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Municipal Law

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MUNICIPAL LAW

I. POLICE CONDUCT

McAtee v. Mentzer, 321 S.E.2d 699 (W. Va. 1984).

With a recent opportunity to examine a local city ordinance, the West Virginia Supreme Court of Appeals firmly backed the authority of municipalities to tightly control police conduct. Granting deference to the City of Weirton regulation prohibiting police officers from engaging directly or indirectly in the sale of intoxicating liquors, the West Virginia Supreme Court of Appeals affirmed the discharge of a patrolman who was part owner of a private club that dispensed liquor. In *McAtee v. Mentzer*,[1] the court dismissed the petitioner's argument that the municipal rule constituted an unreasonable restraint on his personal liberty. With relative ease, Justice Neely rejected each of patrolman McAtee's contentions, relying principally on the heightened scrutiny given the law enforcement profession in general.[2]

McAtee's initial argument against enforcement of the rule precluding outside employment alleged that the rules governing the conduct of the police department had never been formally distributed; therefore, all police officers lacked the necessary notice of this and other provisions. The court found little merit in the relevancy of this point because McAtee had objected earlier to this specific provision in a letter to the Chief of Police of Weirton.[3]

Equally unpersuasive was McAtee's argument that the enforcement of the rules in general were lax and that strict enforcement of this regulation against only him would be discriminatory.[4] This argument would have been valid only if there was evidence to show that other police officers had violated this rule on prior occasions without eliciting repercussions. In fact, "there was no evidence of the department allowing a policeman to operate a private club."[5] The court noted that relatively lax enforcement of other, less important regulations could not negate the importance of strict compliance with a rule that reflected the integrity of the police department.[6] The court's principal concern was the propriety and desirability of allowing a police officer to own a private club that dispenses liquor because police are the primary agents responsible for enforcing city liquor laws and handling the variety of altercations that occur concomitant with such establishments.[7]

The court patterned its standard of review of police officers from the United States Supreme Court decision in *Kelley v. Johnson*,[8] where a rule regulating the acceptable length of police officers' hair was upheld under the minimal test of

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[1] McAtee v. Mentzer, 321 S.E.2d 699 (W. Va. 1984).
[2] *Id.*
[3] *Id.* at 701.
[4] *Id.*
[5] *Id.* at 701-02.
[6] *Id.* at 701.
[7] *Id.* at 702.
[8] Kelley v. Johnson, 425 U.S. 238 (1976).

"whether the [challengers of the regulations] can demonstrate that there is no rational connection between the regulation . . . and the promotion of safety of persons and property."[9] Noting that *Kelley* touched indirectly on the issue of outside employment by police officers via the standard of review established,[10] the West Virginia court affirmed the city's policy of prohibiting law officers from owning clubs that serve liquor.[11] The court strengthened its decision by citing cases indicating that the majority of courts follow the United States Supreme Court's lead in *Kelley* of deferring to the judgment of the individual cities to establish rules that prohibit outside employement of police officers.[12]

II. HAZARDOUS WASTE

Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985).

An ordinance passed by the City of Fairmont which qualified permanent disposal of hazardous waste as a public nuisance, and thus within the city's power to prohibit, was unanimously upheld in *Sharon Steel Corporation v. City of Fairmont*.[13]

Sharon Steel operated a coking plant within the City of Fairmont for thirty-one years. In 1979 the plant was closed. To dispose of an excessive amount of hazardous wastes that had resulted from the coking operations, Sharon Steel sought to construct a permanent hazardous waste containment facility at the same location and subsequently submitted federal and state applications for construction permits.[14] These applications were pending before the appropriate state and federal agencies when the City of Fairmont approved Ordinance No. 597[15] in June of 1983.[16] Ordinance 597 was drafted to prevent potential public nuisances. It sets forth several definitions which attempt to eliminate all possible ambiguity in a necessarily limited and restrictive ordinance. Specifically, the purpose of the ordinance lies in section two which states: "It shall be unlawful for any person to permanently dispose of or attempt to dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited."[17]

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[9] *Id.* at 247.

[10] *McAtee*, 321 S.E.2d at 702.

[11] *Id.*

[12] *Id. See* Vorbeck v. Schnicker, 660 F.2d 1260 (8th Cir. 1981), *cert. denied*, 445 U.S. 921 (1982); Trelfa v. Centre Island, 54 A.D.2d 985, 389 N.Y.S.2d 22 (1976); Borlin v. Civil Service Comm'n, 338 N.W.2d 146 (Iowa 1983); Cox v. McNamara, 8 Or. App. 242, 493 P.2d 54 (1972), *cert. denied*, 409 U.S. 882 (1972).

