

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

SHAWN BRITTINGHAM,)
BRADLEY CORDREY,)
CHRISTOPHER STORY,)
) Petitioners,)
) v.) C.A. No. S10M-09-023 RFS)
))
TOWN OF GEORGETOWN, a)
municipal corporation, WILLIAM)
TOPPING, Chief of Police for the)
Town of Georgetown, and RALPH)
HOLM, Captain of Police for the)
Town of Georgetown,)
) Respondents.)

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment. Granted.
Plaintiffs' Petition for a Writ of Mandamus. Dismissed.

Submitted Date: April 4, 2011
Decided Date: June 28, 2011

Bruce A. Rogers, Esquire, Georgetown, Delaware, Attorney for Petitioners.

James E. Liguori, Esquire, and Gregory A. Morris, Esquire, Liguori & Morris,
Dover, Delaware, Attorneys for Respondents.

STOKES, J.

This is my decision on Defendants' Motion for Summary Judgment as to Plaintiffs' Petition for a Writ of Mandamus. It is also by necessity my decision on the petition for mandamus. During the relevant time periods, Plaintiffs Shawn Brittingham, Bradley Cordrey and Christopher Story were police officers employed by Defendant Town of Georgetown ("Georgetown"). Defendant William Topping and Defendant Ralph Holm are, respectively, Chief of Police and Captain of Police for the Georgetown Police Department ("GPD").

In 2007, Chief Topping issued a verbal order prohibiting officers from meeting with the Mayor or members of the Town Council to discuss police business without his permission. Nevertheless, on December 23, 2009, seven off-duty officers, including Plaintiffs, met with Council Member Sue Barlow at her home to discuss police department issues.

When GPD learned of the meeting, Captain Holm informed each Plaintiff in writing that he was being investigated, consisting of interviews of Plaintiffs, for violating three GPD Rules and Regulations. *See* 11 *Del.C.* § 9200(c). During interviews conducted by Sergeant Eric Richardson of the Dover Police Department, Plaintiffs acknowledged having met with Barlow in violation of Chief Topping's order. Captain Holm concluded that the only substantiated charge was one count of insubordination for each officer for their knowing disregard of an order. Thus, a written reprimand was issued to each Plaintiff by Captain Holm. In May 2010, Plaintiffs received and signed

copies of the investigative findings, the charge sheet and the notice of the disciplinary action, which was a written reprimand.

Plaintiffs requested that a hearing be conducted by officers outside GPD. *See* 11 *Del.C.* § 9205. Chief Topping requested the Criminal Justice Council (“CJC”) to appointed a hearing panel. In September 2010, after taking evidence, the CJC hearing panel found substantial evidence to support the insubordination charge against each Plaintiff for meeting with Barlow. At the hearing, each Plaintiff acknowledged understanding Chief Topping’s order regarding contact with Council members. The panel was not asked to recommend a penalty.

Captain Holm imposed disciplinary actions greater than the original written reprimand: in October 2010, Plaintiffs Cordrey and Story each received a two-week unpaid suspension and a seven-day reduction in rank from Patrolman First Class to Patrolman. In late September, Plaintiff Brittingham received a four-week unpaid suspension and a fourteen-day reduction in rank from Corporal to Patrolman First Class.

In October 2010, Plaintiffs appealed to the Disciplinary Action Appeals Board in the Town Council of the Town of Georgetown. Following a hearing, the Council upheld the findings of the CJC hearing panel. Plaintiffs then signed disciplinary notices from Chief Topping imposing the same penalties as those imposed by Captain Holm after the CJC panel hearing.

In the meantime, on September 24, 2010, Plaintiffs sought mandamus in this Court, pursuant to 10 *Del.C.* § 564. Plaintiffs petition the Court to remand the matter for a new hearing with a different CJC panel, to require Defendants to provide copies of transcripts and records to be used in the case, to immediately restore Plaintiffs' employment, benefits and prior rank and to remove all relevant documents from personnel files and records of the Town of Georgetown.¹

Defendants have moved for summary judgment because there were no LEOBOR violations and, even if there were, they were technical in nature and not substantiated by the evidence.

If a writ of mandamus is issuable, the Court can then consider the appropriateness of summary judgment.² Mandamus is a prerogative writ, issuable not as of right, but only in the exercise of sound judicial discretion.³ When directed to an administrative agency

¹In December 2010, Lester Shaffer and Jennifer Shaffer, his wife, filed a Complaint against Topping, Holm, the Town of Georgetown and numerous additional defendants in this Court for hostile work environment, retaliation, civil conspiracy, abuse of official power, fraud, infliction of emotional distress, slander, aiding and abetting, *respondeat superior*, loss of consortium, and punitive damages. The Complaint was dismissed for Plaintiffs' failure to timely file an answer to Plaintiffs' motion to dismiss. *Shaffer v. Topping*, C.A. S10C-12-016 THG (March 31, 2011).

