

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION ON**

**“Police Officers’
Bill of Rights”**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 25

**COMMONWEALTH OF VIRGINIA
RICHMOND
1993**



COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

General Assembly Building

FREDERICK L. RUSSELL
EXECUTIVE DIRECTOR

November 17, 1992

TO: The Honorable L. Douglas Wilder, Governor of Virginia
and Members of the General Assembly

MEMBERS:
FROM THE SENATE OF VIRGINIA
ELMO G. CROSS, JR., VICE-CHAIRMAN
VIRGIL H. GOODE, JR.
EDGAR S. ROBB

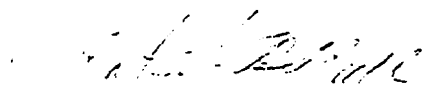
FROM THE HOUSE OF DELEGATES
ROBERT B. BALL, SR., CHAIRMAN
JAMES F. ALMAND
JEAN W. CUNNINGHAM
V. THOMAS FOREHAND, JR.
RAYMOND R. GUEST, JR.
CLIFTON A. WOODRUM

APPOINTMENTS BY THE GOVERNOR:
ROBERT C. BOBB
ROBERT F. HORAN, JR.
GEORGE F. RICKETTS, SR.
ATTORNEY GENERAL'S OFFICE
H. LANE KNEEDLER

House Joint Resolution 166, agreed to by the 1992 General Assembly directed the Virginia State Crime Commission to "study the feasibility of extending the "Police Officers' Bill of Rights" to deputy sheriffs in Virginia and to "submit its recommendations to the Governor and the 1993 Session of the General Assembly."

In fulfilling this directive, a study was undertaken by the Virginia State Crime Commission. I have the honor of submitting herewith the study report on "Police Officers' Bill of Rights."

Respectfully submitted,


Robert B. Ball, Sr.
Chairman

RBB:sc

**Members of the
Virginia State Crime Commission, 1992**

From the Virginia Senate:

Elmo G. Cross, Vice Chairman
Virgil H. Goode, Jr.
Edgar S. Robb

From The House of Delegates:

Robert B. Ball, Sr., Chairman
James F. Almand
Jean W. Cunningham
V. Thomas Forehand, Jr.
Raymond R. Guest, Jr.
Clifton A. Woodrum

Appointments by the Governor:

Robert C. Bobb
Robert F. Horan, Jr.
Rev. George F. Ricketts, Sr.

Attorney General's Office:

H. Lane Kneeder

**Crime Commission Study of
“Police Officers’ Bill of Rights” (HJR 166)**

Crime Commission Subcommittee Members

Robert C. Bobb
Delegate V. Thomas Forehand, Jr.
Senator Virgil H. Goode, Jr.
Mr. Robert F. Horan, Jr.
Reverend George F. Ricketts, Sr.

Crime Commission Staff

Frederick L. Russell, Executive Director
D. Robie Ingram, Staff Attorney
Michael P. Maddox, Staff Attorney
Dana Schrad, Staff Attorney
Susan Bass, Research Analyst
Sylvia Coggins, Executive Assistant
Gina Ford, Secretary
Maryann C. Jayne, Intern

**HOUSE JOINT RESOLUTION 166
STUDY OF
“POLICE OFFICERS’ BILL OF RIGHTS”**

TABLE OF CONTENTS

I.	Authority for Study.....	1
II.	Members Appointed to Serve.....	1
III.	Executive Summary.....	2
IV.	Study Design.....	3
V.	Background.....	4
VI.	Study Issues.....	5
VII.	Legal Findings.....	6
VIII.	Survey Results.....	10
IX.	Conclusions.....	11
X.	Recommendation.....	12

Appendix A:	House Joint Resolution 166 Senate Bill 309 House Bill 291
Appendix B:	Statutes Controlling the Appointment of Deputies, Their Powers, How They Are Removed
Appendix C:	“The Police Officers’ Bill of Rights”
Appendix D:	Caselaw Governing Legal Applicable to HJR 166
Appendix E:	Survey and Survey Results by Office and Department
Appendix F:	Summary of “Official Positions”/Correspondence

Study of "Police Officers' Bill of Rights"

HJR 166 (1992)

I. Authority for Study

During the 1992 Session of the Virginia legislature, Delegate Glenn R. Croshaw sponsored House Joint Resolution No. 166 (HJR 166), requesting and authorizing the Virginia State Crime Commission to "study (i) the feasibility of extending the "Police Officers' Bill of Rights" to deputy sheriffs in Virginia; (ii) the adequacy of the "Police Officers' Bill of Rights;" and (iii) such other remedial avenues of due process as may be appropriate for appointees of constitutional officers."

(See, Appendix A.)

Sec. 9-125 of the Code of Virginia establishes and directs the Virginia State Crime Commission "to study, report, and make recommendations on all areas of public safety and protection." Sec. 9-127 of the Code of Virginia provides that "the Commission shall have the duty and power to make such studies and gather information in order to accomplish its purpose, as set forth in Sec. 9-125, and to formulate its recommendations to the Governor and the General Assembly." Sec. 9-134 of the Code of Virginia authorizes the Commission to "conduct private and public hearings, and to designate a member of the Commission to preside over such hearings." The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of the "Police Officers' Bill of Rights" as requested and authorized by HJR 166.

II. Members Appointed to Serve

At the April 21, 1992, meeting of the Crime Commission, Chairman, Robert B. Ball, Sr., Delegate from Henrico, selected Delegate V. Thomas Forehand, Jr., to serve as Chairman of the subcommittee (Subcommittee No. IV) assigned to study "Police Officers' Bill of Rights". The following members of the Crime Commission were selected to serve on the subcommittee:

Delegate V. Thomas Forehand, Jr., Chesapeake
Robert C. Bobb
Senator Virgil H. Goode, Jr.
Mr. Robert F. Horan, Jr., Fairfax
The Reverend George F. Ricketts, Sr., Richmond

III. Executive Summary

The final report of the staff on the study of the "Police Officers' Bill of Rights" was received by the Crime Commission's Subcommittee No. IV at its meeting of September 22, 1992. The subcommittee approved the report, with a single recommendation, for submission to the full Commission. The Commission considered and approved the report and recommendations at its November 13, 1992, meeting.

The study, authorized by House Joint Resolution 166 (1992), sponsored by Delegate Glenn R. Croshaw, sought, as its prime objective, to determine the feasibility of extending the "Police Officers' Bill of Rights" to Virginia's deputy sheriffs. Because the necessity for consideration of the second and third issues was dependent upon the determination of the prime issue, the subcommittee limited the scope of the study to only the prime study issue.

Significant legal research was done on the status of the sheriff/deputy relationship, specifically with respect to the sheriff's ability to hire and fire his deputies at will. Additionally, all Virginia sheriffs and 25 selected police chiefs were surveyed by mail on the subject of the applicability and success of any grievance procedure employed in those offices. The legal research determined that the sheriff/deputy relationship in Virginia is steeped in history and is unique insofar as the two are deemed "as one" on the basis of a presumed requirement of trust and confidence. The surveys showed that, despite no legal requirement for their use, almost half of the responding sheriff's offices, do use some style of grievance procedure.

Compelling arguments were raised by all those with competing interests in the outcome of the study. While it was argued that deputies are appropriately political appointees of their elected superiors in whom significant trust and confidence must be placed and who, by virtue of that, must serve at a sheriff's pleasure, it was also argued that deputies, particularly in large offices, perform an identical function to police officers who do have the right to disciplinary hearing and, in most cases, binding panel procedures.

On the basis of all the information and arguments before it, the subcommittee determined that the idea of extending the "Police Officers' Bill of Rights" to sheriff's deputies had significant merit but that to do so would also significantly impair a sheriff's ability to run his office smoothly by diminishing the bond of trust and confidence necessary between an elected official and his political appointee. The subcommittee, therefore, recommended that the status quo be preserved. Upon consideration of the findings and recommendations of the subcommittee, the Crime Commission concurred with the subcommittee conclusions.

IV. Study Design

In accordance with the implicit directives of HJR 166 (1992), the subcommittee conferred with, and heard extensive testimony from, representatives of the entire spectrum of Virginia's law enforcement community. The subcommittee also conferred with those representatives from the Virginia General Assembly with an interest in the study including the patrons of identical House and Senate bills offered during the 1992 Session (and carried over) which would amend the code to extend the Bill of Rights to deputies. Significant correspondence, both solicited and unsolicited, was received and reviewed by the subcommittee. Commission staff researched the legal implications of extending the "Police Officers' Bill of Rights" to deputy sheriffs and surveyed all Virginia sheriff's offices and 25 selected police departments on the subject of their grievance procedures. The subcommittee carefully reviewed, with the full advice of those persons listed

above, the full array of complex information before it and made findings and recommendations, as necessary and appropriate, to the full Commission. Meetings of, and reports to, the subcommittee were scheduled as follows:

Initial Report/Meeting May 26, 1992
Interim Report/Public Hearing July 21, 1992
Final Report/Meeting September 22, 1992

The subcommittee presented its findings and recommendations to the full Commission on November 17, 1992.

V. Background

As cited in HJR 166 (See, Appendix A.), the Virginia Legislature has provided already for procedural guarantees for police officers. Chapter 10.1 (§2.1-116.1 et seq.) of Title 2.1 of the Code of Virginia sets forth the “Law Enforcement Officers’ Procedural Guarantees,” otherwise known as the “Police Officers’ Bill of Rights.” (See, Appendix C.)

The “Police Officers’ Bill of Rights” provides for either binding or non-binding grievance procedures for officers depending upon which option is selected by the particular department. However, the “Police Officers’ Bill of Rights” does not offer those guarantees to deputy sheriffs; they are specifically excluded from its protections. Any such guarantees would have to be made available per a sheriff’s directive or by virtue of certain deputies’ status as state employees. Senator Kenneth W. Stolle and Delegate Shirley F. Cooper offered identical bills during the 1992 Session of the General Assembly to extend those guarantees to deputy sheriffs. The bills were carried over.

The study resolution acknowledges the sheriff’s role as a Constitutional officer and the deputy’s appointment concurrent with the sheriff’s term. And history and Virginia law support the proposition that a sheriff should have the right to

hire and fire at will based upon the unique and political nature of the sheriff/deputy relationship. But because sheriff's deputies with law enforcement responsibility perform the same job and suffer the same risks as police officers, there is an argument that they should have the same right to hearing rather than suffer the possibility of summary discharge when charged with a failure in job performance.

