

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

**State ex rel. Robert Shirley,
Sheriff of Jefferson County, Petitioner**

vs.) **No. 12-0586** (Jefferson County 09-AA-7)

**The Honorable David Sanders, Judge
of the Circuit Court of Jefferson County,
and Michael T. Dodson, Respondents**

**FILED
October 19, 2012**

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

MEMORANDUM DECISION

This Court issued a rule to show cause against the respondents, the Honorable David Sanders, Judge of the Circuit Court of Jefferson County (hereinafter “the circuit court”), and Michael T. Dodson (hereinafter “Sergeant Dodson”), as a result of a petition for writ of prohibition filed by the petitioner herein, the Jefferson County Sheriff, Robert Shirley (hereinafter “Sheriff Shirley”). The requested writ is based on the circuit court’s January 5, 2012, order, and resulting letter filed on January 11, 2012. This Court is requested to prevent enforcement of the circuit court’s order and follow-up letter, wherein the circuit court selected the members of the predisciplinary hearing board (hereinafter “the board”) based on its determination that the Deputy Sheriff’s Association (hereinafter “the DSA”) was unable to appoint a board representative in accordance with the applicable statute.

Sergeant Dodson filed his response to the requested writ, urging this Court to deny the same. Having thoroughly considered the parties’ written submissions and oral arguments, the appendix record, and the pertinent authorities, we find that the circuit court’s appointment of the board members was in contravention of the applicable law. Accordingly, Sheriff Shirley’s requested writ of prohibition is granted. This Court further finds that this case presents no new or significant questions of law. Therefore, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

We previously have reviewed this case when Sergeant Dodson appealed Sheriff Shirley’s termination of his employment without providing a predisciplinary hearing. This Court, by memorandum decision, reversed and remanded the case with directions to provide Sergeant Dodson with a predisciplinary hearing in accordance with West Virginia

Code § 7-14C-3(a) (1995) (Repl. Vol. 2010). *See Dodson v. Shirley*, No. 35699 (W. Va. Sept. 23, 2011).

On remand, Sheriff Shirley convened a hearing board; however, prior to any hearing, Sergeant Dodson filed a preliminary injunction in the circuit court, which alleged that the DSA had not been “operating under any recognized procedure in making it’s [*sic*] appointment to the board[.]” and that its selected representative should not be allowed. The circuit court issued a rule to show cause against the Sheriff, and a hearing was held on November 14, 2011.

Sergeant Dodson argued before the circuit court that the DSA’s appointee was not determined according to any proper procedure. Because of this alleged faulty process, Sergeant Dodson argued that the DSA’s appointment should be invalidated. It was attested that Sheriff Shirley exercised undue influence over the DSA’s appointment of its representative to the board because of the involvement of the Sheriff’s administrative assistant in counting the DSA’s voting ballots and because of the department’s chief deputy’s involvement in the DSA’s vote. Further, Sergeant Dodson contended that the DSA had not had a formal meeting in over five years. He also complained of voting irregularities in his declaration that some retired members, as well as some members who were on leave, were provided with an opportunity to vote while other similarly-situated members were not informed of the vote. Sergeant Dodson asserted that these improprieties resulted in the DSA’s inability to choose a representative to place on the board.

At the hearing before the circuit court, Sheriff Shirley explained the manner in which the three-person hearing board had been determined. The Sheriff had requested that the DSA choose a representative for the hearing board as required by W. Va. Code § 17-14C-1(4) (1995) (Repl. Vol. 2010).¹ Because the DSA’s president was out of town, the

¹The relevant portion of the applicable statute provides as follows:

(4) “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

(continued...)

department's chief deputy, who is a member of the DSA, organized the voting process. A ballot was prepared with a list of those deputies who were eligible to serve. The deputies in the department voted by secret ballot, and Deputy Doug Fletcher, who received eighteen votes out of twenty-four votes, was appointed to the board as the DSA representative. Thereafter, Sheriff Shirley appointed Sergeant Ronald Fletcher² as his representative on the board. Deputy Doug Fletcher and Sergeant Ronald Fletcher then chose the third member, Corporal Vincent Tiong.

