

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

C.A. No. 83-0094)

JAY GREGORY, SHERIFF OF)
PATRICK COUNTY, a Constitu-)
tional Officer of the)
Commonwealth of Virginia and)
Elected under the Laws of)
the Commonwealth,)

Defendant.)

MEMORANDUM OF PLAINTIFF UNITED STATES
IN SUPPORT OF ITS MOTION FOR
ENTRY OF JUDGMENT AND FOR RELIEF

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INTRODUCTION

The United States brought this action on June 29, 1983, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., against Jesse W. Williams in his official capacity as Sheriff of Patrick County, Virginia. Jay Gregory subsequently defeated Mr. Williams in a November 1983

election for Sheriff (Gregory Dep. 1/10/84, pp. 4-5) 1/ and was substituted as defendant Sheriff in this action pursuant to Rule 25(d), F.R.Civ.P.

A three-day bench trial was held on January 11, 12 and 20, 1984. On March 21, 1984, this Court granted the Sheriff's motion for a directed verdict, holding that deputy sheriffs in Patrick County are the "personal staff" of an elected official and therefore are exempt from coverage as "employee[s]" under Section 701(f) of Title VII. United States v. Gregory, 582 F. Supp. 1319 (W.D. Va. 1984). 2/ On an appeal taken by the United States, the United States Court of Appeals for the

1/ The depositions of Sheriff Williams taken by the United States on August 11 and October 12, 1983, the deposition of Sheriff Gregory taken by the United States on January 10, 1984, and the exhibits attached to those depositions were received into evidence by the Court at trial of this action, pursuant to Rule 32, F.R.Civ.P. (Tr. Trans. 1/11/84, pp. 11-12).

2/ Section 701(f) of Title VII, 42 U.S.C. 2000e(f), provides:

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Fourth Circuit issued a decision on October 1, 1985 (Slip. Op. No. 83-1613) remanding the action to this Court to reconsider its decision in light of Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984), an intervening decision of the Fourth Circuit issued on August 1, 1984.

It is the position of the United States that the application of the Fourth Circuit's decision in Curl to this action compels the conclusion that deputy sheriffs in Patrick County do not come within the "personal staff" exemption under Section 701(f) of Title VII, but rather are "employee[s]" covered by Title VII. Accordingly, the United States has moved this Court for the entry of judgment for, as well as the relief requested by, the United States 3/

3/ The facts and discussion of applicable law bearing upon the merits of the United States' action, as well as the relief sought by the United States, are set forth in the United States' Post-Trial Brief.

FACTS 4/

A. The Sheriff of Patrick County and His Duties

The Sheriff of Patrick County is a constitutional officer of the Commonwealth of Virginia and is elected for a four-year term by the residents of the County pursuant to the laws of the Commonwealth (Constitution of Virginia, Art. VII, Sec. 4; and Va. Code Ann. §24.1-86).

The Sheriff of Patrick County is responsible for the protection of life and property, the maintenance of order, the enforcement of State laws and local ordinances within the County, courtroom security, and the supervision and maintenance of the Patrick County jail (Pl. Complaint, para. 3; Def's. Answer, para. 3; Williams Dep. 8/11/83, p. 27; and Gregory Dep. 1/10/84, p. 5). In order to carry out his responsibilities, the Sheriff maintains and operates the Patrick County Sheriff's Department (the "PCSD") (Williams Dep. 8/11/83, p. 27). The Sheriff is responsible for the administration and operation of the PCSD, including: the preparation of the PCSD's annual budget and the submission of that budget to the County Board of Supervisors and the Virginia Compensation Board for approval (Williams Dep. 8/11/83, p. 27; and Govt. Exs. 27-31 attached to

4/ The facts set forth herein bear upon and are limited to the issue remanded to this Court by the Fourth Circuit. As noted, supra, the facts bearing upon the merits of the United States' action are set forth in the United States' Post-Trial Brief.

Williams Dep. 10/12/83); the payment of all bills incurred, and the administration of all funds expended, by the Sheriff (Williams Dep. 8/11/83, p. 27); and the recruitment, selection, hiring and appointment of all applicants for employment in the PCSD, as well as the assignment, transfer, promotion, demotion and termination of all employees of the PCSD (Pl. Complaint, para. 4; Def's. Answer, para. 4; Williams Dep. 8/11/83, pp. 27-28, and Govt. Exs. 6-8 attached thereto; and Williams Dep. 10/12/83, pp. 294-319).

B. The Operation of the Patrick County Sheriff's Department

Pursuant to State law, the Virginia Compensation Board annually fixes the salaries of the Sheriff and all PCSD employees, as well as all expenses of the PCSD (Va. Code Ann. §14.1-51 (Cum. Supp. 1984); and Govt. Exs. 27-31 attached to Williams Dep. 10/12/83). 5/ Pursuant to State law, the Virginia Compensation Board also annually fixes the number of employees of the Sheriff which the Board will pay for, as well as their job classifications, salary ranges and expense allowances (Va. Code Ann. §14.1-70 - 14.1-79 (Cum. Supp. 1985)). 6/ Indeed, Section 14.1-73.1:2 of the Virginia

5/ The Virginia Compensation Board and Patrick County jointly fund the operation of the PCSD. Those expenses of the PCSD allocable to each of them are set forth in Govt. Exs. 27-31 attached to Williams Dep. 8/11/83.

6/ To date, the Sheriff of Patrick County has not exceeded these ceilings set by the Board (Williams Dep. 8/11/83, pp. 64-65, and Govt. Exs. 27-31 attached thereto; and Gregory Dep. 1/10/84, pp. 7-8).

