

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Sheriff Lonnie Hannah, Sheriff of Mingo
County, West Virginia, Petitioner**

vs.) No. 11-1206 (Mingo County 11-AAA-1)

Max Jeremy Mounts, Respondent

**FILED
November 21, 2012**

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

John R. Teare, Jr. for Petitioner.

C. Christopher Younger for Respondent.

MEMORANDUM DECISION

Petitioner Lonnie Hannah, Sheriff of Mingo County, West Virginia (“Petitioner Sheriff”), appeals an order of the Circuit Court of Mingo County, entered on August 11, 2011, reversing an order of the Mingo County Deputy Sheriffs’ Civil Service Commission (“Civil Service Commission” or “Commission”), which, upon concluding that Respondent Max Jeremy Mounts resigned his position as a deputy sheriff, placed his name on the existing list of eligibles without competitive examination for Petitioner Sheriff’s future hiring consideration. In reversing the Civil Service Commission’s order, the circuit court remanded this matter to the Commission for a hearing on whether Respondent’s resignation was accepted before it was rescinded.¹

This Court has considered the parties’ briefs and the record on appeal. Following oral argument of the parties, consideration of the standard of review, the briefs, and the appendix record presented, the Court finds no substantial question of law and no prejudicial error. For these

¹The circuit courts order further stated that if the Civil Service Commission finds that Respondent’s resignation was not accepted before it was rescinded, then “this Court specifically finds that [Respondent] had a right to withdraw[his resignation prior to its acceptance and [Respondent] should be returned to his former position as a Deputy Sheriff, in terms of seniority, held prior to his said resignation.” In seemingly inconsistent rulings, the circuit court also directed the Commission to “enter an order immediately reinstating [Respondent] to his position as a Mingo County Deputy if a vacancy exists, and if none should exist, at the next available vacancy[,]” and further ordered that Respondent “SHALL be reinstated by appointment to the lowest rank in the Sheriff’s office next above the probationers of the office.” *See* W.Va. Code §7-14-8 (1972) (Repl. Vol. 2010) and discussion, *infra*.

reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On Thursday, November 4, 2010, after working as a deputy sheriff for almost two years, Respondent submitted his letter of resignation for other, better-paying employment. According to the resignation letter, Respondent's resignation was to be effective at 4:00 p.m. that same day. The following evening, having reconsidered his decision to resign, Respondent visited Petitioner Sheriff at his home to rescind his resignation. According to Respondent, Petitioner Sheriff advised him to "[j]ust come on in Monday and we'll talk about it." When Respondent appeared at Petitioner Sheriff's office on Monday morning, Petitioner Sheriff told Respondent that he had accepted his resignation and that he was no longer employed with the sheriff's department.²

Thereafter, Respondent filed a Motion for Reinstatement and a hearing thereon was conducted before the Civil Service Commission on December 2, 2010. The Commission entered an order on December 7, 2010, finding, *inter alia*, that Respondent's resignation became effective on the date he resigned. The Commission further found that Respondent satisfied West Virginia Code §7-14-8 (1972) (Repl. Vol. 2010), which sets forth conditions for reinstatement of former deputy sheriffs.³ However, the Commission declined to immediately reinstate Respondent, having

²According to testimony presented before the Civil Service Commission, in the past, Petitioner Sheriff had presented resignations of deputy sheriffs before the Mingo County Commission for its approval. Petitioner Sheriff testified that, ordinarily, the request for approval of a resignation was made in conjunction with a request to fill the resulting vacancy. *See* W.Va. Code §7-7-7(a) (2000) (stating that "[t]he...sheriff...by and with the advice and consent of the county commission, may appoint and employ, to assist them in the discharge of their official duties...deputies...[.]") In this case, at the November 17, 2010, meeting of the Mingo County Commission, Petitioner Sheriff, through his chief deputy, presented the resignation of Respondent for its approval. At that same meeting, however, Respondent also appeared and requested that the Mingo County Commission reject his previously-tendered resignation. Though the Mingo County Commission purportedly rejected Respondent's resignation at the November 17, 2010, meeting, this Court is unaware of any statutory or other legal authority under which the Mingo County Commission may either accept or reject the resignation of a deputy sheriff.

³West Virginia Code §7-14-8 states, in relevant part, that

No application for original appointment shall be received on and after the effective date of this article, if the person applying is less than eighteen years of age or more than forty-five years of age at the date of his application: provided, That in the event any applicant formerly served as a deputy sheriff for a period of more than six months in the county to which he makes application, and resigned as a deputy sheriff at a time when there were no charges of misconduct or other misfeasance pending against him, within a period of two years next preceding the date of his application, and at the time of his application resides within the county in which he

stated during the course of the hearing that it understood it has “the authority to put him back on the roster. He goes back on the roster in the top position, but it’s not at our discretion to re-employ him.” Accordingly, therefore, the Civil Service Commission ordered that Respondent “may be reinstated to the top of the list of eligibles to be presented to the Sheriff when he seeks to fill a vacancy within the Department.”

On appeal of the Civil Service Commission’s order, the circuit court specifically found that although Respondent tendered a resignation letter to Petitioner Sheriff, “the record is unclear as to whether or not said resignation was accepted prior to [Respondent] withdrawing and rescinding the same.” The circuit court further found that the Civil Service Commission correctly ruled that Respondent met all of the criteria for reinstatement set forth in West Virginia Code §7-14-8; however, according to the circuit court’s order, the Commission, “through their mistaken understanding” of West Virginia Code §7-14-8, had no authority to place Respondent on the list of eligibles for Petitioner Sheriff’s future hiring consideration. Rather, the circuit court found, “the only options available to the Civil Service Commission pursuant to statute were to reinstate or not reinstate” Respondent.

Based upon its findings, the circuit court ordered this matter remanded to the Civil Service Commission for further proceedings as previously described herein.

It is from the circuit court’s order that Petitioner Sheriff now appeals.

Our review of the circuit court’s order is governed by the following standards of review:

“A final order of a deputy sheriffs’ civil service commission, based upon findings not supported by the evidence, upon findings contrary to the evidence, or upon a mistake of law, will be reversed and set aside by this Court upon review.” Syl. pt. 1, *Mangum v. Lambert*, 183 W.Va. 184, 394 S.E.2d 879 (1990).

Syl. Pt. 1, *Burgess v. Moore*, 224 W.Va. 291, 685 S.E.2d 685 (2009).

seeks appointment by reinstatement, then such applicant shall be eligible for appointment by reinstatement in the discretion of the civil service commission, even though such applicant shall be over the age of forty-five years, provided he is not sixty-five years of age or over, and such applicant, providing his former term of service as a deputy sheriff so justifies, *may be reappointed by reinstatement without a competitive examination, but such applicant shall undergo a medical examination; and if such applicant shall be so appointed by reinstatement as aforesaid, he shall be the lowest in rank in the sheriff’s office next above the probationers of the office.*

(Emphasis added) See Syl. Pt. 3, *Meadows v. Hopkins*, 211 W.Va. 382, 566 S.E.2d 269 (2002).

Furthermore,

“[a]n appellate court may reverse a decision of the Civil Service Commission for Deputy Sheriffs, W.Va. Code §7-14-1 (1991), *et seq.*, as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered an explanation that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise.” Syl. Pt. 3, *Messer v. Hannah*, 222 W.Va. 553, 668 S.E.2d 182 (2008).

Burgess, at syl. pt. 2, 224 W.Va. at 292, 685 S.E.2d at 686.

In this case, the circuit court remanded to the Civil Service Commission the question of whether Respondent’s resignation was accepted before it was rescinded.⁴ We agree with the circuit court’s ruling, particularly in light of this Court’s decision in *West Virginia Dept. of Environmental Protection v. Falquero*, 228 W.Va. 773, 724 S.E.2d 744 (2012), which was decided during the pendency of the present appeal. In syllabus point four of *Falquero*, we held that “[a]cceptance of a tender of resignation of public employment may occur when the employer (1) clearly indicates acceptance through communication with the employee, or (2) acts in good faith reliance on the tender.” Thus, on remand, the Civil Service Commission should determine if Petitioner Sheriff accepted Respondent’s resignation by clearly indicating acceptance through communication with Respondent, or if Petitioner Sheriff acted in good faith reliance on Respondent’s tender of resignation. *Id.*

In the event the Civil Service Commission concludes that Petitioner Sheriff accepted Respondent’s resignation before he rescinded it, then the Civil Service Commission must determine whether Respondent should be reinstated pursuant to West Virginia Code §7-14-8. As this Court held in syllabus point two of *Meadows v. Hopkins*, 211 W.Va. 382, 566 S.E.2d 269 (2002),

[p]ursuant to W.Va. Code 7-14-8 (1972) (Repl. Vol. 2000), the civil service commission for deputy sheriffs has exclusive discretionary authority to reinstate an applicant for deputy sheriff, who formerly served as a deputy sheriff, without either a competitive examination or the concurrence of the sheriff or county commission

Thus, if it is determined that Respondent’s resignation was accepted prior to its rescission, pursuant to West Virginia Code 7-14-8, the Civil Service Commission shall appoint Respondent by

⁴*See In re Queen*, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996) (stating that “[w]hether the respondent, [a correctional officer] quit or was fired is a question of fact committed to the discretion of the Civil Service Commission.”)

reinstatement to “the lowest in rank in the sheriff’s office next above the probationers of the office.”⁵ If, however, the Civil Service Commission determines that Petitioner Sheriff did not accept Respondent’s resignation prior to its rescission, then Respondent’s resignation was void and Respondent remained employed in his position as a deputy sheriff as if he had never resigned.

Because the question of whether Respondent’s resignation from his employment as a deputy sheriff was accepted before it was rescinded is yet to be determined by the Civil Service Commission, this Court orders that, pending remand, Respondent be placed in his previous position of employment with the Mingo County Sheriff’s Department as if he had never resigned, until such time as the resignation issue is resolved.

For the foregoing reasons, the order of the circuit court is affirmed, in part, and reversed, in part.

Affirmed, in part, and reversed, in part.

ISSUED: November 21, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

⁵Similar to the facts in *Meadows*, the Civil Service Commission in the present case placed Respondent at “the top of the existing list of eligibles...for consideration in the event Sheriff Hannah declares a vacancy that he desires to fill by appointment.” West Virginia Code 7-14-11 (1971) authorizes a civil service commission, upon a request by the sheriff, to “certify, from the eligible list, the names of the three persons thereon who received the highest averages at preceding competitive examinations....The appointing sheriff shall, thereupon, with sole reference to the relative merit and fitness of the candidates, make an appointment from the three names so certified[.]” *Id.*, in part. As we emphasized in *Meadows*, however, West Virginia Code 7-14-11 “expressly *excludes* from its application deputy sheriff appointments that are made ‘by promotion, reinstatement or reduction.’” *Meadows*, 211 W.Va. at 386, 566 S.E.2d at 273. Thus, in reading West Virginia Code 7-14-11 *in pari materia* with West Virginia Code 7-14-8, Respondent’s name is not to be placed on “the eligibles” list from which Petitioner Sheriff may fill a future vacancy; as previously established, whether Respondent is to be reinstated is a decision in the exclusive discretion of the Civil Service Commission. *See Meadows* at syl. pt. 2, and 211 W.Va. at 386, 566 S.E.2d. at 273.