[13] Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985).

[14] *Id.* at 619.

[15] FAIRMONT, W. VA., CITY ORDINANCE No. 597 § 2 (1983).

[16] *Sharon Steel*, 334 S.E.2d at 619.

[17] *Id.* at 619 n.2 (quoting FAIRMONT W. VA., CITY ORDINANCE No. 597 §§ 1,2 (1983)).

Sharon Steel challenged the legality of the ordinance on three levels. First, it argued that the city was preempted from enacting local legislation in this area because extensive state and federal legislation already existed to govern hazardous wastes. Second, Sharon Steel argued that the city simply lacked authority to pass such an ordinance because of the limited powers granted to municipalities by the Legislature. Finally, Sharon Steel argued that the ordinance violated substantive due process principles.[18]

Before discussing those challenges, the court noted policy differences between the municipal ordinance under scrutiny and applicable state[19] and federal regulations.[20] The city ordinance was a common law codification of nuisance. It sought to penalize those persons improperly storing hazardous wastes which endanger public health or environment. On the other hand, the federal and state regulations were regulatory in intent, designed to prevent improper handling and disposal of hazardous waste.[21]

Sharon Steel's first argument involved the state and federal preemption question. It alleged the city did not have the authority to adopt a specific prohibition declaring the permanent disposal of hazardous wastes a public nuisance due to existing, preemptive law. The court found that there was no conflict between Fairmont's penal ordinance and state and federal regulations of hazardous wastes because of the different goals reflected in each.[22] Thus, there was no preemption. To further support this conclusion, Justice Miller cited several state court decisions and a recent United States Supreme Court opinion, and then adopted the conclusion of *Exxon Corp. v. Eagerton*,[23] holding that neither a federal nor a state regulation will preempt a municipal ordinance where there exists a savings clause that clearly preserves both statutory and state common law rights for the municipality to enact a law relating to hazardous waste.[24] The court concluded that the purpose of the savings clauses is to preserve these statutory and common law rights for the private individual who wishes to file an action relating to hazardous wastes.[25]

Sharon Steel secondly questioned the general power of the municipality to enact a hazardous waste ordinance as Fairmont did. The court found support for the city's action in West Virginia Code section 8-12-5(23)[26] which provides general

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[18] *Id.* at 618.

[19] Hazardous Waste Management Act, W. VA. CODE §§ 20-5E-1 to -23 (1981) [hereinafter cited as WVHWMA].

[20] Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1983) [hereinafter cited as RCRA].

[21] *Sharon Steel*, 334 S.E.2d at 620.

[22] *See supra* notes 19-21 and accompanying text.

[23] Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).

[24] *Sharon Steel*, 334 S.E.2d at 624 (citing *Exxon Corp.*, 462 U.S. 176).

[25] *Id. See* 42 U.S.C. § 6972(f) (1983) (savings clause of the RCRA); W. VA. CODE § 20-5E-18(d) (1985) (savings clause of the WVHWMA). The court further noted that W. VA. CODE § 20-5E-18(h) (1985) specifically preserves the right of any person to bring an action based on a nuisance. *Sharon Steel*, 334 S.E.2d at 622-23.

[26] W. VA. CODE § 8-12-5(23) (1984) states that a municipality is empowered "[t]o provide for

authority to eliminate those things posing a potential hazard to the health and welfare of the public and the environment. Although lacking specific reference to hazardous waste, a broad interpretation of the Code is not required to find sufficient authority for the city to abate what it determined to be a public nuisance. This holding was premised on a successful showing by the city that hazardous waste is in fact a public nuisance when the city seeks to enforce its ordinance.[27] The court distinguished the city's somewhat circuitous actions of deeming permanent storage of hazardous waste a nuisance, which was within the city's power to prohibit, from a direct determination that Sharon Steel's coking site was, in fact, a public nuisance. The latter issue remains a question of fact which did not arise.[28]

Noting that substantive due process challenges of legislative enactments are not generally favored, the court summarily dismissed Sharon Steel's final argument involving substantive due process. Sharon alleged that the ordinance made an arbitrary and discriminatory distinction between the permanent disposal and temporary storage of hazardous waste.[29] The court stated that municipalities have within their police power the authority to protect the health and safety of its citizens and property. It found that appropriate abatement of public nuisances was therefore within the city's authority.

