

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002643-MR

RONALD McCLURE

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 99-CI-00018

FRANK AUGUSTUS, SHERIFF OF McCRACKEN  
COUNTY, KENTUCKY; MERIT BOARD;  
HON. DONNIE ROBERTS, CHAIRMAN;  
HON. GERALD STEWART, MEMBER;  
HON. RONALD ALSTON, MEMBER; AND  
HON. CHRISTOPHER SHEA NICKELL, MEMBER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Ronald McClure brings this appeal from a June 21, 1999, judgment of the McCracken Circuit Court. We affirm.

On January 8, 1999, Frank Augustus, Sheriff of McCracken County, Kentucky, filed a declaratory action in the McCracken Circuit Court challenging the constitutionality of the Deputy Sheriff Merit Board (Merit Board) established by the McCracken County Fiscal Court under the provisions of Kentucky

<sup>1</sup>Those statutes provide, in part, as follows:

KRS 70.260(1):

The primary legislative body of each county may enact an ordinance creating a deputy sheriff merit board, which shall be charged with the duty of holding hearings, public and executive, in disciplinary matters concerning deputy sheriffs. . . . (Emphasis added.)

KRS 70.261:

(2) The board shall, at a minimum, adopt a body of rules that addresses the following subjects:

(a) For deputy sheriffs:

1. Qualifications for initial and continued employment, which shall at a minimum include: citizenship, age, physical, mental, and educational requirements;
2. Grounds for temporary appointments;
3. Advancement requirements. Deputy sheriffs shall be employed for at least three (3) full years before being eligible for the rank of sergeant;
4. Factors that shall, or may, result in demotion, the procedures for determining whether or not to demote a deputy, and the procedures for executing a demotion;
5. Factors that shall, or may, result in firing, probation, suspension, or removal; and
6. Administrative procedures for the deputies in the office such as transfer, layoff, and

(continued...)

P. 57. On January 15, 1999, Ronald McClure moved to intervene in the proceedings. McClure had been discharged as deputy by Sheriff Augustus on July 21, 1998, and was seeking to have his discharge reviewed by the Merit Board. On March 2, 1999, McClure's motion to intervene was granted. Deputy McClure's intervention squarely pitted the power of the sheriff to dismiss a deputy against the authority of the Merit Board. McClure, of course, maintained the authority of the Board.<sup>2</sup>

The cause came on for conclusion, and the circuit court entered the order from which this appeal arises holding that the establishment of the Merit Board was unconstitutional. The court held *inter alia* that the Merit Board impermissibly intruded upon the constitutional office of sheriff and was an infringement upon the doctrine of separation of powers. Ky. Const. §27 and §28. Perforce, the court reasoned Sheriff Augustus acted within his prerogative in dismissing Deputy McClure.

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<sup>1</sup>(...continued)

reinstatement. . . . (Emphasis added.)

KRS 70.273(5):

The provisions of KRS 70.260 to 70.273 shall not apply to any nonsworn employee appointed by the sheriff pursuant to KRS 70.030, to any special deputy appointed by the sheriff pursuant to KRS 70.045, or to a deputy in a policy-making or confidential position excluded from coverage by the ordinance creating the deputy sheriff merit board.

<sup>2</sup>Kentucky Revised Statute 70.273(5) (see footnote 1) specifically mandates the exclusion of deputy sheriffs "in a policy-making or confidential position." It is, of course, arguable that all deputies are in such a position. This issue, however, has not been raised in these proceedings.

The office of sheriff is a venerable institution -- a part of our English heritage. 70 Am. Jur. 2d, Sheriffs, Police, and Constables §2 (1987). In England, it predated the Norman Conquest (1066). 10 The New Encyclopedia Britannica, Sheriff (1998) at 730. In this Commonwealth, it is a constitutional office filled by vote of the people. Ky. Const. §99.<sup>3</sup> The constitution does not prescribe the duties of the sheriff. Those duties are left to the legislature and the common law. The sheriff is not an officer of the state (Shipp v. Bradley, 210 Ky. 51, 275 S.W. 1 (1925)), but rather a ministerial officer under the executive branch of the county government.

