1984

In The Matter of The Discharge of Wayne L. Jones : Brief of Appellant Toole County Sheriff

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TABLE OF CASES

STATUTORY MATERIAL

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE DISCHARGE OF:	)	
WAYNE L. JONES,	)	Case No. 19238
Respondent.	)	

BRIEF OF APPELLANT
TOOELE COUNTY SHERIFF

STATEMENT OF THE CASE

Appellant, Tooele County Sheriff, discharged Deputy Sheriff Wayne L. Jones pursuant to the provisions of Title 17, Chapter 30, Utah Code Annotated, 1953, as amended, and Deputy Jones appealed the discharge to the Tooele County Deputy Sheriffs Merit Commission.

The Merit Commission reinstated Deputy Jones and Third District Court Judge, Homer F. Wilkinson, upheld the reinstatement and the authority of the Merit Commission to modify the sheriff's disciplinary decision after the Commission sustained a finding of wrongdoing.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the decision of the Third District Court reversed and the discharge of Deputy Wayne L. [illegible] Tooele County Sheriff affirmed. Appellant also seeks a reversal of the Third District Court decision adopting the Arizona and California positions with regard to the authority of the Merit Commission.

[illegible]

On January 26, 1981 Douglas McArthur Jones, a black man enroute to San Francisco from Kansas City, was arrested just outside of Wendover. He had received a lump sum social security payment of $4,694.20 and had flown to Wyoming where he purchased a motorcycle and a truck. (Transcript Vol. I, pp. 10 & 11)

Mr. Jones made it as far as Wendover before he ran out of money. He was stranded at a rest stop just outside of Wendover when he was arrested for driving on revocation and loitering. (Vol. I, p. 7) Douglas M. Jones was incarcerated at the jail in Wendover on January 26, 1981 without bail being set and without having been taken before a magistrate. The next day, January 27, Douglas Jones was informed by Tooele County Deputy Sheriff Wayne Jones that his bail was $200.00. Douglas Jones asked if he could put up his truck and motorcycle for bail, and then return later and pay the bail. (Transcript Vol. I, p. 15)

Thinking he was putting up his truck and motorcycle as collateral for the bail, Douglas Jones signed three or four papers that Deputy Wayne Jones gave him. Deputy Jones released Douglas Jones from jail on January 27th after the signing of the papers, gave Douglas Jones $10.00 and his bags, took him out to the highway, and left him to hitchhike to San Francisco. Before he was given a ride, Deputy Jones returned to Douglas Jones to have him sign one more paper.

[illegible] Vol. I, pp. 16-19)

Douglas was given a ride the next day and after returning to San Francisco, went to the Social Security office to report that the police had taken the truck and motorcycle he had purchased. (Transcript Vol. I, p. 19)

Douglas after arriving in California sent another payment on the truck (there was a $330.00 balance still owing) to the Wyoming dealer from whom he had purchased it. This was verified by the testimony of Leon Broussard, an employee of Ellsworth Motors, who stated that he received a $40.00 money order from Douglas M. Jones several weeks after the purchase of the truck. (Transcript Vol. I, p. 19 and Vol. II, p. 28)

A month after arriving in San Francisco, Douglas Jones returned to Wendover to get his truck and motorcycle. Deputy Wayne Jones informed Douglas that he had sold his truck and motorcycle to the deputy. Douglas Jones disputed the claim and protested to the local judge, but the judge ignored his claim. (Transcript Vol. I, p. 22)

Douglas was informed that representatives of Legal Aid came into Wendover on Wednesday, but he left town for fear of being put in jail again. (Transcript Vol. I, p. 22)

At the hearing, Wayne Jones' testimony was somewhat different than Douglas Jones' testimony. Deputy Wayne Jones and Sergeant LaMar Melville (who was present during part of the transaction) both testified that Douglas McArthur Jones

pleaded with Wayne Jones to purchase the truck and the cycle. Deputy Jones had told Douglas he could not use his vehicles for bail, only cash or a check. (Transcript Vol. I p. 12)

They testified that Wayne Jones obtained two bills of sale for the truck and motorcycle, explained to Douglas what he was signing, and that Wayne Jones agreed to purchase both the truck and the cycle in exchange for posting Douglas Jones' bail of $100.00. (Transcript Vol. II, pp. 44-50 and Vol. IV, pp. 12-16)