Recalling its earlier qualification of permanent hazardous waste storage as a public nuisance, the court upheld the city's ordinance and consequent denial of it's request to construct a permanent storage facility.[30] The court supported its conclusion by noting that although it had insufficient evidence on which to determine if the distinction between permanent and temporary storage was arbitrary or discriminatory, the issue was irrelevant because a public nuisance law could just as easily be defined to prohibit temporary hazardous waste storage as well as permanent disposal.[31]

III. Overtime Pay Ordinance

Local 313, International Association of Firefighters v. City of Morgantown, 323 S.E.2d 604 (W. Va. 1984).

In *Local 313, International Association of Firefighters v. City of Morgan-*

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the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance." The statute further enumerates the following powers, among others, as belonging to municipalities: (13) regulation of garbage, trash, wastes, and other similar matters; (1) authorizing the prevention of anything that is dangerous, offensive, or unwholesome to the public; and (44) authorizing the protection and promotion of public morals, safety, health, welfare, and good order. *See Sharon Steel*, 334 S.E.2d at 625.

[27] *Sharon Steel*, 334 S.E.2d at 625.

[28] *Id.* at 626.

[29] *Id.*

[30] *Id.* at 627.

[31] *Id.*

town,[32] a group of firemen, after being denied relief in the Circuit Court of Monongalia County, appealed their claim for overtime pay under West Virginia Code section 21-5c-3.[33] The firemen contended that they were not receiving overtime pay for an average workweek of fifty-six hours, well in excess of the forty hour workweek after which section 21-5c-3(a) requires overtime pay at one and one-half times the regular rate.[34] A forty hour workweek is standard for all city employees, but this provision sets the fire department's standard workweek at fifty-six hours per week.[35] Because of this discrepancy, the firemen contended that they should have been paid the hourly rate established for a forty hour workweek and then should have received overtime compensation at time and a half for the remaining sixteen hours rather than receive an annual salary.[36]

It was the city's position that the firemen clearly agreed to the fifty-six hour workweek under the designated annual salary for their particular rank in the department.[37] Support for the city's position is found in West Virginia Code section 8-15-10, which states in part that firemen "shall not be required to remain on duty in excess of one hundred twelve hours during any fourteen consecutive day period."[38] The city reasoned that this provision translated into a fifty-six hour workweek when read *in para materia* with the state's wage and hour law.[39] The city further argued that statutory compliance could be met in this case simply by "working backwards from the firemen's annual salary to arrive at regular and overtime pay rates which would equal the annual salary."[40]

It is this final argument which the majority of the court found to be the weak link in the city's defense. Citing several early United States Supreme Court decisions, the court determined that, where employees are paid on a lump sum basis and there is no "explicit proof of another mutually agreed upon rate of pay," the court must infer that "the regular rate actually paid was substantially that obtained by dividing the weekly wage payable for the working of the scheduled workweek by the number of hours in such scheduled workweek."[41]

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[32] Local 313, International Ass'n. of Firefighters v. City of Morgantown, 323 S.E.2d 604 (W. Va. 1984).

[33] W. VA. CODE § 21-5c-3(a) (1985) provides:

> On and after the first day of July, one thousand nine hundred eighty, no employer shall employ any of his employees for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

[34] *Local 313*, 323 S.E.2d at 605.

[35] MORGANTOWN, W. VA., PERSONNEL RULES & REGULATIONS OF THE CITY OF MORGANTOWN § V-1(a).

[36] *Local 313*, 323 S.E.2d at 606.

[37] *Id.*

[38] *Id.* (citing W. VA. CODE § 8-5-10 (1984)).

[39] *Id.* at 606.

[40] *Id.*

[41] *Id.* at 607 (citing Marshall v. Chala Enterprises, Inc., 645 F.2d 799, 801 (9th Cir. 1981)).

The flaw in the city's argument lay in its failure to produce a previously determined express agreement between the firemen and the city as to how the lump sum payment for a fifty-six hour workweek actually was divided between a regular pay rate and an overtime rate of at least one and one-half times the regular rate. The court thus ordered monetary relief in the amount of the regular rate, as determined by the weekly wage and fifty-six hour workweek, times the overtime rate and remanded the case to the circuit court without foreclosing the parties from developing facts to support an express advance wage agreement.[42]

Justice Neely, dissenting, agreed with the city's argument that the firemen had freely agreed to this annual pay rate based upon a fifty-six hour week.[43] While recognizing the inherent danger of the firefighters' work, Justice Neely viewed the majority opinion as implicitly suggesting that the city had contracted with the firemen for sixteen hours of weekly overtime. It was Justice Neely's conclusion that the firefighters were well aware of the special nature and demands of the firefighting profession when they contracted for the position, and they thereby knowingly contracted for overtime pay rates only upon working more than a fifty-six hour workweek.[44]

IV. Reissuing School Bonds

Board of Education v. Slack, 327 S.E.2d 416 (W. Va. 1985).

In March, 1985, the West Virginia Supreme Court of Appeals issued a writ of mandamus directing the Secretary of the Board of Education of Hancock County to execute the necessary documents allowing the school board to issue refunding bonds to retire existing bonds. At issue in *Board of Education v. Slack*,[45] was the Board of Education's proposed refunding bond plan initiated pursuant to the Refunding Bond Act contained in West Virginia Code sections 13-2-1 to -9.[46] The dispute centered on the constitutional and statutory requirements that strictly govern the sale of general obligation bonds and whether the proposed plan conflicted with an agreement earlier approved by voters.

In January, 1980, the Board of Education scheduled a special election for voter approval of bonds in the aggregate principal amount of $13,885,000 with which to finance school construction and improvements.[47] The voters approved the bond issue on March 25, 1980, but the Board was unable to sell any bonds until 1983 at which time bonds totaling only $8,340,000 were sold, leaving $5,545,000 of the

[42] *Id.* at 609.
[43] *Id.* (Neely, J., dissenting).
[44] *Id.* at 610 (Neely, J., dissenting).
[45] Board of Educ. of County of Hancock v. Slack, 327 S.E.2d 416 (W. Va. 1985).
[46] W. Va. Code §§ 13-2-1 to -9 (1985).
[47] *Slack*, 327 S.E.2d at 422.

bonds unissued.[48] At the time of the disputed proposal, one annual payment had been made which reduced the outstanding debt on the issued bonds to $7,645,000.[49] Basically, the Board's plan entailed a reissuance of refunding bonds with an aggregate principal amount of $7,645,000 at interest rates ranging from 8.0 to 9.875 percent per annum and with a maturity schedule that spanned ten years.[50] The money acquired through the sale would be used to purchase United States Treasury obligations which would be deposited in an escrow fund and later used to liquidate the old outstanding bonds. The $3,375,000 left in the Bond Commission account could then be released to complete additional school improvements.[51] The Board planned to thereafter readvertise $1,840,000 of the remaining $5,450,000 worth of bonds which the voters had originally approved for sale, allowing all the proposed school construction work to be completed without issuing the remaining $3,705,000 of the original bond issue. The school board estimated that under its proposal, there would be a resultant savings of approximately $4,312,000 for the voters from the originally approved plan.[52]

The court ultimately held that the Board's plan did not violate the West Virginia Constitution or the applicable provisions of the West Virginia Code. Essentially, the thrust of the court's opinion focused on the continuing importance of ensuring the Board's plan did not exceed the original indebtedness approved by the voters to any significant extent.[53] Therefore, the focus remained on whether the reissuance would create a proscribed new indebtedness by increasing the amount originally authorized by the voters.

The weight of precedent in West Virginia coupled with the overwhelming majority of jurisdictions firmly establishes that a refunding bond does not create a new indebtedness but simply changes the form of the old debt.[54] Acceptance of this rule is conditioned upon keeping within the bounds of the guidelines originally authorized by the voters. The court found that the change in maturity schedule and interest rates, the overall amount of bonds to be refunded, and the original bonds planned for reissuance, when considered collectively, fell well within the voter mandate and did not violate the West Virginia Constitution[55] or the West Virginia Code.[56]

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[48] *Id.* at 423.

[49] *Id.*

[50] *Id.*

[51] *Id.* n.4.

[52] *Id.*

[53] *Id.* at 425.

[54] *Id.* citing Keeney v. Kanawha County Court, 115 W. Va. 243, 245, 175 S.E. 60, 61 (1934).

[55] W. VA. CONST. art. X, § 8 establishes guidelines by which a county, city school district or municipal corporation may incur indebtedness from general obligation bonds; it also addresses voter approval.

W. VA. CONST. art. X, § 10 sets forth the specific provisions for the School Board to follow when implementing a refunding plan.

[56] W. VA. CODE § 13-1-4 (1985) establishes that specific criteria regarding the nature of the bonds must be met in the Election Order.

There are no specific prohibitions against the sale of refunding bonds at a discount. Therefore, the Board of Education was free to sell the bonds at less than par value.[57] The court additionally confirmed the authority of the Board to use any excess money realized from the escrow fund beyond that amount necessary to retire the original outstanding bonds for further school improvements, if those improvements were within the original contemplation of the project.[58]

The Board's second major concern was whether it could appropriately issue only $1,840,000 worth of the total $5,450,000 in unissued original bonds, an amount substantially less than the total amount authorized in the election. Viewing this issue in light of the entire refunding bond plan and recognizing that the school improvements ultimately sought would still be completed without issuing all of the original bonds, the court again approved the Board's action, finding that the plan remained within the voters' original guidelines.[59]

An additional concern of the Board was that the tax levies imposed on the taxpayers would not be reduced despite the fact that a significant percentage of the originally approved bonds had not been issued. To support this argument, the Board relied on a portion of West Virginia Code section 13-2-1.[60] The court rejected this attempt to isolate a small portion of the statute, criticizing the reasoning as inconsistent with the entire tenor of the Code provision.[61] The court further stated that this portion was inapplicable to the facts at issue since there was no question that all of the annual tax revenues would be utilized during the maturity schedule of the bonds.[62] The court emphasized that the Refunding Bond Act was written to allow a measure of flexibility in the implementation of plans such as the one under dispute, again subject only to the qualification that such plan not exceed original constraints. This same flexibility allowed the court to also approve the Board's plan to maintain level debt service rather than level principal payments as was first agreed. Since no overall increase in the tax levy rate would result, the court found this change inconsequential.[63]

The court also addressed the question of which year's assessment, 1979 to 1980

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[57] *Slack*, 327 S.E.2d at 429.

[58] *Id.* at 430.

[59] *Id.* at 431.

[60] *Id.* at 432 (citing W. VA. CODE § 13-2-1 (1985), which provides in pertinent part:

The amount of taxes expected to be available in each year for purposes of this section shall be based upon the rates of levy stipulated in the order directing the election at which the issuance of the bonds being refunded was approved by the voters and upon the most recent assessed salvation of the affected property prior to such election. In the event only a portion of the bonds provided for such order are being refunded or have been issued, an appropriate reduction shall be made in the amount of taxes expected to be available based upon the actual debt service requirements of bonds which have been issued but are not being refunded and the estimated debt service requirements of bonds which have been issued but are not being refunded and the estimated debt service requirements of bonds which have not been issued.

[61] *Id.* at 432-33.

[62] *Id.* at 433.

[63] *Id.* at 434.

or 1980 to 1981, should provide the estimate with which to determine the tax levy rates. The court rejected the plan to establish a single year as the basis for the estimate, reading the applicable provisions of the Refunding Bond Act to allow each year's current property valuations to determine that year's levy rates.[64]

The remaining issues were procedural in nature. The Board questioned the propriety of the plan to withdraw funds presently on deposit with the Bond Commission for further school improvements. The court concluded that, insofar as these funds were not earmarked to amortize the present bond indebtedness, it was within the Board's discretion to use them to complete the original project.[65] These funds had accumulated from the tax levies imposed during the period of March, 1980 through 1983 when the Board had been unable to sell any bonds. If in accord with section 13-3-9(c) of the West Virginia Code, the Board was entitled to obtain the funds from the Bond Commission and apply them toward the original project.[66]

Finally, the court held that the refunding bonds, together with the $1,840,000 in original bonds to be reissued, could be registered with the Chemical Bank of New York without being registered by the West Virginia State Treasurer.[67] Citing sections 13-2-2[68] and 13-1-14[69] of the West Virginia Code, the court agreed with the Board that sufficient authority existed to allow the bonds to be registered at the New York bank which was the place of the payment.[70] A duplicate list of the registered bonds could then be kept at the West Virginia State Treasurer's office and at the New York Chemical Bank with the payor, where payment and re-registration of the bond is handled. The court concluded that the proposed refunding bond plan was lawful as proposed, thus requiring the Secretary of the Board of Education to fulfill his non-discretionary duties as requested.[71]

V. Civil Service Employment

Martin v. Pugh, 334 S.E.2d 633 (W. Va. 1985).

Under a complex factual setting, the West Virginia Supreme Court of Appeals

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[64] *Id.* at 434-35.

[65] *Id.* at 437.

