

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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GEORGETOWN, DE 19947

October 31, 2012

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RE: *Sherry Jordan v. Town of Milton*
C.A. No. S10A-12-005

Dear Counsel:

This is my decision on Sherry Jordan's request to have me conduct the limited review provided for by a *Writ of Certiorari* of the Town of Milton's decision to terminate her employment for taking \$187 in "Staples Rewards" that properly belonged to the Town to see if the Town exceeded its jurisdiction, committed an error of law, or proceeded irregularly when it terminated her. I have reviewed the record and concluded that the Town did not exceed its jurisdiction, commit an error of law, or proceed irregularly when it terminated Jordan.

BACKGROUND

Jordan started working for the Town on a part-time basis in 2001. She became a full-time employee in 2005. Jordan was an administrative assistant to Chief of Police William Phillips. Chief Phillips recommended that Jordan be terminated for insubordination in January, 2009. The Town Council declined to follow the Chief's recommendation and Jordan remained employed by the Town. After declining to terminate Jordan, the Town Council conducted a pre-termination hearing

on whether to terminate Chief Phillips. Jordan testified against Chief Phillips at his pre-termination hearing. The Town Council decided not to terminate the Chief Phillips. The Town Council then transferred Jordan from the Police Department to a job at the Town Hall to prevent Chief Phillips from retaliating against her.

Catherine Jacobi replaced Jordan as the administrative assistant to Chief Phillips in October 2009. On August 4, 2010, a representative from Staples, an office supply store, called Jacobi to discuss the police department's account. During the phone call, Jacobi told the Staples representative that the police department was not receiving credit for returning used ink and toner cartridges. The Staples representative told Jacobi to go to the Staples Rewards website to view all of the account information for the department. Jacobi attempted to sign on to the website, but was unable to do so. She contacted a representative from Staples, who told her that the account was set up in Jordan's name. Jacobi told the Staples representative that Jordan no longer worked for the police department, and requested the contact information be changed to her name. The Staples representative changed the account information and instructed Jacobi to wait 48 hours for the account changes to take effect.

On August 13, 2010, Jacobi again attempted to sign onto the Staples Rewards website, but was again unable to do so. After contacting Staples, Jacobi was told that Jordan had called Staples sometime after the August 4th phone conversation and changed the account information back into her name. Jacobi told Chief Phillips about the problem she was having with the Staples Rewards account. He asked Detective Boone to investigate the matter. Detective Boone did so and determined that Jordan was using the police department's Staples Rewards for her own benefit. Detective Boone discussed the matter with Jordan on September 28, 2010. He told Jordan that if she

did not resign, that she would be arrested. Jordan chose not to resign. Detective Boone then arrested Jordan on seven counts of theft. On October 1, 2010, Jordan received a notice from Mayor Clifford Newlands stating that she was being suspended without pay “based on the evidence that led to the charges against [her] [on] September 28, 2010.” The notice also informed Jordan that she had a right to a pre-termination hearing in front of a majority of the Town Council if she so elected. Jordan elected to have a pre-termination hearing.

THE PRE-TERMINATION HEARING

Jordan’s pre-termination hearing was held in front of a majority of the Town Council on November 23, 2010. Jordan was represented at the hearing by Dean A. Campbell, Esquire. The Town was represented by the Town Solicitor, Seth L. Thompson, Esquire. Detective Boone, Jacobi, and Mayor Newlands testified for the Town. Jordan testified on her own behalf. Councilwoman Ronda Abraham was appointed as the Hearing Officer for Jordan’s pre-termination hearing. Jordan objected to Councilwoman Abraham’s appointment as the Hearing Officer, arguing that Abraham was biased and had a predisposition against her based upon Jordan’s past relationship with Chief Phillips. Councilwoman Abraham stated that she had no personal bias or animosity toward Jordan and that she could decide the case solely on the merits. After hearing this, the Town Council moved forward with Abraham as the Hearing Officer.

Detective Boone testified about his reasons for beginning the investigation, his conversations with the Staples representatives, receipts of purchases made at Staples that bore Jordan’s signature, the Staples Rewards program and account information, and the individual rewards checks that were issued by Staples and used by Jordan. Detective Boone also discussed his conversations with Jacobi, which focused on her inability to log on to the Town’s Staples Rewards account and her

conversations with a Staples representative.