The bills of sale for the truck and motorcycle were signed in the presence of Deputy Jones and Sergeant Melville, but not in the presence of the notary who notorized both documents after the fact. (Transcript Vol. IV, p. 16)

Deputy Jones testified that he had driven by the truck and the cycle prior to purchasing them and that because he had read the papers that were confiscated from Douglas Jones' truck, he was aware that the truck was recently purchased for approximately $1,300.00 and the cycle was purchased for approximately $1,000.00. The truck was a 1967 Ford pick-up. The motorcycle was a 1981 Honda 750. (Transcript Vol. IV, p. 75 and pp. 50-55)

Deputy Jones testified that he did not discuss with Douglas Jones the option of putting up his truck and motorcycle as bail or collateral. Deputy Jones testified he was not aware that pledging property for bail is regularly done in

a state of trust. (Transcript Vol. IV, p. 49)

Subsequently, Deputy Jones was able to obtain title to the Honda motorcycle from the Wyoming dealer. He resold it to a Mr. Lywanacritz for $1,100.00. (Transcript Vol. IV, pp. 58-60) Deputy Jones was not readily able to obtain title to the '67 Ford pick-up. Deputy Jones obtained two temporary permits to enable him to drive the truck. He later discovered that a Wyoming bank had possession of the title and would not release it until Deputy Jones had paid the entire purchase price of $1,300.00. The auto dealership had declared bankruptcy and had not paid the initial down payment to the bank. (Transcript Vol. IV, pp. 24 & 25)

Deputy Jones stated he was unable to come up with the money to pay off the truck, and in the summer of 1981, Deputy Jones attempted to obtain title to the truck by submitting a back dated impound report. Deputy Jones in that report falsely represented that the 1967 Ford was abandoned or possibly stolen hoping to obtain title through an impound sale. (Transcript Vol. IV, pp. 65 & 66) The State Tax Commission employee who had granted the temporary permits noticed that the truck that was purportedly abandoned or stolen was the same truck for which Deputy Jones had obtained temporary permits and reported the irregularity to her superiors who prevented an impound sale from taking place. (Transcript Vol. II, pp. 73 & 74)

Sometime afterward in September or October of 1981,

Deputy Jones took license plates from an impounded vehicle in Wendover and put them on the 1967 Ford pick-up that he had acquired from Douglas McArthur Jones. When the owner of the impounded vehicle, from which the license plates had been taken, and a deputy sheriff from Box Elder County went to Wendover to report the plates stolen, Deputy Jones took the theft report but did not acknowledge to them that he had previously taken the plates or that they were then on his truck. Jones immediately thereafter removed the plates from his truck, but again replaced the illegally taken plates on the 1967 Ford truck in order that he might drive it again. The plates remained on the Ford pick-up until an investigator from the Attorney General's Office came and removed them from the truck on November 25, 1981. (Transcript Vol. IV, pp. 27-30 and pp. 66 & 67)

Because of this episode with the truck and motorcycle, as well as other problems (See Counts III and V below), the sheriff discharged Deputy Jones on February 18, 1982.

Deputy Jones appealed his discharge to the Tooele County Deputy Sheriff's Merit Commission and on April 6 & 7, 1982 the Merit Commisison held hearings and received evidence on four of five counts filed with the Commission by Walter G. Shubert, Tooele County Sheriff. Count IV was dismissed by the County Attorney. The remaining four counts or charges are as follows:

> (I) During the later part of January, 1981, Deputy Wayne L. Jones improperly and/or illegally acquired personal property from a

[illegible] at the Tooele County Jail in Wendover, Utah. Said property included a truck and motorcycle. Jones obtained the property so the prisoner could post a $100.00 bond and be released from incarceration. Thereafter, Jones improperly and/or illegally disposed or maintained possession of said property and made false reports concerning the same.

(II) During 1981, Wayne L. Jones was unable to register in the State of Utah the truck acquired from the prisoner as is mentioned in paragraph (I) above. Wayne L. Jones then illegally took possession of license plates from another truck owned by the John Paras Furniture Company. That truck had been impounded by the Highway Patrol for safe keeping at Wendover, Utah. Jones used said license plates on the truck he had taken from the prisoner. Jones was subsequently notified about the missing license plates, but never told the John Paras employee making the report or the Sheriff's Department that he had possession of and was using the plates. Jones used said plates from at least October 16, 1981 to November 25, 1981, when they were removed from the prisoner's truck which was in Wayne L. Jones' possession.

(III) Wayne L. Jones has, during 1981, represented himself as a sergeant for the Tooele County Sheriff's Department, contrary to direct orders of the Sheriff, and contrary to a ruling of the Deputy Sheriffs Merit Commission.

(V) On January 16, 1982, Wayne L. Jones, while acting as a deputy sheriff, improperly handled an investigation. As a result of Jones' misconduct, a violent altercation took place between himself and Michael Stiatz, a Wendover resident.

The Commission, on April 19, 1982 filed its Findings of Fact and Decision. Of the four charges brought against the deputy, the Merit Commission found that a portion of Count I was supported by the evidence; Count II was supported by the

evidence and Counts III and V were not supported by the evidence. The findings of the Commission are as follows:

1. We find, based on a preponderance of the evidence, that during the latter part of January, 1981, Deputy Wayne L. Jones did not improperly and/or illegally acquire personal property from a prisoner at the Tooele County Jail in Wendover, Utah, and do not find that Jones obtained the property at a fraction of its value and took said property so that prisoner could post a $100.00 bond and be released from incarceration. We do not find that Jones improperly and/or illegally disposed or maintained possession of said property but find that he did make misleading reports concerning the same on the impound report and the missing license plate.

2. We find, based on a preponderance of the evidence, that during 1981, Wayne L. Jones illegally took possession of license plates from a truck owned by the John Paras Furniture Company after that truck had been impounded by the Highway Patrol for safe keeping at Wendover, Utah. We find that Jones used said license plates on the truck he had purchased from the prisoner and that Jones used said plates from at least October 16, 1981 to November, 1981, when they were removed from the truck which was in Wayne L. Jones' possession. We do not find that this represented a felony but was a misdemeanor.

3. We do not find, from a preponderance of the evidence, that Wayne L. Jones, during 1981, represented himself as a sergeant for the Tooele County Sheriff's Department, contrary to direct orders of the Sheriff, and contrary to a ruling of the Deputy Sheriffs Merit Commission. We base this finding on a lack of intent to so represent himself.

4. We do not find, based on a preponderance of the evidence, that on January 16, 1982, Wayne L. Jones, while acting as a deputy sheriff, improperly handled an investigation and as a result of Jones' misconduct, a violent altercation took place between himself and Michael Stratz, a Wendover resident. We base

[illegible] on the conflicting testimony of Mr. [illegible] and what he deem to be insufficient evidence of the allegations.

Based on the foregoing findings, the Commission voted unanimously to reinstate Deputy Wayne Jones; however, the Merit Commission refused to award back pay from the Deputy's termination on February 18, 1982 to the reinstatement on April 16, 1982. (See April 14, 1982 Commission Findings of Fact and Decision)

The Tooele County Sheriff appealed the reinstatement of Deputy Jones to the Third District Court for Tooele County. The Honorable Homer F. Wilkinson upheld the Merit Commission's decision to reinstate Deputy Jones and upheld their authority to order said reinstatement. (See April 25, 1983 Decision Case No. 82-28)

ARGUMENT

POINT I

THE DISTRICT COURT COMMITTED ERROR BY FAILING TO SUBSTITUTE PROPER FINDINGS FOR MERIT COMMISSION FINDING OF FACT NO. 1.

The Tooele County Deputy sheriffs Merit Commission's Finding of Fact No. 1 is so clearly outside of reason it must be deemed arbitrary and capricious. The Third District court committed error by not replacing the Merit Commission's Finding of Fact No. 1 with a finding consistent with the evidence. The Court held, "...that the evidence does sustain the findings of the Commission on the three allegations..."

(See Third District Court [illegible] paragraph 2)

An analysis of each of the facts contained in Merit Commission Finding of Fact No. 1 supports Appellant's contention that said findings are not supported by the evidence.

The Merit Commission found and the Third District Court upheld the finding "that during the latter part of January, 1981, Deputy Wayne L. Jones did not improperly and/or illegally acquire personal property from a prisoner at the Tooele County Jail in Gardover, Utah." (See Merit Commission Findings of Fact and Decision, page 1, paragraph 2)

Even if Appellant concedes that the acquisition of the vehicles from the prisoner was not illegal, it is unbelievable that it was not found to be improper. The Third District Court "feels that this type of practice should be prohibited or at least monitored...." (Third District Court Decision, page 4, paragraph 2), and yet the Court sustained a finding that the transaction was not improper.

To find that the deputy's purchase of a truck and motorcycle worth approximately $3,000.00 (See Sheriff's Exhibit D and Transcript, Vol. II, p. 224, for [illegible] a prisoner who was under duress at the point of an emotional display (Transcript Vol. II, p. [illegible] as not improper is outside of reason to the degree of being absurd.

The Third District Court seems to be concerned mainly with the fact that the purchase by the deputy from the prisoner was "open and above board." (Third District Court Decision, page 4, paragraph 2). Appellant believes that the issue is not whether the purchase was made openly rather than secretly; the issue is the impropriety of a deputy sheriff purchasing a large motorcycle and a used truck from a black, indigent prisoner who was so frightened of being in a small, Utah town jail that he was described as being "wild" and "very upset". (Transcript Vol. II, p. 40)

A peace officer's "fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation...." (Tooele County Law Enforcement Code of Ethics) It is totally unreasonable that the Third District Court would not issue a finding of impropriety given the deputy's position as a peace officer, the condition of the prisoner and the nature of the transaction.

The District Court justifies its decision with regard to Finding No. 1 by stating, "The Justice of the Peace stated that buying property from a prisoner was common practice." A review of the testimony of the Wendover Justice of the Peace reveals that the Justice claimed there were others but to Deputy Jones who had accumulated cars and other property. The Justice, when pressed, couldn't identify anyone who had purchased property from a prisoner during the

time that Deputy Jones was in Washington [illegible] admitted he was not familiar with the [illegible] of the charge against Deputy Jones. (Transcript Vol. I, pp. 95-100) The fact that other deputies may have acquired property, even cars, from prisoners likely at a reasonable price, doesn't somehow justify Deputy Jones' transaction.

The Third District Court stated, "At no time did it [Deputy Jones] manifest a criminal intent of fraud or misrepresentation or coverup...." (Third District Court Decision page 4, paragraph 2) If the Third District Court refuses to reverse the Merit Commission's finding and decision on the basis that the deputy's actions did not rise to the level of "criminal intent," then the District Court imposes a standard not followed by Kigsley v. Civil Service Commission, 40 Cal. App.3d 750, 115 California Reporter 490 at 494 (1974); Board of Chosen Freeholders v. Miller, New Jersey, 367 A.2d 451 (1976); Matter of the Discipline of Setchell, Minnesota, 261 N.W.2d 351 at 355 (1977); and Cirasuolo v. Hasenauer, 407 N.Y.S.2d 357 at 359 (1978). In each of these cases, the dismissal of a deputy sheriff was upheld by the courts based on deputy sheriff misconduct that did not manifest a criminal intent.

In Finding of Fact No. 1, the Merit Commission found and the Third District Court sustained the finding that "We...do not find that Jones obtained the property at a fraction of its value." (Third District Court Decision,

page 3, paragraph 1). If any of the findings are outside of reason, the above finding is.

It is undisputed from the testimony that Deputy Jones purchased the truck and motorcycle for $100.00. (Transcript Vol. II, pp. 49 & 50 and Appellant's Exhibit 1) The deputy testified he knew before he purchased the truck that there was still $330.00 owed on the truck. (Transcript Vol. IV, p. 18) In other words, the testimony indicates that the deputy planned on spending $430.00 to purchase a motorcycle and truck that Douglas Jones had just purchased for $1,895.00 and $1,300.00 respectively. If $430.00 is not "a fraction" of the value of property worth about $3,000.00, then one questions what the Merit Commission and the District Court would consider a fraction.

Deputy Jones himself testified that after a $50.00 cover was purchased and the motorcyle cleaned, he sold it for $1,100.00 to a Wendover resident. (Transcript Vol. IV, pp. 21 & 22) The sale price of $1,100.00 is more than ten times what the deputy paid for it. The Third District Court committed error and abused its discretion by not reversing the Merit Commission's "fraction of its value" finding.

