SC 89605

IN THE
SUPREME COURT OF MISSOURI

TIMOTHY COFFER,

Respondent,

v.

ANGELA WASSON-HUNT, et al.,

Appellants.

Appeal from the 16th Judicial Circuit Court Division 3
The Honorable Thomas C. Clark, Judge
Transfer form the Missouri Court of Appeals Western District

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

FIRST BRIEF FILED PER RULE 84.05 (e)

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INDEX

Page #

Table of Authorities

Page #

Cases

Statutes[1]

Rules

[1] All citations are to Missouri Revised Statutes, unless otherwise indicated.

Constitutional Provisions

JURISDICTIONAL STATEMENT

For the reasons set forth in Argument I, namely untimely filing of the Notice of Appeal, this Court lacks jurisdiction to adjudicate the appeal filed by the Appellants.

In the event that the Notice of Appeal was timely filed (which Respondent denies), then this Court would have jurisdiction over the appeal as the proceeding was before the Jackson County Circuit Court on Respondent's Petition for Judicial Review pursuant to R.S.Mo. §536.110 *et seq.* and Rule 100.01 *et seq.* The Circuit Court sustained said Petition. The Appellants have filed for appeal from the same pursuant to R.S.Mo. §536.140.6.

This appeal involves none of the issues reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court; therefore jurisdiction was properly in the Missouri Court of Appeals, Western District. Mo. Const., Art. V, §3; R.S.Mo. §477.070.

This Court has now accepted transfer of the matter.

STATEMENT OF FACTS

A. Officer Coffer

At the time of his hearing, Respondent Police Office Timothy Coffer ("Officer Coffer") was a 32 year old father of four. (82:8-20).[2] He joined the Kansas City, Missouri Police Department on May 28, 2002. (23 at p.20). His record of service was unblemished by any prior disciplinary actions, and was praised by Captain Lewis and Sgt. Arroyo. (6-7, 83:1-11; 117, 118, 121, 123, 131 at 21:10-22). Officer Coffer has three letters of commendation. (83:1-7; 117, 131 at 21:10-20).

B. The Chase and the DWI

On Friday evening, September 12, 2003, about 8:40 p.m. in downtown Kansas City, Police Officers Aaron Bryant and Timothy Coffer heard an unusual, loud scraping sound. (158). The Officers then spotted the origin of the sound – a car traveling at a high rate of speed on a bare right front tire rim, which was "throwing sparks everywhere." (158). After activating their red lights and [emergency vehicle] sirens which automatically started the videotape, (86), the Officers gave pursuit. (158). The car was being driven by Halgene Lucas. (147). The car did not stop and allow the officers to interact with the diver. (159). The car proceeded on, pausing only briefly near

[2] As all references are to the Legal File, which contains the Transcript therein, only page numbers will be used, and all such page number references are to the Legal File. Any citation that indicates a number followed by at p. ___ are cites to multi-page deposition transcripts that were introduced.

Independence and Delaware, then left the roadway and drove over and down an embankment leading onto I-70/I-35 interstate highways, but was stopped by a guardrail (84-85; 158).

The officers proceeded to arrest Lucas for DWI; his blood alcohol content being .152. (89, 153, 157). These charges were apparently subsequently dropped. The record is unclear why the Police Department dropped the DWI charges against Lucas, but Officer Coffer testified on cross examination by the police board attorney that the charges were dismissed against Mr. Lucas so Lucas would come in and give a statement against Coffer. (92: 6-21).

C. The Execution of the Arrest

Upon Mr. Lucas stopping his car against the guardrail, the officers shouted commands for Lucas to exit his vehicle. (85, 158). Lucas refused. (85, 158). Officer Coffer approached Lucas' vehicle, while Officer Bryant covered him. (85, 158). Officer Coffer again requested Lucas to exit the vehicle. (85, 158). Lucas again refused. (85, 158-159). Officer Coffer put his gun in his holster, opened Lucas' door, and attempted to pull him out of the car. (85). Lucas was resisting – pulling back and mumbling unintelligibly. (84-85). Officer Coffer could smell alcohol on Lucas. (85, 159).

Officer Coffer and Lucas fell to the ground. (85). Officer Coffer's own words best describe what happened next. Then, "I go get him out of the vehicle. He's resisting. I pull him out again. And as I'm pulling him out, you can see he grabs my gun, I yell gun grab." (87, 85) Unequivocally, Police Officer Coffer testified he felt a gun grab and yelled "gun grab" to notify his partner. (85, 128 at p.9:22-23; 158-159). Also, Police

Officer Coffer testified that he and Lucas fought, describing Lucas' actions as resisting arrest. (85-87; 159)

There is no dispute that a gun grab occurred. (56:3-13). The BOP's own expert witness, Conroy, conceded that Police Officer Coffer's mindset regarding the "gun grab" was determinative. (56:22-25; 59:1-16; 60:15-17; 61:21-23; 72:1-14). Officer Bryant, Coffer's partner, confirms the yell of "gun grab." (158-159). Officer Bryant confirmed that Lucas and Police Officer Coffer engaged in a struggle that ended up on the ground, that Lucas was resisting arrest, that Police Officer Coffer yelled "gun grab" and then Bryant struck Lucas in the face and that the civilian ride-along assisted them in controlling Lucas by holding Lucas' feet down. (158-159). Bryant stated that Police Officer Coffer struck Lucas several times, but "the driver continued to resist arrest." (159).

Police Officer Coffer testified that he and Lucas fought, describing Lucas' actions as resisting arrest (85-86). He admitted throwing six punches. (89) When directly confronted with the Conroy accusation that he delivered two extra hits after Lucas was under control, Police Officer Coffer denied knowing that Officer Bryant had Lucas under control and added that Lucas was still moving; i.e., Coffer's subjective belief that he was still in danger was present. (87:13-21; 90:14-21). However, once Lucas was under control, no further hits were made. (87-88)

Conroy testified that the Officer's subject belief of danger due to a gun grab permitted Officer Coffer to strike the vast majority of the blows. (56:22-25; 59:1-16; 60:15-17; 61:21-23; 72:1-14). Conroy, however, has a dispute as to the last two blows.

(64:1-7; 69:2-11). As testified to by Conroy, the purported extra hits came very fast. (62:3-4; 71:4-8). (A review of the video-tape, Ex. 4, in real time demonstrates just how quickly). In fact, the allegedly extra hits occur so fast after the purported point of control that the BOP's expert sometimes testifies that there was one hit or two hits. (62:7-10; 62:21-23).

After Mr. Lucas was under control, Office Coffer spit some chewing tobacco. (88-89). He did not spit the tobacco at or on Mr. Lucas. (88-89).

D. <u>Procedural History</u>

1. On November 17, 2003, a criminal investigation by the Police Department regarding Officer Coffer's actions on September 12, 2003, was submitted to the Jackson County Prosecutor's Offices for possible criminal prosecution. (146). Jackson County Assistant Prosecutor Michael Hunt examined the reports and on November 18, 2003, declined to prosecute Officer Coffer. (146).

2. Officer Coffer's actions were forwarded through the chain of command. Deputy Chief Ortega, Captain Lewis, and Major Barlow all recommended that Coffer be suspended for 15 days without pay. (130 at pp.14-15) Sergeant Arroyo recommended that Coffer be suspended for 10 days without pay. (1-2; 130: at pp.14-15).

3. There is no evidence that Mr. Lucas ever initiated any complaint against Police Officer Coffer (23 at p.19: 8-11).

4. However, on June 18, 2004, the Chief of Police filed charges and specifications against Police Officer Timothy Coffer setting forth that Coffer's employment with the Kansas City Police Department would be terminated. (11-12).

Therein in Count I, Officer Coffer was charged with violation of Kansas City, Missouri Police Department Personnel Policy 201-7, Section II, Paragraphs 1, 9, 12, 15, 44, 59 and 60 via the means of: a) using excessive force; b) spitting on Mr. Lucas; and c) using profanity. (11). Count II of the Charges were dismissed. (38:6-10).

5. Officer Coffer timely filed an appeal to the appropriate administrative body, the BOP, pursuant to R.S.Mo. §84.610. (171 ¶ 6; 183 ¶ 6).

6. On June 14, 2005, the Designated Hearing Officer ("DHO"), the Honorable John I. Moran, retried Jackson County Circuit Court Judge, heard the matter. (33).

7. On June 21, 2005, the Honorable John I. Moran issued his Recommended Findings of Fact, Conclusions of Law and Suggested Sanction/Punishment. (174-176).

8. On or about September 8, 2005 (signed September 8, 2005 – officially filed September 9, 2005), the BOP issued its Findings of Fact and Conclusion of Law that was contrary to the Recommendation of the Honorable John I. Moran. (178-181).

9. On September 29, 2005, Officer Coffer filed his Petition for Judicial Review in the Circuit Court of Jackson County, Missouri. (170-181).

10. On October 5, 2006, the Honorable Thomas C. Clark, Jackson County Circuit Court Judge, issued a voluminous 17-page, single-spaced judgment wherein he found in favor of Officer Coffer and against the BOP. (210-226).

11. On November 2, 2006, the BOP filed a "motion to clarify and reconsider". (R. 232-249). Said motion expressly stated in the text thereof that it sought relief "pursuant to the provisions of Supreme Court Rule 75.01". (232).

12. On November 22, 2006, the trial court entered an unsigned docket entry which again entered judgment for Officer Coffer. (Attached to Appellants' Motion for Leave in WD 68385 – included in the Appendix hereto for the Court's convenience).

13. BOP filed its Notice of Appeal on January 25, 2007. (258).

14. On May 17, 2007, the BOP filed a Motion for Leave to File Notice of Appeal out of Time. It was docketed as WD 68385.

15. On May 21, 2007, in WD 68385, Officer Coffer filed his Response and Suggestions in Opposition thereto.

16. On May 31, 2007, in WD 68385, the Court denied the BOP's Motion for Leave to File Notice of Appeal out of Time.

POINTS RELIED ON

I.

The Board of Police Commissioner's appeal to this Court should be dismissed for lack of appellate jurisdiction, and the Circuit Court's Judgment should be left as the law of this case, as the appellants did not timely file their Notice of Appeal from the Circuit Court to this Court as the Notice of Appeal was filed more than 10 days after the Circuit Court's Judgment became final and a special order of this Court was not issued permitting Appellants leave to file out of time.

II.

The Board of Police Commissioner's Decision of September 5, 2005 was arbitrary, capricious and/or unreasonable and/or was an abuse of discretion in that the overwhelming weight of the evidence demonstrates that Coffer was not guilty of violating any of the police policies for which he was charged in the disciplinary proceeding where even the Board's own expert testified that officer Coffer's conduct was subjectively reasonable and the determination was subjective for the Officer, and the evidence does not demonstrate terminable conduct for spitting or profanity.

III.

The Board of Police Commissioner's Decision of September 5, 2005 was arbitrary, capricious and/or unreasonable and/or was an abuse of discretion in that the overwhelming weight of the evidence demonstrates that Coffer was not guilty of violating any of the police policies for which he was charged in the disciplinary proceeding where the police policies are not self-proving and the Police never introduced the same into evidence.

IV.

The Board's decision to terminate Coffer was against the law or in violation of Resolution 02-06 in that the Boards actions rendered Resolution 02-06, from the procedural safeguard that it was supposed to be, into a sham proceeding by allowing for a hearing officer, but in totally disregarding said hearing officer without any logic or reason stated for overruling him and coming to contrary conclusions.

V.

If the board acted *ultra vires* it was not entitled to deprive Coffer of his governmental employment in that the Board's decision to offer and advocate the use a hearing officer procedure to all police, pursuant to Resolution 02-06, failed to provide Coffer with the statutorily mandated public hearing before the board, which precluded the Board from depriving Coffer from his governmental employment. Thus, the use of the Hearing Officer Procedure was a sham which deprived Coffer of his statutory and procedural due process rights (regardless of the fact the he agreed to a hearing officer procedure). This Argument, although not briefed below, is included due to the Court of Appeals' *sua sponte* discussion concerning the same.

ARGUMENT

I.

The Board of Police Commissioner's appeal to this Court should be dismissed for lack of appellate jurisdiction, and the Circuit Court's Judgment should be left as the law of this case, as the appellants did not timely file their Notice of Appeal from the Circuit Court to this Court as the Notice of Appeal was filed more than 10 days after the Circuit Court's Judgment became final and a special order of this Court was not issued permitting Appellants leave to file out of time.

