

SHERIFF'S SALES, cont.

seconds East along the centerline of Church Street, 138.60 feet to a railroad spike; thence (2) South 50 degrees 05 minutes 42 seconds West along land now or formerly of Donald Zeger, 288.47 feet to an iron pin in the Easterly line of a gravel alley (12 feet wide); thence (3) North 01 degrees 31 minutes 00 seconds West, along the Easterly line of said alley and the prolongation thereof 227.00 feet to a railroad spike in the centerline of Oregon Street; thence (4) North 73 degrees 59 minutes 00 seconds East along the centerline of Oregon Street, 29.68 feet to a railroad spike at a point of curve; thence (5) on a curve to the left having a radius of 319.62 feet the chord of which bears North 62 degrees 36 minutes 45 seconds East, for a distance of 126.12 feet to the place of beginning.

CONTAINING 29,117.66 square feet, plus or minus.

BEING THE SAME REAL ESTATE which Omer E. Grosh and Margaret E. Grosh, his wife, by deed dated November 26, 1980, and recorded among the Deed Records of Franklin County, Pennsylvania, in Deed Book Volume 825, Page 446, conveyed to Herndon Elevator & Grain Limited, a Pennsylvania Corporation.

TOGETHER with the existing railroad tracks and appurtenances thereto located on the above described premises.

SUBJECT, HOWEVER, to easements of record or otherwise affecting the premises hereinbefore described, and specifically to the storm sewer easement granted to the Borough of Mercersburg as more fully set forth in Franklin County Deed Book Volume 802, Page 49; and the state of facts disclosed by survey made by Nassaux-Hemsley, Inc., Chambersburg, Pennsylvania, dated September 3, 1975.

SUBJECT, HOWEVER, to the restriction that the property herein conveyed shall not be used for the retail sale of lumber, building materials, hardware, paint, millwork, or other products commonly sold in conjunction with the operation of a hardware or building supplies store. It is expressly understood and agreed that the restrictive covenant contained herein shall attach to and run with the land, and it shall be lawful for the grantors, their heirs and assigns to institute and prosecute any

SHERIFF'S SALES, cont.

proceedings at law or in equity against the person or persons violating or threatening to violate the same.

TOGETHER WITH and including all buildings, fixtures, and including but not limited to all plumbing, heating, lighting, ventilating, refrigerating, incinerating, air conditioning apparatus, elevators, and all improvements permanently installed thereon, all personally and equipment necessary to the operation of the premises as a business.

BEING sold as the property of Herndon Elevator & Grain Limited, Writ DSB 1983-4.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, March 21, 1983 at 4:00 P.M. E.S.T. Otherwise, all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff

Franklin County, Chambersburg, PA

the transaction with his grandson. It seems to us that relationships, like animosity existing between the personal representative and a legatee, is not grounds per se for removal of those in whom a testator placed trust and confidence. See *Breichner Estate*, supra.

The Act of 1972, June 31, P.L. 508, No. 164 Sec. 2, 20 Pa. C.S.A. Sec. 3182 gives the Court exclusive power to remove a personal representative for mismanaging an estate. Since the remedy is a drastic one, and since the objectives of the petitioner could be achieved in another and less drastic way, we are going to sustain the demurrer. The petitioner has already had a citation issued to the executrices to show cause why they should not account. A like method should be pursued in the execution on the debt, so petitioner will be granted leave to amend his petition to include a request for a citation upon the personal representatives to show cause why they should not execute on the debt. See *Richter's Estate*, 20 Pa. Dist. R. 702 O.C. Snyder Co. (1911).

ORDER OF COURT

November 23, 1982, the motion to strike and the demurrer to the petition to remove the personal representatives are granted. The petitioner is granted twenty (20) days from this date in which to file an amended petition to request that a citation be issued upon the executrices of Roy N. Rock to show cause why they should not issue execution of the debt owed to the estate of Bradley A. and Deborah T. Beaver.

HORST V. ANTRIM TOWNSHIP, C.P. Franklin County Branch,
No. A.D. 125, 1982

Township Supervisor - Compensation of Supervisor Employee - Auditors report - equal protection.

1. The compensation of township supervisors, when acting as roadworkers is fixed by the township Auditors.
2. A trial court can change the rate set by Auditors where the rate set by Auditors is capricious.
3. Where a plaintiff supervisor forfeited overtime pay when he became supervisor as a result of a pay scale approved by Auditors, the Auditors'

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action is a violation of the equal protection clause of the U.S. Constitution.

4. A challenge to the report of township Auditors is the exclusive remedy provided by the Second Class Township Code where a township supervisor is seeking additional wages and benefits for his work as an employee of the township.