Code, adopted in 1980 and amended in 1985, specifically provides that:

The salary range of any full-time deputy sheriff who is primarily a courtroom security officer, a correctional officer or a law-enforcement officer and, if employed on or after July 1, 1974, also has a high school education or the equivalent thereof, shall be no less than that of a correctional officer within the classification and pay system for State employees and shall be administered in accordance with regulations for the system administered by the Department of Personnel and Training. The Governor shall provide the Compensation Board the salary range and regulations within that system as of July 1, 1980, and as of any subsequent date on which changes in the salary ranges and regulations may be adopted.

Further, under State law, employees of the PCSD are considered employees for purposes of vacation and sick leave, and are entitled to receive for each year of service at least two weeks vacation with pay and at least seven days sick leave with pay (Va. Code Ann. §15.1-19.3 (Cum. Supp. 1985)). Lastly, employees of the PCSD are covered by the Virginia Workman's Compensation Act and the Virginia Retirement Act (Va. Code Ann. §65.1-4 (Cum. Supp. 1985); Va. Code Ann. §51-111.10 (Cum. Supp. 1985); and Williams Dep. 8/11/83, pp. 62-63, 85), as well as by the Federal social security program for State and local employees (Va. Code Ann. §51.111.2).

The State, through the Virginia Compensation Board, has established the following statutory deputy sheriff positions:

road (or field) deputy; corrections officer; courtroom security officer; and investigator (Tribble Dep. 10/26/83, pp. 23-24). The positions of civil process server and dispatcher, as well as administrative staff positions (such as secretary and clerk) also have been established by the State; but these positions are not on the State's deputy pay scale (Id.; and Williams Dep. 8/11/83, pp. 71, 225-226).

As of July 1983, the first complete month following the commencement of this action, the Sheriff of Patrick County employed a total of twenty-three (23) persons on a full-time basis. As of January 1984, when this case went to trial, the Sheriff employed a total of twenty-two (22) persons on a full-time basis. The personnel of the PCSD as of July 1983 and January 1984, respectively, were employed in the following job classifications, with a numerical breakdown by sex:

<u>Job Classification</u>	<u>July 1983 7/</u>			<u>January 1984 8/</u>		
	<u>Total</u>	<u>Male</u>	<u>Female</u>	<u>Total</u>	<u>Male</u>	<u>Female</u>
Deputy-Shift Supervisor	2	2	0	1	1	0
Deputy-Investigator	2	2	0	2	2	0
Deputy-Road	4	4	0	6	6	0
Deputy-Courtroom Security Officer	2	2	0	2	2	0
Deputy-Chief Corrections Officer	1	1	0	1	1	0
Deputy-Corrections Officer	5	5	0	4	4	0

7/ Source: Govt. Exs. 33-35 attached to Williams Dep. 10/12/83.

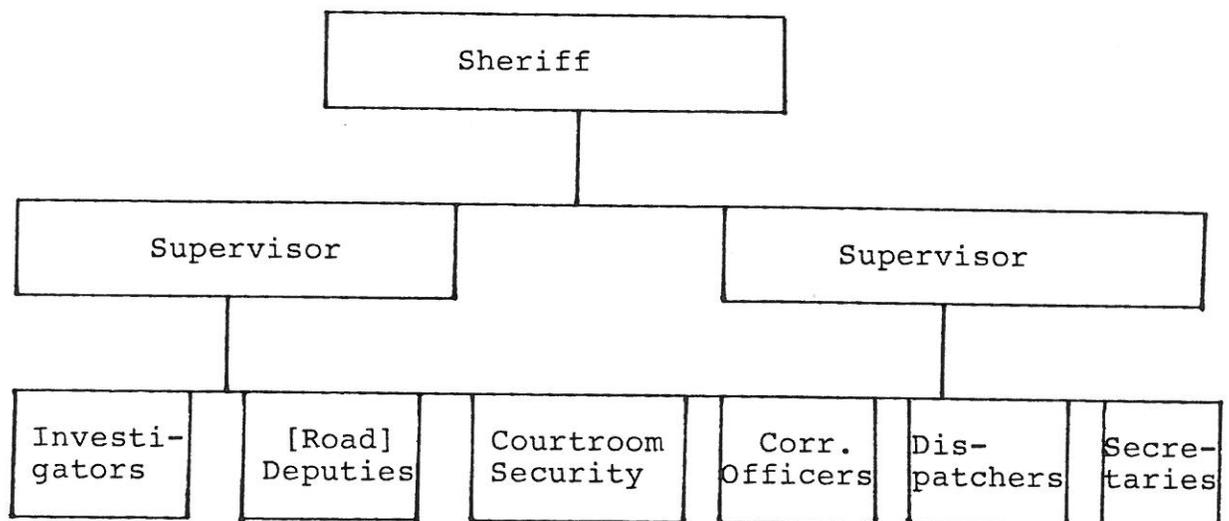
8/ Source: Gregory Dep. 1/10/84, pp. 8-13; and Gregory, Tr. Trans. 1/20/84, pp. 464-467.

<u>Job Classification</u>	<u>July 1983</u>			<u>January 1984</u>		
	<u>Total</u>	<u>Male</u>	<u>Female</u>	<u>Total</u>	<u>Male</u>	<u>Female</u>
Civil Process Server	1	0	1	0	0	0
Dispatcher	4	2	2	4	1	3
Secretary-Matron <u>9/</u>	1	0	1	1	0	1
Clerk-Steno	1	0	1	1	0	1

9/ In his July 28, 1983 Affidavit submitted to the Court, Sheriff Williams testified (p. 1) that he employed three women as sworn officers: Kathy Sheppard, assigned as civil process server; and Betty Martin and Naomi Pilson, assigned as matrons. However, contrary to the Sheriff's testimony in his Affidavit to the Court, Ms. Pilson never had been assigned by the Sheriff as a matron - and the Sheriff so admitted in his subsequent deposition taken by the United States as well as in his trial testimony (Williams Dep. 8/11/83, pp. 109, 134-145; Williams, Tr. Trans. 1/11/84, pp. 165-171). Rather, Ms. Pilson was assigned as a clerk-steno, as the Sheriff had so certified to the State Compensation Board (Govt. Ex. 39, p. 3, attached to Williams Dep. 10/12/83).

So also, although the Sheriff testified in his July 28, 1983 Affidavit to the Court that Ms. Martin was assigned as a matron, the Sheriff subsequently admitted in his August 11, 1983 deposition taken by the United States that Ms. Martin was assigned as secretary-matron, and that she worked almost exclusively as a secretary and only occasionally worked as a matron when she is called upon to search a female prisoner (Williams Dep. 8/11/83, p. 134). Ms. Martin testified that she has been asked to search female prisoners only on rare occasions (Martin, Tr. Trans. 1/20/84, p. 518).

The organizational structure of the PCSD is reflected in the following chart, prepared by Sheriff Williams shortly after he assumed office in 1980 (Williams Dep. 8/11/83, pp. 54-55, and Govt. Ex. 6, p. 2, a copy of which is attached herein for the Court's convenience; and Williams, Tr. Trans. 1/11/84, pp. 218, 219):



As reflected above, the PCSD has a hierarchical structure in which all employees are assigned specific job classifications; and as reflected below, they are expected to perform specific duties within those classifications. Indeed, the Sheriff is required to certify to the Virginia Compensation Board not only the job classification of each of his employees, but also what duties each of them perform in his or her respective job (Williams Dep. 8/11/83, pp. 67, 69, 71-72; and Govt. Exs. 27-31 attached to Williams Dep. 10/12/83).

A deputy sheriff in the PCSD may be employed in one of several different job classifications: road deputy, corrections officer, courtroom security officer, investigator, shift supervisor or chief corrections officer (Williams Dep. 8/11/83, p. 71, and Govt. Ex. 6 attached thereto). Deputies in the job classification of road deputy typically patrol the county, respond to calls for assistance, enforce traffic laws, make arrests and transport prisoners (Govt. Exs. 6 and 15 attached to Williams Dep. 8/11/83). Corrections officers are deputies who maintain the security of the Patrick County jail and the safety and welfare of its inmates (Govt. Exs. 6 and 14 attached to Williams Dep. 8/11/83). Courtroom security officers are deputies who provide courtroom security and assistance to the court and its staff (Govt. Exs. 6 and 13 attached to Williams

Dep. 8/11/83). Investigators are deputies who, as their job classification suggests, conduct criminal investigations of violations, conduct crime scene searches and collect and preserve evidence (Govt. Exs. 6 and 15 attached to Williams Dep. 8/11/83). All of the PCSD deputies, with the exception of the two shift supervisors and one chief corrections officer, discussed infra, are required to complete daily activity sheets, which confirm that they perform those tasks within their respective job classifications on a day-in, day-out basis (Govt. Exs. 82B-82N attached to Williams Dep. 10/12/83).

The PCSD also has three deputies who are employed in supervisory positions: two shift supervisors who are responsible for the supervision and performance evaluations of the other deputies -- including the chief corrections officer -- and non-deputy employees (Williams Dep. 8/11/83, pp. 50-52; Williams Dep. 10/12/83, p. 341; and Govt. Exs. 36, 38, 40-49, 62, 65, 69, 71, 78 and 81 attached thereto) and who are responsible for the PCSP when the Sheriff is absent (Williams Dep. 8/11/83, pp. 50-52, 162-163); and one chief corrections officer who is responsible for the supervision and, with the two shift supervisors, performance evaluations of the corrections officers (Williams Dep. 8/11/83, p. 56; and Govt.

Exs. 35, 40, 46, 48 and 69 attached thereto). 10/

The shift supervisors and the chief corrections officer report to the Sheriff, while the other "lower-echelon" employees of the PCSD (namely, the road deputies, investigators, courtroom security officers, corrections officers and dispatchers) report to one of the supervisors if he is present and can handle their problem or to the Sheriff if one of the supervisors is not present (Williams Dep. 8/11/83, pp. 56-57; Williams Dep. 10/12/83, pp. 340-341).

10/ In explaining the procedure followed by the PCSD in the performance evaluations of the non-supervisory deputies, Sheriff Williams testified (Williams Dep. 8/11/83, p. 52) that:

The two supervisors evaluate them, because they work with them; they are in contact with them. They both evaluate them, and then they sit down and go - they each make their evaluations, and then they get together and go over them.

They agree upon what they will submit to me. Then, I sit down and go over them with the two supervisors. Then, I go over them with the individuals.

These performance evaluations are set forth in formal written annual performance review forms maintained by the PCSD (Govt. Exs. 35, 36, 38, 40-49, 62, 65, 69, 71, 78 and 81 attached to Williams Dep. 8/11/83). Copies of a sampling of these performance evaluation forms for deputies and non-deputies alike are attached hereto for the Court's convenience: Thomas Gregory, Corrections Officer (Govt. Ex. 35, pp. 2-4, 6-9); Robert Day, Chief Corrections Officer (Govt. Ex. 36, pp. 11-14); Roger Gray, Courtroom Security Officer (Govt. Ex. 38, pp. 3-6, 7-9); Raymond Nicholson, Corrections Officer (Govt. Ex. 40, pp. 6-9, 10-13); David Morse, Road Deputy (Govt. Ex. 41, pp. 11-14); Katherine Sheppard, Dispatcher (Govt. Ex. 43, pp. 4-7, 8-11); Danny Stacy, Road Deputy (Govt. Ex. 44, pp. 4-7, 17-20); Steve Tatum, Dispatcher and later Corrections Officer (Govt. Ex. 46, pp. 7-10, 14-17); Claude Bowman, Corrections Officer (Govt. Ex. 48, pp. 3-6); Jay Gregory, Investigator (Govt. Ex. 62, pp. 17-20, 21-23); Owen Issacs, Road Deputy (Govt. Ex. 71, pp. 17-20, 21-24); and Dennis Runge, Investigator (Govt. Ex. 81, pp. 16-18, 19-21).