A. STANDARD OF REVIEW

"In every case, before considering the merits of the appeal, [the Court of Appeals] must first determine, *sua sponte,* [its] jurisdiction to do so, in that if [the Court of Appeals does] not have jurisdiction, [it] must dismiss." Ford Motor Credit Co. v. Updegraff , 218 S.W.3d 617, 620 (Mo.App. W.D. 2007)(*Citing*, Brock v. Blackwood, 143 S.W.3d 47, 55 (Mo.App. W.D. 2004)). Want of subject matter jurisdiction is never waiveable by operation of time or by the conduct of the parties. Arrow Financial Services, L.L.C. v. Bichsel , 207 S.W.3d 203, 207 (Mo.App. W.D. 2006)(*Citing*, Kelch v. Kelch, 450 S.W.2d 202, 204 (Mo. banc 1970)); State *ex rel.* Director of Revenue v. Rauch, 971 S.W.2d 350, 353 (Mo.App. E.D. 1998). Such a defense can be raised even for the first

time on appeal. Vance Bros., Inc. v. Obermiller Const. Services, Inc., 181 S.W.3d 562, 564 (Mo. banc 2006). "When a court lacks subject matter jurisdiction, it can take no action other than exercising its inherent power to dismiss." Gunn v. Director of Revenue, 876 S.W.2d 42, 43 (Mo.App. E.D. 1994); Bichsel , 207 S.W.3d at 207.

This motion deals with construction of the trial court's October 5, 2006 directive, which was denominated a "judgment."

> [S]ince "[c]onstruction of a court order is a question of law." *Jacobs v. Georgiou*, 922 S.W.2d 765, 769 (Mo.App.1996). "The general rules of construction for written instruments are used to construe court judgments." *Dover v. Dover*, 930 S.W.2d 491, 495 (Mo.App.1996). In construing a court's judgment, the words and clauses used in a judgment are to be construed according to their natural and legal import. *Panettiere v. Panettiere*, 945 S.W.2d 533, 539 (Mo.App.1997). "If the language employed is plain and unambiguous, there is no room for interpretation and the effect thereof must be declared in the light of the literal meaning of the language used." *Estate of Ingram v. Rollins*, 864 S.W.2d 400, 403 (Mo.App.1993). "Our task is to ascertain the intention of the [circuit] court in entering the order."

American Family Mut. Ins. Co. v. Hart, 41 S.W.3d 504, 509 (Mo.App. W.D. 2000)(internal citations and quotations in original) *overruled on other grounds by* Blue Ridge Bank and Trust Co. v. Hart, 52 S.W.3d 420, 424 (Mo.App. W.D. 2005).

B. LEGAL ARGUMENT

An appeal is a right conferred by statute and thus timely filing of the notice of appeal pursuant to that statute is jurisdictional. Labrier v. Anheuser Ford, Inc., 621 S.W.2d 51, 53 -54 (Mo. banc 1981); Blue Ridge Bank and Trust Co. v. Hart, 52 S.W.3d 420, 424 (Mo.App. W.D. 2005)("The filing of a timely notice of appeal is mandatory and jurisdictional").

The action in the Circuit Court was under the statutory provisions of R.S.Mo. §536.110 *et seq.* and Rule 100.01 *et seq.* Section 536.140 provides that "Appeals may be taken from the judgment of the court as in other civil cases." R.S.Mo. §536.140.6

Appeals taken in other civil cases are controlled by Rule 81 and R.S.Mo. Chapter 512. As to the time requirements of those provisions, R.S.Mo. §512.050 states in relevant part:

> When an appeal is permitted by law from a trial court and within the time prescribed, a party or his agent may appeal from a judgment or order by filing with the clerk of the trial court a notice of appeal. No such appeal shall be effective unless the notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final…

R.S.Mo. §512.050 (emphasis added). Rule 81.04(a) states in relevant part:

> **Filing the Notice of Appeal.** When an appeal is permitted by law from a trial court, a party may appeal from a judgment or order by filing with the clerk of the trial court a notice of appeal. No such appeal shall be effective

unless the notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final.

Rule 81.04(a)(underline added)(bold in original). Both provisions require that the notice of appeal be filed within 10 days of the date the judgment becomes final.

There is one exception to the 10-day Rule. It is provided for in Rule 81.07(a) and R.S.Mo. § 512.060.1 as the special order exception. The special order exception requires that a motion for a special order to file an appeal out of time be made within 6 months of the date the trial court's judgment became final.

Both the time for the notice of appeal and the time for the special order are measured from the same date; the date that the trial court's judgment became final.

"The trial court retains control over judgments during the thirty-day period after entry of judgment…" *Rule 75.01.* "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." Rule *81.05(a)(1).*

Thus, the following sub-sections of this argument will explore when the Circuit Court's Judgment became final in the unusual procedural circumstances of this case.

1. Elements of Finality

Judgment is defined in Rule 74.01(a):

> a. **Included Matters**. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated "judgment" or "decree" is filed. The judgment may be a separate document or entry on the docket sheet of the case. A docket sheet entry complying with these requirements is a judgment unless the docket sheet entry indicates that the court will enter the judgment in a separate document. The separate document shall be the judgment when entered.

Rule 74.01(a).

Courts interpreting Rule 74.01 have determined that a judgment is entered when the following elements are met: (1) in writing, (2) signed by the judge, (3) designated a judgment, and (4) is filed. Hamby v. City of Liberty, 970 S.W.2d 382, 383 (Mo.App. W.D. 1998); Sparks v. Sparks, 82 S.W.3d 210, 212 (Mo.App. S.D. 2002)(*Quoting*, Martin v. Director of Revenue, 10 S.W.3d 618, 623 (Mo.App. S.D.2000)); Queen v. State, 214 S.W.3d 410, 411 (Mo.App. E.D. 2007).

In the instant action, elements 1-3 are established and do not appear to be in dispute. On October 5, 2006, the Honorable Thomas C. Clark, Jackson County Circuit Court Judge, issued and signed a voluminous 17-page, single-spaced written document entitled "judgment" wherein he found in favor of Officer Coffer and against the BOP. (210-226).

The remaining question is as to element 4 - when is a judgment considered "filed?" However, the case law is not replete with examples of when a judgment is considered filed. The only case that Officer Coffer could locate that directly addresses this question of "filed" is Sparks v. Sparks, 82 S.W.3d 210, 212 (Mo.App. S.D. 2002). In Sparks, the trial court signed a judgment on November 8, 2000, and the clerk filed the same on November 17, 2000. *Id.* at 211. The Court held the judgment was not entered for purposes of Rule 74.01 until said time as the clerk filed the same. *Id.* Thus, the later date of November 17, 2000 was used in calculating the date of entry of judgment.[3]

In the instant case, the question becomes was Judge Clark's Judgment filed on October 5, 2006 or on November 22, 2006 as to determine on what date the judgment was entered. Officer Coffer can see both pro's and con's of either position, and sets forth the same for the Court's ultimate determination of this issue. Regardless, for the reasons set forth in following section, whichever date is operative for purposes of finality, the result is still the same, in that a timely filed notice of appeal is lacking in this case.