VI. Study Issues

The primary issue raised by the study resolution was to determine the "feasibility of extending the "Police Officers' Bill of Rights" to deputy sheriffs in Virginia." Additionally, the Commission was asked to study the adequacy of the "Police Officers' Bill of Rights" as it now stands and to investigate other avenues of due process appropriate for appointees of constitutional officers. Based upon a reading of the recitals in the body of the resolution, the first item of request was the apparent focus of the study. The second was a very broad request for which there is no benchmark (By what standard is "adequate" to be measured?). The third opens the study to consideration of procedural guarantees for all constitutional officers' appointees rather than only to sheriff's deputies. The subcommittee determined, however, that the subsidiary issues might not be germane to the primary focus of the study and held their investigation in abeyance until, and dependent upon the nature of the resolution of, the primary issue.

Nonetheless, significant subsidiary issues were raised, among them:

A. Whether to redefine "Police Officer" to include sheriff's deputies: "Police officer" is defined for the purposes of the Chapter (Chapter 10.1 (§2.1-116.1 et seq.) of Title 2.1 of the Code of Virginia) as essentially any law enforcement officer of any local or state police force except "the sheriff's department of any county or city." (See, Appendix C.)

B. Whether deputy sheriffs should be accorded the full panoply of procedural guarantees offered by the "Police Officers' Bill of Rights": The Chapter accords a

police officer “minimum rights” per §2.1-116.9 (but requires the department to promulgate more thorough grievance procedures) or allows him to avail himself of local governing body grievance procedures to redress grievances based on matters which could lead to his dismissal, demotion, suspension or transfer.

C. Whether to offer a property right in employment to deputy sheriffs: The rights accorded police officers under the Chapter are deemed a property right in continued employment which cannot be taken without Fourteenth Amendment due process. Hummelbrand v. Harrison, 484 F. Supp. 803 (W.D. Va. 1980). The implicit rationale for denying sheriff’s deputies those rights available under Chapter 10.1 of Title 2.1 is set forth in the study resolution as follows: “deputy sheriffs serve concurrently with and at the pleasure of their principal.” In other words, deputies are considered political appointees. Inasmuch as police officers are “ordinary” (and, thus, vested employees by virtue of the Chapter) employees as opposed to “at-will” appointees of Constitutional officers, the rationale is inapplicable to them.

D. Whether deputy sheriffs are denied equal protection: As a result of the exclusion of sheriff’s deputies from the procedural guarantees, similarly situated law-enforcement officers (i.e., deputies and police officers) are treated quite differently re expectation of continued employment. The difference in treatment is quite logical when comparing a small, “intimate” sheriff’s department to a metropolitan police department; however, the difference fades as the size of a sheriff’s department increases and functions more like a metropolitan police department.

VII. Legal Findings

A. Overview of Current Law (See , Appendix B for relevant controlling statutes and Appendix D for detailed discussion of applicable caselaw.)

Under the Virginia Constitution, Article VII, § 4, a sheriff is a constitutional officer elected by the people.

Under settled Virginia caselaw, he serves independent of state and municipal governments; however, he is subject to statutory constraints of the general law or special act. Sherman v. City of Richmond. And he and his deputy are deemed to have a close and confidential relationship, considered historically to be “as one.” Miller v. Jones cited in Whited v. Fields.

Va. Code Sec. 15.1-48 provides that “Any [such] deputy may be removed from office by his principal.” This has been universally interpreted as a right to at-will discharge without resort to any sort of grievance procedure or “due process.” The right to at-will discharge fosters and preserves the close relationship. Virginia caselaw acknowledges no property interest in continued employment for a sheriff's deputy.

An exception to this accepted holding is found in Angle v. Overton. In that case, the Va. Supreme Court held that where a sheriff's deputy took advantage of existing binding grievance procedures, the sheriff was bound by the outcome, despite the historically recognized right to at-will discharge. This decision is regarded by the federal courts interpreting it to have been based on administrative law or estoppel rather than upon an ostensible property interest in continued employment.

Another exception to this rule is found in both Branti v. Finkel and Elrod v. Burns, U.S. Supreme court cases which stand for the proposition that pure patronage discharges are unconstitutional and deprive the discharged party of his First Amendment right to political expression if his position is not “properly conditioned upon his allegiance to the political party in control of the county government.” Branti. Even though no Virginia court has yet reached this issue per se (although both cases are widely discussed), it would appear that if a deputy were discharged purely because of his party affiliation, without more, he would retain his entitlement to employment.

B. Changes in Current Law Required to Include Sheriff's Deputies within "Police Officers' Bill of Rights":

1. Amend the Police Officers' Bill of Rights (Chapter 10.1 of Title 2.1) to include sheriffs' deputies, thereby creating for them a right to due process and a property interest in their employment..

2. Amend §15.1-48 to remove or amend language providing that a deputy may be removed from office by his principal - because this section is interpreted to confer the right to discharge a deputy at-will and would be in conflict with a grievance procedure which affords due process rights and creates a property interest in employment.

3. Amend §2.1-116.1 to redefine police officer to include deputy sheriffs.

C. Result of the Above Statutory Changes:

1. The relationship between sheriff and deputy would arguably be redefined. Current cases acknowledge that a sheriff is absolutely liable civilly and criminally for the acts of his deputies. In other words, the sheriff and deputy are as one. The amendments would necessarily create a more traditional employer/employee relationship.

2. A sheriff would hire his deputies on the basis of their qualifications to do the job. He would not select, nor would he be allowed to select, his deputies on the basis of their loyalty, trust or mere party affiliation. An incoming Republican would possibly be required to retain his Democratic staff. (Depending upon interpretation of Branti and Elrod in Virginia, the prohibition against firing on the basis of political affiliation **may already be existing law**. However, even if Branti and Elrod do describe the current state of the law, a deputy who actively campaigns against the ultimately elected sheriff might still be subject to discharge under §15.1-48. Campaigning actively against your superior is not likely to be construed as maintaining the "as one" relationship. Furthermore,

such activity may not be protected by Branti even if a deputy sheriff is deemed an appropriate political appointment. [See, Caveat, below.]

3. A sheriff could not fire a deputy without cause (or proof of wrongdoing). A deputy would have an opportunity for redress of grievances against him and would have an opportunity to contest what could otherwise be a wrongful discharge by a sheriff based upon uncontestable or unsubstantiated charges.

4. A small sheriff's office with only a few deputies (and which functions pursuant to the "as one" relationship between sheriff and deputy) would be placed on an equal footing with a large metropolitan sheriff's office which performs all the functions of a large police department (rather more impersonally). Virginia courts wrestling with the overall issue acknowledge a difference (and value) in the relationship of deputies in a small, as opposed to large, sheriff's office.

At least one of the questions for the Commission to answer was, then, whether that small office relationship (requirement?) of trust and loyalty with its concomitant potential for abuse should be either preserved as-is or replaced with a traditional employer/employee relationship which essentially nullifies the requirement of trust and loyalty.

Caveat

It is noteworthy that Branti v. Finkel arose in New York and involved the political patronage dismissal of two assistant public defenders by the newly appointed chief public defender who was a member of the opposing political party. The court ruled that such discharge was inappropriate re assistant public defenders but specifically reserved judgment on the issue of such dismissal re assistant prosecutors, a point echoed by the Fourth Circuit in U.S. v. Gregory. This reservation of judgment on whether an assistant prosecutor is a legitimate political appointment could extend as well to sheriff's deputies.

VIII. Survey Results

A. Results of Sheriffs Surveys (See, Appendix E for detailed survey results.)

Of the surveys sent to the 125 sheriffs in Virginia, the staff received 92 responses. There are 3986 (total) sworn deputies in those offices and 1004 law enforcement deputies.

42 of the responding offices utilize a grievance procedure - 22 binding and 20 non-binding.

19 responding offices have fewer than ten deputies on staff and would not be affected by a change in the current law if the size of the office or department were not also changed. (The "Police Officers' Bill of Rights" does not currently apply to departments with fewer than ten officers.) However, of those offices, three have a binding grievance procedure and nine have a non-binding procedure.

30 responding offices have no "law enforcement" officers, i.e., those offices are located in a jurisdiction which has a police department.

In the twelve months preceding the survey, 17 deputy grievances were filed in the responding offices.

B. Results of Chiefs of Police Surveys (See, Appendix E.)

25 surveys were sent to selected police departments. 20 were returned. There are 4564 police officers in those 20 departments.

17 responding departments utilize a binding grievance procedure. Two use a non-binding procedure and one uses either binding or non-binding depending on the issue raised.

In the twelve months preceding the survey, 46 officer grievances were filed in those departments. (NOTE: 25 of those grievances were filed in one department, 21 in the remaining 19 departments.) 37 of the grievance rulings were "challenged"

(appealed) by either the officer or the department.

C. Survey Findings

Perhaps the most revealing information derived from the surveys is that 47% of the responding sheriff's offices currently use some sort of grievance procedure, almost evenly split between binding and non-binding.

21% of the responding sheriff's offices would not be affected by incorporating deputy sheriffs into the Bill of Rights statute unless the size of the offices increased or the law were amended to include offices of fewer than ten deputies.

33% of the responding sheriff's offices have no "law enforcement" responsibilities per se. Thus, limiting the application of the Police Officers' Bill of Rights only to "law enforcement" deputies would exclude a large number of deputies.

Though the data should not be regarded as necessarily representative or highly reliable (because they represent only a 20-department sample), the data indicate that one in 100 police officers (1%) filed a grievance last year. One in 233 sheriff's deputies (0.43%) filed a grievance. (NOTE: Only 42 of the 90 responding sheriff's offices have a grievance procedure.)

IX. Conclusions

A simple answer to the question of whether or not to extend the "Police Officers' Bill of Rights" to sheriffs' deputies does not exist. Those on both sides of the issue raised strong and valid arguments for their positions. (See, Appendix F.)

On the one hand, "if it ain't broke; don't fix it" is compelling. Almost half of the sheriffs now offer a grievance procedure to their deputies. Deputies know their status as political appointees. And those deputies are already protected by the Constitution and a plethora of state and federal laws which protect their civil rights. However, resort to the courts is often required to preserve those rights.

On the other hand, a hard-working law enforcement officer (who happens to be a deputy rather than a police officer) can be left without recourse whatsoever in the face of a complaint against him. He can be summarily dismissed without any opportunity to defend his position.

Ultimately, the subcommittee concluded that the bond of loyalty and trust is an invaluable asset in a political arena and that a sheriff's deputy is, indeed, a political appointee. Despite the acknowledged possibility of a wrongful discharge of a deputy in some circumstances, the subcommittee considered that the integrity of the constitutional office of sheriff is better protected in Virginia by maintaining the existing hiring and firing procedure and, therefore, made the following recommendation, with which the full Commission concurred.

X. Recommendation

We make no recommendation for change in the law inasmuch as hiring and firing of deputies is uniquely within the province of the sheriff and derivative of the unique nature of the sheriff/deputy relationship.

APPENDIX A
Bill of Rights Study Resolution - HJR 166

1992 SESSION

LD4192180

HOUSE JOINT RESOLUTION NO. 166

Offered January 21, 1992

Requesting the Virginia State Crime Commission to study the "Police Officers Bill of Rights."

Patron—Croshaw

Referred to the Committee on Militia and Police

WHEREAS, sheriffs serve the various counties and cities of the Commonwealth pursuant to Article VII, Section 4, of the Constitution of Virginia; and,

WHEREAS, the Code of Virginia provides that constitutional officers appoint deputies to carry out the duties of the office; and,

WHEREAS, deputy sheriffs serve concurrently with the term and at the pleasure of their principal; and,

WHEREAS, Chapter 10.1 of Title 2.1, commonly known as the "Police Officers Bill of Rights," provides certain procedural guarantees for all local Virginia law enforcement officers, except deputy sheriffs; and,

WHEREAS, concern has been expressed that the "Police Officers Bill of Rights" is not extended to deputy sheriffs in Virginia; and,

WHEREAS, certain sheriffs departments currently extend such rights to their deputies; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Crime Commission is requested to study: (i) the feasibility of extending the "Police Officers Bill of Rights" to deputy sheriffs in Virginia; (ii) the adequacy of the "Police Officers Bill of Rights"; and (iii) such other remedial avenues of due process as may be appropriate for appointees of constitutional officers.

The Virginia State Crime Commission is requested to complete its work in time to submit its recommendations to the Governor and the 1993 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Services.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42

1992 SESSION

LD2753739

SENATE BILL NO. 309
Offered January 21, 1992

A BILL to amend and reenact § 2.1-116.1 of the Code of Virginia, relating to law-enforcement officers' procedural guarantees; definitions.

Patrons—Stolle, Potts and Quayle; Delegates: Cantor, Newman, Purkey and Tata

Referred to the Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That § 2.1-116.1 of the Code of Virginia is amended and reenacted as follows:

§ 2.1-116.1. Definitions.—As used in this chapter, the following terms have the following meanings:

1. "Law-enforcement officer" means any person, other than a Chief of Police or a sheriff or chief deputy sheriff of any city or county or the Superintendent of the Department of State Police, who, in his official capacity, is authorized by law to make arrests and who is a nonprobationary member of one of the following law-enforcement agencies:

(a) The Department of State Police;

(b) The police department, bureau or force of any political subdivision of the Commonwealth of Virginia where such department, bureau or force has ten or more law-enforcement officers; however, this shall not include the sheriff's department of any city or county.

This term also means any game warden as defined in § 9-169 (9).

2. "Agency" means:

(a) The Department of State Police;

(b) The political subdivision of the Commonwealth of Virginia employing a law-enforcement officer.

Official Use By Clerks

Passed By The Senate

- without amendment
- with amendment
- substitute
- substitute w/amdt

Passed By The House of Delegates

- without amendment
- with amendment
- substitute
- substitute w/amdt

Date: _____

Date: _____

Clerk of the Senate

Clerk of the House of Delegates

1992 SESSION

LD0685160

HOUSE BILL NO. 291
Offered January 16, 1992

A BILL to amend and reenact § 2.1-116.1 of the Code of Virginia, relating to law-enforcement officers' procedural guarantees; definitions.

Patrons—Cooper, Agee, Callahan, Christian, Cox, Ealey, Hall, Harris, Keating, Marshall, McClure, McDonnell, Parrish, Plum, Rollison, Tata and Wagner; Senators: Potts, Robb and Stolle

Referred to the Committee on Militia and Police

Be it enacted by the General Assembly of Virginia:

1. That § 2.1-116.1 of the Code of Virginia is amended and reenacted as follows:
§ 2.1-116.1. Definitions.—As used in this chapter, the following terms have the following meanings:

1. "Law-enforcement officer" means any person, other than a Chief of Police or a sheriff or chief deputy sheriff of any city or county or the Superintendent of the Department of State Police, who, in his official capacity, is authorized by law to make arrests and who is a nonprobationary member of one of the following law-enforcement agencies:

- (a) The Department of State Police;
- (b) The police department, bureau or force of any political subdivision of the Commonwealth of Virginia where such department, bureau or force has ten or more law-enforcement officers ; however, this shall not include the sheriff's department of any city or county .

This term also means any game warden as defined in § 9-169 (9).

2. "Agency" means:

- (a) The Department of State Police;
- (b) The political subdivision of the Commonwealth of Virginia employing the law-enforcement officer.

Official Use By Clerks

Passed By		Passed By The Senate	
The House of Delegates		without amendment	<input type="checkbox"/>
without amendment	<input type="checkbox"/>	with amendment	<input type="checkbox"/>
with amendment	<input type="checkbox"/>	substitute	<input type="checkbox"/>
substitute	<input type="checkbox"/>	substitute w/amdt	<input type="checkbox"/>
substitute w/amdt	<input type="checkbox"/>		
Date: _____		Date: _____	
_____		_____	
Clerk of the House of Delegates		Clerk of the Senate	

APPENDIX B

Statutes Controlling the Appointment of Deputies, Their Powers, How They Are Removed

§ 15.1-48. Appointment of deputies; their powers; how removed. - The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk of any circuit or city court 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. The sheriff of any county or city making an appointment of a deputy under the provisions of this section may review the record of such deputy as furnished by the Federal Bureau of Investigation prior to certification to the appropriate court as provided hereunder.

The sheriff may appoint as deputies such treatment and rehabilitation employees as are authorized and approved by the State Board of Corrections pursuant to § 53-184 without approval by the State Compensation Board. Deputies appointed pursuant to this paragraph shall not be considered by the State Compensation Board in fixing the number of full-time or part-time deputies which may be appointed by the sheriff pursuant to § 14.1-70 of the Code.

The officer making any such appointment shall certify the same to the court in the clerk's office which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court. Any such deputy at the time his principal qualifies as provided in § 15.1-38 or thereafter, and before entering upon the duties his office, shall take and prescribe the oath now provided for county officers. The oath shall be filed with the clerk of the court in whose office oath of his principal is filed and such clerk shall properly label and file all such oaths in his office for preservation. Any such deputy may be removed from office by his principal. Such deputy may also be removed by the court as provided by §24.1-79.1.

§ 15.1-48.1. Appointment of deputies and employment of employees; discriminatory practices by certain officers; civil penalty. - A. It shall be an unlawful employment practice for a constitutional officer:

1. To fail or refuse to appoint or hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of ointment or employment, because of such individual's race, color, religion, sex or national origin; or
2. To limit, segregate, or classify his appointees, employees or applicants for appointment or employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

B. Nothing in this section shall be construed to make it an unlawful employment practice for a constitutional officer to hire or appoint an individual on the basis of his sex or national origin in those instances where sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular office. The provisions of this section shall not apply to

policy-making positions, confidential or personal staff positions, or undercover positions.

C. With regard to notices and advertisements:

1. Every constitutional officer shall, prior to hiring any employee, advertise such employment position in a newspaper having general circulation state or local government job placement service in such constitutional officer's political subdivision except where the vacancy is to be used (i) as a placement opportunity for appointees or employees affected by layoff, (ii) as a transfer opportunity or demotion for an incumbent, (iii) to fill positions that have been advertised within the past sixty days, (iv) to fill positions to be filled by appointees or employees returning from leave with or without pay, (v) to fill temporary positions, temporary employees being those employees hired to work on special projects that have durations of three months or less, or (vi) to fill policy-making positions, confidential or personal staff positions normally regarded as undercover work.

2. No constitutional officer shall print or publish or cause to be printed or published any notice or advertisement relating to employment by such constitutional officer indicating any preference, limitation, specification, or discrimination, based on sex or national origin, except that notice or advertisement may indicate a preference, limitation, specification, or discrimination based on sex or national origin sex or national origin is a bona fide occupational qualification for employment.

D. Complaints regarding violations of subsection A of section may be made to the Virginia Council on Human Rights. The Council shall be the authority to exercise its powers as outlined in § 2.1-720 of the Code of Virginia.

E. Any constitutional officer who willfully violates the provisions of subsection C shall be subject to a civil penalty not to exceed two thousand dollars.

APPENDIX C

"The Police Officers' Bill of Rights"

§ 2.1-116.1. **Definitions.** - As used in this chapter, the following terms have the following meanings:

1. "Law-enforcement officer" means any person, other than a Chief of Police or the Superintendent of the Department of State Police, who, in his official capacity, is authorized by law to make arrests and who is a non probationary member of one of the following law-enforcement agencies:

(a) The Department of State Police;

(b) The police department, bureau of force of any political subdivision of the Commonwealth of Virginia where such department, bureau or force has ten or more law-enforcement officers; however, this shall not include the sheriff's department of any city or county.

This term also means any game warden as defined in § 9-169 (9).

2. "Agency" means:

(a) The Department of State Police;

(b) The political subdivision of the Commonwealth of Virginia employing the law-enforcement officer. (1978, c. 19; 1979, c. 592; 1983, c. 357.)

§ 2.1-116.2. **Conduct on investigation.** - Whenever an investigation by an agency focuses on matters which could lead to the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer, the following conditions shall be complied with:

1. Any questioning of the officer shall take place at a reasonable time and place as designated by the investigating officer, preferably when the officer under investigation is on duty and at the office of the command of the investigating officer or at the office of the local precinct or police unit of the officer being investigated, unless circumstances dictate otherwise.

2. Prior to the officer being questioned, he shall be informed of (i) the name and rank of the investigating officer and of any individual to be present during the questioning and (ii) the nature of the investigation. (1978, c. 19.)

§ 2.1-116.3. **Personal assets of officers.** - No law-enforcement officer shall be required or requested to disclose an item of his property, income, assets, source of income, debts, or personal or domestic expenditures, including those of any member of his family or household, unless such information is necessary in investigating a possible conflict of interest with respect to the performance of his official duties, or unless such disclosure is required by law, or unless such information is related to an investigation. Nothing in this section shall preclude an agency from requiring such law-enforcement officer to disclose any place of off-duty employment and where he may be contacted. (1978, c. 19.)

§ 2.1-116.4. **Notice of charges; response; election to proceed under grievance procedure of local governing body.** - A. Before any dismissal, demotion, suspension without pay or transfer for punitive reasons may be imposed, the following must be complied with:

1. The law-enforcement officer shall be notified in writing of all charges, the

basis therefor, and the action which may be taken;

2. The law-enforcement officer must be given an opportunity, within a reasonable time limit after the date of the written notice provided for above, to respond orally and in writing to the charges. The time limit shall be determined by the agency, but in no event shall it be less than five calendar days unless agreed to by the law-enforcement officer;

3. In making his response, the law-enforcement office may be assisted by counsel at his own expense; and

4. The law-enforcement officer shall be given written notification of his right to initiate a grievance under the grievance procedure established by the local governing body pursuant to §§ 15.1-7.1 and 15.1-7.2. A copy of the local governing body's grievance procedure shall be provided to the law-enforcement officer upon his request.