Not surprisingly, a most instructive description of the role and the duties and responsibilities of the Sheriff's two shift supervisors is provided by Sheriff Williams in a formal request dated February 25, 1981, to the Virginia Compensation Board with respect to Shift Supervisor Boyd, in which the Sheriff advised the Board (Govt. Ex. 113, pp. 41-42, attached to Tribble Dep. 10/26/83, a copy of which is attached hereto for the Court's convenience) that:

As a first line supervisor in the Sheriff's Department [Shift Supervisor Boyd] is part of management and the person with whom the average employee has the most direct or regular contact. First line supervisors are the focal point in communicating the policies and objectives of the Sheriff to employees. They stimulate, motivate and instill in employees a sense of participation in achieving the departments [sic] goals. They are responsible for the efficient and economical operations of the organizational unit they supervise.

As a shift supervisor, [Boyd] is responsible for the entire operations in the absence of the Sheriff. He must see that all functions are carried out and that the department continues to serve the public and perform in a manner that is mandated by the laws of the Commonwealth and expected by the public. 11/

The non-deputy personnel in the PCSD have job classifications and duties which are self-explanatory. The civil process server -- created by Sheriff Williams in 1982 but abolished by Sheriff Gregory when he took office in January 1984 -- was

11/ In this formal request to the Virginia Compensation Board, the Sheriff stated that both of his shift supervisors should be paid the same, "because their duties and responsibilities are the same" (Id.).

primarily responsible for serving civil papers, warrants, garnishee papers and summonses in the county (Williams Dep. 8/11/83, p. 111, and Govt. Ex. 43 attached thereto; and Gregory Dep. 1/10/84, pp. 18-19). The dispatchers monitor all law enforcement telephone calls and operate the radio transmitter to dispatch personnel (Govt. Exs. 6 and 12 attached to Williams Dep. 8/11/83). The secretary and clerk-steno perform clerical duties (Williams Dep. 8/11/83, pp. 108-110). 12/

C. Stated Qualification Standards and Selection Procedures for Deputies

Under Virginia law, a candidate for deputy sheriff must:

- (a) be a United States citizen;
- (b) undergo a background investigation;
- (c) be a high school graduate or have a G.E.D.;
- (d) possess a valid Virginia driver's license; and
- (e) undergo a complete physical examination (Va. Code Ann. §15.1-131.8 (Cum. Supp. 1985)).

Virginia law also requires that deputies

12/ The current secretary has the title "secretary-matron," since she is occasionally asked to search female prisoners (Williams Dep. 109-110; Govt. Ex. 34). Betty Martin, employed as a "secretary-matron" by both Sheriffs Williams and Gregory, testified at trial that she rarely performed as a matron (Martin, Tr. Trans. 1/20/84, p. 518). Indeed, at her October 1983 deposition, she testified that it had been over a year since she actually served as a matron (Martin Dep. 10/12/83, pp. 14-15).

successfully complete compulsory training courses 13/ administered by the Virginia Department of Criminal Justice Services within one year of hire (Va. Code Ann. §§9-169 and 14.1-73.1 (Cum. Supp. 1984)), 14/ and that failure to comply with such training requirement shall result in forfeiture of employment and benefits (Va. Code Ann. §9-181 (Cum. Supp. 1985)). 15/

During his tenure as Sheriff from January 1, 1980 to January 1, 1984, it was Sheriff Williams' stated policy to require all applicants for employment with the PCSD to have a

13/ The compulsory training courses for deputies include the "Law Enforcement Officer Training Course;" as well as the "Jailors and Custodial Officers Course" (for corrections officer deputies) and the "Courtroom Security Officers Course" (for courtroom security officer deputies) (Govt. Exs. 11, 11A, 13, 13A, 15 and 15A attached to Cimino Dep. 11/27/83, received into evidence during the trial of this action by stipulation of the parties.

14/ Prior to July 1, 1982, these compulsory training courses were administered by the Virginia Criminal Justice Services Commission (Va. Code Ann. §9-107-9-111.2 (Cum. Supp. 1983)).

15/ The State also requires in-service training for deputies (Govt. Exs. 12, 12A, 14 and 14A attached to Cimino Dep. 11/29/83).

high school diploma or a G.E.D. equivalent, 16/ and to submit a written application (Williams Dep. 8/11/83, p. 165, and Govt. Ex. 6, p. 2, attached thereto; and Williams Dep. 10/12/83, p. 294). The application itself, entitled "County of Patrick, Virginia Application for Employment," requested applicants to detail their personal record, education, military service, personal references and employment history (Govt. Ex. 16 attached to Williams Dep. 8/11/83).

Sheriff Williams next required that all applicants for employment with the PCSD take a law enforcement-related written examination administered by the Sheriff, and to obtain a score of at least 70 on that exam in order to be given further consideration for employment (Williams Dep. 8/11/83, p. 167, and Govt. Exs. 6, 10 and 11 attached thereto). 17/ Sheriff

16/ Source: Govt. Exs. 12-15 attached to Williams Dep. 8/11/83. Applicants for dispatcher, however, are allowed to substitute equivalent experience for the high school diploma or G.E.D. requirement (Govt. Ex. 12 attached to Williams Dep. 8/11/83).

17/ One of the two written examinations used alternatively by the PCSD is a police officer examination which was developed at the request of the International Association of Chiefs of Police under the direction of the Director of Personnel Research of the former United States Civil Service Commission (Id., Govt. Ex. 10 attached thereto).