[3] Sparks was not discussing finality for purposes of appeal, but was discussing compliance of a 30 day payment provision from date of the entry of judgment.

In favor of the earlier date, a deputy Jackson County Circuit Court Clerk, Sharon Snyder, attested that a true copy of the judgment was forwarded to the parties on October 5, 2006. (226). A Clerk of the Court taking action on a judgment could constitute the filing thereof on October 5, 2006. A Clerk cannot attest that a document is a true copy of part of the record unless that document is filed as part of the record. Thus, in this circumstance, the Clerk's attestation should be the date of filing/entry. In addition, awaiting a ministerial act of a Clerk in a large court, such as Jackson County, to enter the judgment into the electronic docket (where no notice is sent to the parties of such a date), creates a larger difficulty for parties in determining when the judgment was filed. Therefore, the date of attestation by any deputy clerk as the same being a true and correct copy should be considered the date of filing.

Also, the Court could consider that the November 22, 2007 docket entry of filing is merely an order and not the entry of judgment. In Norfolk v. State, 200 S.W.3d 36, 39 (Mo.App. W.D. 2006), the trial court's typewritten and unsigned docket entry qualified as an "order" under Rule 74.02 as said Rule does not require an order to be handwritten or signed by the judge.

In favor of November 22, 2007, an official filing date by the Clerk creates a bright-line test for the when a judgment is final. Some Courts, of which Jackson County does not appear to be one, require that the Clerk time and date stamp the actual judgment

on the day it is signed as if it were any other document being filed into the Court.[4] A review of the Missouri Supreme Court Operating Rules (especially Rule 4.01 *et seq.*) does not reveal any requirement for doing so. As a matter of policy, file-stamping judgments with the date and time that they are filed would be the most clear and unambiguous method of determining when the judgment is filed. However, Officer Coffer acknowledges that the same is not the ordinary practice of the Jackson County Circuit Court.

In this matter that is practically of first impression, Officer Coffer defers to the Court's resolution of the matter of when is a judgment considered filed.

2. No Exception to Finality As No Authorized After-Trial Motion

a. November 22, 2006 as Entry Date

If the October 5, 2006 directive of the trial court was not considered a judgment until it was filed on November 22, 2006, said directive had the operative effect of an order from October 5, 2006 until its filing on November 22, 2006. Orders are defined in Rule 74.02 as:

> Every direction of a court made or entered in writing and not included in a judgment is an order.

[4] For examples of Jackson County's time and date stamp, (*See*, 195, 201, 232).

Rule 74.02. The October 5, 2006 directive signed by Judge Clark gives directions to the parties, and as the document was not a judgment until November 22, 2006, it fits the definition of an order pursuant to Rule 74.02 during the time when it was not yet a judgment.

As an order, said directive was modifiable at any point in time prior to the entry of judgment. *See gen.*, *Rule 74.01(b)*(Although discussing adjudications of fewer than all claims or parties, said rule recognizes that "before the **entry** of judgment" any decision is "subject to revision" no matter what it is denominated). Therefore, the October 5, 2006, decision was subject to modification prior to its entry on November 22, 2006.

Importantly, the BOP filed a motion for reconsideration on November 2, 2006. (232). Said date falls within the period after the directive was issued, but before it was filed as a judgment. In other words, it is a pre-judgment motion. Said motion was before the trial court, and trial court had the opportunity to modify its October 5, 2006 directive, consistent with the motion, prior to the entry of the November 22, 2006 judgment. The trial court did not modify its October 5, 2006 directive – but rather, allowed the judgment to be filed.

The BOP might counter that said motion is merely a premature authorized after-trial motion.[5] However, authorized after-trial motions must be filed after judgment is

[5] Respondent will address why said motion is not an authorized after-trial motion in the next section. Whether it is or not is irrelevant to the instant argument

entered because any motion filed prior to the entry of judgment that is not called for hearing prior to the entry of judgment is automatically denied. *See e.g.*, Gramex Corp. v. Green Supply, Inc., 89 S.W.3d 432, 445 (Mo. banc 2002)(Failure to call motion for hearing leaves nothing for review); *C.f.*, Reynolds v. Briarwood Development Co., Inc., 662 S.W.2d 905, 906 (Mo.App. E.D. 1983)("A finding for plaintiff which necessarily carries with it a finding against a defendant, on defendant's counterclaim, will constitute a final judgment even though the counterclaim has not been expressly mentioned in the judgment"). Therefore, by operation of law, the motion was denied on November 22, 2206, and nothing was pending thereafter.

Moreover, certain rules of procedure allow for premature filing of certain pleadings; for example, the notice of appeal. *See*, Rule 81.05(b)(premature notice of appeal). There is no similar permissive in the any of the Rules that discuss any of the authorized after-trial motions recognized by the Courts. Thus, based on the doctrine of express mention and implied exclusion,[6] there is no authority to prematurely file an authorized after-trial motion.

Therefore, based on the forgoing, the following dates are applicable:

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except to the extent argued herein that, by operation of law, one cannot have a premature authorized after-trial motion.

[6] Missouri follows this doctrine as it relates to statutory construction. *See*, State v. Bass, 81 S.W.3d 595, 604 (Mo.App. W.D. 2002).

- October 5, 2006 – Judge Clark's Order (denominated as a judgment). (226).
- November 2, 2006 – Motion for Reconsideration filed. (232).
- November 22, 2006 – Judgment filed and thus entered – Clock starts to run for finality.
- December 22, 2006 – Judgment final (Rule 75.01; Rule 81.05(a)(1).
- January 2, 2006 – Notice of Appeal due – Rule 81.04(a); 44.01(a).
- January 25, 2007 – Notice of Appeal filed. (258)
- June 22, 2006 – Special Order to Appeal Out of Time due – Rule 81.07

Based on these dates, there is no timely notice of appeal filed in this action. Therefore, the Court lacks jurisdiction to consider the appeal, and should dismiss the BOP's appeal.

b. October 5, 2006 as Entry Date

If October 5, 2006 is the date that the judgment was filed and thus entered, then under the ordinary principles discussed above, the Judgment of the Trial Court in this case became final on Monday, November 6, 2006.[7] Rule 81.05(a)(1) states, "A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed. Thus, a notice of appeal would need to have been filed on or before November 16, 2006, unless an authorized after-trial motion was filed.

[7] As the 30th day, November 5, 2006, was a Sunday, Rule 44.01(a) provides that moves said date to the next following day of business.