B. A law-enforcement officer may proceed under either the local governing body's grievance procedure or the law-enforcement officer's procedural guarantees, but not both. (1978, c. 19; 1987, c. 461.)

§ 2.1-116.5. Hearing. - 1. Whenever a law-enforcement officer is dismissed, demoted, suspended or transferred for punitive reasons, he may, within a reasonable amount of time following such action, as set by the agency, request a hearing. If such request is timely made, a hearing shall be held within a reasonable amount of time set by the agency; provided, however, that the hearing shall be set no later than fourteen calendar days following the date of request unless a later date is agreed to by the law-enforcement officer. At the hearing, the law-enforcement officer and his agency shall be afforded the opportunity to present evidence, examine and cross-examine witnesses. The panel shall have the power to, and on the request of either the law-enforcement officer or his agency shall, issue subpoenas requiring the testimony of witnesses who have refused or failed to appear at the hearing. The law-enforcement officer shall also be given the opportunity to be represented by counsel at the hearing unless such officer and agency are afforded, by regulation, the right to counsel in a subsequent de novo hearing. The panel conducting the hearing shall rule on the admissibility of the evidence. A record shall be made of the hearing.

2. The hearing shall be conducted by a panel, such panel to consist of one member from within the agency selected by the grievant, one member from within the agency of equal rank of the grievant but no more than two ranks above appointed by the agency head, and a third member from within the agency to be selected by the other two members. In the event that such two members cannot agree upon their selection, the chief judge of the judicial circuit wherein the duty station of the grievant lies shall choose such third member.

3. At the option of the agency, it may, in lieu of complying with the provisions of § 2.1-116.4, give the law-enforcement officer a statement, in writing, of the charges, the basis therefor, the action which may be taken, and provide a hearing as provided for in this section prior to dismissing, demoting, suspending or transferring for punitive reasons the law-enforcement officer. (1978, c. 19; 1980, c. 191.)

§ 2.1-116.6. Immediate suspension. - Nothing in this chapter shall prevent the immediate suspension without pay of any law-enforcement officer whose

continued presence on the job is deemed to be a substantial and immediate threat to the welfare of his agency or the public, nor shall anything in this chapter prevent the suspension of a law-enforcement officer for refusing to obey a direct order issued in conformance with the agency's written and disseminated rules and regulations. In such a case, the law-enforcement officer shall, upon request, be afforded the right provided for under this chapter within a reasonable amount of time set by the agency. (1978, c. 19).

§ 2.1-116.7. Outcome of hearing. - The recommendations of the panel, and the reasons therefor, shall be in writing, shall be transmitted promptly to the law-enforcement officer or his attorney and to the chief executive officer of the law-enforcement agency. Such recommendations shall be advisory only, but shall be accorded significant weight. (1978, c. 19.)

§2.1-116.8. Informal counseling not prohibited. - Nothing in this chapter shall be construed to prohibit the informal counseling of a law-enforcement officer by a supervisor in reference to a minor infraction of policy or procedure which does not result in disciplinary action being taken against the law-enforcement officer. (1978, c. 19.)

§2.1-116.9. Chapter accords minimum rights. - The rights accorded law-enforcement officers in this chapter are minimum rights and all agencies shall promulgate grievance procedures not inconsistent herewith; provided that any agency may provide for the rights of law-enforcement officers in addition hereto. (1978, c. 19.)

APPENDIX D

Caselaw Governing Legal Issues Applicable to HJR 166

1. Feasibility of extending the “Police Officers’ Bill of Rights” to deputy Sheriffs in Virginia.

A. Foundation

Extension of the “Bill of Rights” set forth in Chapter 10.1 of Title 2.1 of the Code to deputy sheriffs requires that an inquiry of existing caselaw be made to determine the current extent of deputies’ property interest in their jobs and what effect a change in that status would have upon the operation of a Virginia sheriff’s office.

Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) is the controlling case re the propriety of purely political dismissals (such as result when a newly elected sheriff takes office). In Elrod, the Democratic sheriff of Cook County, Illinois sought to discharge two of his deputies (Republicans) upon his taking office. The U. S. Supreme Court held that such dismissal was improper. In a plurality decision, three members of the Court stated that such patronage dismissals violate the First Amendment freedom of political belief and association and the Fourteenth Amendment right to due process, and set forth a multi-point, tortuous test which, if met, would preserve the right of a government employee to his job.

A two member concurrence seems to be the more widely accepted view of the controlling law, however - that a politically motivated patronage dismissal cannot be proper if a nonpolicymaking, nonconfidential employee is dismissed upon the sole ground of his political beliefs. In Elrod, the sheriff’s deputies were held to be nonpolicymaking and nonconfidential.

Branti v. Finkel, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980); amplified the law of Elrod, although interpreters of the decisions, notably the Fourth Circuit Court of Appeals, still wrestle with the rules, especially with respect to Virginia sheriffs and deputies. In Branti, two Republican New York State assistant public defenders were threatened with dismissal by the newly appointed (by the Democrat-controlled legislature) public Defender on the sole ground of their political beliefs.

The Branti Court held that the issue is not whether “policymaker” or “confidential” fits the public office in question, but rather whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office, stating “it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only responsibility of an assistant public defender is to represent individual citizens in controversy with the state.” Id., at 445 U.S. 519. The court added, “[t]his is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of

such a an official could be dismissed on grounds of political party affiliation or loyalty." 445 U.S. 519, n.13.

The cases in Virginia decided in the federal courts for the Eastern and Western Districts of Virginia and in the Fourth Circuit Court of Appeals dealing with the same general subject matter as the cases above have been decided similarly but with differing underlying rationales. The plaintiffs argue diverse legal reasons for their claims (First (speech and political expression), Fifth (due process) and Fourteenth (due process) Amendment violations, 42 U.S.C. 1983 claims, Chapter VII (Civil Rights Act) claims and state statute claims (pursuant to grievance procedures adopted by localities/sheriff's departments, etc.). The defendants offer as many defenses. To attempt a thorough analysis of those cases here would be prohibitively space-consuming and not necessarily responsive to the discrete issue at hand.

B. Extension of the "Police Officers' Bill of Rights" to deputy sheriffs could potentially undermine and usurp the historical role of Virginia sheriffs.

"[A] deputy is under the control and supervision of the sheriff and has no civil service protection but serves at the pleasure of the sheriff. Thus, deputies have no expectations of continued employment nor are they covered by the 'Police Officers' Bill of Rights'." . . . Deputy sheriffs, therefore, have no property interest in their positions as deputies and are not entitled to any due process rights as a result of state law [Va. Code Ann. §15.1-48]." U.S. v. Gregory, 582 F. Supp. 1319, 1321 (W.D. Va. 1984).

Clearly, the Gregory court's explanation for denying due process (or a property interest in the job) to the deputy sheriff (here, claiming sexual discrimination) is based upon existing Virginia statute. To overcome that statutory impediment, however, a deputy sheriff could arguably be included under the Bill of Rights umbrella by amendment of that Chapter. To do that, though, would create a direct conflict with the statutory provision that has been widely interpreted by the judiciary to allow a sheriff to hire and fire his deputies at will. Va. Code §15.1-48 states that, "[t]he sheriff of any county or city . . . may at the time he qualifies . . . appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office" and, without qualification, that "[a]ny such deputy may be removed from office by his principal." (For the proposition that a sheriff may hire and fire at will, see, e.g., Sherman v. City of Richmond, 543 F. Supp. 447 (1982); Hopkins v. Dolinger, 453 F. Supp. 59 (1978).)

Thus, it would seem that two statutory modifications might accomplish the legitimate inclusion of deputy sheriffs under the Bill of Rights. 1) Add them to the list of those law enforcement officers covered by the Bill of Rights, and 2) strike language from the code which allows sheriffs unfettered, at-will discharges. But for the status of the sheriff as a Constitutional officer with significant liability for the acts of his deputies and but for the (heretofore untested in Virginia) proposition that sheriffs' deputies fulfill both the requirements of Elrod, supra., and Branti, supra., and should remain subject to at-will discharge, the two-step statutory revision might work. Arguably, one more hurdle remains, however.

"In Virginia . . . the relationship between the sheriff and his deputy is such that he is not simply the 'alter ego' of the sheriff, but he is one and the same as the sheriff. The public policy of Virginia with regard to the relationship between the sheriff and his deputy is grounded upon common law and is stated in Miller v. Jones, 50 Va. (9 Gratt.) 584 (1853). * * * Not only is the sheriff civilly liable for the acts of his deputy in Virginia, but he is also liable criminally and can be fined for the conduct of his deputy. The most significant parts of the foregoing law which is today the public policy of Virginia are the words that as between a sheriff and his deputy they are as 'one person.' There can be no doubt that the statute regarding the appointment of deputies in Virginia is grounded upon a very good foundation. Since the sheriff is liable absolutely for all the acts of his deputies, the sheriff should have complete and unfettered control over who his deputies are. . . .

Whited v. Fields, 581 F. Supp. 1444, at 1444-1445 (W. D. Va. 1984). (See, also, Sherman v. City of Richmond, *supra.*, for the proposition that the sheriff is the only potentially liable party defendant in an employment grievance suit by a deputy. (Actions by plaintiff, deputy against the Commonwealth of Virginia and City of Richmond dismissed on motion.))

The language of Whited v. Fields suggests not only that the role of sheriff and deputy are so inextricable and inseparable as to dictate the maintenance of the sheriff's right to discharge at will (the sheriff is entitled to absolute faith in his deputy.), but also strongly suggests that the position of deputy meets the Elrod test (if it is still viable) of "confidential" and "policymaking" and the Branti test of whether (in the appropriate case) the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office. (Could not affiliation with an opposition political party alone cast some doubt on a deputy's loyalty?) The court in U.S. v. Gregory interpreted the nature of the sheriff-deputy relationship as follows: "Thus, it is clear that in such a relationship there is a high degree of accountability between a sheriff and deputy and 'equates with the *confidential* relationship of a sheriff deputy's employment.' McBee v. Jim Hogg County, 703 F. 2d 834, 840 (5th Cir. 1983)." *Id.*, at 1321. (Emphasis added.)

Notwithstanding the above obvious impediments to a significant change in the relationship of deputies and sheriffs and to granting deputies a property interest in their employment, it would appear the Virginia legislature has the power, without amending the Constitution, to confer some employment property interest via legislation.