Jacobi testified about the manner in which she orders items for the police department from Staples and the process for returning ink and toner cartridges. Jacobi testified that every time she would return an ink or toner cartridge, the Town would receive a \$2.00 credit per cartridge. The Town would also receive a percentage credit based on all of its purchases. Jacobi also testified about her telephone conversations with the Staples representatives, the difficulty she experienced in accessing the Staples Rewards account, and seeing Jordan's name on the Town's account. Jacobi also described the transactions involving the use of the Town's Staples Rewards.

Mayor Newlands testified about the notice that he sent to Jordan informing her of her suspension, the reason for her suspension, and her right to a pre-termination hearing. Mayor Newlands also testified that he believed Jordan should be terminated based on the evidence that led to her arrest on multiple counts of theft.

Jordan testified about her employment history with the Town, shopping at Staples, the use and history of her personal Staples credit card, the use of the two Staples Rewards key tags on her key chain, receiving the Staples Rewards certificates in the mail at her house, a previous work suspension, and testifying against Chief Phillips at his pre-termination hearing. On cross-examination Jordan testified about the items she purchased from Staples, the use of the Staples Rewards, and affirmed that she did not call Staples or log on to the website and change the contact information on the Staples Rewards account. Jordan argued that she had her own Staples account and that all of the Staples Rewards that she used were ones that she had rightly earned from her own purchases.

After hearing all of the evidence, the Hearing Officer terminated Jordan for misconduct and

insubordination, concluding that she had used Staples Rewards that rightfully belonged to the Town.

STANDARD OF REVIEW

“Under Delaware law, a *writ of certiorari* is essentially a common law writ.”¹ Its purpose “is to permit a higher court to review the conduct of a lower tribunal of record.”² Under this common law writ, this Court has the power to quash or affirm the proceedings and to remand.”³ The “threshold qualifications for a *Certiorari* review...[are] in particular that the judgment below is final, and that there must be no other available basis for review.”⁴ The Court’s review on *certiorari* “involves a review only of errors that appear on the face of the record.”⁵ *Certiorari* review differs from appellate review in that an appeal “brings up the case on its merits,” while a writ brings the matter before the reviewing court to “look at the regularity of the proceedings.”⁶ Thus, *certiorari*

¹ *Goldberg v. City of Wilmington*, 1992 WL 114074, at *1 (Del. Super. May 26, 1992); See also *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004)(Citing *Shoemaker v. State*, 375 A.2d 431, 436-437 (Del. 1977); Woolley, *Delaware Practice*, Volume 1, § 894. See e.g. *Hundley v. O’Donnell*, 1998 WL 842293, at *3 n. 7 (Del. Ch. Dec. 1, 1998).

² *Christiana Town Center, LLC*, 2004 WL 2921830, at *2.

³ *Jardel Co., Inc. v. Carroll*, 1990 WL 18296, at *2 (Del. Super. Feb. 26, 1990); *State v. J.P. Ct. No. 7*, 1989 WL 31600, at *1 (Del. Super. April 3, 1989); *Breasure v. Swartzentruber*, 1988 WL 116422, at *1 (Del. Super. Oct. 7, 1988)(Citations omitted).

⁴ *Christiana Town Center, LLC, v. New Castle County*, 2003 WL 22120857, at *1 (Del. Super. Sept. 10, 2003); see e.g. *Adjile, Inc., v. City of Wilmington*, 2004 WL 2827893, at *1 (Del. Super. Nov. 30, 2004), *aff’d*, 2005 WL 1139577 (Del. May 12, 2005).

⁵ *Luby v. Town of Smyrna*, 2001 WL 1729121, at *2 (Del. Super. Dec. 27, 2001), citing *Castner v. State*, 311 A.2d 858, 860 (Del. 1973).