[66] *Id.* (citing W. Va. Code § 13-3-9(c) (1985). The statute provides in relevant part:

> If an issuer has remitted to the commission funds not earmarked for the purpose of amortizing bonded indebtedness, all or a portion of such funds may be withdrawn by the issuer upon sixty days written notice to the commission: Provided, that such withdrawal shall neither create a deficit in the issuer's account with the commission nor be in conflict with terms of the bond issue. . . .

[67] *Id.* at 437.

[68] W. Va. Code § 13-2-2 (1985) states that the bond-issuing authority has the right to have the bonds payable "at the office of the state treasurer and at such other place or places as the body issuing the same may designate."

[69] W. Va. Code § 13-1-14 (1985) provides similar language relating to the payment of the original bonds.

[70] *Slack*, 327 S.E.2d at 437.

[71] *Id.* at 438.

reversed a circuit court decision and held that patrolman Edward Martin, hired by the City of Chester in 1977, was not entitled to the status of full-time police patrolman despite having worked several months under the pretext of that title.

Proper understanding of the court's reasoning in *Martin v. Pugh*[72] depends a great deal on careful reading of the Police Civil Service Act[73] which provides a "complete and all-inclusive system for the appointment, promotion, reduction, removal and reinstatement of all officers (except the chief of police), policemen and other employees of paid police departments. . . ."[74] Strict adherence to the intent of the Legislature predominated the court's analysis and conclusions throughout its discussion.

On July 30, 1976, Mr. Martin took the two civil service tests[75] necessary for eligibility to become a police officer for the City of Chester. Although he successfully passed both examinations, Mr. Martin's score placed him in the sixth position for those taking the part-time test and sixth position for those taking the full-time test.[76] Ten months later, Mr. Martin again took both examinations, this time achieving a passing score on the part-time examination but failing the full-time test.[77] Since the time of taking these tests, only one candidate had been appointed as a full-time officer. This person scored top grades on the the full-time test for two consecutive years.[78] Mr. Martin was subsequently hired on a part-time basis by the City of Chester in October, 1977, and was scheduled to work two days per week and to thereafter remain on call as necessary.[79]

Transcripts from a Chester City Council meeting in July, 1978, indicated that Mr. Martin was, at that meeting, "appointed" a full-time officer.[80] The city alleged that the appointment was purely a clerical error, but the court affirmed the Policemen's Civil Service Commission finding that there was no persuasive evidence to support the contention. Thus, the appointment was presumed correct.[81]

Mr. Martin therefore began working forty hour weeks at part-time hourly wages

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[72] Martin v. Pugh, 334 S.E.2d 633 (W. Va. 1985).

[73] W. VA. CODE § 8-14-6 to -23 (1984) will be examined in greater detail throughout this discussion.

[74] Daniels v. McCulloch, 285 S.E.2d 483 (W. Va. 1981) (quoting Dougherty v. City of Parkersburg, 138 W. Va. 1, 76 S.E.2d 594, 595 (1952)).

[75] There is one test for full-time officers and one for part-time officers. The full-time examination is more difficult but the actual duties of both positions are the same. The primary distinction is that only full-time officers are provided health insurance benefits, retirement fund contributions, paid vacation days, paid sick leave, and, quite naturally, higher pay in general. *Martin*, 334 S.E.2d at 636.

[76] *Id.*

[77] Mr. Martin's score on the part-time test placed him in a tie for second position among those candidates passing that test and in a tie for fifth position of those passing either the first or second part-time test, while failure on the full-time test left him in ninth position among those passing either the first or second full-time test. *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

while the city paid his health insurance premiums. One year after the City Counsel meeting, Mr. Martin was notified that he was again to work only two days per week and that the city would no longer pay for his insurance. At this point, Mr. Martin initiated a mandamus proceeding in circuit court to force the city to legally recognize him as a full-time police officer with all benefits entailed by that position. However, the proceeding was dismissed because Mr. Martin failed to first exhaust his administrative remedy of seeking a hearing before the Policemen's Civil Service Commission.[82]

Following the dismissal the city returned Mr. Martin to a five-day, forty hour week; this arrangement lasted over three years. On November 17, 1982, the city once again reduced Mr. Martin's work time to two days per week on the grounds that other part-time officers were readily available and the city wished to more evenly apportion the available work.[83] At this time, Mr. Martin filed a grievance pursuant to West Virginia Code section 8-14-20(a)[84] seeking review of all actions taken by the city relevant to his entire period of employment.