Williams testified that he required applicants to take and pass a written examination as a means of trying to "get the best possible qualified candidates" (Williams Dep. 8/11/83, p. 167), and that the exam score achieved demonstrated relative ability to perform (Id., p. 169). Those applicants who passed the written examination were, during Sheriff Williams' tenure, required to pass a background investigation (Govt. Ex. 6, p. 2, attached to Williams Dep. 8/11/83; and Williams Dep. 10/12/83, pp. 294-302). At the conclusion of an applicant's background investigation, the Sheriff would decide whether or not to hire the applicant (Govt. Ex. 6, p. 2, attached to Williams Dep. 8/11/83; and Williams Dep. 10/12/83, p. 294).

D. Expectations by the Employees of the PCSD of Continued Employment beyond the Term of the Sheriff 18/

Although under State law a sheriff has a four-year term of office and deputies serve at the pleasure of a sheriff, the personnel in the PCSP -- deputies and non-deputies alike --

18/ In light of the Fourth Circuit's holding in Curl (740 F.2d at 1327-1328) that one does not have to have any property interest in one's employment to bring an employment discrimination claim under Title VII, it would appear that the facts set forth in this section may not be necessary for a determination of the issue on remand to this Court. However, the facts set forth herein reflect that there is no basis on this record for this Court's earlier findings that "deputies stand for re-election as does the Sheriff himself" (582 F. Supp. at 1322) and that deputies have "no expectations of continued employment" (582 F. Supp. at 1325). We thus ask the Court to reconsider these findings to the extent that such findings would form any basis for the Court's decision of the issue on remand.

have, as a factual matter, a reasonable expectation of continued employment beyond the term of the Sheriff.

The record reflects that in Patrick County candidates for Sheriff have no formal political party affiliations (Williams Dep. 8/11/83, p. 142), and that when Sheriff Williams ran for reelection he did not require any of his employees to support his candidacy as a condition of their continued employment (Id., pp. 142-143). Indeed, when Sheriff Williams assumed office on January 1, 1980, he hired 11 of the 16 persons who, until he assumed office, had been employed in the PCSD under Sheriff Williams' predecessor (Id., p. 154). Sheriff Williams testified that he hired these 11 persons on the basis of merit (Id., p. 155), and that he declined to hire the remaining five persons for cause (Id., pp. 151-155). Further, Sheriff Williams did not require any of the 11 persons who were employed in the PCSD at the time he took office, and who he hired, to submit an application (Id., p. 149), or to undergo the selection procedures set forth supra, pp. 15-17 (Id., p. 150).

When Sheriff Gregory assumed office on January 1, 1984, he hired 20 of the 23 persons who, until he assumed office, had been employed in the PCSD under Sheriff Williams (Gregory Dep. 1/10/84, pp. 8-14). Sheriff Gregory testified that he hired these 20 persons on the basis of merit, and that he declined to

hire two of the remaining three persons for cause and the third person because he abolished the job classification in which that person was employed (Id., pp. 15-18). Like his predecessor, Sheriff Gregory did not require any of the 20 persons who were employed in the PCSD at the time he took office, and who he hired, to submit an application or to undergo the selection procedures set forth supra, pp. 15-17 (Id., pp. 14-15).

ARGUMENT

DEPUTY SHERIFFS IN THE PCSD ARE EMPLOYEES FOR THE PURPOSE OF TITLE VII COVERAGE UNDER THE STANDARDS SET FORTH IN CURL v. REAVIS

A. The Fourth Circuit's Decision in Curl v. Reavis

In Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984), the Court held that the "personal staff" language of Section 701(f) was to be construed narrowly to exempt only those "who are in highly intimate and sensitive positions of responsibility on the staff of the elected official" (Id. at 1328 (quoting Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1981)). Examining the role of a deputy sheriff in Iredell County, North Carolina, the Court concluded that a deputy sheriff in that office was an "employee" covered by Title VII.

In Curl, the plaintiff, a female deputy sheriff who had been denied promotion to road patrol and detective positions, claimed discrimination on the basis of sex, in violation of Title VII.

Undertaking the requisite "careful examination of the nature and circumstances of [the] role" of deputy sheriff in that office, the Court in Curl concluded that it was not exempt from Title VII coverage (Id. at 1328). Initially, the Court dismissed as misplaced the sheriff's reliance on case law dealing with the status of deputy sheriffs in North Carolina, instructing that "none of the decisions cited involved Title VII claims interpreting §2000e(f)." Further, while acknowledging that deputies in that office serve at the pleasure of the sheriff, the Court instructed that "it is not necessary to have ... a constitutionally protected [property] interest to bring an employment discrimination claim under Title VII" (Id. at 1327-1328); and the Court further found that the position of deputy sheriff was created and compensation for that position was paid by the county pursuant to state law (Id. at 1328). The Court noted that the plaintiff deputy did not "occupy a high position within the chain of command" but, rather, that her duties were administrative (Id. at 1328). Given this role and level of responsibility, the Court concluded that it could not be said that the plaintiff deputy held

a "highly intimate and sensitive" position, requisite for a "personal staff" exemption for coverage under Title VII (Id. at 1328).

Having rejected the sheriff's contention that his deputies were not employees covered under Title VII, the Court in Curl upheld the lower court's determination that the plaintiff had been unlawfully denied a road patrol position, as well as the opportunity to acquire the requisite experience for promotion to detective due to the sheriff's maintenance of "a 'male line of progression' toward detective work" (Id. at 1331). The Court thus concluded that the plaintiff was entitled to reinstatement in the first available road patrol position with back pay and retroactive seniority (or experience) credit for the purpose of evaluating her promotion to any detective position she may seek (Id.).