Clearly, even though the Constitution creates the office of sheriff, the Virginia legislature has placed restrictions upon the operation of the office and upon the qualifications and size of a sheriff's staff. His deputies must be trained. He may only have as many deputies in his employ as are funded by the state Compensation Board unless the locality provides additional funding. He may not discriminate on the basis of gender, race, or age in his hiring practices. Indeed, with respect to employees other than deputies, a different set of hiring and firing

procedures apply altogether (unless those employees meet the "relationship tests" discussed, supra).

The General Assembly could, likewise, by statute, remove the ability of a sheriff to dismiss at will and substitute the requirement that all deputies have the right to due process pursuant to the Bill of Rights (or another vehicle). Such a change would also require that the unique nature of the relationship between sheriff and deputy be regarded as - and changed by legislation to - the more traditional employer/employee with the traditional rules of respondeat superior applicable. Under such circumstance, the sheriff and the deputy could no longer by law, at least, be considered "as one."

Assuming, arguendo, such changes in state law were made, query whether the sheriff's status as an elected Constitutional officer has any less meaning or whether by merely stating that the status is different actually makes it so?

The District Court for the Western District of Virginia, while considering whether a deputy is an "employee" under the Civil Rights Act (42 U.S.C. 2000e et seq.), stated that a number of factors should be considered before including Virginia sheriff's deputies universally under the rubric "employee." "To make such a wholesale decision would be to ignore the vast differences that exist between the sheriff's departments in such urban counties of Virginia as Fairfax or Chesterfield and those in rural counties such as Lee or Northumberland." Brewster v. Shockley, 554 F. Supp. 365, 371 (W.D. Va. 1983). The court in U.S. V. Gregory, considering the same issue in a case arising in Patrick County, held that under definitions in the Civil Rights Act, a deputy is "precisely the sort of job the Congress envisioned to be within the "personal staff" of an elected official. . . . [T]he nature of the accountability between a deputy and sheriff, the size of the sheriff's staff, and the rural nature of Patrick County indicate to me that sheriff's deputies in Patrick County are not "employees" under Title VII." 582 F. Supp. 1325.¹ Thus, the question remains whether a deputy could truly fit the status of vested employee" yet continue to engender the mutual trust required by the sheriff/deputy relationship in a small town.

C. Summary/Overview

It is appropriate to give a cursory analysis to the effect of granting sheriff's deputies a property right in their employment.

¹The definition of employee in question appears at 42 U.S.C. 2000e(f), as follows: "(f) 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."

First, it is arguable that, under Elrod, pure patronage dismissals remain impermissible in any sheriff's office in Virginia whether or not a deputy has due process rights under the Bill of Rights or an adopted grievance procedure. However, Elrod is far more likely to be upheld in a populous jurisdiction having a large sheriff's department, inasmuch as the likelihood of a confidential and policymaking relationship between the sheriff and his deputies is less likely to exist. The Fourth Circuit has suggested, without deciding, that Elrod is limited to patronage dismissals alone and, in pure dicta, suggested that the differences between Cook County, Illinois and Lee County, Virginia are significant enough that Elrod may be inapplicable in Lee County. The court said, "[t]he efficient operation of the sheriff's office in Lee County requires a high degree of mutual cooperation, confidence and support. None of these elements is likely to be present where the parties are bitter political antagonists. By contrast, the relationship between the sheriff and his deputies in the large Cook County, Illinois office is likely to be far more impersonal. There is no showing that the deputies in Elrod took an active part in the campaign against the sheriff. They were discharged because they had generally failed to support the Democratic Party. Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978)

Thus, without passage of any legislation offering deputies the protection of the Bill of Rights, there may already exist job security against a pure political dismissal - especially in a large department. Regarding dismissals for cause, however, neither Elrod nor Branti nor their progeny offer any security. The federal courts of Virginia have universally held that a sheriff may dismiss a deputy at will and withstand a court challenge if his defense is sufficient to overcome a charge of pure patronage dismissal.

Finally, a sheriff might be bound by a grievance committee's decision if he were to allow a deputy to pursue a grievance (if a grievance procedure has been adopted by the office) through to final decision. In Angle v. Overton, 235 Va. 103, 365 S.E. 2d 758 (1988); the Virginia Supreme Court held that a binding decision by a grievance committee to reinstate a deputy was binding upon the sheriff despite the language of Va. Code §15.1-48. (But, c.f., Hutto v. Waters, 552 F. Supp. 266 (E.D. Va. 1982); wherein the court held that grievance guidelines similar to those in Angle were not sufficient to overcome Va. Code §15.1-48. Likewise, see, Jenkins v. Weatherholtz, 909 F. 2d 105 (4th Cir. 1990) wherein the Fourth Circuit distinguished a similar case as follows: "Sheriff Weatherholtz's adoption of the Employees Handbook could not compromise the statutory authority in §15.1-48 to remove deputies like Jenkins at his discretion. Angle v. Overton does not require a different conclusion." 909 F. 2d at 109. The Weatherholtz court reasoned that the Virginia Supreme Court's decision in Angle was based solely in administrative law (or, alternatively, estoppel), in that the sheriff had allowed a binding administrative proceeding to go to completion and should therefore be bound by it, adding that "the [Angle] court did not rely on any expectation of continued employment that might be sufficient to create a protectible property interest [in employment]." 909 F. 2d at 110.

APPENDIX E
Survey and Survey Results by Office and Department

POLICE CHIEFS' RESPONSES

<u>JURISDICTION</u>	<u>#OFFICERS</u>	<u>#CIVILIAN EMPLOYEES</u>	<u>GRIEVANCE PROCEDURE</u>
ABINGDON	16	2	local, binding
ALBEMARLE CO.	71	14	local, binding
BLACKSBURG	48	22	local, binding
CHESAPEAKE	273	69	local, binding
CHESTERFIELD CO.	344	101	local, binding
FAIRFAX CO.	1392	394	local & dept., binding & non-binding
FREDERICKSBURG	90	24	local, binding
HENRICO CO.	384	180	local, binding
HOPEWELL	42	21	local, non-binding
LYNCHBURG -	145	47	local, binding
MARTINSVILLE	51	10	local, binding
NEWPORT NEWS	286	63	local, binding
PORTSMOUTH	208	76	dept., non-binding
PRINCE WILLIAM CO.	297	118	local, binding
SALEM	57	24	dept., binding
SUFFOLK	96	31	local, binding
VIRGINIA BEACH	620	215	local, binding
WAYNESBORO	46	4	local, binding
WILLIAMSBURG	28	11	local, binding
WINCHESTER	52	18	local, binding
TOTALS (20 RESPONSES)			BINDING 17 NON-BINDING 2 BOTH 1

SHERIFFS' RESPONSES

<u>JURISDICTION</u>	<u>#SWORN DEPUTIES</u>	<u>#CIVILIAN EMPLOYEES</u>	<u>LAW ENFR.</u>	<u>#LAW ENFR. DEPUTIES</u>	<u>GRIEVANCE PROCEDURE</u>
ACCOMACK CO.			yes	16	"N/A"
ALBEMARLE CO.	12	30	yes		local, non-binding
ALEXANDRIA	165	35	no	0	office, non-binding
ALLEGHANY CO	34	0	yes	12	office, binding
AMELIA CO.	7	8	yes	7	office, binding
AMHERST CO.	33	3	yes	16	office, non-binding
APPOMATTOX CO.	24		yes		office, binding
ARLINGTON CO.	156	13	no	0	office, non-binding
AUGUSTA CO.	59	12	yes	28	neither
BLAND	12	6	no	0	office, binding
BOTECOURT CO.	38	9	yes	23	"N/A"
BRUNSWICK CO.	8	2	no	0	"N/A"
BUCHANAN CO.	36	9	yes	23	neither
CAMPBELL CO.	45	8	yes	30	office, binding
CAROLINE CO.	29	9	yes	16	neither, binding
CARROLL CO.	31	9	yes	17	neither
CHARLES CITY	5	6	yes	5	neither
CHARLOTTESVILLE	7	1	no	0	local, non-binding
CHESTERFIELD CO.	123	19	no	0	local, binding
CLIFTON FORGE	6	0	no	0	neither
COLONIAL HGTS.	5		no	0	office, non-binding
CULPEPER CO.	50	12	yes	16	neither
DANVILLE	46	0	no	0	none
DICKENSON CO.	26	8	yes		local, non-binding

<u>JURISDICTION</u>	<u>#SWORN DEPUTIES</u>	<u>#CIVILIAN EMPLOYEES</u>	<u>LAW ENFR.</u>	<u>#LAW ENFR. DEPUTIES</u>	<u>GRIEVANCE PROCEDURE</u>
EMPORIA	1		no	0	neither
ESSEX CO.	8	5	yes	8	local, binding
FAIRFAX CO.	401	36	no	0	local, depends
FALLS CHURCH CTY.	2	1	no	0	office, non-binding
FLOYD CO.	16		yes		neither
FRANKLIN CO.	49	13	yes	30	neither
FREDERICK CO.	47	13	yes	41	both, binding
FREDERICKSBURG	10	1	no	0	local, nn-binding
GILES CO.	24	6	yes	24	neither
GLOUCESTER CO.	48	10	yes		neither
GOOCHLAND CO.	13	11	yes	7	neither
GRAYSON CO.	21	6	yes	7	neither
GREENE CO.	9	6	yes		office, non-binding
GREENSVILLE	27	2	yes	12	neither
HALIFAX CO.	29	9		18	neither
HAMPTON CTY.	90	7	no	0	neither
HANOVER CO.	98	9	yes	64	office, non-binding
HENRICO CO.	145	5	no	0	neither
HENRY CO.	76	12	yes	54	"N/A"
HIGHLAND CO.	7	5	yes		local, non-binding
HOPEWELL CTY.	22	1	no	0	none
ISLE OF WIGHT CO.	20	6	yes	18	neither
KING GEORGE CO.	15	5	yes	13	both, non-binding
KING&QUEEN CO.	5	5	yes	5	local, non-binding
LANCASTER CO.	19	4	yes	7	unknown
LOUDON CO.	164	64	yes	95	office, non-binding