In January 2011, Plaintiffs in this case, as well as Plaintiff Lester F. Shaffer, filed for breach of contract against the same Defendants. The Complaint alleges violation of the Law Enforcement Officers' Bill of Rights ("LEOBOR"), retaliation, civil conspiracy, abuse of official power/violation of due process, slander, breach of town and departmental policies. Defendants have moved to dismiss.

²*Rosario v. Town of Cheswold*, 2007 WL 914899 (Del. Super.).

³*Guy v. Greenhouse*, 637 A.2d 287 (Del. 1993)(table).

or public official, mandamus will issue only to require performance of a clear legal or ministerial duty.⁴ A ministerial duty is one which is prescribed with such precision and certainty that nothing is left to discretion or judgment.⁵ Mandamus will not lie unless the plaintiff has no other remedy.⁶

Both parties argue the merits of *Smith v. The Dep't. of Public Safety of the State of Delaware*.⁷ In *Smith*, the defendants moved for summary judgment on the plaintiff's mandamus petition, which alleged violations of LEOBOR and due process of law. Although *Smith* noted that mandamus may be the proper way to remedy such violations, the Court chose not to exercise jurisdiction because the alleged LEOBOR violations were technical in nature and did not give rise to due process violations. Moreover, as in this case, the plaintiff did not assert that he was falsely accused. The *Smith* Court declined to interject itself in the routine disciplinary proceedings of a state agency.⁸

Plaintiffs assert without elaboration that the facts of *Smith* are distinguishable from those at bar. The only notable difference is that *Smith* was given summary disciplinary action without benefit of an internal investigation, unlike this case where Sgt. Richardson conducted an internal investigation prior to disciplinary action. In both cases, the

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷1999 WL 1225250 (Del. Super.), *aff'd*, 2000 WL 1780781 (Del.).

⁸*Id.* at *13.

plaintiffs were given the opportunity for a hearing to determine whether the charges were substantiated. Section 9203.

Plaintiff argues that *Rosario v. Town of Cheswold*⁹ provides better guidance. *Rosario* held that the scheduling and holding of a CJC hearing is a nondiscretionary duty pursuant to 11 *Del.C.* § 9203. In this case, Defendants arranged for CJC to schedule and conduct a hearing to determine whether each Plaintiff's "guilt [had] been established by substantial evidence." Section 9205(e). The statutory procedure was followed and the charge of insubordination was substantiated as to each Plaintiff.

Defendants have provided the Court with contemporaneous documentation of the written Notification of Professional Standards Inquiry as to each Plaintiff, the Results of Professional Standards Inquiry as to each Plaintiff and the Notice of Disciplinary Action as to each Plaintiff. Also proffered are the written decisions of the CJC hearing panel, dated September 15, 2010, and the Disciplinary Action Appeals Board of the Town Council, dated October 18, 2010.

These documents show that Defendants followed the standards set forth in the LEOBOR, 11 *Del.C.* Ch. 92, for the internal investigation (§ 9200(c)), the mandatory hearing (§ 9203) and the required procedure or the hearing (§ 9205).

Plaintiffs acknowledge that an investigation and hearing took place, and do not deny that they committed the charged act. They allege the following violations of their

⁹2007 WL 914899 (Del. Super.).

rights.

First, Plaintiffs assert without elaboration that Defendants did not enforce the requirement in the GPD Code of Conduct that all members of the force obey all orders. This bare assertion has no basis in LEOBOR, nor does it present a cognizable issue to the Court.

Second, Plaintiffs argue that Defendants failed to protect their constitutional right to free speech by prohibiting them from contacting Council members. Plaintiffs did not raise this issue below, nor is it within the panel's statutory role as fact finder. *See* § 9207. Plaintiffs have not stated a viable civil rights claim, or initiated such an action.

Third, Plaintiffs argue that Defendants did not conduct the investigation by an authorized member of GPD. Section 9200(c)(3) states no complaint against an officer shall be prosecuted without substantial evidence obtained in “an investigation by an authorized member of the department.” In this case, Chief Topping appointed Sgt. Richardson of the Dover Police Department to conduct the investigation. Having an investigator outside GPD was an added protection for Plaintiffs because the dispute lay squarely between the seven officers and their Chief. There is no violation of Plaintiffs' rights.

