IN THE SUPREME COURT OF MISSOURI

MICHAEL A. McCOY,	)	
JOHN A. OAKS,	)	
Appellants,	)	
vs.	)	**Supreme Court No. SC-85498**
	)	
CALDWELL COUNTY, MISSOURI,	)	
and CALDWELL COUNTY	)	
SHERIFF KIRBY L. BRELSFORD,	)	
Respondents.	)	
_____)		

APPELLANTS' BRIEF

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II. JURISDICTIONAL STATEMENT

Appellants submit the following jurisdictional statement in accordance with Rule 84.04(b) of the Missouri Rules of Civil Procedure:

1. The Cole County Circuit Court exercised jurisdiction over the subject matter of this case pursuant to the provisions of *§ 536.110 RSMo. (2000).*

2. This is an appeal from the Cole County Circuit Court and this Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

3. The Cole County Circuit Court entered its final order on December 28, 2001, and Appellants' Notice of Appeal was timely filed in the Missouri Court of Appeals for the Western District of Missouri on February 5, 2002.

4. On June 24, 2003, the Missouri Court of Appeals for the Western District issued its opinion and remanded the case to the Cole County Circuit Court with instructions to review the Appellants' Petition for Judicial Review.

5. Respondents filed in the Missouri Court of Appeals for the Western District a Motion for Rehearing and an Application for Transfer to the Missouri Supreme Court. Respondents' motion was overruled and their application was denied on July 29, 2003.

6. Respondents filed an Application for Transfer to the Missouri Supreme Court on August 14, 2003.

7. On September 30, 2003, the Missouri Supreme Court granted Respondents' Application for Transfer.

8. This appeal surrounds the Cole County Circuit Court's granting of Appellees' Motion to

Dismiss Appellants' Petition for Judicial Review for a lack of subject matter jurisdiction.

III. STATEMENT OF FACTS

The underlying facts in this case are undisputed. Appellants Michael A. McCoy and John A. Oaks were employed as full-time deputy sheriffs with Caldwell County, Missouri. (OLF [1], p. 99)(MLF [2], p. 99) On December 31, 2000, both Appellants were terminated from their employment with Caldwell County by Appellee Brelsford.(OLF, p. 99) (MLF, p. 99). In August of 2001, both Appellants received a written statement giving the reasons for their termination, and both Appellants made a timely request for hearing on their termination under the provisions of *§ 57.275 RSMo. (2000)*. (OLF, p. 99) (MLF, p. 99). On August 23, 2001, Appellants appeared before a three-member hearing board appointed by Appellee Brelsford. At the hearing, Appellants were prevented from cross-examining adverse witnesses and from having the testimony transcribed by a court report who was present at Appellants' request. (OLF, p. 99) (MLF, p. 99).

On or about September 11, 2001, Appellants were provided with the written findings of the hearing board in support of Appellee Brelsford's decision to terminate Appellants' employment. (App., pg. A1). Both Appellants timely filed petitions for judicial review, which were dismissed by the Circuit Court. (OLF, p. 99) (MLF, p. 99).

Both Appellants timely appealed the dismissals, and those appeals were consolidated in this Court.

IV. POINTS RELIED UPON

The Circuit Court erred in dismissing the Petition for Judicial Review for lack of

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[1] Oaks legal file.

[2] McCoy legal file.

jurisdiction because the administrative hearing conducted pursuant to *§ 57.275 RSMo. (2000)* is a "contested case", as defined in *§ 536.010 RSMo. (2000)*, in that such a hearing is adversarial in nature and is required by law, so that, the Circuit Court should have entertained the Petition for Judicial Review pursuant to *§ 536.100 RSMo. (2000)*.

A. The Circuit Court erred in ruling that hearings conducted pursuant to *§ 57.275 RSMo. (2000)* are not adversarial proceedings.....6, 9

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V. ARGUMENT AND AUTHORITIES

The sole issue on appeal in this case is the interpretation of *§ 57.275 RSMo. (2000)*. Appellants contend that the trial court erred in finding that the hearing referenced in the statute is not a contested case as defined under the Missouri Administrative Procedures Act (MAPA) *§ 536.010 RSMo. (2000), et seq*. This case appears to involve an issue of first impression, since no published decision reported in this state has involved the interpretation of *§ 57.275 RSMo. (2000)*. Appellant requests that this Court reverse the Circuit Court's ruling that the administrative hearing in this case was not a contested case, so that the Court had no jurisdiction to entertain a petition for judicial review under *§ 536.010 RSMo. (2000),* and requests that the case be remanded back to the Circuit Court with instructions to review Appellee Brelsford's decision to terminate Appellants' employment with Caldwell County.

STANDARD OF REVIEW

This Court reviews the Circuit Court's findings of fact under a "clearly erroneous" standard, and in this case, Appellants do not contest any of the Circuit Court's findings of fact. Issues involving statutory interpretation are purely questions of law, and this Court reviews the Circuit Court's conclusions of law *de novo*. The issue before this Court is purely a question of law. *Delta Airlines, Inc. v. Director of Revenue,* 908 S.W.2d 353 (Mo. banc 1995).

A. The Circuit Court erred in ruling that hearings conducted pursuant to *§ 57.275 RSMo. (2000)* are not adversarial proceedings.

In dismissing Appellants' Petition for Judicial Review, the Circuit Court ruled that the *§ 57.275 RSMo. (2000)* hearing is not a contested case based on two conclusions of law. First, that the *§ 57.275 RSMo. (2000)* hearing was not adversarial, and second, that the hearing lacked the procedural formalities of a contested case. Based on those conclusions, the Circuit Court ruled that it lacked jurisdiction to consider Appellants' Petitions for Judicial Review. Appellants contend the Circuit Court, in reaching these conclusions, committed reversible error because the hearing conducted in accordance with *§ 57.275 RSMo. (2000)* was adversarial and contained a measure of procedural formality. Therefore, the trial court did have jurisdiction to review the Hearing Board's determination.

In reviewing the Circuit Court's decision, the Court must first look at the plain language of the statute itself. *§ 57.275 RSMo. (2000)* provides as follows:

> 1. Any full-time deputy sheriff upon dismissal shall be furnished with written notice of the grounds for dismissal. Upon receipt of the written grounds for dismissal, the deputy sheriff may request a hearing. The request must be made to the sheriff, in writing, within three working days of the receipt of the grounds for dismissal. Such hearing shall take place before the hearing board to be appointed by the sheriff. The sheriff shall schedule a closed hearing within a reasonable time but within thirty (30) days after the written request was received by the sheriff. A written report of the facts determined during the hearing shall be forwarded to the sheriff. The sheriff will review the findings,

and has the final decision-making authority. Any law enforcement agency shall be deemed to be in compliance with this section if the agency: (1) has published and distributed department policies and procedures which include provisions for dismissal of deputy sheriffs or other employees; (2) provides a deputy sheriff who has been dismissed written notification of the grounds for the dismissal; (3) allows the officer to request and have a hearing; and (4) provides the officer with written results of such hearing.

2. The procedural requirements created pursuant to this section shall not be interpreted as creating any new substantive due process rights. Nothing in this chapter shall be interpreted as conferring or creating an employment status for deputy sheriffs other than at-will status and nothing in this chapter shall be interpreted as depriving any person of any rights which are conferred as a matter of employment, including postemployment benefits such as workers' compensation and unemployment compensation.

Additionally, the hearing required under *§ 57.275 RSMo. (2000)*, is defined by *§ 57.015 RSMo. (2000)* as follows:

> 2. Hearing - A closed meeting conducted by a hearing board appointed by the sheriff for the purpose of receiving evidence in order to determine the facts regarding the dismissal of the deputy sheriff. Witnesses to the event that triggered the dismissal may attend the hearing from the limited purpose of providing testimony; the attorney for the deputy dismissed may attend the hearing, but only to serve as
>
> an observer; the sheriff and his or her attorney may attend the hearing, but only to serve as an observer.

§*536.010(2) RSMo. (2000)* provides the following definition of a contested case:

> "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing[.]

Missouri courts have struggled to apply this definition in order to determine which administrative hearings are contested cases, and which are not. [3] The courts have traditionally looked to whether the

[3] For example, see "Redefining the Contested Case in the Missouri Administrative Procedure Act: A Call for Legislative Action", 55 Mo. Law Review 975 (1990).

element of adversity is present in deciding the contested case issue. Appellants first contend that the Circuit Court erred in ruling that the hearing in this case was not adversarial in nature. Clearly, the element of adversity is present in these hearings. The dismissed deputy sheriff has the opportunity to present evidence and to call witnesses in order to challenge the Sheriff's termination decision. The Sheriff and the dismissed deputy are opposed to each other in these hearings, and have opposing interests at stake. In discussing the adversity element, the Missouri Court of Appeals, in the case of *Benton-Hecht Moving and Storage, Inc. v. Call*, 782 S.W.2d 668 (1989), stated at Page 671:

> The feature most frequently mentioned in the cases as indicative of a contested case is the adversarial character of the hearing. Obviously, the term adversarial describes a contest of opponents favoring divergent results in the decision to be made by the agency. A component of such a case is the necessity of notice to those who may constitute opponents and who are, by the notice, provided an opportunity to appear and present their evidence.

In ruling that the hearing at issue was not adversarial in nature, the Court further stated, at Page 671:

> These details confirm that no adversarial proceeding of any kind occurred, not because the witnesses gave unsworn testimony and not because the right of cross-examination and introduction of evidence was denied, but because the hearing purpose set out in the statute was supervisory and not adversarial.

By contrast, a § 57.275 RSMo. (2000) hearing is by its very nature adversarial. It provides that an aggrieved deputy may present evidence and call witnesses, offering testimony disputing the Sheriff's grounds for termination, and the deputy may present evidence rebutting the testimony of adverse witnesses. These acts are inherently adversarial. This is not unlike a courtroom trial setting because Appellants called witnesses and presented evidence rebutting the Sheriff's prior findings. In essence, this hearing gave them the opportunity to combat the Sheriff's decision. Certainly, the hallmark of an adversarial proceeding is the ability to question the decisions or determinations of the agency through evidence and witness testimony.

The parties to the *§ 57.275 RSMo. (2000)* hearing are also seeking divergent results and contrasting remedies. The participants obviously must take opposite positions. Quite simply, the Sheriff requests that the Hearing Board affirm his decision to terminate the deputy, and in contrast, the deputy seeks to overturn the Sheriff's decision. Furthermore, at the conclusion of the hearing, the Hearing Board must take into account the evidence presented and issue findings of fact. The Board, in issuing these findings, can either side with the deputy or the Sheriff whose interests are at odds. This final determination can either favor the aggrieved deputy or the Sheriff, not both. The foregoing discussion demonstrates that the Circuit Court erred in ruling the hearing in this case was not adversarial in nature.

B. Hearings conducted pursuant to *§ 57.275 RSMo. (2000)* require a measure of procedural formality sufficient to meet the definition of a contested case.

In dismissing Appellants' Petition for Judicial Review, the Circuit Court ruled:

> The provisions of *RSMo. § 57.275* and § *57.015 (2000)* do not require procedural formalities to be followed at the hearing as are required in a

> contested case such as notice of the issues, oral evidence taken upon oath or affirmation, the calling, examining and cross-examining of witnesses, the making of a record, adherence to evidentiary rules, and written decisions
> including findings of fact and conclusions of law as described in the Missouri Administrative Procedure Act, RSMo.
> *§ 536.067, § 536.070,* and *§ 536.090.* (OLF, pp. 24-25) (MCF, pp.24-25).

Appellants contend that the Circuit Court erred by comparing the hearing involved in this case to hearings held in accordance with *§ 536.070 RSMo. (2000)* in determining whether this hearing was a contested case. *§ 57.275* and *§ 57.015 RSMo. (2000)* are separate and distinct from the provisions of Chapter 536, and contain procedural requirements to be followed in the event of a decision to dismiss a deputy sheriff. A plain reading of these two sections reveals that certain procedural formalities are mandated in the statute.

The first requirement found in *§ 57.275 RSMo. (2000)* is that the deputy being fired must be provided with written notice of the grounds for termination. Such a writing qualifies as notice of the issues to be considered at the hearing, and provides the deputy with an opportunity to prepare evidence in his or her defense.

The second requirement in that section is that the hearing must be requested by the deputy within three (3) working days of receipt of the written grounds for termination. Such a requirement is akin to a statute of limitations, perhaps the ultimate formal, procedural requirement. That provision fixes the time, place and manner in which the

deputy may invoke the right to a hearing to challenge the Sheriff's decision. Also, the hearing is to be held within 30 days, which is similar to the speedy trial requirement in criminal cases.

The third requirement is that the Sheriff appoint a hearing board to hear the evidence and determine the facts. This provision allows for a trier of fact other than the Sheriff to hear the evidence and make written findings, which adds a measure of objectivity to the hearing process, as well as a measure of formality that would not otherwise be present.

In addition, § *57.015 RSMo. (2000)* mandates numerous, specific procedural requirements for these hearings. For example, (1) the hearing is to be a closed meeting; (2) witnesses may only attend the hearing for the limited purpose of providing testimony; (3) attorneys may be present, for both the deputy and the Sheriff, but may not participate; and (4) the hearing board must hear the evidence and determine the facts.

The fact that the procedural formalities required under these two sections of Chapter 57 are different from those found in *§ 536.070* of the MAPA merely indicates that the Legislature intended to place limits on the due process rights of discharged deputy sheriffs at the agency level. Nothing in the language of *§ 57.275* or *§ 57.015 RSMo. (2000)* expressly denies those deputies their right to have a judicial review of the agency's decision to terminate their employment. Unlike MAPA, Chapter 57 is silent as to judicial review of a Missouri Sheriff's decision to fire a deputy. If the Legislature had intended that the Court should not have jurisdiction to review terminations of deputies, it would certainly have been an easy task to include such a provision in the wording of the statutes. Thus, the determination of whether a Chapter 57 hearing is a contested case for purposes of judicial review should not turn on whether all of the procedural formalities contained in *§ 536.070 RSMo. (2000)* are

present, but should depend on whether the provisions of Chapter 57 mandate that procedural formalities be followed.

This Court had occasion to determine the constitution of a contested case in a similar situation in which procedural limitations were imposed by a state agency as they were in this case. In *Rugg v. City of Carrolton*, 990 S.W.2d 89 (Mo. App. 1999), two police officers filed a petition for administrative review in the Circuit Court of Cole County requesting a review of disciplinary actions taken against them by the City of Carrollton. The two officers were accused of professional misconduct and possible criminal violations, which resulted in one officer's termination for engaging in the alleged conduct, and the other officer's suspension of five days for ethical violations. After receiving notification of the City's action, both officers requested a review hearing, pursuant to the City's personnel manual.

During the hearing before the City Council, the officers were prevented from presenting evidence, and the City Council refused to make an official record of the proceedings. Based on the information presented during the review hearing, the City Council upheld the officers' disciplines. Once the Council rendered its decision, both officers filed a petition for judicial review in Circuit Court. The Circuit Court held that the agency hearing constituted a contested case under the Missouri Administrative Procedures Act and held that the Council had failed to comply with the procedural mandate for contested cases. Accordingly, the Circuit Court remanded the cases and ordered the City Council to conduct full hearings in compliance with *§ 536.070 RSMo. (2000).* The City appealed the holding of the Circuit Court to the Missouri Court of Appeals for the Western District. Upon review, this Court affirmed the ruling of the Circuit Court and held that the hearing before the City Council

constituted a contested case even though the hearing had lacked the procedural indicia. The Court specifically held that the classification of a contested case is not left "to the ipse dixit or the invention of the agency, but should be determined as a matter of law." *Id.* at 90. This Court did not allow the state agency in the *Rugg* case to benefit from the its own prohibitions.

The Court in *Rugg* noted that no evidence was taken and no official transcript was created and thus no indicia of an adversarial hearing was present. However, the Court still held, despite the failure to follow these basic procedural requirements, that the case should have been conducted in conformity with the dictates of *§ 536.070 RSMo. 2000*.

The basic facts surrounding the *Rugg* case are similar to those of the Appellants' current case.

§ 57.015 RSMo. (2000) allows appellants to present testimony by calling their own witnesses in their defense and are allowed to present documentary evidence to the Hearing Board so that it can make an informed decision as to the justification for their dismissal. The only procedural formalities that the hearing lacked were the making of a record and the cross-examining of witnesses. Nothing in *§ 57.015 RSMo. (2000)* prohibits the making of a record nor the cross-examination of witnesses *§ 57.275 RSMo. (2000)* only prohibits participation by attorneys representing the deputy and the Sheriff.

The Legislature, in defining the hearing under *§ 57.015 RSMo. (2000),* meant to limit the procedural formalities in these hearings, not remove them altogether. At the very least, there is a measure of procedural formality present, contrary to the ruling of the Circuit Court.