<u>JURISDICTION</u>	<u>#SWORN DEPUTIES</u>	<u>#CIVILIAN EMPLOYEES</u>	<u>LAW ENFR.</u>	<u>#LAW ENFR. DEPUTIES</u>	<u>GRIEVANCE PROCEDURE</u>
LOUISA CO.	18	6	yes	18	office binding
LUNENBURG CO.	6	6	yes	6	neither
MADISON CO.	11	8	yes	7	local, binding
MARTINSVILLE	18	2	no	0	neither, binding
MATHEWS CO.	7	7	yes	7	neither
MECKLENBURG CO.	45	3	yes	15	both, binding
MIDDLESEX CO.	8	6	yes		neither
MONTGOMERY CO.	77	14	yes	33	neither
NEW KENT CO.			yes		neither
NEWPORT NEWS	154	7	no	0	neither
NORTHAMPTON CO.	19	7	yes	8	neither
NORTHUMBERLAND	18	1	yes	6	neither
NOTTOWAY CO.	10	6	yes	10	"N/A"
PATRICK CO.	17	6	yes	11	office, binding
PITTSYLVANIA CO.	61	10	yes	38	office, non-binding
POWHATAN CO.	11	4	yes	11	unknown
PRINCE GEORGE CO.	12	6	yes	11	local, binding
PRINCE WILLIAM CO.	56		no	0	neither
PULASKI CO.	50	14	yes	17	both, non-binding
RADFORD CTY.	14	2	no	0	none
RAPPAHANNOCK	16	0	yes	6	neither
RICHMOND CTY.	398	5	no	0	"N/A"
RICHMOND CO.	10	6	yes	5	office, binding
ROANOKE CTY.	138	9	no	0	both, binding
ROANOKE CO.	80	4	no	0	local, binding
ROCKBRIDGE CO.	24	0	yes	15	"N/A"

<u>JURISDICTION</u>	<u>#SWORN DEPUTIES</u>	<u>#CIVILIAN EMPLOYEES</u>	<u>LAW ENFR.</u>	<u>#LAW ENFR. DEPUTIES</u>	<u>GRIEVANCE PROCEDURE</u>
ROCKINGHAM CO.	48	14	yes	28	neither
SALEM CTY.	10	0	no	0	neither, binding
SCOTT CO.	27	0	yes	17	neither
SMYTH CO.	17	2	no	0	neither
SOUTHAMPTON	32	10	yes	15	neither
STAUNTON	5.5	0	no	0	neither
SUFFOLK	13	2	no	0	neither
SURRY CO.	7	8	yes	6	local, non-binding
SUSSEX CO.	29	3	yes	13	both, non-binding
TAZEWELL	42	10	yes	29	neither, binding
WASHINGTON CO.	44	10	yes	28	none
WARREN CO.	54	1	yes	18	office, binding
WAYNESBORO	5	0	no	0	neither
WESTMORELAND CO.	30	7	yes	20	neither, binding
WILLIAMSBURG	18	3	no	0	neither
WINCHESTER	3	0	no	0	local, non-binding

<u>Total Number of Responses (of 125 offices)</u> ..	<u>92</u>
Offices with Binding Procedure	22
Offices with Non-binding Procedure	20
Offices with None or Neither	50
Offices with "Local" Procedure	14
Offices with "Office" Procedure	18
Offices with Fewer than Ten Deputies	19
Binding Procedure	3
Non-binding Procedure	9
None or Neither	7
Offices with no "Law enforcement" Deputies ..	30

SURVEY RELATING TO
"POLICE OFFICERS' BILL OF RIGHTS"

1. SHERIFF'S OFFICE: _____
ADDRESS: _____
CONTACT: _____ PHONE: _____
2. NO. OF SWORN DEPUTIES: _____ NO. OF CIVILIAN EMPLOYEES: _____
3. DOES YOUR OFFICE HAVE LOCAL LAW ENFORCEMENT RESPONSIBILITY (I.E., NO LOCAL POLICE DEPARTMENT)?
YES _____ NO _____ NO. OF LAW ENFORCEMENT DEPUTIES _____
4. IF YOUR OFFICE HAS ADOPTED A GRIEVANCE OR "DUE PROCESS" PROCEDURE FOR DEPUTIES, IS IT THE LOCAL GOVERNMENT PROCEDURE OR THE OFFICE'S OWN PROCEDURE?
LOCAL _____ OFFICE _____ BOTH _____ NEITHER _____
(IF AVAILABLE, PLEASE RETURN, WITH THIS SURVEY, A COPY OF THE GRIEVANCE PROCEDURE THAT YOU USE.)
5. IS THE PROCEDURE BINDING OR NON-BINDING ON THE SHERIFF?
BINDING _____ NON-BINDING _____
6. HOW MANY TIMES HAS THIS GRIEVANCE PROCEDURE BEEN USED BY DEPUTIES DURING THE PAST TWELVE MONTHS? _____
7. OF THE GRIEVANCE PROCEDURE DECISIONS RENDERED WITH RESPECT TO DEPUTIES DURING THE PAST TWELVE MONTHS:
HOW MANY WERE CHALLENGED BY THE DEPUTY? _____
BY THE SHERIFF? _____
HOW MANY WERE OVERTURNED IN FAVOR OF THE DEPUTY? _____
IN FAVOR OF THE SHERIFF? _____
8. HOW MANY TIMES DURING THE PAST TWELVE MONTHS HAS YOUR OFFICE (THE SHERIFF) BEEN SUED OVER PERSONNEL MATTERS? _____
9. WHAT WERE THE RESULTS OF THOSE SUITS? (ENTER A NUMBER)
DEPUTY'S VERDICT _____ SHERIFF'S VERDICT _____ PENDING _____
DISMISSED _____ UNDISCLOSED _____ SETTLED _____
10. HOW MANY EEOC COMPLAINTS HAVE BEEN FILED AGAINST YOUR OFFICE (THE SHERIFF) DURING THE PAST TWELVE MONTHS? _____
11. WHAT WERE THE RESULTS OF THOSE EEOC COMPLAINTS? (ENTER A NUMBER)
FOR DEPUTY _____ FOR SHERIFF _____ PENDING _____
DISMISSED _____ UNDISCLOSED _____ SETTLED _____
12. PLEASE ADD COMMENTS OR EXPLANATIONS IF YOU WISH:

SURVEY RELATING TO
"POLICE OFFICERS' BILL OF RIGHTS"

1. POLICE DEPARTMENT: _____

ADDRESS: _____

CONTACT: _____ PHONE: _____

2. NO. OF OFFICERS: _____ NO. OF CIVILIAN EMPLOYEES: _____

3. IF YOUR DEPARTMENT HAS ADOPTED A GRIEVANCE OR "DUE PROCESS" PROCEDURE FOR OFFICERS, IS IT THE LOCAL GOVERNMENT PROCEDURE OR THE DEPARTMENT'S OWN PROCEDURE (PURSUANT TO THE "BILL OF RIGHTS")?

LOCAL _____ DEPARTMENT _____

(IF AVAILABLE, PLEASE RETURN, WITH THIS SURVEY, A COPY OF THE GRIEVANCE PROCEDURE THAT YOU USE.)

4. IS THE ADOPTED PROCEDURE BINDING OR NON-BINDING ON THE DEPARTMENT?

BINDING _____ NON-BINDING _____

5. HOW MANY TIMES HAS THIS GRIEVANCE PROCEDURE BEEN USED BY POLICE OFFICERS DURING THE PAST TWELVE MONTHS? _____

6. OF THE GRIEVANCE PROCEDURE DECISIONS RENDERED WITH RESPECT TO POLICE OFFICERS DURING THE PAST TWELVE MONTHS:

HOW MANY WERE CHALLENGED BY THE OFFICER? _____

BY THE DEPARTMENT? _____

HOW MANY WERE OVERTURNED IN FAVOR OF THE OFFICER? _____

IN FAVOR OF THE DEPARTMENT? _____

7. HOW MANY TIMES DURING THE PAST TWELVE MONTHS HAS THE DEPARTMENT BEEN SUED OVER PERSONNEL MATTERS? _____

8. WHAT WERE THE RESULTS OF THOSE SUITS? (ENTER A NUMBER)

OFFICER'S VERDICT _____ DEPARTMENT'S VERDICT _____ PENDING _____

DISMISSED _____ UNDISCLOSED _____ SETTLED _____

9. HOW MANY EEOC COMPLAINTS HAVE BEEN FILED AGAINST THE DEPARTMENT DURING THE PAST TWELVE MONTHS? _____

10. WHAT WERE THE RESULTS OF THOSE EEOC COMPLAINTS? (ENTER A NUMBER)

FOR OFFICER _____ FOR DEPARTMENT _____ PENDING _____

DISMISSED _____ UNDISCLOSED _____ SETTLED _____

11. PLEASE ADD COMMENTS OR EXPLANATIONS IF YOU WISH:

APPENDIX F

Summary of "Official Positions"/Correspondence

1. NAACP, Virginia State Conference:
Ernest E. Miller, President

Opposed to Police Officer's Bill of Rights or any binding grievance procedure for deputy sheriffs in Virginia. The NAACP favors the elimination of the grievance procedure for law enforcement officers altogether.

Why: The NAACP feels officers should be held accountable for their actions by their elected sheriffs or appointed police chiefs.

2. Department of State Police:
Colonel William Corvello

No comment on issue of expanding the Bill of Rights to deputy sheriffs. Note - Police Officers Bill of Rights is rarely, if ever, used by State Police officers because State Grievance Procedure is binding and Police Officers' Bill of Rights is not.

Suggest State Grievance Procedure "parallel the provisions of the Police Officers Bill of Rights . . .", in order to balance more with the agency's obligation to the public interest.

4. Virginia Association of Chiefs of Police:
Jay Cochran, Executive Director

"Not appropriate" to comment on expansion of Bill of Rights to deputy sheriffs. Virginia Association of Chiefs of Police favors the Police Officers' Bill of Rights with the addition that officers be mandated to use Police Officers' Bill of Rights procedures for grievance.

Why: (1) "a police officer must be held to a higher standard of accountability than other public employees;" (2) ". . . official and off-duty conduct of police officers impact [upon the] confidence and cooperation [of the public] favorably as well as unfavorably."

5. Virginia State Police Association:
William P. Elwood, Executive Director

No comment on issue of expanding Police Officers' Bill of Rights to sheriffs. Would like: (1) "Make the findings of the hearing panel established under the Bill of Rights binding." (2) "Through the Bill of Rights, give State Police officers access to the state grievance procedure in the same manner that local police officers are currently given access to local grievance procedures."

Why: Because employees can use only one procedure, and since the Police Officer's Bill of Rights procedure is not binding, they usually choose the state grievance procedure.

**6. Fraternal Order of Police, VA State Lodge:
Bob Harvey, Legislative Chairman**

In favor of including deputy sheriffs in "Law-enforcement Officer's Procedural Guarantees", in order to give them due process. One-third of sheriff's departments in Virginia have agreed to provide deputies entrance into local grievance procedures. The F.O.P. would like Virginia Code § 2.1-116.1 amended and reenacted to expand definition of law-enforcement officer to "include deputy sheriffs below the rank of Chief Deputy," and would like to strike the following language: ". . . however, this shall not include the sheriff's department of any city or county." (Virginia Code § 2.1-116.1). Such a change would result in a non-binding (advisory) procedure for deputy sheriffs.