The Merit Commission found and the Third District Court sustained the following finding contained in Finding of Fact No. 1, "We do not find that Jones improperly and/or illegally disposed or maintained possession of said property...." (Third District Court Decision, page 3, paragraph 1)

The testimony indicates that [illegible] Jones to maintain possession of the truck, he knowingly submitted an impound report containing false information (Transcript Vol. II, pp. 72-74) and later, he illegally took possession of license plates he removed from an impounded vehicle. (Transcript Vol. IV, pp. 27-29) It is totally outside of reason not to find such actions improper. The Third District Court committed error by failing to find that Deputy Jones improperly maintained possession of the truck by deceitful and illegal actions.

In short, appellant argues it was error for the Third District Court not to find that Deputy Jones improperly acquired personal property from a prisoner; that Jones obtained the property at a fraction of its value; and that Jones improperly maintained possession of said property. To find otherwise, requires the factfinder to ignore so much of the evidence as to be totally outside of reason.

A proper Finding of Fact No. 1 by the Third District Court would have meant that charges I and II (Third District Court Decision, page 2) would be sustained by the evidence and since charges I and II substantially represent the basis for Deputy Jones' dismissal, the Third District Court would then have been obligated to sustain the sheriff's discharge of Deputy Wayne Jones.

POINT II

THE THIRD JUDICIAL DISTRICT COURT ERRONEOUSLY RULED THAT THE DEPUTY SHERIFFS MERIT COMMISSION HAS AUTHORITY TO MODIFY THE SHERIFF'S DECISION.

The Deputy Sheriffs Merit Commission is a personnel merit system commission established by, and its authority is defined by, Title 17, Chapter 30 of the Utah Code Annotated, 1953, as amended. (Hereinafter U.C.A., 1953).

Among other things, such as conducting open examinations to determine qualifications of peace officer candidates, the Deputy Sheriffs Merit Commission is authorized to hear deputies' appeals from a sheriff's disciplinary order. The sheriff may demote, suspend, discharge or reduce the pay of a deputy for various offenses listed in Section 17-30-18, U.C.A., 1953.

The authority of the Merit Commission with regard to an appeal by an aggrieved deputy is set forth in Section 17-30-19, U.C.A. 1953: The Commission "shall fix a time and place for a hearing upon the charges...." and "after the hearing, the Commission shall make its decision in writing, including therein findings of fact, and shall mail a copy to each party."

The Appellant argued before the Third District Court that the Merit Commission assumed authority not statutorily granted to it when it chose to modify the sheriff's decision by substituting the sheriff's discharge order with a 60-day suspension without pay.

The Respondent argued that the Merit [illegible] "inherent power" to modify a sheriff's decision. Brief of Respondent, Third District Court, Case No. [illegible]. In support of its position, the Respondent cited authority from State Personnel Commission v. Wabb, Arizona, 500 P.2d 329 (1972), and Hackett v. Morse, California, 188 P. 308 (1920).

The Third District Court ruled "that the Merit Commission does have the authority to modify the sheriff's decision and adopts the ruling and logic of the courts of Arizona and California on this subject as set forth in the deputy's brief." (Third District Court Decision, p. 6)

Therefore, the issue is whether the Deputy Sheriffs Merit Commission may modify a sheriff's decision when the statute defining the Commission's appellate authority (Section 17-30-19) is silent as to the extent of authority the Commission may exercise.

Appellant contends that absent statutory authority, the Merit Commission may not substitute a suspension order for an order of discharge by the sheriff. Pursuant to its statutory obligation to make a decision, together with findings of fact, the Merit Commission has only the authority to review the facts to determine if there were sufficient grounds for the disciplinary action taken. If sufficient grounds do not exist for the disciplinary action by the sheriff, based on its review of the facts, the Commission

to affirm the order of the sheriff and remand the case to him for a more appropriate disciplinary action.

The County Sheriffs Merit Commission, unlike the District Court, is not granted the authority to "affirm, set aside or modify the ruling complained of." (See Section 17-30-20, U.C.A., 1953) It seems clear that if the framers of the statutes had intended to grant the Merit Commission the same authority to modify as granted to the District Court, they would have provided for such authority in a section of Title 17, Chapter 30. There is a very similar Utah case wherein the Utah Supreme Court prohibited a Civil Service Commission from modifying a police chief's disciplinary order when such action was not authorized by the relevant statutes.

The Utah Supreme Court in Vetterli v. Civil Service Commission of Salt Lake City, 106 Utah 83, 145 P.2d 792 (1944), defined the Civil Service Commission's power to "fully hear and determine the matter" as being the power to determine "the truth or falsity of the charges made, and thereupon to determine whether to affirm or to set aside the order made." Id. at 796.

With regard to the Commission's authority beyond the above-stated power to affirm or set aside the police chief's disciplinary order, the Court stated:

> We do not find in our statute any phrase which grants the same jurisdiction on appeal as is conferred where the

> power on appeal is to "affirm, modify, or reverse," -- an express grant usually but not universally employed where such authority is actually conferred. The substitution of suspension for six months without pay, in lieu of dismissal, was beyond the power of the commission. Id. at 796.

It is important to note, however, that the Civil Service statutes (§15-6-64 & §15-9-21, U.C.A., 1943, now repealed) in the Vetterli case, from which the police chief derived his disciplinary power are not as broad as their current statutory counterpart. The repealed sections only gave the police chief power to suspend for 15 days without any right to appeal or the power to discharge, subject to the Civil Service Commission's review. The current statute, Section 17-30-18, U.C.A., 1953, grants the sheriff power to demote, reduce pay, suspend or discharge. The old statutes are, therefore, distinguishable.

Appellant contends, however, that the logic the Court uses cannot be distinguished. The Court limited the power of the Civil Service Commission because the statutes did not expressly grant the power to modify the police chief's order. The Court held that it would not allow the Civil Service Commission to exercise authority that the department head did not possess (i.e., suspension for more than 15 days), unless "the statutes were such as to indicate a legislative intent to give such authority to the commission." Id. at 795.

On the other hand, it can be argued that the repealed

statute which afforded the Civil Service Commission the authority to "fully hear and determine the matter," (§15-9-21, U.C.A, 1943) is much broader than the current statute which only allows the Merit Commission to "make its decision in writing, including therein findings of fact." (§17-30-19, U.C.A, 1953, as amended)

If the Utah Supreme Court was willing to limit the Civil Service Commission's power, given the broad language of the former statute, there now seems much more reason to limit the authority of a merit commission which acts pursuant to a statute that grants it something less than the power to "fully hear and determine that matter."

In Vetterli, the Utah Supreme Court held that the Civil Service Commission must be governed by legislative intent as determined by the statutes. Likewise, in the case at hand, the Deputy Sheriffs Merit Comission must be governed by similar authority. If the framers of Title 17, Chapter 30, had intended that the Merit Commission "may affirm, set aside or modify the ruling" of the sheriff, then such language would be found in Title 17, Chapter 30.

Courts in other jurisdictions have held that a civil service or merit commission may not modify the decision of a department head if there is no statutory authorization to do so.

In State of Florida Department of Pollution Control v. State of Florida Career Service Commission, Florida, 320 So.2d 846 (1975), an employee of the Department of Pollution Control

was dismissed for several of the [illegible] controlling Florida statute as [illegible] agency head may dismiss an employee. [illegible] also provided that the reasons which would be deemed just cause for dismissal would also be reason for suspension of the employee.

The employee appealed to the Career Service Commission. The Commission found that the evidence sustained the charges against the employee but said that the dismissal was too harsh and severe, and ordered that the action should be modified to a thirty-day suspension and the employee reinstated with full back pay. The District Court of Appeal vacated the order of the Career Service Commission and reinstated the dismissal of the employee. The court in effect said that the Commission had no authority to determine what disciplinary action was to be taken, but only had the authority to review the facts to determine if there was sufficient grounds for the action that was taken. Its holding was as follows:

> ...it appears that the grounds for suspension must be for just cause. The rules do not provide a criteria for distinguishing between when an agency must suspend an employee rather than dismiss the employee. It appears therefore that sole discretion to determine whether the employee is to be dismissed or suspended is vested in the agency... The role of the Career Service Commission on appeal is to determine whether there existed competent substantial evidence to sustain the action taken by the agency and whether the facts established 'just cause.' Id. at 843.