C. The Circuit Court erred in ruling that it lacked jurisdiction to review Appellants' termination because of their at-will employment status.

The Appellants submit that the Circuit Court further erred when it held that § 57.275 did not create new substantive due process rights for Appellants, leaving their employment status as at-will employees and only granting them the right to have a hearing before the Hearing Board appointed by the Sheriff. In essence, the Court determined that since the Appellants remained employees at-will, they were not entitled to seek judicial review. However, the Appellants contend the Court had jurisdiction to inquire as to whether the procedural requirements of MAPA were met.

Under § 536.140 RSMo (2000), the Court **may** make seven (7) distinct determinations when reviewing a contested case. The Court's inquiry may extend to a determination of whether the act of the agency:

(1) Is in violation of constitutional provisions;

(2) Is in excess of statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable; or

(7) Involves an abuse of discretion.

In *Mosley v. Members of the Civil Service Board for the City of Berkeley*, 23 S.W.2d 3d 855 (Mo. App. E.D. 2000), the Missouri Court of Appeals reviewed a terminated probationary employee's request for judicial review. The Court held that a terminated at-will employee cannot seek judicial review of the adequacy of the grounds for their termination, but the Court expressly held that a terminated at-will employee can seek judicial review of any procedural improprieties that related to the

termination. Therefore, under *Mosley*, a terminated at-will employee may request that the Court determine whether the agency complied with the procedural dictates of MAPA.

Section 536.170 of MAPA describes a certain level of procedural formality that must be followed in any contested case. MAPA requires that in a contested case, oral evidence must be taken by oath or affirmation, each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called them to testify and to rebut evidence against them. The aggrieved party is also allowed to testify on his own behalf, and each agency must cause all proceedings before it to be suitably recorded and preserved.

Appellants, in their Petition for Judicial Review, alleged that during the hearing they were denied the opportunity to cross-examine witnesses and they were prohibited from making an official record of the proceedings. In dismissing Appellants' Petition for Judicial Review, the Court refused to analyze whether the § 57.275 hearing complied with the procedural requirements under MAPA. The Appellants contend that the Court had an obligation to not only determine whether their terminations were based on substantial and competent evidence, but also to determine whether their hearing complied with the procedural elements of a contested case under MAPA.

Appellants contend that the Court erroneously concluded that it could not inquire as to whether the hearing complied with MAPA because the Appellants were employees at-will. The holding in the *Mosley* case demonstrates that the Court should have determined whether the procedural formalities

were followed regardless of the Appellants' employment status.

VI. CONCLUSION

In its order dismissing Appellants' Petition for Judicial Review, the Circuit Court erroneously concluded that a hearing conducted pursuant to *§ 57.275 RSMo. (2000)* is not adversarial in nature, that such hearings lack procedural formalities and that it lacked jurisdiction to review the case due to the Appellants' employment status. Those erroneous rulings led the Circuit Court to incorrectly rule that it had no jurisdiction to review the decision to fire Appellants from their jobs as deputy sheriffs.

The post-termination hearing required under Chapter 57 is adversarial in nature because it involves opposing interests being heard and ruled upon. That element of adversity, coupled with the procedural formalities contained in the statutes, makes such hearings contested cases for purposes of jurisdiction over a petition for judicial review. Appellants request that the Court reverse the Circuit Court's order of dismissal, and remand the matter back to Cole County Circuit Court with instructions to proceed on Appellants' petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing Appellants' Appeal Brief by depositing same in the United States Mail, first-class postage prepaid, this 6th day of November, 2003 addressed as follows:

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SHERIFF KIRBY L. BRELSFORD,	)	
Respondents.	)	
_____	)	

CERTIFICATION UNDER RULE 84.06(g)

OF THE MISSOURI RULES OF CIVIL PROCEDURE

Pursuant to Rule 84.06(g) of the Missouri Rules of Civil Procedure, counsel for Appellants hereby certifies that the disk has been scanned for viruses and it is virus free.

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_____	)	

CERTIFICATION UNDER RULE 84.06(c)
OF THE MISSOURI RULES OF CIVIL PROCEDURE

Pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, counsel for Appellants states that the brief complies with the limitations contained in 84.06(b) and the brief contains 4675 words.

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