The office of sheriff is one of high esteem and large consequence. It is charged with functions of great and small importance. The sheriff's responsibilities are wide in scope and varied in nature. Whether it be to guard and protect life or property, quell domestic disturbances, or remove a pet from a tree, the office of sheriff is the point of initial contact. No office is closer to the people.

The sheriff is statutorily empowered to: collect taxes (KRS 134.140); be in attendance upon the office of clerk for delivery of processes to be served (KRS 70.075); be in attendance

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**<sup>3</sup>§99. County officers, justices of the peace, and constables - Election - Term.**

At the regular election in nineteen hundred and ninety-eight and every four years thereafter, there shall be elected in each county a . . . Sheriff . . ., who shall enter upon the discharge of the duties of . . . [his] office(s) on the first Monday in January after . . . [his] election, and who shall hold . . . [his] office(s) four years until the election and qualification of their successors.

upon the fiscal court and any Court of Justice for the purpose of keeping order (KRS 70.140); post notice of the release of certain prisoners (KRS 197.170); act as jailer under specified conditions (KRS 71.090); convey prisoners to institutions for execution of sentence (KRS 70.130 and KRS 431.215); visit and inspect dance halls, roadhouses, places for sale of alcohol, restaurants, places of lodging, etcetera, and to report monthly to the county attorney and circuit court clerk (KRS 70.160); and patrol the public roads in the county (KRS 70.150). These enumerated statutory duties are not, by any means, exhaustive. The sheriff is the general conservator of the peace. See Lusk v. Commonwealth, 291 Ky. 339, 164 S.W.2d 389 (1942). Overall, the office of sheriff is entrusted with the maintenance of law and order and the assurance of peace and tranquility in the lives of all countians.

The sheriff is, in fact, the chief law enforcement officer of the county, especially empowered to summons all persons to aid in the performance of his duties. KRS 70.060 provides as follows:

**Sheriff may command power of county.**

Any sheriff, deputy sheriff or other like officer may command and take with him the power of the county, or a part thereof, to aid him in the execution of the duties of his office, and may summon as many persons as he deems necessary to aid him in the performance thereof.

The office of sheriff is unique in that the occupant is required not only to take the oath prescribed by Kentucky Constitution §228, but also the "special oath" required in KRS 70.010.

In order to execute the many and divers functions of his office, the sheriff is empowered to act through deputies. KRS 61.035. The deputies are not employees of the sheriff, but rather are deputized persons who fill the office of sheriff in the sheriff's place and stead. A deputy acts with the authority of the sheriff. KRS 61.035. A deputy is required to take the same oath as the sheriff. KRS 70.030. It has long been established that a sheriff is liable for the acts of a deputy in the performance and discharge of official duties. See West v. Nantz' Adm'r., 267 Ky. 113, 101 S.W.2d 673 (1937), Stephens v. Wilson, 115 Ky. 27, 72 S.W. 336 (1903). In Harlan v. Lumsden, 62 Ky. 86, 1 Duv. 86 (1863), it was held that a deputy sheriff was not directly liable to the Commonwealth for failure to pay over revenues collected, but was liable to the sheriff, who in turn was liable to the Commonwealth.

Deputies have historically served at the pleasure of the sheriff. See Hodges v. Daviess County, 285 Ky. 508, 148 S.W.2d 697 (1941), and Day v. The Justices of the Fleming County Court, 42 Ky. 198, 3 B. Mon. 198 (1842). Kentucky Statutes § 4560, the precursor of the statute under attack, provided as follows:

**§ 4560. Deputies; appointment and removal; oath.** – Every sheriff may, by and with the approval of the county court, appoint his own deputies, and may revoke the appointment at his pleasure. Before any deputy shall proceed to execute the duties of his office he shall take the oath required to be taken by the sheriff. (Emphasis added.)

