

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

April 24, 2012

Perry F. Goldlust, Esquire  
Perry F. Goldlust, P.A.  
702 King Street, Suite 600  
P.O. Box 1675  
Wilmington, DE 19899-1675

David H. Williams, Esquire  
James H. McMackin, III, Esquire  
Allyson Britton DiRocco, Esquire  
Morris James LLP  
500 Delaware Avenue, Suite 1500  
P.O. Box 2306  
Wilmington, DE 19899

**RE: *General Teamsters Local Union 326 and Robert T. Whitman v.  
City of Rehoboth Beach, Delaware***  
C.A.No. S11C-03-019 ESB

Date Submitted: December 1, 2011

Dear Counsel:

This is my decision on the Cross Motions for Summary Judgment filed by Plaintiffs General Teamsters Local Union 326 (the “Union”) and Robert T. Whitman (“Whitman”) and Defendant City of Rehoboth Beach (“Rehoboth”) in this case involving a dispute over whether Rehoboth’s suspension without pay of Whitman is discipline or not. Whitman is a uniformed police officer in Rehoboth’s Police Department and a member of the Union. Rehoboth and the Union are parties to a collective bargaining agreement (the “CBA”) governing the police officers. Whitman is a member of the collective bargaining unit and covered by the CBA. The CBA sets forth a certain process that Rehoboth must follow before it can discipline a police officer.

The dispute in this case began when the Sussex County Family Court issued a Protection From Abuse order against Whitman on February 3, 2009. The PFA required Whitman to relinquish all firearms in his possession for the duration of the PFA. In accordance with the PFA, the Rehoboth Police took possession of Whitman's firearms, including his service weapon. Chief of Police Keith Banks then suspended Whitman without pay on February 4, 2009, because he was no longer able to carry his service weapon. The PFA expired on February 13, 2009. Chief Banks reinstated Whitman on February 15, 2009. Whitman missed his scheduled shifts on February 6, 7, 8, 11, and 12 due to his suspension. Whitman filed a grievance with Rehoboth, arguing that his suspension without pay constituted discipline even though he had not violated any laws, policies or directives. The CBA has a multi-step disciplinary process that allowed Whitman to appeal his suspension to Chief Banks, then to Town Manager Gregory J. Ferrese, and finally to the Mayor and Commissioners. They all denied Whitman's grievance.

The CBA provides that if the Union is not satisfied with the decision by the Mayor and Commissioners that it may file an action in the Sussex County Superior Court.<sup>1</sup> The CBA further provides that the power and authority of the Superior Court shall be limited to a "determination and interpretation of the terms of this Contract."<sup>2</sup> The Union and Whitman filed a complaint in this Court against Rehoboth. The Complaint has two counts. Count one alleges that Rehoboth did not follow the disciplinary process before suspending Whitman without pay. Count two alleges that Rehoboth violated Whitman's constitutional due process rights when it suspended him without pay in an arbitrary and capricious manner. Rehoboth acknowledges that it did not properly follow the

---

<sup>1</sup> Collective Bargaining Agreement 9.7.

<sup>2</sup> Collective Bargaining Agreement 9.8.

disciplinary process if Whitman's suspension without pay is determined by the Court to be discipline.

I have granted the Motion for Summary Judgment filed by the Union and Whitman, reasoning that suspending Whitman without pay where he can not lawfully possess his service weapon is discipline because a suspension without pay is (1) a recognized form of discipline under the CBA, and (2) was done because Whitman was not meeting a standard that police officers must meet, i.e., the ability to lawfully carry a service weapon.

### **STANDARD OF REVIEW**

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>3</sup> The moving party must initially demonstrate that there is no genuine issue of material fact.<sup>4</sup> If that burden is met, the burden then shifts to the non-moving party to demonstrate that an issue of material fact remains in dispute.<sup>5</sup> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based upon the record submitted with the motions.<sup>6</sup> Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.<sup>7</sup> Filing of a

---

<sup>3</sup> Superior Court Civil Rule 56(c).