As such, the dispositive question concerning this section of the brief is 'was the November 2, 2006 Rule 75.01 motion filed by the BOP an authorized after-trial motion which extends the trial court's plenary jurisdiction from 30 days to 90 days?' The short answer is that said motion was not an authorized after-trial motion.

In complete candor to this Court, Officer Coffer is mindful of the Court of Appeal's ruling in Hart , 52 S.W.3d at 425 n.8, that failure to invoke a specific rule is no longer grounds, in and of itself, for not considering a motion as an approved after trial motion. However, that Court was not confronted with the situation where a party expressly invokes a rule, which could in and of itself provide relief. In this case, the BOP expressly only sought relief "pursuant to the provisions of Supreme Court Rule 75.01". (232). Said invocation is not in the title; but rather, is in the first paragraph of the motion. The instant case is not the circumstance of failure to invoke an authorized after-trial rule. Rather, this is a situation where the BOP (knowing the law) expressly chose to invoke Rule 75.01 only. By the rubric of this recital in the text of the document (not the title), the BOP expressly only sought relief under Rule 75.01.

Motions made under Rule 75.01 are not approved after trial motions. In State, Department of Labor and Industrial Relations v. Ron Woods Mechanical, Inc., 926 S.W.2d 537, 540 (Mo.App. W.D. 1996), the Court of Appeals rejected a party's claim that its motion to vacate, which "expressly invoked" Rule 75.01, could be construed as a motion to amend under then-Rule 73.01(a)(5), which is now found in Rule 78.07(c)."

This Court then abrogated Ron Woods and its progeny in part. To wit:

> To the extent that *Ron Woods* and other cases from this court can be read to require a party to cite the specific rule under which its substantively-sufficient after-trial motion is made or else the motion will not be considered or reviewed as an authorized after-trial motion, they appear to be in conflict with *Taylor* and *Massman* and, therefore, should no longer be followed.

Hart, 52 S.W.3d at 425; Dunkle v. Dunkle, 158 S.W.3d 823, 832 (Mo.App. E.D. 2005). A basis of that abrogation was based on a judgment should not be judged by its title, but by what is in the text. *See also*, Worley v. Worley, 19 S.W.3d 127, 129 (Mo. banc 2000)("A pleading is judged by its subject matter-not its caption").

Such is not the case in this matter. Respondent does not complain of the title of Appellants' November 2, 2006 motion, but of the express request for relief in the text of the motion under Rule 75.01. (232). The trial court had the power to grant the relief requested by the Appellants under Rule 75.01. The Court in Hart stopped short of abrogating Ron Woods in its entirety; and in particular that portion that holds "expressly invoking" Rule 75.01 can be sufficient reason to deny consideration of the motion as an authorized after trial motion. Ron Woods, 926 S.W.2d at 540.

Therefore, Appellants' Rule 75.01 motion should not be considered an approved after-trial motion. As such, Judge Clark's judgment was final on November 6, 2006. Thus, the notice of appeal was due on or before November 16, 2006. Furthermore, any

motion for special order was required to be filed on or before May 8, 2007. Rule 81.07(a); R.S.Mo. § 512.060.1.

As none of the foregoing timely occurred, this Court lacks jurisdiction to proceed with the BOP's appeal.

c. Conclusions and relief sought

The Court lacks jurisdiction because there is no timely filed notice of appeal and no special order permitting the appeal to proceed out of time. Thus, Officer Coffer respectfully requests that this Court dismiss the BOP's appeal, which would leave the Honorable Thomas Clark's Judgment as the final disposition of this matter.

II.

The Board of Police Commissioner's Decision of September 5, 2005 was arbitrary, capricious and/or unreasonable and/or was an abuse of discretion in that the overwhelming weight of the evidence demonstrates that Coffer was not guilty of violating any of the police policies for which he was charged in the disciplinary proceeding where even the Board's own expert testified that officer Coffer's conduct was subjectively reasonable and the determination was subjective for the Officer, and the evidence does not demonstrate terminable conduct for spitting or profanity.

A. STANDARD OF REVIEW – ADMINISTRATIVE APPEAL

The issue is not whether there is any evidence to support the agency decision, rather pursuant to the administration review act, whether the action of the agency is unsupported by competent and substantial evidence upon the whole record, § 536.140.2 (3). The issue is not whether there is any evidence to support the agency decision, rather pursuant to the administration review act, whether the action of the agency is unsupported by competent and substantial evidence upon the whole record, § 536.140.2 (3).

"Standards for judicial review of an action of an administrative agency are set out in: Missouri Constitution, Article 5, § 22; Rule 100.07(b); § 536.140(2), R.S.Mo. In cases where a hearing is required by law, the reviewing court must determine whether a decision of any administrative body is "supported by competent and substantial evidence upon the whole record." Hanebrink v. Parker, 506 S.W.2d 455, 457 (Mo. Ct. App. 1974).

The term "substantial evidence" both implies and comprehends competent evidence and is evidence which, if believed, would have a probative force upon the issues" *Id.*

Furthermore, there is nothing in the constitution that requires a reviewing court to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the agency's decision. Lagud v. Kan. City Bd. Of Police Comm'rs, 136 S.W. 3d 786, 790-791 (Mo. banc 2004)(*Citing*, Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003))("Court must look to the whole record in reviewing the Board's decision, not merely at that evidence that supports its decision. To the extent prior cases instruct that on appeal the evidence should be viewed in the light most favorable to the decision of the agency, they should no longer be followed").

Thus, looking at the record as a whole, the reviewing court should simply decide whether there is sufficient competent and substantial evidence to support the agency's decision. *Id.* at 790. An agency's decision does not meet this standard if it is contrary to the overwhelming weight of the evidence on the record as a whole. *Id.* at 791.

This standard should apply to arguments II, III, IV, and V.

B. The BOP's Findings Are against the Weight of the Evidence

Before proceeding with the specifics of this section, it is significant to note that the Honorable Thomas Clark went out of his way to note that in his now 20 years on the bench, this case is the first instance of Judge Clark not affirming the Board. (210 n.1).

Judge Moran imposed a 15 day suspension without pay, based on his conclusion for conduct not charged. (176).

It is also important to note Michael Hunt of the Jackson County Prosecutor's Office refused to press charges against Officer Coffer. (146).

Each of four levels of the chain of command recommended 15 days or less worth of suspension. (1-2; 130 at pp.14-15)

The only exception to the 15 day suspension is the Chiefs' opinions, where the Chiefs examined less than the full panoply of evidence. (223).

1. No Excessive Force

The record as a whole does not support that Officer Coffer used excessive force.

Upon Mr. Lucas stopping his car against the guardrail, the officers shouted commands for Lucas to exit his vehicle. (85, 158). Lucas refused. (85, 158). Officer Coffer approached Lucas' vehicle, while Officer Bryant covered him. (85, 158). Officer Coffer again requested Lucas to exit the vehicle. (85, 158). Lucas again refused. (85, 158-159). Officer Coffer put his gun in his holster, opened Lucas' door, and attempted to pull him out of the car. (85). Lucas was resisting – pulling back and mumbling unintelligibly. (84-85). Officer Coffer could smell alcohol on Lucas. (85, 159).

Officer Lucas and Lucas fell to the ground. (85). Officer Coffer's own words best describe what happened next. Then, "I go get him out of the vehicle. He's resisting. I pull him out again. And as I'm pulling him out, you can see he grabs my gun, I yell gun grab." (87, 85) Unequivocally, Police Officer Coffer testified he felt a gun grab and yelled "gun grab" to notify his partner. (85, 128 at p.9:22-23; 158-159). Also, Police Officer Coffer testified that he and Lucas fought, describing Lucas' actions as resisting (arrest). (85-87; 159)

There is no dispute that a gun grab occurred. (56:3-13). The BOP's own expert witness, Conroy, conceded that Police Officer Coffer's mindset regarding the "gun grab" was determinative. (56:22-25; 59:1-16; 60:15-17; 61:21-23; 72:1-14). Officer Bryant, Coffer's partner, confirms the yell of "gun grab." (158-159). Officer Bryant confirmed that Lucas and Police Officer Coffer engaged in a struggle that ended up on the ground, that Lucas was resisting arrest, that Police Officer Coffer yelled "gun grab" and then he (Bryant) struck Lucas in the face and that the civilian ride-along assisted them in controlling Lucas by holding Lucas' feet down. (158-159). Bryant stated that Police Officer Coffer struck Lucas several times, but "the driver continued to resist arrest." (159).

Police Officer Coffer testified that he and Lucas fought, describing Lucas' actions as resisting (arrest). (85-86) He admitted throwing six punches. (89) When directly confronted with the Conroy accusation that he delivered two extra hits after Lucas was under control, Police Officer Coffer denied knowing that Officer Bryant had Lucas under control and added that Lucas was still moving; i.e., Coffer's subjective belief that he was

still in danger was present. (87:13-21; 90:14-21). However, once Lucas was under control, no further hits were made. (87-88)

Conroy testified that the Officer's subject belief of danger due to a gun grab permitted Officer Coffer to strike the vast majority of the blows. (56:22-25; 59:1-16; 60:15-17; 61:21-23; 72:1-14). Conroy, however, has a dispute as the last two blows. (64:1-7; 69:2-11). As testified to by Conroy, the purported extra hits came very fast. (62:3-4; 71:4-8). (A review of the video-tape, Ex. 4, in real time demonstrates just how quickly). In fact, the allegedly extra hits occurs so fast after the purported point of control that the BOP's expert sometimes testifies that there was one hit or two hits. (62:7-10; 62:21-23).

The dispute comes down to an issue of Monday morning quarterbacking by those not in the line of fire. The BOP merely relies on opinions after the fact that two of the blows came fractional seconds after the BOP believes that Mr. Lucas was under control. However, even the BOP's own expert Conroy admits that it is the Officer's subjective belief under the circumstances that controls. Conroy (although he did not care for the tactics) agreed that so long as Coffer believed and had a fear due to the gun grab, Officer Coffer was entitled and obligated to use all such force as necessary to protect him and his partner.

Measuring Officer Coffer's actions at the time they occurred and under the circumstances, in which they occurred, there is no evidence that Officer Coffer did not still have a good faith belief in his fear due to the gun grab that occurred seconds before. From Coffer's testimony, he did not yet see that his partner had an arm locked. However,

two seconds later, when Coffer knew the subject had been properly subdued, Coffer offered no more blows.

Based on the evidence in the record, there was no substantial and competent evidence on which to terminate Officer Coffer on this ground. Instead, the evidence supports the finding that Officer Coffer reacted appropriately in this emergency situation.

2. No Spitting

The record as a whole does not support that Officer Coffer spit at or on Mr. Lucas. Officer Coffer does not dispute that he was chewing Skoal or that he spit.

Officer Coffer disputes that he spit at or on Mr. Lucas (the charged conduct). The evidence in the record is lacking to support any such finding.

Conroy opines that Coffer spit at Mr. Lucas. (64). Said opinions comes from watching the video as Conroy was not an eye-witness.

Chief Corwin provided no testimony concerning spitting.

Chief Easley's opinion concerning spitting comes from his view of the video-tape that he see's Coffer spit at the head area of the person under arrest. (129 at p. 10:9-14). Chief Easley was made aware that Officer Coffer was found to be truthful to polygraph questions: 1) Did you purposely spit on Mr. Lucas (A: No); and 2) Did you purposely spit at Mr. Lucas (A: No.). (131 at pp. 18-19). In Board of Police administrative proceedings, the results of polygraphs may come into evidence. "[P]olygraph examinations may also be used as a means of clearing the reputation of a police officer after a charge of misconduct." Kendrick v. Board of Police Com'rs of Kansas City, Mo.,

945 S.W.2d 649, 654 n.3 (Mo.App. W.D.1997)(*Citing*, State ex rel. Bernsen v. City of Florissant, 641 S.W.2d 477, 480 (Mo.App. E.D.1982)).

Officer Coffer testified that he did not spit on Mr. Lucas. (89:12-14). Officer Coffer further testified that he was chewing Skoal and had to spit; but that the spit was not "meant towards him, directed towards him, or any kind of glory or pay back or anything such as that." (89:15-23).

Officer Bryant's statement is silent as to spitting.

The portions of Mr. Lucas' statements that are referenced in Sergeant Arroyo and Captain Lewis' reports make no mention of spitting.

The civilian ride-along's, Andrew Marr, statement is silent as to spitting.

In sum, the BOP's entire assertion of spitting comes from what they believe they saw on a video-tape. However, all of other the persons at the scene do not mention spitting. Officer Coffer testified concerning the same, and testified that he did not spit at or on Mr. Lucas. Officer Coffer even passed a lie detector test on these questions. The substantial competent evidence leaves only one conclusion - Officer Coffer did not spit at or on Mr. Lucas.

3. No Profanity

The record as a whole does not support that Officer Coffer used the profanity of "stupid son of a bitch" at Mr. Lucas. The only indication of the use of "stupid son of a bitch" is Captain Lewis' and Sergeant Arroyo's written statements in reports that the Mr. Lucas stated that Officer Coffer called him a "stupid son of a bitch". Neither of the actual written statements of Mr. Lucas states this. With Mr. Lucas' .152 degree of

drunkenness at the time of the event, and the lack of placing the "stupid son of a bitch" into any formal statement he gave to the police, makes this double hearsay comment, much less than substantial competent evidence, especially when viewing the record as a whole.

The civilian ride-along's, Andrew Marr, statement does not reflect the use of "stupid son of a bitch." His statement was only portions enclosed in the double hearsay reports of Lewis and Arroyo. (9). His statement was he believes or thinks that Officer Coffer used profanity, but does not remember. (9).

Officer Coffer's testimony does not reflect the use of "stupid son of a bitch." Moreover, during the hearing Officer Coffer was never asked by the Board's attorney whether or not he said any such statement.

Officer Bryant's statement does not reflect the use of "stupid son of a bitch." (*See*, absence thereof in 158-160).

No one else was present at the scene, and the audio portion of the recording did not activate. (94).

Based on the foregoing evidence, there is not substantial competent evidence that Officer Coffer called Mr. Lucas a stupid son of a bitch.

C. Conclusions and relief sought

There is not substantial competent evidence that Officer Coffer did any of the conduct charged in the specifications. Officer Coffer did not use unreasonable force. Officer Coffer did not spit on or at Mr. Lucas. Officer Coffer did call Mr. Lucas a "stupid son of a bitch".

Based thereon, the BOP's decision should be reversed. Officer Coffer should be reinstated and awarded his back pay from March 20, 2005.[8] Morgan v. City of St. Louis, 154 S.W.3d 6, 12 (Mo.App. E.D. 2004)(*Citing*, Edmonds v. McNeal, 596 S.W.2d 403, 408 (Mo. banc 1980))("An improperly dismissed public employee is entitled upon reinstatement to recover his lost back pay from the date of termination to the date of his reinstatement."). Officer Coffer should also be awarded his attorneys fees in vindicating his reinstatement. *Id.*

III.

The Board of Police Commissioner's Decision of September 5, 2005 was arbitrary, capricious and/or unreasonable and/or was an abuse of discretion in that the overwhelming weight of the evidence demonstrates that Coffer was not guilty of violating any of the police policies for which he was charged in the disciplinary proceeding where the police policies are not self-proving and the Police never introduced the same into evidence.

[8] Although Officer Coffer was terminated on March 4, 2005, a fifteen day suspension would require missing pay through and including March 19, 2005.

A. LEGAL ARGUMENT

No Evidence of Police Polices Violated

Officer Coffer was charged with Kansas City, Missouri Police Department Personnel Policy 201-7, Section III, Paragraphs 1, 9, 12, 15, 44, 59 and 60. (11). The text of said paragraphs is not set forth in the Charges and Specifications (11-12). [9]

In slightly different circumstances, the Court of Appeals in Powell v. State Farm Mut. Auto. Ins. Co., 173 S.W.3d 685, 690 (Mo.App. W.D. 2005), held that police policies are not self proving if they are not published in the Code of State Regulations. Moreover, the Court indicated that evidence had to be offered that the policy was in effect at the time of the event at issue. *Id.*

Officer Coffer asks that this Court take judicial notice that Kansas City, Missouri Police Department Personnel Policy 201-7 is not published in the Code of State Regulations. Certified copies of the Kansas City, Missouri Police Department Personnel Policy 201-7, Section III, Paragraphs 1, 9, 12, 15, 44, 59 and 60 were not placed into evidence at the time of the hearing. Furthermore, there was no testimony that said policies were in effect on September 12, 2003; the night that Officer Coffer allegedly violated them.

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[9] Unofficial typing in internal police reports set forth references that purport to be ¶¶ 9, 12 and 59 (none of which deal with excessive force). (115, 120). Excessive force is referenced in these internal memoranda with no correlation to any of the actually charged paragraphs. (115, 120).

As such, the BOP failed in its evidentiary burden to prove violations of said policies, where said policies and their effectiveness were not in the record. As such, the decision of the Board cannot stand as it was not supported by substantial evidence. In other words, the Board cannot prove violations of a policy without first proving the policy, and proving its effectiveness on the date in question.

The BOP might attempt to counter that it need not introduce such evidence as Coffer admitted that he was subject to discipline for the event of that evening. (97:3-18). However, as clarified on redirect, Officer Coffer was discussing his poor use of tactics. (97:13-18). The record is replete with examples of the poor use of tactics by Officer Coffer: "flagging," (47:6); approaching Lucas with his gun drawn, (49); too close contact with Lucas risking a gun grab, (51); removing Lucas without securing his hands, (51-52); pulling Lucas out by his head exposing his weapon to a gun grab, (53); placing ride-along at risk by not restricting him to the inside of the police car, (54-55); and failing to activate the audio portion of the videotape. (94).

However, in the end, the poor use of tactics is not what has been charged for the termination at issue in the Charges and Specifications. Officer Coffer concedes to a 15 day punishment based on his poor use of tactics, and nothing more. That is why he did not fight the punishment, but fought the actual charges made against him.

B. Relief Sought

There is not substantial competent evidence that Officer Coffer did any of the conduct charged in the specifications, or that said conduct was in violation of any police policy as the policies were not put into evidence. Based thereon, the BOP's decision should be reversed. Officer Coffer should be reinstated and awarded his back pay from March 20, 2005.[10] Morgan v. City of St. Louis, 154 S.W.3d 6, 12 (Mo.App. E.D. 2004)(*Citing*, Edmonds v. McNeal, 596 S.W.2d 403, 408 (Mo. banc 1980))("An improperly dismissed public employee is entitled upon reinstatement to recover his lost back pay from the date of termination to the date of his reinstatement."). Officer Coffer should also be awarded his attorneys fees in vindicating his reinstatement. *Id.*

IV.

The Board's decision to terminate Coffer was against the law or in violation of Resolution 02-06 in that the Boards actions rendered Resolution 02-06, from the procedural safeguard that it was supposed to be, into a sham proceeding by allowing for a hearing officer, but then totally disregarding said hearing officer without any logic or reason stated for overruling him and coming to contrary conclusions.

[10] Although Officer Coffer was terminated on March 4, 2005, a fifteen day suspension would require missing pay through and including March 19, 2005.

A. Sham Proceeding

Officer Coffer has the right to a hearing before the full Board of Police Commissioners (or proper quorum thereof). R.S.Mo. §84.600. This right is to protect an officer's procedural due process, which the Board cannot take away from the officer. *See*, State ex rel. Rogers v. Board of Police Com'rs of Kansas City, 995 S.W.2d 1, 6 - 7 (Mo.App. W.D. 1999). However, like all rights, including those under our Constitutions, said rights may be waived. *See*, McCormack v. Maplewood-Richmond Heights School Dist. Bd. of Educ., 935 S.W.2d 703, 708 (Mo.App. E.D. 1996).[11] In other words, an officer cannot be forced to use a hearing officer and must be given a hearing before the full board, if he so desires; but an officer may knowingly and willingly waive this right.

Officer Coffer entered into an agreement with the BOP to waive his right to a hearing before the full board, and to the use of a Designated Hearing Officer to protect his due process rights. (144). The Honorable John Moran (a retired Judge of the Circuit Court of Jackson County) was the DHO. (125).

Judge Moran heard testimony from Police Officer Conroy, a Police Academy training instructor who was not an eyewitness but evaluated the videotape of the events. He also heard testimony from Chief or Police James Corwin, who was not an eyewitness,

[11] No Court has expressly held that this right can be waived. However, a citizen's most fundamental rights under the Bill of Rights can, and are waived, on routine basis. As this right is a procedural due process right, it can be waived like any other right.

but merely confirmed the termination by former Chief of Police Richard Easley, (76-79), and from Police Officer Timothy Coffer, the terminated employee and only eyewitness to testify in person at the hearing and importantly, the only eyewitness who was subjected to cross examination at the hearing. Judge Moran also examined twelve exhibits. Judge Moran heard the evidence and witnesses and had the opportunity to observe the witnesses credibility and demeanor. (171 ¶¶10, 11; 183 ¶10; 184 ¶11).

Judge Moran made specific findings that the BOP failed in its burden of proof to prove excessive force, spitting or profanity. (176). Judge Moran further found that decision to terminate Officer Coffer is not supported by the evidence, and that termination is excessive, and out of proportion to the misconduct. (176).

Although issuing an Order and Findings, (177, 178-181), the Board summarily ignored Judge Moran's Findings, Conclusions and Recommendations without any explanation of why. The BOP attempts to fashion reason for imposing discipline, but it offers no reason whatsoever of how or why the eminent opinion of Judge Moran was erroneous or off-base in any manner.

Given Judge Moran's superior position to analyze the evidence in this matter, the Board's summary action demonstrated no consideration of the actual events at hearing, and thus deprived Officer Coffer of his procedural due process rights. It is as if the Board's actions were the foregone conclusion of a handmaiden to the Chief of Police.

V.

If the board acted *ultra vires* it was not entitled to deprive Coffer of his governmental employment in that the Board's decision to offer and advocate the use a hearing officer procedure to all police, pursuant to Resolution 02-06, failed to provide Coffer with the statutorily mandated public hearing before the board, which precluded the Board from depriving Coffer from his governmental employment. Thus, the use of the Hearing Officer Procedure was a sham which deprived Coffer of his statutory and procedural due process rights (regardless of the fact the he agreed to a hearing officer procedure).

A. *Ultra Vires*

Assuming, *arguendo*, that the use of the *ultra vires* doctrine was appropriate in this case, the Board of Police Commissioners actions were *ultra vires* and deprived Officer Coffer of his gainful governmental employment for the past four years and denied him his statutory and procedural due process rights by offering and advocating the use of a sham Hearing Officer Procedure, pursuant to Resolution 02-06, and subsequently terminating Officer Coffer prior to a public hearing before the Board. "Administrative agencies have only those powers granted them by statute, and no more." Wheeler v. Board of Police Com'rs, 918 S.W.2d 800, 803 (Mo.App. W.D. 1996)(*Citing*, AT&T Info. Sys. Inc., v. Wallemann, 827 S.W.2d 217 (Mo.App. W.D. 1992)). Additionally, there is no power listed giving a police board the ability to replace a public hearing before the

board with the Hearing Officer Procedure in Kansas City. R.S. MO. §84.610 (listing the powers granted to a police board).

As it does with all Police Officers, The Board of Police Commissioners advocated the use of a Hearing Officer Procedure to Officer Coffer following charges being filed against him by the Chief of Police. Officer Coffer subsequently attempted to waive his right to a public hearing in front of the Board in order to proceed under the Hearing Officer Procedure. However, Officer Coffer's attempt to waive his right to the public hearing was invalid as there is no other procedure for terminating an Officer statutorily prescribed except for a pubic hearing before the Board. The Board was aware that a public hearing was required before it could terminate Officer Coffer. Nevertheless, the Board, despite this knowledge, chose to terminate Officer Coffer prior to fulfilling its statutory obligation to hold a public hearing.

The Boards' actions terminating Officer Coffer subsequent to a review by a hearing officer were *ultra vires*. The Board attempted to overstep its statutorily listed powers by terminating Offer Coffer prior to a public hearing before the Board. Officer Coffer's attempt to waive his right to a hearing is moot. No agreement or waiver could confer power upon the board to terminate officers subsequent to the Hearing Officer Procedure as the Board strictly is limited to the powers provided by statute. Because Officer Coffer has been denied statutory and procedural due process he should be reinstated to his former position and awarded

his back-pay from March 20, 2005 through the present and his attorney's fees in vindicating his rights.

CONCLUSIONS

The BOP's appeal should be dismissed because this Court is without jurisdiction. Therefore, Judge Clark's opinion should be left as the controlling and final decision in this matter.

If this Court does have jurisdiction, then there is not substantial competent evidence supporting the BOP's decision. As such, Officer Coffer should be awarded his back-pay March 20, 2005 through present, and his attorney's fees in vindicating his rights.

Respectfully Submitted by,

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COUNSEL FOR RESPONDENT

Certificate of Compliance and Service

I, John P. O'Connor, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. Excluding the cover page, the signature block, the acknowledgement, this certification, and the certificate of service, the brief contains 9, 891 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. The CD-ROM filed with this brief contains a copy of this brief. It was scanned for viruses on November 19, 2008 using a Norton Corporate Anti-Virus Protect VirusScan program, which was originally installed in January 2006 and updated weekly since. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a CD-ROM containing a copy of this brief were mailed, postage prepaid, to Lisa S. Morris and Daniel J. Haus, Kansas City, Missouri Police Department 1125 Locust Street Kansas City, MO 64106 and William Quirk of Shugart Thompson and Kilroy at Twelve Wyandotte Plaza, 120 West 13th Street, Kansas City, Missouri 64105 on the ___ day of November, 2008.

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John P. O'Connor

APPENDIX

Page #