Thomas A. Beckley, Esq. Attorney for Appellant

Stephen E. Patterson, Esq., Attorney for Appellee

OPINION AND ORDER

EPPINGER, P.J., November 26, 1982:

Michael Horst is a Supervisor of Antrim Township and is also a full-time road maintenance employee and road foreman. Antrim Township is a Second Class Township located in Franklin County.

The compensation of Supervisors, when acting as Superintendents, roadmasters and laborers is to be fixed by the township Auditors. This compensation may not exceed that paid in the locality for similar services. Act of 1933, May 1, P.L. 103 Sec. 515 as amended, 53 P.S. Sec. 65515. The purpose of this legislation is obvious. Elected Supervisors should not be permitted to take jobs on the roads and pay themselves at excessive rates.

The problem here is that the Auditors set Horst's rate for 1981 lower than for some working on Antrim Township roads and others doing the same work in other township.¹ Under action taken by the auditors in January, 1981, he received \$6.60 per hour regardless of hours worked and no overtime pay. Other Antrim Township road employees whose wages were fixed by the Supervisors were paid time and a half for over 40 hours in any work week.

To protest what the appellant views as an inequitable and unconstitutional limit on his wages, he filed an appeal from the "Annual Audit and Financial Report for Antrim Township for the Year 1981." It was on this statement that, though not specifically mentioned, Horst's wages were confirmed for the year 1981. A challenge to the report of the township Auditors under the Second Class Township Code, supra, 553, 53 P.S. Sec. 65553 is appellant's exclusive remedy when seeking additional wages and benefits. *Louis Festa v. Derry Township*, 49 Pa. Com. Ct. 293, 410 A.2d 979 (1979).

¹ The average hourly rate in some neighboring townships for the same work in 1981 was \$7.72 and time and a half for over 40 hours.

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The Auditors, stating that appellant's wages were set in January, 1981, and that he had notice thereof, including from the checks he received and the approval he gave to the treasurer's disbursements during the year, contend he should have filed an appeal from the 1980 audit statement and since he didn't, his appeal should be dismissed. There was no evidence that any part of the Auditor's report for 1981 mentioned these wages. We refuse to dismiss.

We think the work of public auditors is to examine and pass upon the accounts and vouchers of officers who have received and expended public money. *Hicks v. Davis*, 100 Kan. 4, 163 P. 799 (1917). By definition, an audit is a review of events that have occurred. It is not prospective. If appellant's exclusive remedy is by an appeal from the Auditor's report such appeal could properly be filed after the account covering the period during which he was paid the salary has been stated and audited. The fact that he believed all of the year 1981 that he was being underpaid, did not nullify his right to protest. He could wait until the audit report was filed in March, 1982 and then do it.

Baughman v. Hempfield Township, 159 Pa. Super. 178, (1946) does not hold that Horst was required to file some kind of appeal after he knew what his wage rate would be for 1981 even though not stated in the 1980 Auditor's Report. In that case, unlike the facts in this case, the wage rates for the Supervisors were fixed in advance by the township Auditors in the Auditor's Report for 1938. The supervisors in *Baughman*, contending that the Auditors acted capriciously took an appeal from the 1938 audit. While this appeal was pending, two Supervisors paid themselves at a higher rate for 1939, while Baughman was paid at the rate set by the Auditors. The appeal from the 1938 Auditor's Report was sustained and the wage rates for 1939 were increased by the Court. Baughman then brought an action in assumpsit for 1939 wages to compel payment at the increased rate. The Superior Court overruled the trial court and held that assumpsit would lie.

The Court's opinion is not a holding that the statement of the trial court that Baughman should have appealed from the 1939 Auditor's Report was improper. All it said was that there would have been no point in filing an appeal from the 1939 report because the matter was already before the Court on the appeal from the 1939 report. The Court clearly stated that its conclusion was based on the facts in that particular case.

A lesson that we can learn from *Baughman*, however, is that the trial Court can change the rate set by the Auditors simply because the Auditors acted capriciously. The Auditors in *Baughman* had fixed the rates at \$2.50 per day as Supervisors and \$3.00 per day as roadmasters, the minimum allowed at that time. The lower Court sustained the appeal of the Supervisors and fixed the rate at \$4.00 and \$5.00 respectively.

As a matter of policy, it would seem that since the thrust of the act directing Auditors to set Supervisors' salaries when the latter work on the road is to prevent Supervisors from paying themselves at a rate higher than that paid other persons for similar work, when the Auditors set the salaries significantly lower, on an appeal such as this, Auditors should introduce evidence to justify their decision. No such evidence was introduced in this case. That suggests that there was no justification. If none, then the act of the Auditors may be considered to be capricious. At the least we think that the refusal of the Auditors to pay Horst overtime, when others working in similar positions are paid overtime by the same taxpayers, is arbitrary and capricious and is made without just cause.

What has happened is that Horst apparently forfeited what would be a right to overtime pay when he decided to run for the office of township Supervisor. A government may not require an individual to relinquish rights guaranteed to him by the First Amendment as a condition of public employment. *Aboud v. Detroit Board of Education*, 431 U. S. 209, 97 S. Ct. 1782, 52 L.Ed. 2d 261 (1979). Freedom of political belief and association are rights protected under the First Amendment through the Fourteenth Amendment of the U. S. Constitution. *Elrod v. Burns*, 427 U. S. 347, 96 S. Ct. 2673, 49 L.Ed. 2d 547 (1976). Any condition of public employment which severely restricts these rights must be scrutinized. The Fourteenth Amendment intended that equal protection and security be given all under like circumstances, and that no greater burdens be laid upon one than are laid upon others in the same calling and condition. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892 (1890).

Therefore, in addition to being capricious the act of the Auditors in refusing to pay Horst overtime is a violation of his fundamental rights under the Fourteenth Amendment of the U.S. Constitution.

The regular rates paid to township workers during the year 1980 were:

	Jan. to July	July to Dec.
Road Crew	\$ 5.65	\$ 5.80
Assistant Foreman	5.80	5.95
Foreman	6.00	6.00

The regular rates paid to township workers during the year 1981 were:

	Jan. to July	July through Dec.
Road Crew	\$ 6.38	\$ 6.48
Assistant Foreman	6.60	6.70
Foreman	6.60	6.60

In both years, the road crew and the assistant foreman received a mid-year adjustment of 10¢ per hour. The appellant, Mr. Horst who is road foreman received none. For his supervisory status at the end of 1981 he received just 12¢ an hour more than the road crew and 10¢ an hour less than the assistant foreman. The failure to keep the appellant's wages in line with the others is arbitrary, capricious, and unconstitutional, and it is difficult for us to understand what prompts the Auditors not to keep his wages apace, especially since others doing the same kind of work in the other townships surveyed were receiving on the average \$7.72 per hour in 1981 with overtime and other benefits. The work in Antrim Township cannot be materially different than that in the other townships and is just as important.

It is our view that the appellant should have received a minimum of \$6.85 for each hour worked in 1981 as road foreman from January to July and \$6.95 for each hour worked from July through December. We further hold that he is entitled to overtime pay for the same period for every hour over 40 hours worked at the rate of one and one-half times his adjusted hourly rate.

ORDER OF COURT

November 26, 1982. The appellant is directed to file a proposed Decree Nisi within twenty (20) days to give effect to this decision, including interest at the legal rate computed from the date each salary payment should have been made and costs of these proceedings. A copy of the proposed order shall be served upon the attorney for the Auditors for comment and suggested

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revisions, if necessary, but such revisions shall be made only if the proposed order does not follow the decision of the Court.

COMMONWEALTH V. MILLER, C.P., Franklin County Branch, No. 240 of 1982

Criminal Law - Murder - Defense of Insanity - Nolle Prosequi

1. When the defense of insanity is raised, the Commonwealth is required to prove the defendant sane beyond a reasonable doubt.
2. Evidence of lay witnesses can establish the sanity of a defendant who has offered expert testimony as to insanity.
3. Where there is no evidence of defendant's conduct at or about the time of the crime, the Commonwealth cannot prove the defendant's sanity beyond a reasonable doubt.

District Attorney

Public Defender

OPINION

EPPINGER, P.J., December 8, 1982:

The District Attorney has filed an Application to Nolle Prosequi the charge of Murder pending against the defendant, Tammy R. Miller. When the application was filed the Court scheduled a hearing and at that hearing it was stipulated that reports of Dr. Paul David Mozley, Psychiatrist and Gynecologist, Dr. Joseph O. Strite, Psychiatrist, Dr. D. K. Chang, Pathologist, Dr. Robert F. Hall, Radiologist and the police report should be admitted in evidence. No testimony was taken.

Before the hearing the defendant entered her own plea of not guilty by reason of insanity in substitution of the plea of not guilty entered earlier for her by the Court when she stood mute at arraignment. When the defense of insanity is raised, the Commonwealth is required to prove the defendant sane beyond a reasonable doubt. *Commonwealth v. Demmitt*, 456 Pa. 475, 321 A 2d 627 (1974). Evidence of lay witnesses can establish the sanity of a defendant who has offered expert testimony as to insanity. *Demmitt*, supra.