Fourth, Plaintiffs assert that their rights were violated by Defendants' failure to produce the Departmental Internal Investigation Control Log. Section 9200(c)(7) requires that a complete record of the investigative interviews be provided at the officers'

request, but contains no reference to an internal investigative log. The record shows that copies of the interviews were made available to Plaintiffs' counsel prior to the CJC panel hearing. Plaintiffs have not shown an LEOBOR violation.

Fifth, Plaintiffs assert that Defendants failed to "delineate the proper insubordination charge." The notice of inquiry sent to each Plaintiff prior to questioning sets forth three alleged violations of the Code of Conduct directives, as well as a narrative description of the events in question. Section 9200(c)(4) requires that the officer being investigated "shall be informed in writing of the nature of the investigation prior to being questioned." Defendants complied with this requirement.

Sixth, Plaintiffs allege that Defendants failed to support the "initial complaint by substantial evidence." Section 9200(c)(3) provides in part that "No formal complaint against a law-enforcement officer seeking dismissal or suspension or other formal disciplinary action shall be prosecuted under departmental rule or regulation unless the complaint is supported by substantial evidence derived from an investigation by an authorized member of the department." That is, the purpose of the investigation is to determine whether substantial evidence exists. The statements of the seven officers interviewed, including Plaintiffs, confirmed that an unauthorized meeting with Barlow had taken place in conscious disregard of Chief Topping's order. These statements constitute substantial evidence. The formal charge to each Plaintiff was issued after the investigation generated these admissions.

Seventh, Plaintiffs allege that Defendants failed to disclose exculpatory evidence. Section 9200(c)(10) states that an officer charged with any violation will be given access to any exculpatory evidence or any evidence to be used at the hearing. Defendants' counsel stated at the hearing that there was no exculpatory evidence, and Plaintiffs have not identified any exculpatory evidence they believe to exist. The evidence presented by the defense was entered without objection and had been previously provided to Plaintiffs' counsel. The Court finds no LEOBOR violation.

Eighth, Plaintiffs argue that Sgt. Richardson failed to inform them in writing of his findings and recommendations. The record shows that based on Sgt. Richardson's report, Captain Holm informed Plaintiffs in writing of the results of the investigation, including the fact that three of the four charges were either unsubstantiated or exonerated the Plaintiffs. If this procedure was not consistent with § 9200(c)(11), it is a matter of no consequence in light of Captain Holm's informative written submissions to Plaintiffs.

Plaintiffs also make claims against the CJC hearing panel. The three panel members are not named parties to this action, nor do Defendants have authority over the CJC's appointees. Nonetheless, Plaintiffs argue that the panel refused to subpoena their witnesses and to compel discovery. The panel has no statutory authority to fulfill either of these roles, as explained to Plaintiffs' counsel by Michael Tupman, Esquire, DAG attorney for Defendants.

Plaintiffs further assert that the panel violated their rights by limiting their

presentation time to three hours. Each side received an equal amount of time to present its case. Plaintiff assert that they were precluded from arguing mitigation or justification. The hearing panel is a statutory fact-finding body and is not authorized to resolve questions of law. *See* 11 *Del.C.* § 9207.

There is no basis for the issuance of a writ of mandamus. While Plaintiffs are guaranteed a range of protections under LEOBOR, they have not shown that Defendants violated those protections by failing to perform a ministerial duty.¹⁰ Nor have they shown any procedural or substantive due process violations. The Court finds no violation of Plaintiffs rights under LEOBOR or other reason to interject itself in the routine disciplinary proceedings of the GPD. Thus, the Court in its discretion declines to exercise its mandamus jurisdiction.¹¹ The petition for a writ of mandamus is DISMISSED.

Summary judgment is granted only when the moving party fails to show the non-existence of any material issue of fact.¹² If the moving party makes this showing, the burden shifts to the non-moving party to establish any material issues of fact.¹³ If the non-moving party cannot make this showing, summary judgment must be granted.

¹⁰This Court has previously found that the requirements for disciplinary investigations under LEOBOR are ministerial not discretionary. *Smith*, at *12.

¹¹*Id.*

¹²*Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

¹³*Id.*

As discussed, *supra*, Defendants have shown that no material issues of fact exist in regard to the disciplinary procedures implemented by Defendants in this case. Plaintiffs have not shown that any genuine issue of material fact exists. Defendants' Motion for summary judgment is therefore **GRANTED**.

Having requested attorney's fees and costs, Defendants shall file a motion providing a basis for such awards, as well as a detailed log of time and costs expended. The motion shall be filed no later than Friday, July 8, 2011. Plaintiffs may submit an answer no later than Monday, July 18, 2011.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary