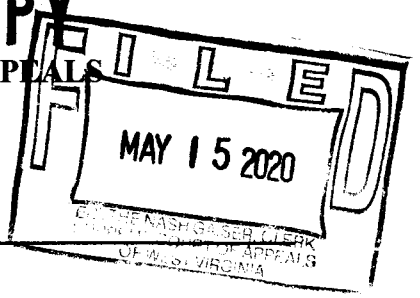


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

TIMOTHY JARRELL,
PETITIONER
vs.
THE CITY OF NITRO, WEST VIRGINIA
RESPONDENT

Docket No.19-0907
(Kanawha Circuit Court Action No. 19-AA-40)

REPLY BRIEF OF PETITIONER

Mark McMillian (W. Va. Bar No. 9912)
Counsel for Petitioner
Mark McMillian - Attorney at Law, L.C.
Boulevard Tower - Suite 900
1018 Kanawha Blvd., East
Charleston, WV 25301
Tele: 304.720.9099
email: mark@markmcmillian.com

Comes now the Petitioner, Sgt. Timothy Jarrell, by Counsel, and replies to the *Response Brief* heretofore filed by the Respondent City of Nitro ("City"). Petitioner further adopts by reference his *Brief of Petitioner* in reply to such points raised by Respondent in its Brief.

FACTS OF THE CASE

Respondent City asserts in its Response Brief, P.3 that Jared Hester was "released without charges and allowed to leave the property in the Casino shuttle bound for the Comfort Inn..." and "[d]espite being outside of his jurisdiction and without lawful authority to make an arrest, Petitioner confronted Mr. Hester and told him that he must go inside and get a room for the night or be arrested." This misrepresents both the facts and the law. While clearly and admittedly intoxicated, Mr. Hester was clearly both verbally and physically aggressive with Casino security officers.

A Yeah, like he was --
Q (inaudible) recording doesn't pick it up here, but what
A Like he was coming at --
Q -- do you mean --
A Like he was coming at me at the bench.
Q Okay.
A Like, you know, (indicative motion).
Q What , like trying to shoulder--
A Yeah.
Q – punch or something?
A Just kind of like, you know, (indicative motion). That's what I call that he was going to get combative with me, because of the way he kept coming at me.
Q Oh, like I mean, sort of like lunging as if you're trying to intimidate somebody, that sort of thing?
A Yeah. Yeah.
(Testimony of Lisa Smith, JA 0771-72)

Once police were called to deal with Mr. Hester, he was ultimately given the opportunity to avoid arrest conditioned upon taking the shuttle to the Comfort in where he would then take a

room. Sgt. Jarrett followed the shuttle to insure that happened. The contact with Mr. Hester could hardly be described as him being "released without charges" as the condition had not been fulfilled and the situation was clearly ongoing, and part of a continuous transaction. Sgt. Jarrell's arrest of Hester was authorized by statute. W. Va. Code §8-14-3 provides, in pertinent part:

> In order to arrest for the violation of municipal ordinances and as to all matters arising within the corporate limits and coming within the scope of his official duties, the powers of any chief, policeman or sergeant shall extend anywhere within the county or counties in which the municipality is located, and any such chief, policeman or sergeant shall have the same authority of pursuit and arrest beyond his normal jurisdiction as has a sheriff. For an offense committed in his presence, any such officer may arrest the offender without a warrant and take him before the mayor or police court or municipal court to be dealt with according to law.

The City also posits that "Mr. Hester offered no physical resistance, did not attempt to flee and made no aggressive moves toward Petitioner; at worst, passively resisted Petitioner by not placing his hands behind his back when directed to do so." (P. 3). The Civil Service Commission below justifiably determined otherwise. Sgt. Jarrell testified as follows:

> From here, I'm standing behind him. I'm relatively safe here. He could – he would have a hard time to, you know, to assault me easily. So from here, I'm telling him, "Stop, stop, stop, stop." That's what I said. That 's exactly what I said, "Stop, stop, stop, stop." He doesn't, and where things get much more dangerous, he's a very, very strong man. He's extremely strong. From this position, he' s here. He just leans forward. Now, Mr. – there we go. So my feet, my heels start to come up off the ground.
>
> It 's not super pronounced in this video, but when I'm holding him here, just telling him to stop, there's no choking. There's no constriction of any airway, nothing. He starts to lean forward, and I think, "I'm going to get flipped right over his back. I'm going to land on my head on the concrete. "
>
> So at that point is when I used the carotid restraint.

Nevertheless, the circuit court below found, in critical part "[T]he threat perceived by the officer could not have been high enough to justify the choke hold, as Hester had done nothing to come

into or threaten physical contact with either an officer or bystander and was being charged with a non-violent crime." In Elliott v. Leavitt, 99 F.3d 640,642 (4th Cir. 1996) that court held:

> A reviewing court may not employ "the 20/20 vision of hindsight" and must make "allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving." Graham, 490 U.S. at 396-97, 109 S.Ct. at 1872. The court's focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection. Greenidge v. Ruffin, 927 F.2d 789, 791-92 (4th Cir.1991) (citing Graham, 490 U.S. 386, 109 S.Ct. 1865).

The court below critically erred, as a matter of fact and law, in its finding that "The "security problem at issue" was low, as Hester had not performed any violent or threatening actions, and his alleged crime was public intoxication." First, as noted *ante*, Hester had acted violently towards Security officer, Ms. Smith and verbally aggressively toward Sgt. Jarrell (JA 0481): "I - - you can see me in the video, I'm pointing towards the glass, towards the doors, and I'm telling him, 'Go in right now or you're going to go to jail. Go in.' And he's said, 'F you, I'm not going to jail.' That is exactly what he said." Moreover, in Elliott v. Leavitt at 644, that Court noted "Finally, we must reject appellees' contention that Elliott's intoxication somehow made him less threatening."

The Respondent and the decision below focus on the nominally "minor offense of public intoxication". Doing so ignores that the record below established that the real compelling concern was that Mr. Hester clearly intended to get into his nearby car, thus posing a life threatening risk to himself and others. That threat was not abated by taking him some distance from his car, as noted by Jarrell. "So, for instance , if we were to let him go unattended and he were to go off the shuttle bus, walk out in front of a car , and then to be hit or hurt or hurt

someone else, you know, we're liable for that." (JA 0478).

RESPONDENT'S RELIANCE ON W. VA. CODE §61-2-9d

Respondent asserted below, and again here, with some emphasis, the provisions of W. Va. Code §61-2-9d (Strangulation; definitions; penalties) but, without elaboration. To the extent Respondent suggests that a statute which became effective after the facts in this case occurred creates "public policy", it is misplaced. "Under Ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syl. Pt. 1, Adkins v. Bordenkircher, 262 S.E.2d 885 (W. Va. 1980). Moreover, that section, while criminalizing acts not specifically described in §61-2-9, it does nothing to limit the type of force that may be used, when justified, by law enforcement officers. The foregoing notwithstanding, the matter was addressed during the civil service proceedings below. Petitioner, Sgt. Jarrell, testified as follows:

> Q . So I know you haven ' t been in active service with the department during your - - the
> pendency of these various actions leading up to today, but is it your understanding that the policy of the department has been modified under the new administration?
> A. Yes , sir.
> Q . Okay . Do you have any qualm or quarrel with complying with the policies as they currently exist once you return to active service ?
> A. Absolutely not .
> Q . In other words, no one should have any cause for concern - -
> A . No , sir.
> Q. - - that you ' re going to exercise your - -
> exercise your own independent judgment in defiance of what the department tells you to do?
> A. No , sir . The policies that are approved, I'll follow, as always .
> (JA 0475).

PROCEDURAL ISSUE

At Page 4 of its Brief, Respondent recites a woefully inaccurate history of the underlying disciplinary action against Sgt. Jarrell. It acknowledges that "The City of Nitro decided to place Petitioner on paid administrative leave pending the outcome of the criminal process". That occurred on June 13, 2016[1], Sixteen months later Sgt. Jarrell received notice that came by way of two letters, each over the signature of the chief of police. On October 19, 2017, the chief issued a letter (JA 0084-85) captioned "Notice of Termination, Statement of Charges and Notice of Right to a Hearing" that begins "This is to inform you that you are hereby dismissed from the Nitro Police Department effective 0001 hours October 20, 2017 for violation of the Rules and Regulations of the Nitro Police Department. This disciplinary action is based upon my review of the several internal investigations conducted at my direction." A second letter issued that same day directed him to turn in all department equipment and keys, and instructed him not to return to the department premises "unless otherwise ordered to do so." Undersigned Counsel, responded by letter to the Chief (JA 0092) asserting, *inter alia*:

> I am in receipt of copies of a notice of termination and other materials presented to himon October 19, 2017. I am also informed that this was preceded by an extended period of suspension from his position in the department . This will demand his immediate reinstatement to his former position, restitution of lost wages or pay differential, and removal of references to this matter from his personnel records. West Virginia Code §7- 14A-3(a) provides: " **Before taking any punitive action** against an accused officer, the police or fire department shall give notice to the accused officer that he or she is entitled to a hearing on the issues by a hearing board or the applicable civil service commission . The notice shall state the time and place of the hearing and the issues involved and shall be delivered to the acc While used officer no later than ten days prior to the hearing." (Emphasis added).

---

[1]Petitioner was, at the same time, presented with a memorandum directed to all members of the department that, for the first time announced it was limiting the use of the carotid restraint. This occurred after the *Hester* arrest.

While the referenced materials inform Sgt. Jarrell of the availability a later hearing, the disciplinary action has been taken and prior to any hearings.

See, also uncontroverted testimony of Petitioner of April 13, 2018, JA 0177:

Q. Did you ever request a departmental hearing?
A. Yes, sir, through my attorney.
Q. And that was never addressed?
A . It's never occurred. I've been on administrative leave for almost two years I've been on paid administrative leave. And we requested that hearing but the City of Nitro never honored that request.
Q. So you're not on active duty at this time?
A . No, sir. I'm on paid administrative leave.

During the pendency of the present appeal, this Court issued its memorandum decision in Porter v. Brown (Docket No. 18-0729), wherein this Court noted:

The plain language of W. Va. Code 7-14C-1(3) defining "punitive action" encompasses a wide variety of punishments that range from the severe ("dismissal") to the relatively minor ("written reprimand"). Deputy Brown was placed on indefinite "paid administrative leave" and was subject to a number of conditions including loss of previously approved secondary employment. He was also required to be at his house every weekday from 8:30 a.m. to 4:30 p.m., and was required to be "reasonably available for investigative purposes." We emphasize that there was no time limit on these conditions imposed against Deputy Brown. We find that the indefinite imposition of these conditions fall under the broad definition of "punitive action" contained in W. Va. Code § 7-14C-1(3). In particular, we conclude that depriving Deputy Brown of previously approved secondary employment, on an indefinite basis, is a more severe punishment than a written reprimand. Additionally, requiring Deputy Brown to hold himself available for investigative purposes on an indefinite basis, with no notice of the allegations against him, and requiring him to be in a specific location every weekday on an indefinite basis, is, at the very least, as severe as a "written reprimand." Because the actions taken against Deputy Brown were punitive, we find that Sheriff Porter was required to provide Deputy Brown with notice of the issues underlying the punitive action, and notice that he was entitled to a hearing on these issues pursuant to the plain language of W. Va. Code § 7-14C-3(a): "before taking punitive action the sheriff shall give notice to the deputy sheriff that he or she is entitled to a hearing on the issues by a hearing board."

Accordingly, the City's position on that issue is without foundation and Sgt. Jarrell is

entitled to relief on the basis announced in Brown.

THE LEGAL EXPERT ISSUE

The City took issue with and Court below agreed that the expert testimony of contract City Johnnie Brown was not accorded adequate weight in the proceedings below. The civil service commission heard his testimony, but ultimately concluded to credit it as that of a lay witness.

> [A]n expert's testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.
> Indeed, it is black-letter law that it is not for witnesses but for the judge to instruct the jury as to applicable principles of law. In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. The danger is that the jury may think that the "expert" in the particular branch of the law knows more than the judge — surely an impermissible inference in our system of law.
> Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702[.]

Jackson v. State Farm Mut. Auto. Ins. Co., 600 S.E.2d 346, 356 (W. Va. 2004) citing Franklin D. Cleckley, Handbook On Evidence For West Virginia Lawyers § 7-4(B), pp. 7-78 — 7-79 (2000).