⁶ *Breasure*, 1988 WL 116422, at *1.

review “is not the same as review on appeal” because it “is on the record and the reviewing court may not weigh evidence or review the lower tribunal’s factual findings.”⁷ To that end, the “transcript of the evidence below is not part of the reviewable record ... the Court cannot examine the transcript in order to evaluate the adequacy of the evidence which supports the conclusion rendered below.”⁸ It is the function of “the agency, not the court, to weigh evidence and resolve conflicting testimony and issues of credibility.”⁹ Thus, the Court does not consider the case below “on its merits” or “substitute its own judgment for [that] of the inferior tribunal.”¹⁰ Instead, the Court’s review is limited to considering “the record to determine whether the lower tribunal[:]” (a) exceeded its jurisdiction, (b) committed errors of law, or (c) proceeded irregularly.¹¹ A decision “will be reversed on jurisdictional grounds only if the record fails to show that the matter was within the lower tribunal’s personal and subject matter jurisdiction.”¹² A decision “will be reversed for an error of

⁷ *Christiana Town Center, LLC*, 2004 WL 2921830, at *2, citing *Reise v. Bd. of Bldg. Appeals of Newark*, 746 A.2d 271, 274 (Del. 2000).

⁸ *Green v. Sussex County*, 668 A.2d 770, 773 (Del. Super. 1995), *aff’d*, 1995 WL 466586 (Del. Aug. 2, 1995). See e.g. *Matter of Butler*, 609 A.2d 1080, 1081-82 (Del. 1992)(declining to consider a transcript of the underlying Superior Court proceedings or overrule *Castner*, 311 A.2d 858, and holding that the Superior Court’s order “is the entire record before us for purposes of *certiorari* review.”). Cf. *Barbour v. Bd. of Adjustment of Bethany Beach*, 1992 WL 302292, at *2 (Del. Super. Sept. 28, 1992)(Noting that “statutory writ of *certiorari* is broader and allows for the filing of a transcript of the evidence” but that “a transcript could not be filed in a common law *certiorari* proceeding since the reviewing court was prohibited from considering the evidence before the lower tribunal.”).

⁹ *Christiana Town Center, LLC, v. New Castle County*, 2004 WL 1551457, at *2 (Del. Super. July 7, 2004), *aff’d* 2004 WL 2921830 (Del. Dec. 16, 2004).

¹⁰ *Christiana Town Center, LLC*, 2004 WL 2921830, at *2; *Breasure*, 1988 WL 116422, at *1.

¹¹ *Christiana Town Center, LLC*, 2004 WL 2921830, at *2, citing *Reise*, 746 A.2d at 274.

¹² *Id.* at *2, citing Woolley, *Delaware Practice*, Volume I, § 921.

law ... When the record affirmatively shows that the lower tribunal has ‘proceeded illegally or manifestly contrary to law.’”¹³ Finally, a decision “will be reversed for irregularities of proceedings if the lower tribunal failed to create an adequate record to review.”¹⁴ The “burden of persuasion rests upon the party attempting to show that the Board’s decision was arbitrary and unreasonable.”¹⁵

DISCUSSION

I. Hearsay use in an Administrative Hearing

Jordan argues that the Hearing Officer’s decision was based entirely on hearsay. Specifically, Jordan argues that there was no first-hand information presented at her pre-termination hearing that established that the Town owned the Staples Rewards account in question. Hearsay evidence is permissible in certain administrative hearings, but the administrative board may not rely upon such evidence as the sole basis for its decision.¹⁶ The purpose of allowing boards to accept evidence that would not normally be allowed in a trial setting is to free the boards and commissions from technical rules preventing the invalidation of administrative orders on appeal when such evidence was presented before them.¹⁷ Despite this relaxed standard, there must also be competent evidence of probative value in order to support a board’s finding.

The critical hearsay that Jordan focuses on deals with the account number of the Staples Rewards account in question. Jordan argues that a Staples employee told Jacobi that account number

¹³ *Christiana Town Center, LLC*, 2004 WL 2921830, at *2, citing Woolley, *Delaware Practice*, Volume I, § 939.

¹⁴ *Id.* at *2, citing Woolley, *Delaware Practice*, Volume I, § 923.

¹⁵ *Christiana Town Center, LLC*, 2004 WL 1551457, at *2.

¹⁶ *Larkin v. Gettier & Assoc.*, 1997 WL 717792, at *3 (Del. Super. Nov. 14, 1997).

¹⁷ *Id.*

32756660 belonged to the Town and that Jordan's name and address were on the account. Jordan testified that it was her personal account. This evidence was not the only evidence upon which the Hearing Officer based her decision. Moreover, a decision in a case does not have to rest solely on direct evidence.¹⁸ Many cases are decided based solely on circumstantial evidence.