Before determining Mr. Martin's appropriate status in the police department, the court reviewed the Civil Service Commission's order and the subsequent ruling by the circuit court. The Commission's findings were significant in two respects. First, they ruled that West Virginia Code section 8-14-1[85] allowed paid police departments to have only full-time officers or hourly (part-time) officers. Thus, a police department employing both was in violation of the statute.[86] Pursuant to this conclusion, the City of Chester could not lawfully hire any part-time officers while maintaining full-time officers on the payroll; therefore, the Commission reasoned that all officers hired must be designated as full-time and the City must thereafter give only full-time exams.[87] Second, the Commission further determined that because the duties of the full-time and part-time positions were identical, Mr. Martin was eligible for appointment as a full-time police officer on the basis of his part-time test scores. The Commission concluded that Mr. Martin's appointment as a full-

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[82] *Id.* at 636-37.

[83] *Id.* at 637.

[84] W. VA. CODE § 8-14-20(a) (1984) provides in pertinent part:
No member of any paid police department subject to the civil service provisions of this article shall be . . . reduced in rank or pay except for just cause, . . . ; and no such member shall be . . . reduced except as provided by the civil service provisions of this article, and in no event until he shall have been furnished with a written statement of the reasons for such action.

[85] W. VA. CODE § 8-14-1 (1984) states:
For the purpose of this article, the term "paid police department" shall be taken to mean only a municipal police department maintained and paid for out of public funds and whose employees are paid on a full-time basis out of public funds. The term shall not be taken to mean a department whose employees are paid nominal salaries or wages or are only paid for services actually rendered on an hourly basis.

[86] *Martin*, 334 S.E.2d at 637.

[87] *Id.*

time officer became absolute on June 30, 1979, the end of his probationary period.[88] Throughout its assessment of the situation, the Commission ignored the fact that Mr. Martin's score on the part-time test placed him in sixth position on the eligibility list. This appeared to be based on the fact that the record failed to indicate that any person who received a higher score remained eligible for, or interested in, appointment to the police force.[89]

No record in the case revealed the reasoning behind the circuit court's decision to affirm the Commission's ruling, short of stating that all parties were given a fair hearing.[90] The court, quoting *Appeal of Prezkop*,[91] noted its earlier holding that "[a] final order of a police civil service commission based upon a finding of fact will not be reversed by a circuit court upon appeal unless it is clearly wrong or is based upon a mistake of law."[92] In the same decision, the court stated that "[t]he judgment of a circuit court affirming a final order of a police civil service commission, upon appeal therefrom as provided by statute, will not be reversed by this Court unless the final order of the commission was against the clear preponderance of the evidence or was based upon a mistake of law."[93] Ultimately, the court would determine that the Civil Service Commission and the circuit court had committed two mistakes of law which warranted reversal of the lower court's decision.

Turning to the substantive law, the court reemphasized the importance of strict compliance with the intent of the Legislature as expressly stated in the Police Civil Service Act.[94] To emphasize this necessity and to exemplify the errors committed by the persons authorized to appoint, promote, and remove police officers, the court cited the key statutory provision detailing the appointment process. Section 8-14-15 of the West Virginia Code states in pertinent part:

> . . .[t]he appointing officer shall notify the policemen's civil service commission of any vacancy in a position which he desires to fill, and shall request the certification of eligibles. The commission shall forthwith certify, from the eligible list, the names of the three individuals thereon who received the highest averages at preceding competitive examinations held under the civil service provisions of this article within a period of three years next preceding the date of the prospective appointment. The appointing officer shall, thereupon, with sole reference to the relative merit and fitness of the candidates, make an appointment from the three names so certified.[95]

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[88] *Id.* at 638.
[89] *Id.* at 637-38.
[90] *Id.* at 638.
[91] *Appeal of Prezkop*, 154 W. Va. 759, 179 S.E.2d 331 (1971).
[92] *Martin*, 334 S.E.2d at 638 (quoting *Appeal of Prezkop*, 179 S.E.2d at 331).
[93] *Id.* (quoting *Appeal of Prezkop*, 179 S.E.2d at 331-32).
[94] W. VA. CODE § 8-14-1 to -23 (1984).
[95] *Martin*, 334 S.E.2d at 639 (quoting W. VA. CODE § 8-14-15 (1984)).