In response to Sergeant Dodson's request for an injunction, Sheriff Shirley argued that no requirements exist that prescribe the manner in which the DSA is to vote on any matter, including the appointment of members to a hearing board. Members of the DSA pay annual dues which continue to be collected in the absence of any formal meetings. Sheriff Shirley proffered that, although the DSA had not met for a formal meeting, it voted on several issues including the allocation of charitable donations and the appointment of members to other hearing boards. Additionally, the DSA is listed as a current nonprofit organization with the West Virginia Secretary of State and pays annual dues and files yearly reports with that office.

The circuit court agreed with Sergeant Dodson's position and stated that "the Deputy Sheriff's Association cannot appoint a member of the Board and it becomes to [sic]

¹(...continued)

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, 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.

W. Va. Code § 7-14C-1 (1995) (Repl. Vol. 2010).

²Deputy Doug Fletcher and Sergeant Ronald Fletcher are not related.

role of the Chief Judge to appoint members pursuant to § 7-14C-1(4).” Each party was ordered to provide a list of five potential board members. From these submissions, the circuit judge convened a board comprised of three individuals from Sergeant Dodson’s list and three individuals from the DSA’s list submitted by Sheriff Shirley, for a total of six members. The circuit court denied Sheriff Shirley’s request that he be allowed to identify a member of the board as his representative. Sheriff Shirley seeks a writ of prohibition from this Court to prevent the circuit court from enforcing the order wherein it appointed the members of the board. This Court issued a rule to show cause.

Generally, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code 53-1-1.*” Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). Sheriff Shirley argues to this Court that the circuit court exceeded its authority when it appointed the hearing board members. A circuit court is permitted to appoint citizens to the board only in the event that the members cannot be appointed otherwise. In effect, Sheriff Shirley argues that the lower court’s decision divested the Sheriff of his statutory right to identify a member of the board on his behalf, and, further, that the Sergeant whose conduct is under investigation was allowed to choose half of the board members when the statute does not provide the Sergeant with the right to pick any of the board’s members. Conversely, Sergeant Dodson responds that the errors in the DSA’s process serve as an appropriate basis for the circuit court to exercise its discretion in appointing members to the board.

In this case, the circuit court determined that “the Deputy Sheriff’s Association cannot appoint a member of the Board[.]” We disagree with this assertion. According to the statute, a

“[h]earing board” . . . consists of three members, all to be selected from deputy sheriffs within that agency 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[.]

W. Va. Code § 7-14C-1. As pointed out by Sheriff Shirley, this provision does not set forth any specific requirements or restrictions on the manner in which the DSA is to appoint its representative to the Board. Additionally, this statute does not provide any authority for the deputy under investigation to appoint any board members. While Deputy Dodson argues that the DSA’s voting procedure was “faulty” and tainted the process, we cannot agree. While the DSA had not conducted formal meetings, the evidence showed that its members continued to pay annual dues and continued to vote on issues as the need arose. Moreover, in this specific case, the DSA, through the department’s chief deputy, who was also a DSA

member, had a voting ballot prepared with a list of those deputies who were eligible to serve. The deputies in the department voted by secret ballot, and the person who received the largest number of votes was appointed to the board as the DSA representative. While an administrative assistant in the Sheriff's office assisted with the tallying of the secret votes, we note that she is authorized to assist the DSA with administrative matters. There is no evidence that the DSA, as an organization, or that its voting process, or that the help it received from the Sheriff's administrative assistant, had any improper effect on the DSA's choice of its representative on the board. Thus, it is clear that the circuit court was incorrect when it determined that the DSA was unable to appoint a member of the board.

Because the statute provides that "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" *only* "in the event one or more members of the board cannot be appointed as otherwise provided in this section," the circuit court acted outside of its authority in appointing any board members. W. Va. Code § 7-14C-1. The circuit court's actions exceeded its authority because it is only authorized to determine the constitution of the board members if the DSA, or any of the other listed entities, is unable to appoint its own representative. The DSA appointed a member, the Sheriff appointed a member, and those two appointees then mutually agreed on the third board member. Because the three board members were selected as set forth in the statute, and because there was no impropriety in how these members were chosen, the circuit court had no authority to name the members of the board. Therefore, the writ of prohibition is hereby granted.

Writ Granted.

ISSUED: October 19, 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