Why: The F.O.P. feels it is inequitable - deputies do not have the rights and guarantees that police officers do, though many deputies "do the same job" as the police officers.

**7. Virginia State Sheriffs Association:
John W. Jones, Executive Director**

Opposed to expanding ". . . a Bill of Rights grievance procedure or any procedural guarantee to appointees of constitutional officers."

Why: (1) ". . . present remedies provide a fair balance of deputies and sheriffs rights." Extending the Police Officer's Bill of Rights to deputies ". . . infringes [on] the autonomous nature of the office of sheriff," and ". . . would alter decades of case law and tamper with a system that works well." (i.e., the Sheriffs Association prefers the status quo); (2) as to the adequacy of the Police Officers' Bill of Rights issue, the Sheriffs Association would prefer the Commission "research and analyze individual cases in which officers were reinstated after committing crimes or serious acts of aggression." (Because the Association feels that officers should be held accountable for their actions and are subject to a higher standard of conduct.); (3) On the issue of remedial avenues of due process for appointees of constitutional officers: the Association would prefer that deputy sheriffs be treated the same as other constitutional officers (Commonwealth's attorneys, clerks, treasurers, commissioners of revenue) and that whatever procedures are given to sheriffs should be given to these others as well.

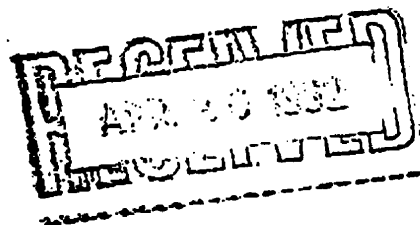
NAACP
Virginia State Conference



1214 W. Graham Road
P.O. Box 27212
Richmond, Virginia 23261
804 / 321-5678
800-426-2227

April 17, 1992

Delegate Robert B. Ball, Sr.
910 Capitol Street
Suite 915
General Assembly Building
Richmond, Virginia 23219



Dear Delegate Ball:

The Virginia State Conference NAACP is opposed to the implementation of a bill of rights or any type of binding grievance procedure for deputy sheriffs throughout Virginia. It is our belief that all law enforcement officers should be held accountable for their actions by the duly elected sheriffs or appointed police chiefs.

As the Virginia State Crime Commission prepares to decide the direction of a study pursuant to House Joint Resolution No. 166, I encourage you to use whatever influence possible to see that proper attention is given to the feasibility of eliminating binding grievance procedure for law enforcement officers.

Please feel free to contact our office if we can be of further assistance or if we can provide additional information.

It is always a pleasure for us to work together on positive issues that will benefit all of the citizens of the Commonwealth.

Sincerely yours,

Ernest E. Miller, Jr.
Ernest E. Miller, President

pc: John W. Jones, Exec. Director

Ernest E. Miller
President

Oscar Williams
Vice President

John Hines
Treasurer

Yvette Strickland
Recording Secretary

Linda Byrd-Harden
Executive Secretary

James E. Ghee, Esq.
General Counsel



COMMONWEALTH of VIRGINIA

DEPARTMENT OF STATE POLICE

Colonel W. F. Corvello
Superintendent

Lt. Colonel H. M. Durham
Deputy Superintendent

(804) 674-2000

P. O. BOX 27472, RICHMOND, VA 23261-7472

May 12, 1992

Lt. Colonel C. M. Robinson
Director
Administrative & Support Services

Lt. Colonel C. R. Baker
Director
Criminal Investigation

Lt. Colonel L. A. Graham
Director
Field Operations

Mr. D. Robie Ingram, Staff Attorney
Virginia State Crime Commission
General Assembly Building
910 Capitol Street, Suite 915
Richmond, Virginia 23219

Dear Mr. Ingram:

This will respond to your letter of May 5, 1992, regarding the Virginia State Crime Commission's subcommittee study of the Police Officers' Bill of Rights (P.O.B.R.).

Your letter points out the subcommittee's primary focus is the extension of the bill of rights to deputy sheriffs. As I am confident you can appreciate, I am not in a position nor inclined to comment on the application of the bill of rights to deputy sheriffs.

As a matter of information, I will share with you that the P.O.B.R. is seldom, if ever, utilized by our State Police officers. The obvious reason being that the State Grievance Procedure is all encompassing, while the P.O.B.R. is applicable only to matters involving suspension, demotion, transfer or termination of employment. Additionally, and perhaps most importantly, a decision rendered by the P.O.B.R. panel is advisory while the State Grievance Procedure panel's decision is binding.

From a management perspective, a procedure that would be preferable would be one that maintains a balance between employees' rights and the agency's obligation to the public interest. The provisions of the P.O.B.R. provide this balance in my view. I would suggest that the State Grievance Procedure parallel the provisions of the P.O.B.R. as it relates to the advisory nature of panel decisions.

With kind regards.

Sincerely,

Superintendent

WFC/JLL/et

A NATIONALLY ACCREDITED LAW ENFORCEMENT AGENCY

TDD 1-800-553-3144

F-4



VIRGINIA ASSOCIATION OF CHIEFS OF POLICE

1500 FOREST AVENUE, SUITE 218
RICHMOND, VA 23288
(804) 285-8227
FAX (804) 285-3363

May 22, 1992

D. Robie Ingram, Staff Attorney
Virginia State Crime Commission
General Assembly Building
Richmond, Virginia 23219

Dear Mr. Ingram:

Your letter of May 12, 1992 advising of the May 26th meeting of the Commission's Subcommittee Studying the Police Officers' Bill of Rights pursuant to House Joint Resolution 166 has been received. I regret that Association business requires me to be absent from Richmond on the 26th so I will be unable to be present at the subcommittee's meeting to personally express the Association's views on this subject and to respond to the questioning of the subcommittee.

The entire issue of Police Officers' rights is one in which the Chiefs are vitally interested and one which holds very serious implications for the future of the law enforcement profession. As a result, I have attached a position paper addressing those portions of the issue the Association believes should receive the attention of the subcommittee.

Every effort to be present at future subcommittee meetings will be made so that direct responses to the subcommittee may be made. Please keep us advised of the subcommittee's schedule.

With best regards,

Sincerely,

A handwritten signature in cursive script that reads "Jay Cochran".

Jay Cochran
Executive Director

cc: John Jones, Executive Director
Virginia State Sheriffs' Association



VIRGINIA ASSOCIATION OF CHIEFS OF POLICE

1500 FOREST AVENUE, SUITE 218
RICHMOND, VA 23288
(804) 285-8227
FAX (804) 285-3363

May 22, 1992

VIRGINIA ASSOCIATION OF CHIEFS OF POLICE: CONCERNS AND PERSPECTIVES ON HOUSE JOINT RESOLUTION 166

The Virginia Association of Chiefs of Police (VACP) does not believe it appropriate to comment on extending coverage of the police officers' bill of rights (POBR) to Deputy Sheriffs, or the impact of such action on constitutional officers generally. However, we do believe it appropriate to comment on the adequacy of the POBR as it currently exists.

In summary, VACP favors the retention of Chapter 10.1, (POBR) Code of Virginia, as currently written with one addition. We believe the Code should mandate the grievance procedure for police officers in lieu of the variety of systems that have been established throughout Virginia at the state, county, and municipal level since enactment of the POBR almost a decade and a half ago.

These days the POBR is seldom, if ever, used. The major reason is the grievance systems that have been established at the state, county, and municipal level and which are intended to cover all public employees in that jurisdiction with the same set of rules, universally provide for a "due process" panel or other administrative hearing device whose decisions after hearing of the grievance are binding on the agency administrators, be they Chiefs of Police, Directors of Public Utilities, etc. In contrast, the POBR provides that the "due process" decision be advisory only to the Chief of Police, "but shall be accorded significant weight", in the final agency determination. Although not specified in the statute, action in the courts remains an option if the Chief's decision is still believed unjust upon conclusion of the POBR procedure.

Because of this distinction, police officers facing severe disciplinary action by virtue of allegations of substantial, sometimes criminal, misconduct chose not to use the POBR, opting for the often times more lenient "civilian" panels or administrative hearing officer systems. As a result, it is not uncommon for police officers disciplined by their Chiefs for such serious infractions as excessive use of force, misuse of their authority as police officers, and the like, to be restored to duty with either no discipline or discipline inconsistent with the nature of the offense. We can document several cases in the past 10 years where such has occurred.

Why do Chiefs of Police object to being second guessed in this manner? First and foremost, their position is that the nature of policing, because of its obligations and responsibilities to the public, requires that the sworn police officer must be held to a higher standard of accountability than other public employees. For example, a truck driver for the Department of Transportation who lies to his supervisor in the course of employment can probably be rehabilitated through appropriate discipline and restored to unencumbered public service. Not so for a police officer. Lying in the performance of the job must be a terminal offense for a police officer. If not, how can the office avoid impeachment on the witness stand when testifying under oath?

Secondly, Police Chiefs realize the success of their departments is dependent, in large part, on the degree of public confidence and cooperation the department enjoys. The official and off-duty conduct of police officers impact that confidence and cooperation favorably as well as unfavorably. It is the Chiefs' responsibility to effectively manage the Department. That management includes holding officers to the higher standard of accountability so that nothing occurs which adversely affects public trust. If the Chief fails in this responsibility as a result of the arbitrary or capricious application of discipline, the Chief can be removed from office with little or no formality since service is at the pleasure of the appointing authority and without tenure.

It is our Association's view that Chapter 10.1 (POBR) should be changed to require all police officers to use the procedures established therein in pursuit of a grievance for the type disciplinary action defined in the statute.



VIRGINIA STATE POLICE ASSOCIATION

6944 Forest Hill Avenue • Richmond, Virginia 23225
Office: (804) 320-6272 • Fax: (804) 320-261

April 29, 1992

President

H. Dallas Church
133 Pleasant View Drive
Abingdon, VA 24210
(703) 676-2445

1st Vice President

Roger L. Macy
10412 Salem Oaks Drive
Richmond, VA 23237
(804) 748-4251

2nd Vice President

Gerald F. Gregory
Route 1, Box 333
Luray, VA 22835
(703) 743-4076

Secretary

Calvin R. Johnston, Jr.
6360 Centerville Road
Williamsburg, VA 23188
(804) 565-0022

Treasurer

M. Lynn Cofer
10422 Collingham Drive
Fairfax, VA 22032
(703) 323-1022

Executive Director

William P. Elwood
6944 Forest Hill Avenue
Richmond, VA 23225
(804) 320-6272
FAX (804) 320-2616

The Honorable V. Thomas Forehand, Jr.
House of Delegates
3924 Oak Drive, East
Chesapeake, Virginia 23321

Dear Tom:

At the April 21 meeting of the State Crime Commission, you were appointed chairman of a subcommittee to oversee the study of the "Police Officers' Bill of Rights" mandated by HJR 166. While the main issue is whether the Bill of Rights should be broadened to include sheriffs' deputies, we have another issue that we hope you might consider while studying this statute.