As previously asserted, Mr. Brown readily conceded he had no particular knowledge of self-defense tactics or medical expertise, but rather legal expertise through decades of representing parties in police related actions. His testimony was actually given greater weight than warranted by the commission, particularly when those officers more familiar and actually participated in drafting of the policies and their application by department members were heard, combined with two medical experts and a self defense expert.

THE DETERMINATION OF FACTS BY THE REVIEWING COURT

The reviewing court below engaged in essentially a *de novo* review of testimony and evidence and improperly determined facts based on its own judgment.

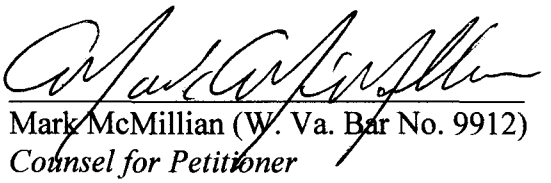
> Credibility determinations are properly made by the trier of fact, in this case the administrative law judge, who has had the opportunity to observe, first hand, the demeanor of the witness. See, e.g., State v. Guthrie, 194 W.Va. 657, 669 n. 9, 461 S.E.2d 163, 175 n. 9 (1995) ("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact."). See also Jackson v. State Farm Mut. Auto. Ins. Co., 215 W.Va. 634, 641, 600 S.E.2d 346, 353 (2004) (" 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]' " (quoting Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (additional citation omitted))); Haller v. Haller, 198 W.Va. 487, 496, 481 S.E.2d 793, 802 (1996) ("Like all triers of fact, the family law master had to balance conflicting evidence and make his ruling based on a weighing of the evidence, which necessarily involved credibility determinations."); Syl. pt. 2, State v. Bailey, 151 W.Va. 796, 155 S.E.2d 850 (1967) ("The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses."). Although the hearing examiner in the instant case was deprived of observing the demeanor of Trooper Pauley, he did have the opportunity to observe Mr. Chenoweth and found Mr. Chenoweth's testimony was not reliable. In these circumstances, we find the circuit court, which was essentially sitting as an appellate court, erred in reversing the factual determinations of the administrative law judge, which were subsequently adopted by Commissioner Miller in the order under review. Miller v. Chenoweth, 229 W.Va. 114, 727 S.E.2d 658 (W. Va. 2012).

In the present case, the civil service commissioners considered the testimony of the witnesses and made appropriate determinations concerning credibility and applied those in reaching its findings of facts, consistent with the foregoing authorities. It was improper for the reviewing circuit court to simply apply its own judgment.

CONCLUSION

Petitioner respectfully prays that the Court find and order that the decision of the circuit court in this action be reversed, and that the decision of the civil service commission be reinstated, that the Petitioner be awarded his costs and attorney fees incurred in defending the appeal below and the present appeal, along with such further relief this Court finds proper under law.

Respectfully Submitted,



Mark McMillian (W. Va. Bar No. 9912)
Counsel for Petitioner
Mark McMillian - Attorney at Law, L.C.
Boulevard Tower - Suite 900
1018 Kanawha Blvd., East
Charleston, WV 25301
Tele: 304.720.9099
email: mark@markmcmillian.com

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

TIMOTHY JARRELL,
PETITIONER

vs.

THE CITY OF NITRO, WEST VIRGINIA
RESPONDENT

Docket No.19-0907
(Kanawha Circuit Court Civil Action No. 19-AA-40)

CERTIFICATE OF SERVICE

Undersigned Counsel for the Petitioner hereby certifies that a true copy of the accompanying *Reply Brief of Petitioner* was served this the 15th day of May, 2020 by United States Mail, postage paid, upon the Respondent the City of Nitro, West Virginia through its Counsel, addressed as follows:

John Teare, Esquire
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., E.
Charleston, WV 25301

Mark McMillian (W. Va. Bar No. 9912)
Counsel for Petitioner
Mark McMillian - Attorney at Law, L.C.
Boulevard Tower - Suite 900
1018 Kanawha Blvd., East
Charleston, WV 25301
Tele: 304.720.9099
email: mark@markmcmillian.com