B. Virginia Law, as It Pertains to the Role and Employment Status of Deputies, Is a Mirror Image of North Carolina Law and, thus, Provides No Basis for Exempting Deputies in the PCSD from Coverage under Title VII

In Curl, the Fourth Circuit at the outset emphasized (740 F.2d at 1327) that:

'a plaintiff's status as an employee under Title VII is a question of federal, rather than of state law'.... State law is only relevant 'insofar as it describes the plaintiff's position, including his duties and the way he is hired, supervised and fired.' Calderon, 639 F.2d at 273. Accord, Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1981).

The Fourth Circuit remanded the present action to this Court for reconsideration of its order because, at the time of filing of its opinion, this Court did not have the benefit of the Curl decision (Slip Op., p. 4, CA No. 84-1613). The Court of Appeals stated that remand was also necessary since the Curl decision involved North Carolina sheriffs and their deputies, whereas this action involves Virginia sheriffs and their deputies (Id.).

Virginia law, as it pertains to the role and employment status of deputies, is a mirror image of North Carolina law and, thus, provides no basis for exempting deputies in the PCSD from coverage under Title VII. Sheriffs in Virginia, like their counterparts in North Carolina, considered by the Court of Appeals in Curl, are constitutional officers elected under the laws of their state. 19/ Sheriffs in Virginia, like their

19/ Va. Cons't., Art. VII, Sec. 4, and Va. Code Ann. §24.1-86; N.C. Cons't., Art. VII, Sec. 2, and N.C. Gen. Stat. §162-1.

counterparts in North Carolina, have the exclusive right to hire and to discharge their deputies at will. 20/

Deputy sheriffs in Virginia, like their counterparts in North Carolina, are statutorily charged with the powers and

20/ Section 15.1-48 of the Virginia Code provides, in pertinent part, that:

... [T]he sheriff of any county or city...may at the time he qualifies as provided in §15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law.

* * * * *

Any such deputy may be removed from office by his principal. Such deputy may also be removed by the court as provided by ¶15.1-63.

Section 153A-103 of the North Carolina General Statutes provides, in pertinent part, that:

Subject to the limitations set forth below, the board of commissioners may fix the number of salaried employees in the offices of the sheriff.... In exercising the authority granted by this section, the board of commissioners is subject to the following limitations:

(1) Each sheriff ... elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office.

* * * * *

(2) Each sheriff ... elected by the people is entitled to at least one deputy, who shall be reasonably compensated by the county. The deputy so appointed shall serve at the pleasure of the appointing officer.

duties of their principal, the sheriff. 21/

Deputy sheriffs in Virginia, like their counterparts in North Carolina, must meet established state employment qualifications. 22/

Deputy sheriffs in Virginia, like their counterparts in North Carolina, must meet training standards imposed by the state. Virginia law requires that deputies successfully complete compulsory training courses administered by the Virginia Department of Criminal Justice Services within one year of hire. 23/ Failure to comply with such training requirements results in forfeiture of employment and benefits. 24/ Pursuant to North Carolina law, entry level deputy sheriffs also must successfully complete initial training courses, administered by the North Carolina Sheriff's Education and Training Standards Commission. 25/

21/ Va. Code Ann. §15.1-48, set out in footnote 20, supra.

Section 17E-1 of the North Carolina General Statutes provides, in pertinent part, that:

...The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff.

22/ Va. Code Ann. §§14.1-73.1:2 and 14.1-76 (1984 Cum. Supp. and 1985 Interim Supp.) and Govt. Exs. 27-31 attached to Williams Dep. 10/12/83.

23/ Va. Code Ann. §§9-169 and 14.1-73.1 (1984 Cum. Supp.)

24/ Va. Code Ann. §9-181.

25/ N.C. Gen. Stat. §17E-7(b).

Sheriffs in Virginia, like their counterparts in North Carolina, do not fix the salaries of their employees. Pursuant to Virginia law, the Virginia Compensation Board annually fixes the salary of the Sheriff and all the PCSD employees, as well as the expenses of the PCSD. 26/ Also pursuant to State law, the Virginia Compensation Board annually fixes the number of Sheriff's employees which the Board will pay for, as well as their job classifications, salary ranges and expense allowances. 27/ Similarly, in North Carolina each County Board of Commissioners fixes the number of salaried employees in that county's Sheriff's office 28/ as well as their salaries. 29/

26/ Va. Code Ann. §14.1-51 (1984 Cum. Supp.).

27/ Va. Code Ann. §§14.1-70 - 14.1-79 (1984 Cum. Supp. and 1985 Interim Supp.).

28/ N.C. Gen. Stat. §153A-103.

29/ N.C. Gen. Stat. §153A-102.

C. The Application of the Standards Set Forth by the Fourth Circuit in *Curl v. Reavis* to the Record Evidence before this Court in the Present Action Compels the Conclusion that Deputies in the PCSD Are Employees for the Purpose of Title VII Coverage

1. In holding that all deputies in the PCSD are members of the Sheriff's "personal staff" and, thus, exempt from coverage under Title VII, this Court placed great weight upon Virginia statutory law which provides that "deputies are appointed by the sheriff and serve at his will" (582 F. Supp. at 1325), and that deputies have "the legal authority ... to perform all functions and duties of sheriff" (Id.). The Court thus concluded (Id.) that:

A deputy is an extension of the sheriff and becomes one and the same as the sheriff. Nothing could be more personal than that.

However, as demonstrated supra, pp. 23-24, deputies in North Carolina also are statutorily charged with the powers and duties of the sheriff, and the Fourth Circuit in Curl made clear that deputies are not exempt from coverage under Title VII simply because they serve, as here, at the pleasure of the sheriff (740 F.2d at 1327-1328). Further, while deputies in Virginia, like their counterparts in North Carolina, may have the statutory authority to perform the duties of sheriff, the record before this Court clearly reflects (supra, pp. 9-14) that only the two deputies employed as shift supervisors in the PCSD have in fact been given the authority by the Sheriff for

the operation of the PCSD, and then only in the Sheriff's absence.