Following the direction of the statute, the court noted that Mr. Martin's average score placed him well below the scores of the top three candidates for either full-time or part-time duty.[96] Apparently, both the Civil Service Commission and the circuit court interpreted this provision to require the certification of one of the three individuals who received the highest score on the *most recent* examination prior to the date of the prospective appointment.[97] Mr. Martin's second place score on the last part-time test therefore made him eligible for appointment to the full-time position according to the Commission's and lower court's conclusion that responsibilities of the positions were identical. The supreme court found this interpretation regarding test scores and eligibility for a police position constituted the first mistake of law and reversed the decision based primarily on the authority of *Prezkop*.[98]

The court found that the second mistake of law occurred in the assumption by the Commission and the circuit court, based on silence in the record regarding other applicants, that individuals who earned higher average test scores than Mr. Martin were no longer available for the vacant position.[99] The court explained that an applicant for the police force bears the burden of proving that they meet the initial appointment requisites outlined in West Virginia Code sections 8-14-14 and -15. They must affirmatively show that candidates with higher average test scores are no longer eligible for appointment.[100]

Not only did Mr. Martin fail to show that others who scored better than he were no longer interested in the position, but the Civil Service Commission failed to certify Mr. Martin's score in the top three. Additionally, the Commission's appointing officer failed to select Mr. Martin's name from the list of certified names, another requirement of section 8-14-15.[101] All three of these occurrences violated section 8-14-15 requirements, as per the specific requirement of strict compliance with the Police Civil Service Act.[102]

Because of their conclusion, the court found it unnecessary to address the question of whether West Virginia Code sections 8-14-1 to -23[103] prohibit municipalities from making hybrid appointments of full-time and part-time officers.[104]

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[96] *Id.* at 640.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id. See* W. VA. CODE § 8-14-15 (1984), which provides that the commission may refuse to examine an applicant or to certify an otherwise eligible applicant based on specified grounds, including: " . . . addiction to intoxicating liquors or drugs; criminal behavior or notoriously disgraceful conduct; dismissal from public service for misconduct; and fraudulent behavior with respect to securing the police civil service position.

[101] *Martin*, 334 S.E.2d at 640. *See* W. VA. CODE § 8-14-15 (1984).

[102] *Martin*, 334 S.E.2d at 641.

[103] *See supra* note 94 and accompanying text.

[104] *Martin*, 334 S.E.2d at 641.

Finally, the court discussed the action of the Chester City Council July, 1978, where the minutes indicated that Mr. Martin was *appointed* as a full-time officer. The court concluded that since the procedure for appointment as a full-time officer required by section 8-14-15 was not followed, the purported appointment was void *ab initio*.[105] The court then discussed the possibility of an action against the city based on the invalid appointment. It noted that equitable estoppel could not be used against the city because "estoppel cannot be based on unauthorized acts of municipal authorities acting in a governmental capacity."[106] Principal authority for this concept lay in the earlier West Virginia Supreme Court of Appeals decision of *Cawley v. Board of Trustees*.[107] In *Cawley*, city officials appointed a forty-one year old person to the city's fire department despite a statutory restriction that established the maximum age for a fire fighter at thirty-five years.[108] The court held that while the Mayor and Council acted beyond their power and contrary to the explicit provisions of the statute, because they acted in "a governmental capacity, [they were] not subject to the law of equitable estoppel."[109] The court's support for this general principle was that "[t]o permit such estoppel on the basis of mistake or ill advised action by a former municipal authority would hinder and hamper governmental functions; and may be contrary to the public interest in many cases."[110]

A similar conclusion was reached by the United States Supreme Court in *Heckler v. Community Health Services of Crawford County, Inc.*[111] There the Court refused to eliminate the possibility that the government might, under more narrow circumstances, be estopped. The Court stated:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant . . . [T]hose who deal with government are expected to know the law and may not rely on the conduct of government agents contrary to the law.[112]

Based on the above, it was the West Virginia high court's final conclusion in *Martin v. Pugh* that Mr. Martin was never entitled to the status of full-time police officer with the City of Chester and consequently was ineligible for back wages and other benefits earned by full-time status.

Gretchen L. Roos

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[105] *Id.*

[106] *Id.*

[107] Cawley v. Board of Trustees, 138 W. Va. 571, 76 S.E.2d 683 (1953).

[108] *Martin*, 334 S.E.2d at 641 n.13 (citing W. VA. CODE § 8-15-17 (1984)).

[109] *Id.* at 642 (quoting *Cawley*, 76 S.E.2d at 690).

[110] *Id.* (quoting *Cawley*, 76 S.E.2d at 690).

[111] Heckler v. Community Health Services of Crawford County, Inc., 104 S. Ct. 2218 (1984).

[112] *Martin*, 334 S.E.2d at 642 (quoting *Heckler*, 104 S. Ct. at 2224, 2226).