<sup>4</sup> *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

<sup>5</sup> *Id.*

<sup>6</sup> Superior Court Civil Rule 56(h).

<sup>7</sup> *Emmons v. Hartford Underwriters Insurance Co.*, 697 A.2d 742, 745 (Del. 1997).

cross motion for summary judgment does not serve as a waiver of the party's right to assert the existence of a factual dispute as to the other party's motion.<sup>8</sup>

### DISCUSSION

The power and authority of this Court to review a decision made by the Mayor and Commissioners was established by the CBA.<sup>9</sup> The Court's review is strictly limited to a determination and interpretation of the terms of the contract.<sup>10</sup> Given the limited role the Court is to play, as agreed upon by the parties, I am not going to consider the second count of the complaint because to do so would involve more than a determination and interpretation of the terms of the contract and, as such, would exceed the Court's limited grant of authority.

Thus, the sole issue for decision is whether the suspension of Whitman without pay because he could not lawfully carry his service weapon is discipline within the meaning of the CBA. Rehoboth argues that it was not discipline because it was not done to encourage Whitman to comply with any standard that a uniformed police officer must meet. The Union and Whitman argue that his suspension without pay can not logically be anything other than discipline.

In interpreting a contract, the Court must first examine the entire agreement to determine whether the parties' intent can be discerned from the express words used or, alternatively, whether its terms are ambiguous.<sup>11</sup> Initially, the Court looks to the terms of the contract.<sup>12</sup> If the terms are

---

<sup>8</sup> *United Vanguard Fund, Inc. v. Take-Care, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

<sup>9</sup> Collective Bargaining Agreement 9.7.

<sup>10</sup> Collective Bargaining Agreement 9.8.

<sup>11</sup> *Izquierdo v. Sills*, 2006 WL 318631, at \*2 (Del. Ch. Jan. 30, 2006).

<sup>12</sup> *Id.*

clear on their face, the Court must apply the meaning that would be ascribed to the language by a reasonable third party.<sup>13</sup> Where there is an ambiguity in the contract-that is, where a contract's provisions are reasonably susceptible to two or more meanings-the Court should consider extrinsic evidence to glean the reasonable shared expectation of the parties at the time of contracting.<sup>14</sup>

The CBA does not define discipline. However, it does discuss both the types and purpose of discipline. The types of discipline available to Rehoboth and the applicable reference in the CBA are as follows:

<u>TYPES OF DISCIPLINE</u>	<u>CBA ARTICLE</u>
1. Oral warning	7.5
2. Oral reprimand	7.5
3. Written warning	7.5
4. Written reprimand	7.5
5. Suspension	7.10
6. Demotion	7.10, 10.17.2, 10.18.2
7. Suspension with pay	7.12, 13.6.2, App. A, §4.A.1
8. Suspension without pay	7.14, 13.6.1,13.10.1, 13.10.2, 14.16, App. A, Weight Control Program, §4
9. Discharge	13.6.1, 13.6.2, 13.10.3
10. Written reminder	14.16
11. Notice of counseling	14.16
12. Official reprimand	14.16
13. Non-payment of compensation	26.8.3

The forms of discipline listed in Article 7 of the CBA are non-specific and presumably apply to a broad range of situations. The forms of discipline listed in other Articles of the CBA sometimes relate to specific areas, (i.e. Alcohol and Drug Testing - Article 13, Attendance - Article 14, Sick Leave - Article 26, and Physical Fitness - Appendix A) and sometimes relate to non-specific areas

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

(i.e., Demotion - Article 10). In any event, there is no doubt as to what forms discipline may take. Similarly, there is no doubt that being suspended without pay is a form of discipline.

Discipline, as set forth in the CBA, is “[f]or the sole purpose of impressing upon an employee that an improvement is required in a certain area in order for that employee to meet a required level of performance applicable and consistent with the standard prevalent with the majority of other department employees subject to the same standards and conditions.” Notwithstanding this stated purpose of discipline, the fact that an employee may ultimately be discharged shows that discharge, the final act of the disciplinary process, once applied, is punitive in nature and will not impress upon an employee the need to meet a certain level of performance regarding a particular standard. This is true of the other forms of discipline as well. Being demoted or suspended without pay are certainly punitive, albeit to a lesser degree than discharge.

Chief Banks suspended Whitman without pay. This is a form of discipline that appears in Article 7, as well as other Articles of the CBA. Rehoboth argues that doing this was not discipline because it was not done for the purpose of encouraging Whitman to meet a required level of performance applicable and consistent with the standard prevalent with the majority of other police officers subject to the same standards and conditions as Whitman. Rehoboth’s argument is undermined by Chief Banks’ own statements. Chief Banks’ notice of suspension without pay states, in applicable part, the following:

The very nature of your job required you to carry a service weapon. Therefore, effective immediately, you are suspended, without pay, pending Court notification reinstating your ability to carry a service weapon. (Emphasis added).

Chief Banks’ letter addressed to the Union after he considered Whitman’s grievance states,

in applicable part, the following:

Per Article 9.3 of the Contract, I have investigated your complaint and find the following: on February 4, 2009, Cpl. Whitman was suspended as a result of a temporary Ex Parte Order against him. According to the document, he is prohibited, for the duration of the Order, from possessing firearms. The very nature of his job requires him to carry a service weapon. (Emphasis added).

In both instances Chief Banks stated that Whitman had to be able to carry a service weapon in order to do his job. This is a minimum standard that Whitman and all the other uniformed police officers must meet according to Chief Banks. It is seemingly no different than other standards that a uniformed police officer must meet in order to do his job, such as maintaining a certain minimum level of physical fitness. Quite simply, a uniformed police officer must be physically fit and able to carry a service weapon. Whitman is a uniformed police officer. One of the standards that such officers must meet, according to Chief Banks, is the ability to carry a service weapon. Chief Banks suspended Whitman when he lost the ability to carry a service weapon. Chief Banks reinstated Whitman when he regained the ability to carry a service weapon. Thus, Whitman was suspended and reinstated in accordance with his ability to meet or not meet the standard of lawfully carrying a service weapon. This is wholly consistent with the purpose of discipline as defined in the CBA.

### **CONCLUSION**

After reviewing the applicable terms in the CBA, I have concluded that Rehoboth's suspension without pay of Whitman was an act of discipline because it was one of the forms of discipline set forth in the CBA and is consistent with the stated purpose of discipline in the CBA. It simply defies logic to argue, as Rehoboth does, that a recognized form of discipline is not discipline. Rehoboth would have had an excellent argument if the PFA required it to suspend

Whitman without pay. However, that was not the case. The PFA only prohibited Whiteman from possessing a firearm. It was Chief Banks' decision to suspend Whitman without pay and he did it because Whitman could not carry his service weapon. Suspending a police officer without pay where he can not carry his service weapon also serves to enforce a standard. Chief Banks stated this in both his notice of suspension without pay and grievance letters. A uniformed police officer has to be able to carry a service weapon to do his job according to Chief Banks. He suspended Whitman until he could regain the right to carry a service weapon. This was clearly done to impress upon Whitman the need to do whatever he had to do in order to regain the right to carry a service weapon. This is the agreed-upon purpose by the parties of discipline. Therefore, I have granted the Motion for Summary Judgment filed by Plaintiffs General Teamsters Local Union 326 and Robert T. Whitman, and denied the Motion for Summary Judgment filed by Defendant City of Rehoboth Beach.

**IT IS SO ORDERED.**

Very truly yours,

/s/ E. Scott Bradley

cc: Prothonotary