The Delaware case of State v. Berenguer, Delaware, 321 A.2d 591 (1974) supports the Appellant's position. In that case, the appellee, John Berenguer, was dismissed from his position as a probation/parole officer with the Delaware Department of Health and Social Services for failure to adhere to department regulations and supervisory orders. He appealed his dismissal to the State Personnel Commission, pursuant to 29 Del. C. §5949 (a), which allows the Commission to review the disciplinary actions of appointing authorities. The Commission ruled that the Department's actions in dismissing Berenguer were duly harsh under the circumstances and modified the punishment to a thirty-day suspension without pay. The State then appealed this decision as an employer to the Superior Court of Delaware.

The Delaware court held for the state on the grounds that the relevant Delaware statute (29 Del. C. §5949 (b)) is silent on the question of the Commission being able to modify penalties imposed by the appointing authority, and thus any modification would be beyond the statutory powers of the Commission. "An administrative body exercising purely statutory powers must find in the act 'its warrant for the exercise of any authority it claims.'" State v. Berenguer, Supra, at 509, citing People v. Hurley, Delaware, 54 A.2d 517, 517 (1948).

In Jorrill v. Erskine, 54 A.2d 494, 134 Conn. 16 (1947), the Supreme Court of Errors of Connecticut held that

in the absence of specific statutory authority, the merit appeals board could only affirm or reject the action of the appointing authority, but "could not go further, as, for example, in modifying the action of the appointing authority by directing a greater or less period of suspension." Id. at 497.

The New Jersey Court of Errors and Appeals has also held that the State Civil Service Commission may affirm or reject, but may not modify the decision of a department head in dismissing an employee. Maguire v. Van Meter, 1 A.2d 445, 121 N.J.L. 150 (1938). This decision was based on the fact that, as a statutory tribunal, the State Civil Service Commission had no jurisdiction except that expressly conferred by statute, and since there was no statutory provision concerning modification, it could not be done. Furthermore, the Maguire court held that the original determination of the Civil Service Commission was not res judicata if jurisdictionally deficient, and could be attacked collaterally. Id. at 446. The New Jersey legislature later passed a statute giving the State Civil Service Commission express power to modify the disciplinary decisions of appointing authorities. (R.S. 11 : 15 - 6, N.J.S.A.)

The weight of authority argues against respondent's position that the Dade County Sheriff's Merit Commission should have an inherent or an implied power to modify the appointing authority's (sheriff's) disciplinary decision.

[illegible] that jurisdiction has addressed the [illegible] vesting the Merit Commission with the power to [illegible] the sheriff's disciplinary decisions, would, to a [illegible], destroy the line of authority so vital to a law enforcement organization. In Phillips v. State Board of Higher Education, Oregon, 490 P.2d 1007 at 1007 & 1008 (1971), the Court of Appeals of Oregon held that to construe the statute in question as enabling the board to make a decision "independent of the decision of the appointing authority...would result in vesting disciplinary power of the various state agencies over their employees in the Board and not the agencies which appoint them. Such a result would undermine their administration."

The argument that small county politics necessitates giving merit commissions the authority to modify the sheriff's disciplinary decisions (See Respondent's District Court Brief, p. 12) ignores the fact that the Merit Commissioners are chosen by county politicians and are often county politicians themselves.

The solution to small or large county politics is found in the statute itself. The power to modify any unjust decision by the sheriff or the merit commission is statutorily placed where it is most wisely exercised: the neutrality of the district court.

CONCLUSION

We ask this Court to return the Third District Court's decision to sustain the allegations found

in the Merit Commission's finding of [illegible] findings are substituted, the weight of evidence will then shift in favor of Appellant's [illegible] Deputy Jones.

Finally, Appellant urges this Court to reject the notion that the Deputy Sheriffs Merit Commission has an implied power to modify the sheriff's disciplinary decision. The power to modify an unjust decision by the appointing authority or the Merit Commission is statutorily vested in the District Court. Based on the arguments found in Point II, the Merit Commission should be limited to affirming or disaffirming the appointing authority's decision according to the Commission's "findings of fact," and the sufficiency of the facts to support the actual decision of the appointing authority.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Appellant, postage prepaid, to David E. Yocom, Attorney for Respondent, 431 South 300 East, Salt Lake City, Utah 84111, this 15th day of July, 1983.

Tina Cochrane