. Dodson also submitted to the Court perspective candidates, the Court selected only an equal number from his list. The fairness of that process is apparent and is not susceptible to the present legal challenge.

CONCLUSION

WHEREFORE, the Respondent, Sgt. Michael Dodson, respectfully prays that this Court find and order that prohibition does not properly lie in this case, to dismiss the within action with prejudice and order it stricken from the docket of this Court along with such further relief that this Court deems proper under law, including the award of costs and attorney's fees to the Respondent.

Respectfully Submitted
Michael T. Dodson, Respondent

By counsel


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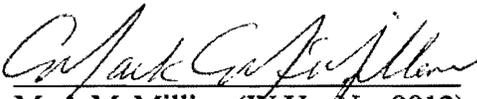
Respondents.

CERTIFICATE OF SERVICE

I, Mark McMillian, undersigned counsel for the Respondent, hereby certify that a true and exact copy of the *Summary Response of Respondent Michael T. Dodson* was served upon the Petitioner, through his counsel Stephanie F. Grove, Assistant Prosecuting Attorney of Jefferson County via fax transmittal to (304) 728-3293 and United States mail to:

Stephanie F. Grove, Esquire
Assistant Prosecuting Attorney of Jefferson County
Jefferson County Prosecutor's Office
Post Office Box 729
Charles Town, WV 25414

on this 1st day of June, 2012.


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