Under that statute, the power of the sheriff to dismiss deputies was absolute.<sup>4</sup>

If there is anything self evident in our system of government, it is that a constitutional office holder is charged with the unqualified responsibility of fulfilling the functions of the elected office. To these ends, the sheriff may be removed from office for sundry failures. Ky. Const. §227, KRS 61.040, KRS 63.100, and Cf. Holliday v. Fields, 210 Ky. 179, 275 S.W. 642 (1925). We think it must naturally follow that a sheriff could suffer a forfeiture of his office by and through the delinquent acts of deputies. For this reason alone, it is indispensable that a sheriff at all times must possess the full and complete confidence of deputized personnel.

We now come to the pivotal question of whether the sheriff or the Merit Board is to be empowered to remove deputies. More succinctly, we frame the issue as whether the legislative branch of government may constitutionally seize the prerogative of the sheriff to dismiss deputies and place that prerogative in the discretion of a Merit Board.

Under the statutory scheme of KRS 70.260-273, the legislature has authorized the local legislative body to establish a five-member board, two of whom are appointed by the county judge/executive, two by the sheriff, and one "elected" by the deputy sheriffs of the county. The board is designated the "Deputy Sheriff Merit Board." Primarily, the board is empowered

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<sup>4</sup>The power of appointment was subject to approval of the county court as a part of the system of checks and balances. See 70 Am. Jur. 2d Sheriffs, Police, and Constables §13 (1987).

to establish the qualifications for initial appointment of deputies. The Board is also directed to adopt rules pertaining to training and disciplinary matters and to set forth factors that may result in demotion or dismissal.<sup>5</sup> We are not here concerned with appointment and training. We are only concerned with the power to discharge.

As heretofore noted, deputies are not mere employees; they are rather deputized persons with the full power of the sheriff. In our opinion, it is beyond all hope that a sheriff could fulfill the multiple and heterogeneous functions of the office without the power to discharge a deputy who is empowered to act in place and stead. Moreover, it is beyond all reason that a sheriff could be so expected.

We do not think that in this Commonwealth the power of removal of deputies has been exercised other than by the sheriff. For the first time, the enactment of the merit system places the ultimate power of discharge within the jurisdiction of the board. It simply strips the sheriff of the power to discharge deputies. It is this transfer of authority that is said to offend the constitution.

Our constitution is emphatic in addressing separation of powers. Ky. Const. §27 provides:

**§ 27. Powers of government divided among legislative, executive and judicial departments.** – The powers of the government of the Commonwealth of Kentucky shall be

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<sup>5</sup>It does not appear that the statutory scheme makes provision for termination of deputies when the sheriff leaves office. In this regard, it has the characteristics of "tenure of office."



divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ky. Const. §28 provides:

**§ 28. One department not to exercise power belonging to another.** – No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

It has been said that the foregoing provisions present a "double-barreled, positive-negative approach." See Legislative Research Commission, Prather v. Brown, Ky., 664 S.W.2d 907, 912 (1984).

Our division of government into three branches is clear and unambiguous, probably more so than provided by constitutions of other states. See Sibert v. Garrett, 197 Ky. 17, 246 S.W. 455 (1922). Sections 27 and 28 not only separates the powers of government but prevents each branch from intruding into the powers or functions of another. See Legislative Research Commission, Prather, 664 S.W.2d 907. The unreasonable interference by one branch into the functions of another is an intrinsic violation of Sections 27 and 28.

The dismissing of deputies by the sheriff is the exercise of an executive power by an independently elected executive officer. We are of the opinion the legislative branch may not usurp this power without offending Sections 27 and 28 of our constitution. As such, we hold that the establishment of the Merit Board is unconstitutional.

For the foregoing reasons, the judgment of the  
McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tod D. Megibow  
Paducah, Kentucky

BRIEF FOR APPELLEE, FRANK  
AUGUSTUS, SHERIFF:

Mark D. Pierce  
Paducah, Kentucky