2. Since, by state statute, deputies in Virginia serve at the pleasure of the sheriff and their terms are coterminous with his, this Court also found -- as an additional basis for concluding that deputies in the PCSD are members of the Sheriff's "personal staff" -- that deputies in Virginia have "no expectations of continued employment" (582 F. Supp. at 1321, 1325), "no property interest in their positions" (Id. at 1321), or "any other usual benefits that accrue with longevity" (Id. at 1325).

As demonstrated, supra, however, the Court in Curl made clear that deputies are not exempt from Title VII coverage simply because they serve at the pleasure of the sheriff. Further,

... we need not consider whether a [Virginia] deputy sheriff has any property interest in his employment, since it is not necessary to have such a constitutionally protected interest to bring an employment discrimination claim under Title VII. (Curl, 740 F.2d at 1327-1328).

Instead, what is required in order to determine whether deputies in the PCSD are employees under Title VII is "a careful examination of the nature and circumstances" of their roles in the PCSD. Curl, supra, 740 F.2d at 1328. It is clear from the record evidence before this Court (supra, pp. 17-19)

that PCSD personnel -- deputies and non-deputies alike -- in fact have a reasonable expectation of continued employment beyond the term of the Sheriff. It is similarly clear that although deputies in Virginia do not have civil service protection under the "Policeman's Bill of Rights", Va. Code Ann. §2.1-116.1, et seq., they do in fact enjoy many of the "usual benefits that accrue with longevity." 30/

3. This Court, in its March 21, 1984 memorandum opinion, also alluded to the "high degree of accountability between a sheriff and deputy" (582 F. Supp. at 1321; see also Id. at 1325), and the concomitant public perception of a deputy as a representative of a sheriff" (Id. at 1321, 1325), as two additional bases for concluding that deputies in the PCSD are members of the Sheriff's "personal staff". As the Court opined (Id. at 1321-1322):

30/ Thus, the salaries of deputies in Virginia are tied to those of State-employed corrections officers (Va. Code Ann. §14.1-73.1-2); they are considered State employees for purposes of vacation and sick leave (Va. Code Ann. §15.1-19.3); they are covered by the Virginia Workman's Compensation Act and the Virginia Retirement Act (Va. Code Ann. §65.1-4; Va. Code Ann. §51.11.10; and Williams Dep. 8/11/83, pp. 62-63, 84); and they are covered by the Federal social security program for State and local employees (Va. Code Ann. §51.111.2).

... being an elected official, the sheriff must depend on his deputies to be his eyes and ears as to public sentiment and opinion. Unofficially, it is the deputy's job to know what is going on in his assigned [geographical] area of the country that might affect the sheriff favorably or adversely in the eyes of the voting public.

.
In a very real and practical sense, the deputies stand for re-election as does the Sheriff himself.

Assuming arguendo that there exists in the PCSD a high degree of accountability between the Sheriff and his deputies and a concomitant public perception of PCSD deputies as representatives of the Sheriff, such situation would not distinguish the deputies in the PCSD from other law enforcement officers. Indeed, this Court itself observed (582 F. Supp. at 1321) that such situation exists between a sheriff and his deputies throughout Virginia. Basing an exemption to Title VII's coverage upon such a rationale would thus exempt, at a minimum, all deputies throughout Virginia. The Court in Curl rejected just such a "wholesale" exclusion of all North Carolina deputies (740 F.2d at 1328). Further, it must be remembered that although North Carolina sheriffs -- like their Virginia counterparts -- are elected officials and although deputy sheriffs in North Carolina -- like their Virginia counterparts -- are statutorily charged with the powers and duties of their principal (see, pp. 23-24, supra), the Court in

Curl held that a deputy sheriff in the Iredell County Sheriff's Department was an employee covered by Title VII; and the Court thus concluded that the plaintiff was entitled to reinstatement in the first available road deputy position with back pay and retroactive seniority (or experience) credit for the purpose of evaluating her performance to any detective position she may seek (740 F.2d at 1331).

Lastly, the findings upon which this Court based its accountability-public perception rationale as to the PCSD have no support in the record, and the rationale itself is totally inapplicable to those deputies in the PCSD whose contact with the general public is limited. Thus, there is no record evidence that any deputies in the PCSD are assigned, either officially or unofficially, to certain geographical areas of the county to monitor the sentiment of the voting public. 31/

4. The last two bases advanced by this Court for concluding that deputies in the PCSD are members of the Sheriff's "personal staff" are the "size of the sheriff's

31/ Indeed, assignments of that type would be impossible for deputies employed as corrections officers and courtroom security officers.

staff, and the rural nature of Patrick County" (582 F. Supp. at 1325).

In relying upon the size of the PCSD and the rural nature of the county, this Court appears to be seeking a "small office" exemption to Title VII. No such exemption is set forth in Section 701(f) of Title VII, no such exemption was intended by Congress 32/ and no such exemption was recognized by the Fourth Circuit in Curl. To do this would be to replace the requisite "careful examination of the nature and circumstances" of the role of deputies in the PCSD (Curl, 704 F.2d at 1328) with a "wholesale" exclusion under Title VII of deputies in small, rural offices throughout the State (Id.). According to Virginia Compensation Board records, there were during 1983 twenty-five (25) counties throughout Virginia in Patrick County's population class (10,000-20,000) having sheriff's departments employing a total of approximately 464 persons (Govt. Exs. 95-98 attached and Tribble Dep. 10/26/83).

32/ Congress defined Title VII coverage based upon the number of employees of an employer. See Section 701(b), 42 U.S.C. §2000e(b), under which the PCSD is covered.

