

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TOWN OF CHESWOLD,)
) No. 257, 2007
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Kent County
) C.A. No. 05M-12-004
 ELLIOT ROSARIO,)
)
 Plaintiff Below,)
 Appellee.)

Submitted: February 20, 2008

Decided: April 1, 2008

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This 1st day of April 2008, it appears to the Court that:

(1) In September 2005, the Town of Cheswold, defendant-appellant, suspended a town police officer, Elliot Rosario, plaintiff-appellee. 11 *Del. C.* § 9203 requires a hearing whenever a police officer is suspended. Cheswold never scheduled any hearing regarding Rosario’s suspension. Cheswold attempted to contact Rosario by mail but never reached him because Rosario changed addresses. 11 *Del. C.* § 9204 prescribes that a hearing be “scheduled within a reasonable period of time from the alleged incident, but in no event more than 30 days

following the conclusion of the internal investigation, unless waived *in writing* by the charged officer.”¹

(2) A Superior Court judge ruled that, because Cheswold failed to schedule a hearing within the statutory time frame, that failure to comply with the statutory mandate entitled Rosario to a remedy.² At the time of his written order, the trial judge asked the parties for further submissions and argument about the appropriate remedy. After hearing the parties’ proposed remedies, the trial judge ordered Rosario’s reinstatement, subject to his agreement by stipulation to immediately resign, and also awarded Rosario back pay as a monetary remedy for Cheswold’s failure to comply with the statute.

(3) Cheswold appealed that order. On appeal, Cheswold agrees that Rosario had a statutory right to a hearing but contends that Rosario waived that right to a hearing because he failed to provide Cheswold with an up-to-date address. Cheswold does not challenge the trial judge’s remedy on appeal.

(4) In our November 20, 2007, Order,³ we asked the trial judge to clarify the remedy he ordered in the case, *i.e.* (1) Rosario’s reinstatement followed by his

¹ 11 *Del. C.* § 9204 (emphasis added).

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

³ *Cheswold v. Rosario*, No. 257, 2007, Nov. 20, 2007 (Del.).

immediate resignation and (2) back pay. The trial judge explains the remedy in his Response to Order of Remand.⁴

(5) First, he notes that the parties stipulated that:

1. Lost wages between date of termination and April 27, 2007 are calculated as \$27,870. (including setoff).

2. If the Court does not order reinstatement, then it should add \$564.00 in lost wages through today. (Two weeks to May 9, 2007). If the Court does order reinstatement, then it should order Cheswold to pay \$282.00 per week until Officer Rosario is reinstated.

Cheswold apparently argued to the trial judge that Rosario should not be reinstated. However, the trial judge disagreed. Instead, he ordered Rosario's reinstatement assuming Rosario's immediate resignation. Neither party submitted supplemental briefing to us. Apparently neither party quarrels with the trial judge's decision about reinstatement or the damages formulation.⁵

(6) Thus, the only issue left for us to decide is whether Rosario waived his right to the hearing. As section 9204 makes plain, waiver of a scheduled hearing can only occur by written consent.⁶ Moreover, the statute simply leaves no doubt that the hearing must be scheduled within 30 days.⁷ Here, Cheswold should have scheduled Rosario's hearing within thirty days and attempted to notify him, at

⁴ *Cheswold v. Rosario*, C.A. No. 05M-12-004, Jan. 8, 2008 (Del. Super.).

⁵ We note that because neither party objected on appeal to the remedy, which appears to have been crafted mostly by stipulation, we have no occasion to consider the appropriateness of the remedy.

⁶ 11 *Del. C.* § 9204. Section 9204 also appears to require written consent for waiver of the thirty day scheduling requirement.

⁷ *Id.*

his last known address, of the hearing's time and date. If at that point Rosario failed to respond to the notice or to appear at the hearing, then Cheswold would have met its obligation to schedule a hearing and Rosario would have waived his right to the hearing by not appearing. Rosario's failure to keep an updated address on file with the Town on these facts is irrelevant to an alleged waiver of a right to a hearing the Town of Cheswold never scheduled.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice