

IN THE SUPREME COURT
STATE OF MISSOURI

MICHAEL A. MCCOY, ET AL.,)
)
 Appellants,)
)
vs.)
)
)
CALDWELL COUNTY, MISSOURI,)
ET AL.,)
)
 Appellees/Respondents.)

No. SC85498

SUBSTITUTE BRIEF OF APPELLEES/RESPONDENTS

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STATEMENT OF FACTS

Appellants have conceded in their Statement of Facts that the “underlying facts in this case are undisputed.” (Appellants’ Subst. Br. p. 3). For this reason, this Court should adopt the findings of fact made by the Circuit Court in the judgment entered against each Appellant contained in the Appendix attached hereto. (App. p. 3 - 12). Appellees/Respondents Kirby L. Brelsford and Caldwell County, Missouri (hereinafter “Appellees/Respondents”) are providing this supplemental Statement of Facts for the Court’s consideration.

Appellee/Respondent Kirby L. Brelsford, was the Sheriff of Caldwell County, Missouri on December 31, 2000. (L.F. p. 98 and 99). Appellants were employed as Deputy Sheriffs of Appellee/Respondent Caldwell County, Missouri until their termination on December 31, 2000. (App. p. 3 and 8). Pursuant to RSMo. § 57.275 (2000), Appellants were afforded written notice of the reasons for their terminations as Deputy Sheriffs of Caldwell County, Missouri. (App. p. 3 and 8). The provisions of RSMo. § 57.275 (2000) require a hearing before a Hearing Board appointed by the Sheriff for a Deputy Sheriff who is terminated if properly requested in writing. Appellants filed timely requests for hearings before a Hearing Board pursuant to RSMo. § 57.275 (2000). (App. p. 4, 5, 9, and 10).

Appellants were granted hearings concerning their terminations from employment as Deputy Sheriffs of Caldwell County pursuant to the provisions of RSMo. § 57.275 (2000) and §57.015 (2000). (App. p. 4, 5, 9, and 10). RSMo. § 57.275 and § 57.015 (2000) did not require procedural formalities at the hearings such as notice of the issues,

oral evidence taken upon oath or affirmation, examining of witnesses, the making of a record, adherence to evidentiary rules, or a written decision including findings of fact and conclusions of law. (App. p. 5 and 10). Moreover, pursuant to RSMo. § 57.275 (2000), the Appellants retained their status as “at-will employees” even though they had requested hearings concerning their termination pursuant to the statute. (App. p. 5 and 10). At the conclusion of the hearings, the Appellants were each provided with the official findings of the Hearing Board as required by RSMo. § 57.275 (2000). (App. p. 5 and 10).

The Appellants each filed a Petition for Judicial Review requesting the Circuit Court to review the hearing granted to each of them as a “contested case” pursuant to RSMo. § 536.100 (2000) of the Missouri Administrative Procedure Act. (App. p. 5 and 10). The Petitions for Judicial Review were filed in the Circuit Court of Cole County pursuant to the provisions of RSMo. § 536.110 (2000). (Id.) To be entitled to judicial review of the hearing, the hearings before the Hearing Board appointed by Appellee/Respondent Sheriff Kirby L. Brelsford pursuant to RSMo. § 57.275 (2000) must be found to be a “contested case” under the MAPA § 536.100 (2000). (App. p. 5 and 10). The Appellees/Respondents filed Motions to Dismiss the Petitions for Judicial Review because the hearings were not “contested cases” and because Appellants were employees at-will who could be terminated with or without cause. (L.F. p. 83 and 84). The Circuit Court entered Judgment against each Appellant containing findings of fact and conclusions of law in favor of the Appellees/Respondents dismissing each Petition for Judicial Review. (App. p. 3 - 12). Each Judgment specifically found that the hearing

granted to each Appellant was not a “contested case” entitling Appellants to Judicial review under the Missouri Administrative Procedure Act (Id.). Appellants have appealed the judgments contending that the hearings granted to them were “contested cases” entitling them to judicial review pursuant to RSMo. § 536.100 of the Missouri Administrative Procedure Act.

POINTS RELIED ON

I. THE JUDGMENTS OF THE CIRCUIT COURT OF COLE COUNTY DISMISSING APPELLANTS' PETITIONS FOR JUDICIAL REVIEW OF THE HEARINGS GRANTED TO APPELLANTS UNDER RSMO. § 57.275 (2000) SHOULD BE AFFIRMED BECAUSE THE HEARINGS FOR APPELLANTS CONDUCTED PURSUANT TO RSMO. § 57.275 (2000) WERE NOT CONTESTED CASES AS REQUIRED BY THE MISSOURI ADMINISTRATIVE PROCEDURE ACT TO GIVE THE CIRCUIT COURT JURISDICTION TO REVIEW THE TERMINATIONS OF THE APPELLANTS PURSUANT TO RSMO. § 536.100 (2000) IN THAT THE HEARINGS BEFORE THE HEARING BOARD PURSUANT TO RSMO. § 57.275 (2000) WERE NOT ADVERSARIAL HEARINGS WHERE A MEASURE OF PROCEDURAL FORMALITY WAS REQUIRED TO BE FOLLOWED.

City of Richmond Heights v. Board of Equalization of St. Louis County, 536 S.W.2d 338 (Mo. banc 1979).

Hagely v. Board of Education of Webster Groves School District, 841 S.W.2d 663 (Mo. banc 1992).

Benton-Hecht Moving & Storage, Inc. v. Call, 782 S.W.2d 668 (Mo.App. W.D. 1989).

II. THE JUDGMENTS OF THE CIRCUIT COURT OF COLE COUNTY DISMISSING APPELLANTS' PETITIONS FOR JUDICIAL REVIEW OF THE HEARINGS GRANTED TO APPELLANTS UNDER RSMO. § 57.275 (2000) SHOULD BE AFFIRMED BECAUSE THE MISSOURI ADMINISTRATIVE

PROCEDURE ACT DOES NOT AUTHORIZE JUDICIAL REVIEW OF THE TERMINATIONS OF APPELLANTS IN THAT APPELLANTS WERE AT-WILL EMPLOYEES WHO COULD BE TERMINATED WITH CAUSE OR WITHOUT CAUSE.

Daniels v. Board of Curators of Lincoln University, 51 S.W.3d 1 (Mo.App. W.D. 2001).

Mosley v. Members of the Civil Service Bd. For the City of Berkeley, 23 S.W.3d 855 (Mo.App. E.D. 2000).

Barnes v. City of Lawson, 820 S.W.2d 598 (Mo.App. W.D. 1991).

ARGUMENT

I. THE JUDGMENTS OF THE CIRCUIT COURT OF COLE COUNTY DISMISSING APPELLANTS' PETITIONS FOR JUDICIAL REVIEW OF THE HEARINGS GRANTED TO APPELLANTS UNDER RSMO. § 57.275 (2000) SHOULD BE AFFIRMED BECAUSE THE HEARINGS FOR APPELLANTS CONDUCTED PURSUANT TO RSMO. § 57.275 (2000) WERE NOT CONTESTED CASES AS REQUIRED BY THE MISSOURI ADMINISTRATIVE PROCEDURE ACT TO GIVE THE CIRCUIT COURT JURISDICTION TO REVIEW THE TERMINATIONS OF THE APPELLANTS PURSUANT TO RSMO. § 536.100 (2000) IN THAT THE HEARINGS BEFORE THE HEARING BOARD PURSUANT TO RSMO. § 57.275 (2000) WERE NOT ADVERSARIAL HEARINGS WHERE A MEASURE OF PROCEDURAL FORMALITY WAS REQUIRED TO BE FOLLOWED.

A. PRELUDE

As Appellants correctly state in their Substitute Brief, this appeal involves the interpretation of RSMo. § 57.275 (2000)¹ as it relates to the termination of a Deputy Sheriff. Each Appellant filed a Petition for Judicial Review asking the Circuit Court of Cole County, Missouri to review the hearing granted to each Appellant by RSMo. § 57.275 as a “contested case” pursuant to the Missouri Administrative Procedure Act §

¹ All statutory references will be to the year 2000 unless otherwise noted.

536.100 and § 536.010.² The sole issue for this Court to determine is whether the Circuit Court was correct in its finding that the hearings granted to the Appellants were not “contested cases” as required by the Missouri Administrative Procedure Act to give the Circuit Court jurisdiction to review the terminations of each Appellant. Appellees/Respondents request the Court to affirm the Circuit Court’s judgments dismissing Appellants’ Petitions for Judicial Review because the hearings granted to Appellants pursuant to the provisions of RSMo. § 57.275 were not adversarial proceedings qualifying as “contested cases” subject to judicial review under the Missouri Administrative Procedure Act.

B. STANDARD OF REVIEW

Since the Appellants have conceded that the Circuit Court’s findings of fact were correct, Appellees/Respondents agree that the statutory interpretations of RSMo. § 57.275, § 57.015, § 536.100, and § 536.010 are purely questions of law which should be reviewed by this Court de novo. The issue of whether the hearings granted to the Appellants were “contested cases” entitling the Appellants to review under the Missouri Administrative Procedure Act § 536.100 is a question of law for this Court to decide based upon the undisputed facts. See, State ex rel. Valentine v. Board of Police Com’rs of Kansas City, 813 S.W.2d 955, 957 (Mo.App. W.D. 1991).

² RSMo. § 536.100 authorizes the review of a final decision in a contested case. RSMo. § 536.010 defines a contested case in subsection 2 for the purpose of review under § 536.100.

C. THE HEARINGS WERE NOT ADVERSARIAL PROCEEDINGS QUALIFYING AS “CONTESTED CASES”

Appellants argue in Point I of their Substitute Brief that the Circuit Court erred in dismissing Appellants’ Petitions for Judicial Review because the hearings granted to each Appellant pursuant to RSMo. § 57.275 were contested cases in that they were adversarial and contained a measure of procedural formality.³ Appellants’ arguments are without merit because RSMo. § 57.275 and § 57.015 did not require the procedural formalities generally found in adversarial proceedings to make the hearings granted to Appellants contested cases for the purpose of review under the Missouri Administrative Procedure Act § 536.100 (hereinafter “MAPA”). For this reason, the Circuit Court correctly dismissed the Appellants’ Petitions for Judicial Review for lack of jurisdiction, and the judgments of the Circuit Court should be affirmed.

The Appellants, as Deputy Sheriffs of Appellee/Respondent Caldwell County, were granted certain procedural rights by RSMo. § 57.275 when they were terminated from their employment as Deputy Sheriffs. RSMo. § 57.275 provides that a Deputy Sheriff upon dismissal shall be furnished with written notice of the grounds for his dismissal and upon receipt of the written notice, the Deputy Sheriff may make a written request for a hearing to the Sheriff within three days of the receipt of the grounds for the

³ The Appellants attack two conclusions of law found by the Circuit Court namely that the § 57.275 hearings were not adversarial and that the hearings lacked the procedural formalities of a contested case.

dismissal. (App. p. 2). The Sheriff is obligated to grant the hearing within 30 days after a request is received before a Hearing Board to be appointed by the Sheriff. (App. p. 2). Upon the conclusion of the hearing, the Hearing Board must forward a report of the facts determined during the hearing to the Sheriff for review with the Sheriff retaining final decision-making authority concerning the dismissals. (App. p. 2). Pursuant to RSMo. § 57.275(2), the procedural requirements created by the statute do not create any new substantive due process rights for the Deputy Sheriff. (Id.) More importantly, the procedural rights granted to the Deputy Sheriff do not change the Deputy Sheriff's employment status with the Deputy Sheriff remaining an employee at will. (Id.)

The type of hearing granted to the Deputy Sheriff is mandated by RSMo. § 57.015. (App. p. 1). The hearing is required to be a closed meeting conducted by the Hearing Board appointed by the Sheriff for the purpose of receiving the evidence in order to determine the facts regarding the dismissal of the Deputy Sheriff. (Id.) Witnesses to the event that triggered the dismissal may attend the hearing for the limited purpose of providing testimony. (Id.) The attorney for the Deputy Sheriff may attend the hearing, and the Sheriff and his or her attorney may attend the hearing, but only to serve as observers. (Id.) All of the procedural requirements required by RSMo. § 57.275 and § 57.015 were followed for the Appellants' hearings concerning their dismissals as Deputy

Sheriffs of Caldwell County.⁴

The Petitions for Judicial Review filed by the Appellants are based upon the claim that the hearing before the Hearing Board granted to each Appellant pursuant to § 57.275 was a “contested case” reviewable under § 536.100 RSMo. (2000). (App. p. 5 and 10). A “contested case” before an administrative agency is defined by the MAPA as “a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be determined after a hearing.” § 536.010(2) RSMo. A contested case is a case which must be contested because of some requirement by statute, municipal charter, ordinance, or constitutional provision for a hearing of which a record must be made unless waived. Housing Authority of St. Louis County v. Lovejoy, 762 S.W.2d 843, 844-45 (Mo.App. E.D. 1988). The fact that there is some contest between the parties does not, in and of itself, make a case a contested case. See, City of Richmond Heights v. Board of Equalization of St. Louis County, 586 S.W.2d 338, 342 (Mo. banc 1979). Moreover, a statutory requirement requiring a hearing does not determine that the proceedings constitute a “contested case.” See, Benton-Hecht Moving & Storage, Inc. v.

⁴ Appellants have not argued in their brief that the Appellees/Respondents did not follow the procedural requirements of RSMo. § 57.015 and § 57.275 in the hearing granted to each Appellant. Therefore, Appellants have abandoned any claim of error that the procedural requirements of the statutes were not followed. See, Hocker Oil Company, Inc. v. Barker-Phillips-Jackson, Inc., 997 S.W.2d 510, 519 (Mo. App. S.D. 1999); Supreme Court Rule 84.04(d).

Call, 782 S.W.2d 668, 670 (Mo.App. W.D. 1989). The classification of a case as “contested” or “non-contested” is not left to the discretion of the agency, but rather is to be determined as a matter of law. State ex rel. Valentine v. Board of Police Com’rs of Kansas City, 813 S.W.2d 955, 957 (Mo.App. W.D. 1991).

This Court in City of Richmond Heights v. Board of Equalization of St. Louis County, 586 S.W.2d 338 (Mo. banc 1979) established the principals applicable to determining whether a hearing required by law would qualify as contested case for purposes of review under MAPA. The Court focused on the meaning of the word hearing in the definition of a contested case in § 536.010(2), and concluded “the element of adversity is essential to the meaning of ‘hearing’ as it is used in § 536.010,” and that the General Assembly in using the word hearing in § 536.010 “contemplated an adversary proceeding.” Id. at 342-343. In analyzing the term “hearing” the Court noted that it:

presupposes a proceeding before a competent tribunal for the trial of issues between adversary parties, the presentation and consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues; it also requires that the parties be apprised of all evidence offered or considered, with the opportunity to test, examine, explain or refute such evidence; it contemplates an opportunity to be heard, not only the privilege to be present when the matter is being considered, but the right to present one’s contentions, and to support the same by proof and argument. Thus, there

is no “hearing” when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute. Id. at 342, quoting, 39A C.J.S. Hear, p. 632-33.

Utilizing this definition, this Court determined that the element of adversity is “essential to the meaning of ‘hearing’ as used in § 536.010.” Id. at 342-343. In applying this principal, the Court determined that the hearing in City of Richmond Heights required by § 138.100 RSMo. (1978) was not an adversary proceeding because there was no provision in the statute for notice to the appellants, the appellants did not participate in the proceedings, and the statute gave the appellants no right to present evidence or to be apprised of the evidence presented. Id. at 343. Because the proceeding required by the statute presented none of the indicia of a contested case, the Court found that it was not a contested case due to its nonadversarial character. Id. at 343.

This Court reaffirmed this holding in Hagely v. Board of Education of the Webster Groves School Dist., 841 S.W.2d 663 (Mo. banc 1992). In Hagely, the Court found that “[A] measure of procedural formality is essential to the meaning of ‘hearing’ as it is used in § 536.010” and that “[T]he term ‘hearing’ presupposes a proceeding before a competent tribunal in which adversarial parties are apprised of all of the evidence offered or considered, with the opportunity to test, examine, explain or refute such evidence, and have the right to present their contentions and to support them by proof and argument.” Id. at 668. The Court reaffirmed that the requirement of “adversity” ensures the observance of procedural formalities “that attend a full adjudicatory hearing between

adversary parties.” Id. at 668, footnote 8.⁵ Applying these principles, this Court held that a hearing is not a contested case when a party does not know what evidence is offered or considered, and the party is not given an opportunity to test, explain or refute. Id. at 668.

The analysis utilized by this Court in City of Richmond Heights and Hagely should be applied to determine whether the hearing granted to each Appellant under § 57.275 and § 57.015 was a contested case. The mere fact that the Appellee/Respondent Sheriff, and the Appellant Deputy Sheriffs would be opposed to each other at the hearings, and have opposing interests at stake, does not make the hearings adversarial in nature. City of Richmond Heights, 586 S.W.2d at 342. (“The existence of opposing interests alone fall short of meeting the definition of ‘contested case.’”) A review of the two statutes confirms that the statutes lack the minimum indicia of an adversarial proceeding to constitute a contested case. For example, the statutes do not require notice of issues to the Appellant Deputy Sheriffs, the statutes do not allow the Deputy Sheriffs and/or Sheriff to either participate in the hearing or introduce evidence, the statutes do

⁵ The Court in Hagely suggests that a hearing not held pursuant to the format required by MAPA did not qualify as a contested case. In State ex rel. Yarber v. McHenry, 915 S.W.2d 325 (Mo. banc 1995), this Court overruled this portion of Hagely, focusing on “not whether the agency in fact held a contested case hearing, but whether it should have done so.” Id. at 328. This is consistent with Appellees/Respondents’ position that the procedural requirements of § 57.275 do not require the hearing to be conducted as a “contested case.”

not require testimony under oath or allow cross-examination, and the statutes do not sanction the Hearing Board determining whether the terminations were proper or not, but only allow the Hearing Board to render a written report of the facts determined from witnesses testifying. The non-adversarial character of the hearings is further confirmed by the statutes allowing attorneys for the Sheriff and the Deputy Sheriffs to attend the hearing, but only as observers. No provision of the statutes indicates that the required hearing is adversarial in nature.

Moreover, RSMo. § 57.015 specifically provides that witnesses to the event that triggered the dismissal may attend the hearing for the limited purpose of providing testimony, but the statute does not provide that the dismissed Deputy Sheriffs may cross-examine any witness, call any witness to challenge the Sheriff's termination decision, or that the Deputy Sheriffs may present evidence in any matter. In fact, the statute does not specifically allow the dismissed Deputy Sheriff to either attend the hearing or to participate in any manner. Contrary to the Appellants' arguments, nothing in the statute provides that the dismissed Appellants would have the opportunity to either combat the Sheriff's decision or to question the decision or the determination of the Sheriff through evidence and testimony of witnesses. The hearing could not be adversarial without these rights being granted to the Appellants. Simply put, the dismissed Appellants would not know what evidence would be offered or considered, and are not granted the right to test, explain, or refute the evidence to make the hearing a contested case.

Moreover, unlike the Appellants' argue in their Brief, neither § 57.015 nor § 57.275 allows the Deputy Sheriff's attorney, the Sheriff, or his attorney to participate in

the hearing in any manner. The fact that these individuals can only observe the hearing further confirms the non-adversarial nature of the hearing. A literal reading of both statutes confirms that the hearing is not a trial of the issues between the Deputy Sheriffs and the Sheriff like the Appellants contend in their Brief. The failure of the statutes to allow the Appellants and the Appellee/Respondent Sheriff to be heard at the hearing and to present evidence confirms that the Hearing Board does not act as a tribunal making a decision in an adversarial proceeding, but only as a fact-finder as provided in § 57.015. If this were not true, the Appellee/Respondent Sheriff would be compelled to follow the decision of the Hearing Board, and would not be given the final decision-making authority by § 57.275. For all these reasons, the hearings granted to Appellants were not “contested cases” reviewable under § 536.010 of MAPA based upon the principles adopted by the Court in City of Richmond Heights and Hagely.

This finding is consistent with various appellate decisions. The Court of Appeals for the Western District has also held that a statutory requirement for a hearing does not necessarily classify a case as contested because “[N]ot every case in which there is a contest about rights, duties or privileges, even though a hearing may be held, will be a contested one.” Benton-Hecht, 782 S.W.2d at 670; Cade v. State, 990 S.W.2d 32, 38 (Mo.App. W.D. 1999). Moreover, the Western District held in Benton-Hecht that the element of adversity was essential to the meaning of the word hearing as used in § 536.010 in MAPA, and that the General Assembly in using that term contemplated an “adversary proceeding.” 782 S.W.2d at 670. In analyzing the requirement of an adversary proceeding, the Court in Benton-Hecht noted “[T]he essential characteristics of

notice to opposing parties, an adversarial alignment, and a right to introduce evidence, hallmarks of a contested case, are not present in a non-contested case even though a statute or ordinance may impose a requirement for hearing before issuance of an administrative order or decision.” Benton-Hecht, 782 S.W.2d at 671. The same principal was reaffirmed by the Western District in Cade wherein the Court held that “[A]n administrative decision is considered to be “non-contested” if “made without any requirement of an adversarial hearing at which a measure of procedural formality is followed.” Cade, 990 S.W.2d at 37.

The Western District in Benton-Hecht and Cade examined the statutes granting the hearings to determine whether the hearing granted by each statute was an adversarial proceeding to qualify as a contested case. Benton-Hecht, 782 S.W.2d at 671; Cade, 990 S.W.2d at 38. Both decisions found that the hearings lacked the procedural formalities required to qualify each hearing as a “contested case.” Id. at 671; Id. at 38-39.⁶ An examination of § 57.275 and § 57.015 granting the hearing to the Appellants mandates the same finding because the statutes lack the procedural formalities of an adversarial proceeding to qualify the hearings as “contested cases.”

The Missouri Court of Appeals for the Eastern District has also adopted the same principles in Lipic v. State, 93 S.W.3d 839 (Mo.App. E.D. 2002) and State ex rel. Mitchell v. Dalton, 831 S.W.2d 942 (Mo.App. E.D. 1992). The Court in Lipic held

⁶ The Western District observed that a number of cases had adhered to this principle. See cases cited in Cade, 990 S.W.2d at 38.

“[B]ut simply requiring a ‘hearing’ is not enough . . . to meet the definition of a contested case, the proceeding must be one at which a ‘measure of procedural formality is followed.” 93 S.W.3d at 842. The Court noted that the relevant inquiry, pursuant to the decision by this Court in Yarber, supra, “is not whether the agency actually held an ‘adversary proceeding in a contested case,’ but whether it was required to do so by statute, ordinance, or constitutional provision.” Id. at 841. The Lipic Court analyzed the requirements of the regulations requiring the hearing at issue and found that the hearing lacked the “minimum indicia” of a contested case. Id. at 842. Similarly in Mitchell, the Court held that a parole hearing was not a contested case because certain “essential indicia of an adversary hearing” were missing from the process. 831 S.W.2d at 944.⁷ The Mitchell Court concluded that the term “hearing” in § 536.100 was contemplated to be an “adversary hearing” and that the element of adversarial parties is essential to the definition of a “contested case.” The principles adopted by the Eastern District also mandate a finding that the hearings granted to Appellants in this case were not “contested cases.”

Contrary to the Appellants’ argument, the holding in Rugg v. City of Carrollton, 990 S.W.2d 89 (Mo.App. W.D. 1999) does not mandate a finding that the hearings were contested cases. In Rugg, the Court found that a personnel manual granted to the

⁷ These rights include a hearing, required notice to necessary parties, the use of sworn testimony, the parties’ right to call and examine witnesses and to cross-examine opposing witnesses, and use of evidentiary rules. See, §§ 536.063-536.090 cited by the Court.

terminated police officers the right to continuous employment and the right to a hearing that would be deemed “contested” and subject to judicial review. Id. at 91-92. Specifically, the Court, in analyzing the personnel manual, found that “[T]his Court will not allow the City, de hors the record, to rescind the right to a contested hearing, which it created and promised its employees.” Id. at 91. Although the Court did not analyze all of the provisions of the personnel manual, it is clear from the holding of the court that the personnel manual for the City provided the right to a contested hearing for the employees which was not granted to the terminated police officers.⁸ In this case, § 57.275 does not grant the Appellants the right to a contested hearing subject to judicial review, as the personnel manual did in Rugg. For this reason, the holding in Rugg provides no support for a finding that the hearings for the Appellants were contested cases.

This Court should not assume a legislative role by rewriting the statutes to require the formalities of a contested case as requested by the Appellants. The terms of § 57.275 and § 57.015 are clear and unambiguous, so the Court does not have the power to rewrite the statutes. See, Jepson v. Stubbs, 555 S.W.2d 307, 313 (Mo. banc 1977) (Court will not rewrite statutes; “[I]f that is to be done, it must be by legislative action”). Likewise, placing requirements on a Sheriff’s Department not contained in the statutes, violates the primary rule of statutory construction to ascertain the intent of the legislature from the language used, and to give effect to that intent, if possible, and to consider the words of

⁸ It is also significant to note that the police officers in Rugg were not employees at-will, but had a “right to continuous employment.”

the statute in their plain and ordinary meaning. See, Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). The statutes should be construed to grant the Hearing Board the powers granted to it by the statutes, and no more, and to require the informal hearing contemplated by the statutes. See, AT&T Information Systems, Inc. v. Wallemann, 827 S.W.2d 217, 221 (Mo.App 1992). The expansion of the hearing to a full adjudicatory proceeding when none of the terms of the statutes require this type of hearing is a legislative function and not within this Court's power. This Court should not assume a legislative function by rewriting the statutes as requested by the Appellants. For all these reasons, this Court should affirm the judgments of the Circuit Court.

II. THE JUDGMENTS OF THE CIRCUIT COURT OF COLE COUNTY DISMISSING APPELLANTS' PETITIONS FOR JUDICIAL REVIEW OF THE HEARINGS GRANTED TO APPELLANTS UNDER RSMO. § 57.275 (2000) SHOULD BE AFFIRMED BECAUSE THE MISSOURI ADMINISTRATIVE PROCEDURE ACT DOES NOT AUTHORIZE THE JUDICIAL REVIEW OF THE REASONS FOR THE TERMINATIONS OF APPELLANTS IN THAT APPELLANTS WERE AT-WILL EMPLOYEES WHO COULD BE TERMINATED WITH CAUSE OR WITHOUT CAUSE.

Appellants, as employees at-will, also requested the Circuit Court in the Petitions for Judicial Review to review the reasons for their terminations under the MAPA to determine if the reasons were either arbitrary and capricious or not supported by

competent and substantial evidence.⁹ (L.F. 102). This request is directly contrary to the law concerning the termination of an employee at-will. An employee at-will in Missouri can be terminated without cause or reason, or for any reason, and in such cases, no action can be brought for wrongful discharge. See, Daniels v. Board of Curators of Lincoln University, 51 S.W.3d 1, 7 (Mo.App. W.D. 2001). Because the Appellants would have no cause of action concerning their discharge, they should not be allowed to contest the reasons for their discharge through a judicial review under MAPA. To allow this would, in effect, create a new cause of action for any terminated deputy sheriff in the State of Missouri. The Courts in Missouri have never sanctioned judicial review of the reasons for the termination of employees at-will, and this Court should not do so under the MAPA. While this issue has not been analyzed in an alleged “contested case,” the principles adopted in cases where employees at-will have sought judicial review in “non-contested” cases under the MAPA are instructive.

An appeal of an employee at-will for judicial review under the MAPA in a non-contested case was analyzed in Mosley v. Members of the Civil Service Bd. for the City of Berkeley, 23 S.W.3d 855 (Mo.App. E.D. 2000). There, the Plaintiff filed a Petition for Judicial Review of her termination of employment with the City of Berkeley. In

⁹ A decision in a contested case must be affirmed if it is supported by competent and substantial evidence on the whole record, is not arbitrary, capricious, or unreasonable and does not constitute an abuse of agency discretion. See, Benton-Hecht, 782 S.W.2d at 668.

determining whether the Plaintiff employee was entitled to a review of the case as a non-contested case under the MAPA, the Court determined that the Plaintiff was an employee at-will. Id. at 859. The Court declared that the employment of the Plaintiff was considered to be at-will, terminable for cause or without cause in the absence of a contract of employment, an ordinance, or a statute conveying a property interest in the employment or providing that the employee can be discharged only for cause. Id. For this reason, the Court found that at-will employees could be lawfully fired for any reason or no reason at all and that § 536.150 of the MAPA did not authorize judicial review of the termination of at-will employment. Id.; See also, Barnes v. City of Lawson, 820 S.W.2d 598, 600-01 (Mo.App. W.D. 1991); Cooper v. City of Creve Coeur, 556 S.W.2d 717, 721 (Mo.App. 1977); State ex rel. Hicks v. Village of Bel-Ridge, 669 S.W.2d 251, 253 (Mo.App. E.D. 1984). Since the Plaintiff was an employee at-will and no contract of employment, ordinance, or statute gave her a property interest in her employment or provided she could be discharged only for cause, the Court found that the determination of the adequacy of the grounds for her dismissal was not subject to judicial review. Mosley, 23 S.W.3d at 860.

The same principles announced for employees at-will seeking judicial review in a non-contested case concerning termination of employment are applicable to the instant case. The fact that a hearing was held for each Appellant pursuant to § 57.275 did not change the nature of Appellants' employment or the right to discharge Appellants at-will. See, Cooper, 556 S.W.2d at 721. Moreover, § 57.275 also confirms that granting a hearing does not create any new substantive due process rights for the Appellants and that

their employment status will remain “at-will.” Therefore, even assuming Appellants’ hearings before the Board appointed by the Sheriff were “contested” hearings, the Appellants should not be entitled to judicial review of the adequacy of the reasons for their terminations since each Appellant, as an employee at-will, could be terminated with or without cause.

Simply put, after the facts are determined at a hearing under § 57.275, the Sheriff retains the final decision-making authority which should not be second-guessed by a Court. A judgment of a court determining that the Sheriff’s reasons for termination of either Appellant were either arbitrary or capricious, or not supported by competent evidence, would change the Appellants’ employment status in direct contravention of RSMo. § 57.275.2 and would institute a rule that Appellants could be terminated only for cause. This should not occur through judicial review of the hearings under the MAPA when it could not occur in a cause of action for wrongful discharge.¹⁰ For this reason, the Circuit Court correctly dismissed the Petitions for Judicial Review of the reasons for their termination.

¹⁰ Contrary to Appellants’ argument in Section C of their Substitute Brief, the Circuit Court correctly applied the terms of § 57.275 when it found that the statute created no new substantive due process rights for Appellants and that Appellants remained employees-at-will. For these reasons, Appellants are not entitled to review of the reasons for their termination under the law. Mosley, 23 S.W.3d at 859, and cases cited therein.

Appellants argue in Section C. of the Substitute Brief that the Circuit Court erred in not finding that it had jurisdiction to inquire as to whether the procedural requirements of MAPA were met in the hearings. (App. Subst. Br. p. 15). Appellants' argument is without merit because § 57.275 and § 57.015 do not require the formal hearing procedures of MAPA to be used in the hearings granted to terminated deputy sheriffs.

The Appellants' argument that the hearing should have been conducted pursuant to § 536.070 of MAPA is foreclosed by this Court's decisions in City of Richmond Heights and Yarber. Both of these decisions require a court to analyze the requirements of the particular statute requiring the hearing to determine whether it is an adversarial proceeding qualifying as a contested case for review under RSMo. §536.100. City of Richmond Heights, 586 S.W.2d at 343; Yarber, 915 S.W.2d at 328. Contrary to Appellants' arguments, the law to be analyzed to determine whether a hearing is a contested case is the law that requires the hearing and not the provisions of the Missouri Administrative Procedure Act.¹¹ Id.; see also, Cade, 990 S.W.2d at 36-39; Lipic, 93 S.W.3d at 841. As is confirmed herein, §§ 57.275 and 57.015 do not require a formal adversarial hearing in the case of a terminated deputy sheriff, which would make the hearings contested cases for review. No provision of the statutes required that Appellants

¹¹ If this was not the case, any hearing granted by law would require the procedures of § 536.070 be utilized during the hearing, leaving no reason for the "non-contested" case review in MAPA in § 536.150.

be granted the type of hearing required by MAPA § 536.070 as argued by the Appellants because the hearings were not “contested cases.”

The Appellants incorrectly argue in their brief that the decision in Mosley, 23 S.W.3d 855 required the Circuit Court to determine whether the agency complied with the procedural dictates of MAPA in the case of a terminated at-will employee. (App. Subst. Br. p. 16). In Mosley, the plaintiff filed a Petition for Judicial Review of the termination of her employment with the defendant city under both § 536.140 RSMo. (1994) providing for judicial review of an agency decision in a “contested case” and §536.150 providing for judicial review of an agency decision in a “non-contested case.” Id. at 857. On appeal, the Court determined that the plaintiff’s case was not a contested case subject to review under § 536.140.2. Id. at 859. However, the Court did find that “[a]n administrative decision that is not a contested case under MAPA is a non-contested decision subject to judicial review pursuant to § 536.150.” Id. In this context, the Court held that the plaintiff as an employee at-will was not entitled to a determination of the adequacy of the grounds for her dismissal in the judicial review, but was entitled to a determination of whether “plaintiff’s dismissal was procedurally proper.” Id. To make this determination, the Court reviewed the procedural requirements required by the defendant city’s personnel rules and regulations to determine if the correct procedures had been followed. Id. at 860. The Court determined that the procedures dictated by the defendant city’s personnel rules and regulations were followed and no procedural error occurred in plaintiff’s termination. Id.

The holding in Mosley does not require the Appellees/Respondents to follow the procedural requirements for a contested case found in § 536.070 of MAPA but would require that Appellees/Respondents follow the procedures required by § 57.275 and § 57.015 in the hearings provided to Appellants. In this case, the Appellants have not argued that the Appellees/Respondents did not follow the procedural requirements contained in § 57.275 and § 57.015 as the Plaintiff did in Mosley. As confirmed in the undisputed facts, the Respondents followed the procedural requirements contained in the statutes for the hearings provided to the Appellants. Consequently, the holding in Mosley provides no support for Appellants' argument that the Circuit Court erred in not finding it had jurisdiction to determine whether Appellees/Respondents followed the procedural requirements of MAPA. Mosley only requires that the procedural requirements of the law requiring the hearing be followed, and no more.¹² For these reasons, the Circuit Court correctly decided that it did not have jurisdiction to inquire whether the procedural requirements of the MAPA were followed in the hearings.

CONCLUSION

For the reasons set forth above, the Court should affirm the Circuit Court's Judgment in favor of the Appellees/Respondents and against each Appellant.

¹² It should be noted that Appellants did not request review of the hearings as "non-contested" cases as the Plaintiff in Mosley did.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herein certifies that two copies of the foregoing Substitute Brief and a floppy disk were sent via Airborne Express this 5th day of December to Lawrence G. Rebman and Sean P. McCauley, STEVE A.J. BUKATY, CHARTERED, 8826 Sante Fe Drive, Suite 218, Overland Park, Kansas 66212, Attorneys for Appellants.

The undersigned further certifies as required by Special Rule No. 1(c) to Missouri Supreme Court Rule 84.06 that the Substitute Brief of Appellees/Respondents complies with the limitations contained in Special Rule No. 1(b). The number of words used in the Brief is 6180 by the word count of the word processing system used in preparing the Brief. A copy of the word count printed directly from the word processing system is attached to this Certificate. The Substitute Brief was prepared using Microsoft Word using a Times New Roman font in 13 point size.

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