Clearly, the exemption of all deputies in the PCSD -- and, by inference, the exemption of all deputies in these other sheriff's departments -- based upon a "small office" rationale would fly not only in the face of clear Congressional intent to the contrary but also against the explicit direction of the Court in Curl that what is required is a "careful examination of the nature and circumstances" of the role of deputies in the PCSD.

The only attempt undertaken by this Court to demonstrate the relevance of the size of the PCSD and the rural nature of Patrick County to the issue of the coverage of deputies in the PCSD under Title VII is the Court's reference to Ramey v. Harbor, 589 F. 2d. 753, 757 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979), and Whited v. Fields, 581 F. Supp. 1444 (W.D. Va. 1984). The Court initially observed (582 F. Supp. at 1325) that the Court in Ramey had:

...taken 'notice of the intimate relationship that undoubtedly exists between the Sheriff and his deputies in a small county (like Lee County, Virginia). The efficient operation of the Sheriff's office [in Lee County] requires a high degree of mutual cooperation, confidence and support.'

The Court further partially quotes (582 F.Supp. at 1325) from the district court's decision in Whited that "...in rural counties ... there is a personal relationship not just between

the sheriff and deputy but with sheriff and citizen and the deputy and citizen."

This Court's reliance upon Ramey and Whited is misplaced, "for [neither of those] decisions ... involved Title VII claims interpreting §2000e(f)" (Curl v. Reavis, supra, 740 F.2d at 1327). Rather, both cases dealt with the application of the Supreme Court's holding in Elrod v. Burns, 427 U.S. 347 (1976), that the discharge of nonconfidential, nonpolicy-making public employees on a partisan political basis violates the First Amendment. The court in Whited also wrestled with a subsequent Supreme Court decision, Branti v. Finkel, 445 U.S. 507 (1980). Unlike here, where the record reflects the absence of political considerations in the hiring of deputies in the PCSD and a stability of the PCSD personnel from one sheriff to the next, both Ramey and Whited dealt with intense partisan political battles for the office of sheriff in Lee County and Page County, Virginia, respectively, which usually resulted in a complete change of deputy personnel by a newly-elected sheriff. Ramey, supra, 589 F.2d at 756-757; Whited, supra, 581 F.Supp. at 1445, 1446. Even so, overlooked by the Court here is the Court's statement in Ramey (589 F.2d at 754) that "Deputy

sheriffs in Lee County are nonconfidential, nonpolicy
-making public employees." 33/

What is required by the Court's decision in Curl is a "careful examination of the nature and circumstances" of the role of deputies in the PCSD; what is proscribed by the Court's decision in Curl is the "wholesale" exclusion under Title VII coverage of deputies in the PCSD based upon a reference to judicial decisions involving different factual situations.

5. The exemption in Section 701(f) of Title VII was intended to be narrowly construed (Curl, supra, 740 F.2d at 1328) to exempt only elected officials and their "first line advisors" -- those select few who must be in a confidential relationship because they advise the elected official. Thus, the exemption applies only to appointees in the most

33/ In addition to Ramey and Whited, this Court also referred (582 F. Supp. at 1321) to McBee v. Jim Hogg County, 703 F.2d 834, 840 (5th Cir. 1983), wherein the Fifth Circuit observed that "there is a high degree of accountability between a sheriff and deputy [which] 'equates with the confidential relationship of a sheriff deputy's employment.'" Like Ramey and Whited, however, McBee was a political discharge case and did not involve a Title VII claim interpreting §2000e(f). Thus, reliance upon McBee is misplaced (Curl, supra, 740 F.2d at 1327). Also, the panel's decision in McBee referred to by this Court has been vacated by the Fifth Circuit en banc, 730 F.2d 1009 (1984).

"intimate and sensitive positions of responsibility on the staff of the elected official (Id.). The exemption is limited to those who hold a "high position in the chain of command" (Ibid), and not to the large percentage of employees who administer the decisions of the elected official.

Although this Court held in its March 21, 1984 memorandum opinion that all deputies in the PCSD are exempt from Title VII (582 F. Supp. at 1325), the record before this Court clearly demonstrates that: not all deputies in the PCSD hold a "high position within the chain of command" (Curl, supra, 740 F.2d at 1328); not all deputies in the PCSD are "first line advisors" (Id.); and not all deputies in the PCSD have a working relationship with the Sheriff which is "highly intimate and sensitive" (Id.). Indeed, the record reflects that there are only two deputies in the PCSD -- the two shift supervisors -- who arguably hold "high position[s] within the chain of command." (see, supra, pp. 9-14). Even then, however, there is no evidence that either of the shift supervisors advise the Sheriff with respect to policymaking. The remaining deputies in the PCSD, as in Curl, have responsibilities that are administrative, to carry out the assigned duties in their respective job classifications: road deputy, corrections officer, investigator and courtroom security officer.

On the foregoing record, we submit there can be no valid reason for excluding from Title VII coverage the non-shift supervisor deputy positions in the PCSD which the United States contends were unlawfully denied Stephanie Ressel, Doris Scales, Wanda Hylton and Kathy Sheppard, in light of the Fourth Circuit's conclusions in Curl that the plaintiff there had been unlawfully denied a road deputy position, as well as the opportunity to acquire the requisite experience for promotion to detective and, thus, was entitled to instatement in a road deputy position with, inter, alia, retroactive seniority (or experience) credit for the purpose of evaluating her promotion to any detective position she may seek (740 F.2d at 1331).

CONCLUSION

Based upon the facts and discussion of the applicable law both herein and in our Post-Trial Brief, this Court should grant the United States' Motion for the Entry of Judgment and for Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John M. Gadzichowski, hereby certify that on October 30, 1985, I served by Federal Express, a copy of the foregoing Motion of Plaintiff United States For Entry of Judgment and For Relief, and Memorandum in support thereof, upon the following counsel:

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