When the General Assembly was in session on April 15, a bill was introduced to exempt the Department of State Police from the provisions of the Virginia Personnel Act. The bill's intent was to protect the Department from the promotional policies being required by the Department of Personnel and Training. However, the original bill also meant that our Troopers would lose access to the state grievance procedure. Realizing this, the final version of the bill did not take State Police from under DPT policies and regulations, but froze the promotional system to what was in effect on January 1, 1992.

This flurry of activity exposed what we feel is a weakness in the Police Officers' Bill of Rights. As set out in Section 2.1-116.7, the recommendations of a hearing panel established through use of the Bill of Rights are not binding to the agency in question. However, the findings of a panel established through the state grievance procedure (Section 2.1-114.5:1) are final and binding to both the grievant and the agency. Therefore, in practice few if any State Police Officers seek recourse through the Bill of Rights, instead understandably seeking the stronger protection offered through the state grievance procedure.

Since the issue of exempting the Department of State Police from the Virginia Personnel Act may yet again surface in the future, it is our desire to seek modifications in the Bill of Rights that would insure our members the same protection they now enjoy under the state grievance procedure. We have two suggestions on how this might be accomplished:

1. *Make the findings of a hearing panel established under the Bill of Rights binding. Section 2.1-116.7 could be amended as follows (new language italicized, deleted language in [brackets]):*

2.1-116.7. Outcome of hearing.--The *findings* [recommendations] of the panel, and the reasons therefor, shall be in writing, shall be transmitted promptly to the law-enforcement officer or his attorney and to the chief executive officer of the law enforcement agency. *The decision of such panel shall be final and binding and shall be consistent with provisions of law and written policies.* [Such recommendations shall be advisory only, but shall be accorded significant weight.]

2. *Give State Police Officers access to the state grievance procedure through the Bill of Rights. Section 2.1-116.4 allows a law enforcement officer to proceed with a grievance "under either the local [emphasis added] governing body's grievance procedure or the law enforcement officer's procedural guarantees, but not both." This section could be amended as follows:*

2.1-116.4. Notice of charges; response; election to proceed under grievance procedure of applicable state or local governing body.--{Existing language remains same until paragraph A 4} 4. The law enforcement officer shall be given written notification of his right to initiate a grievance under the grievance procedure established by the *applicable state or local governing body* pursuant to *S 2.1-114.5:1 or SS 15.1-7.1 and 15.1-7.2.* A copy of the *state or local governing body's grievance procedure* shall be provided to the law enforcement officer upon his request.

B. A law enforcement officer may proceed under either the *applicable state or local governing body's grievance procedure* or the law enforcement officer's procedural guarantees, but not both.

We feel that these approaches will satisfy the concerns that we have about the Police Officers' Bill of Rights and hope that you will be able to include some consideration of them in the course of your study. Thank you for your time and attention to this matter. If you have further questions, please do not hesitate to contact me. With best regards, I remain

Yours truly,



William P. Elwood
Executive Director

cc: The Honorable Robert B. Ball, Sr., Chairman
✓ Frederick L. Russell, Executive Director



Virginia State Sheriffs Association

9507 HULL STREET ROAD - SUITE D • RICHMOND, VIRGINIA 23236
(804) 745-3720 FAX (804) 745-2292

President
W. Alvin Hudson
Immediate Past President
J. Irving Baines
1st Vice President
Vernie W. Francis
2nd Vice President
James Dunning
Secretary
James Bowman
Treasurer
F. W. Howard, Jr.
Legislative Committee Chairman
Clay B. Hester

Region I
R. D. Carrico
Region II
James E. Dooley
Region III
James Burch
Region IV
Terry Hawkins
Region V
John Woodward
Region VI
John Isom
Region VII
Damon Davis
Region VIII
Shirley Reynolds
Region IX
Perry A. Lewis
Region X
John R. Newhart

Executive Director
John W. Jones

May 21, 1992

Delegate V. Thomas Forehand, Jr.
3924 Oak Drive, East
Chesapeake, VA 23321

Dear Delegate Forehand:

House Joint Resolution No. 166 requests the Virginia State Crime Commission to study the "Police Officers' Bill of Rights" and other procedural guarantees as it relates to police officers, deputy sheriffs, and deputies of other constitutional officers. As you know, the Association has a keen interest in this study, which is to address (1) the feasibility of extending a "Bill of Rights" to deputy sheriffs, (2) the adequacy of the "Bill of Rights", and (3) other avenues of due process as it relates to deputies of constitutional officers.

Attached is a position paper representing the Association's views.

I look forward to working with you on this study. If I can be of further assistance, please feel free to let me know.

Sincerely,

John W. Jones
Executive Director

JWJ/pdc
Enclosure



Sheriffs Association's Position on HJR 166

(1) The feasibility of extending the "Police Officers' Bill of Rights" to deputy sheriffs in Virginia. The proponents of the "Bill of Rights" have often indicated that deputy sheriffs should be treated like other law enforcement officers in Virginia. The Association maintains that the relationship between a sheriff and his deputy are closer and more intimate, professionally, than the relationship between a police officer and a chief of police or the head of a state agency. Federal court cases have held that a sheriff is not only civilly liable for the acts of his deputy, but criminally liable and can be fined for the conduct of his deputies. This is not necessarily the case in the relationship between a chief of police and a police officer. Since the sheriff is absolutely liable for all the acts of his deputies, the sheriff should have complete and unfettered control over the deputies (language excerpts from *Whited v. Fields*).

This is not to say that deputy sheriffs should not be afforded some avenues of remedy if they believe they've been dealt an injustice. These avenues exist with the EEOC and the federal courts.

The elected system was never designed for decisions of elected officials to be overturned by grievance panels and those not accountable directly to the public. The court said in *Whited v. Fields*, a case in which individuals sued the sheriff for not being appointed as deputy sheriffs when a new sheriff took office in Russell County, that

"a vital government end is served in this case which the public policy of Virginia has derived from the common law. The benefit gained is multi-faceted, but there is no higher benefit in all of our system of government than that of preserving the benefit of a person's vote. All else is vanity. For this court to say that Sheriff Fields must hire his opponents as deputies to carry out his polices, is the same as declaring the 1983 general election in Russell County void."

Virginia law under Title 15.1-48 provides that sheriffs and all other constitutional officers may appoint one or more deputies who may discharge the official duties of their principal during his continuance in office and that the deputies may be removed from office by their principal. Virginia law and the case law supports that deputies serve a term commensurate with their principal. Accordingly, deputies must be sworn in or re-sworn in after each election of the sheriff. Title 15.1-48.1 adopts civil penalties for constitutional officers for not following nondiscriminatory practices when appointing their deputies.

To overturn a sheriff's decision on personnel could mean that the elected official would be required to hire their opponents to carry out the policies of their office. It is not a common practice in Virginia for sheriffs to wholesale "not reappoint" deputy sheriffs at the beginning of a new term or to wholesale fire deputies for political reasons.

Sheriffs are constitutional officers pursuant to article seven section four of Virginia's Constitution. Case law relating to this provision clearly establishes sheriffs as serving independent of municipal and state government (Sherman v. the City of Richmond). Accordingly, the extension of a state or local grievance procedure or so called "Bill of Rights" or other procedural guarantees infringes the autonomous nature of the office of sheriff.

Accordingly, the Virginia State Sheriffs Association is opposed to extending a "Bill of Rights," grievance procedure or any procedural guarantee to appointees of constitutional officers. The Association maintains that present remedies provide a fair balance of deputies and sheriffs' rights. To change the appointment laws governing constitutional officers would alter decades of case law and tamper with a system that works well.

(2) The adequacy of the "Police Officers' Bill of Rights." The resolution language directing the Crime Commission to study the adequacy of the "Police Officers' Bill of Rights" may be interpreted broadly to examine the "Bill of Rights" (and similar procedural guarantees) in terms of adequacy of protecting the public against actions by law enforcement officers. This is an important issue and should be examined by the subcommittee.

The attached news article indicates that a police officer in a major city in Virginia was reinstated by a local grievance procedure after having been convicted of assault. The news account indicates that the officer assaulted an arrestee while in handcuffs.

In another situation, a police officer in a Virginia county was reinstated after perjury in court was alleged. The Commonwealth's attorney chose dismissal from employment over prosecution for a variety of reasons, but the officer was later reinstated under the local government's grievance procedure.

In a rural county, a state game warden was arrested for drunk driving, resisting arrest, reckless driving, and refusal to take a blood test, by a deputy sheriff. The officer was convicted of reckless driving and attempting to elude police and served six months in jail. The officer was reinstated by the state grievance procedure after being fired and continues to serve as a Virginia law enforcement officer.

The Association recommends that the subcommittee direct this study to research and analyze individual cases in which officers were reinstated after committing crimes or serious acts of aggression. We believe that a review of such cases would reveal that an adjustment to the grievance procedure or other procedural guarantees for law enforcement officers may be necessary. The Association believes that law enforcement officers in Virginia should be held to higher standards than other government employees. The officers should be held accountable for their actions, especially those actions that may be perceived as abusive by members of the public. Citizens are held to a higher standard (a higher penalty) for assault of a law enforcement officer (Section 18.2-57.1). So the idea of holding law

enforcement officers to a higher standard than other government employees is consistent with Virginia tradition.

The concept of this subcommittee reviewing the grievance procedure and due process for law enforcement officers in terms of making it a non-binding procedure is supported by the State Police Superintendent, the Virginia Association of Chiefs of Police, the State Conference of the NAACP, and the Virginia State Sheriffs Association.

(3) Other such remedial avenues of due processes as may be appropriate for appointees of constitutional officers. The President and the Executive Board of the Virginia Association of Local Executive Constitutional Officers (VALECO) has expressed concern that the Commission would consider recommending the implementation of any type of procedural due process for deputies of constitutional officers. The Sheriffs Association maintains the position that sheriffs should be treated the same as the commissioners of revenue, treasurers, clerks, and Commonwealth's attorneys. Accordingly, whatever procedures are implemented for sheriffs should also be implemented for other constitutional officers and their deputies.

Attached are news articles, summaries of Virginia law relating to sheriffs and deputies, a copy of code sections relating to the police "Bill of Rights" and grievance procedures, and related correspondence.