The largely non-hearsay testimony of Jacobi, Detective Boone and Jordan established the following:

Jacobi ordered supplies for the Police Department online from Staples. She put account number 32756660 on the orders when she made them. Jacobi only went to a Staples store to return ink cartridges. She noticed that the Police Department was not getting credit for the returned ink cartridges. When she was finally able to access the Staples website, she saw that Jordan's name and address were on the account. A printout of the account linked the account to Jordan's credit cards. The rewards were being used for items that the Town did not have in its possession. Jordan ordered items for the Police Department from Staples when she was the administrative assistant for Chief Phillips. Thus, she had access to the online ordering system for the Town's Staples account. Jordan also had a Staples account. She had two separate Staples Rewards tags. One of the tags was for account 32756660, the same account that Jacobi used for the Town. Jordan frequently received rewards certificates in the mail and used them to purchase items from Staples. Indeed, even after Jordan cancelled her credit card linked to the Staples account she continued to use the Staples Reward tags.

This evidence allowed the Hearing Officer to infer that it was Jordan who was using the Staples Rewards that rightfully belonged to the Town. The Hearing Officer was well within the law to use hearsay evidence in reaching a decision to terminate Jordan.

II. The Role of the Town Solicitor

Jordan argues that her due process rights were violated because Thompson had a conflict of interest in representing the Town and in prosecuting Jordan. The Town Charter provides that the Town Solicitor's responsibility is to "give legal advice to the Town Council." Thompson also prosecuted Jordan at her pre-termination hearing. Jordan argues that Thompson's dual role gives

¹⁸ Delaware Pattern Criminal Jury Instruction §4.e (2006).

an appearance of impropriety and violates her due process rights. She adds that it would be like a Deputy Attorney General prosecuting a case in Superior Court and also “telling the Judge how to do his/her job.”

The Town argues that Thompson clearly identified his role as counsel for the Town at the start of the hearing. The Town also argues that Thompson did not act as counsel for the Hearing Officer, and that he did not provide any legal advice to the Hearing Officer. At no time before or during the hearing did Jordan object to Thompson’s role. Jordan could have certainly raised this objection prior to the start of her pre-termination hearing, but she did not. The scope of a *certiorari* review is extremely limited in scope and Delaware law mandates that the “reviewing court will not decide any question that was not raised in the tribunal below.”¹⁹ To consider this issue would require this Court to exceed the scope of *certiorari* review. Moreover, as a practical matter, Thompson had no conflict of interest. It was the Hearing Officer and not the Town Council that made the decision to terminate Jordan. Thompson did not offer legal advice to the Hearing Officer. Thus, there was no conflict of interest and no violation of Jordan’s due process rights.

III. Majority of Town Council vs. Hearing Officer

Jordan argues that it is unclear as to whether the Hearing Officer or the Town Council should have made the decision to terminate her. The Milton Town Code states the following:

... a majority of the Council must be present for the hearing. The hearing officer shall not be the person who recommends the dismissal charges. At the hearing, which need not follow any formal procedures, and need not be transcribed, the employee may offer his/her side and the reasons why dismissal is not warranted. After having heard both the charges, and the employee’s answer to them, the hearing officer shall notify the employee of his/her decision within five working days of the hearing. If

¹⁹ *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, at *4 (Del. Super. July 19, 2006).

dismissed, the employee is entitled to a letter listing the reasons, incidents and conditions that singly or together led to the dismissal.²⁰

The Milton Employee Handbook states the following:

...that in the notice of termination the employee will have an “opportunity for a pre-termination hearing in front of a majority of the Town Council...the pre-termination hearing will be conducted by a hearing officer.”²¹

Jordan argues that neither the Milton Town Code nor the Employee Handbook define who must make the decision on termination. Therefore, according to Jordan, the Code and Employee Handbook are ambiguous. The premise for Jordan’s argument is that if the Hearing Officer is the person who makes the decision on termination, then why is it necessary for a majority of the Town Council to be present at the hearing. Moreover, according to Jordan, while the Town Code states that the Hearing Officer will notify the employee of *his/her* decision(emphasis added), the Employee Handbook merely states that the hearing will be conducted by a hearing officer.

Jordan did not raise this issue at any point during her pre-termination hearing. Again, the scope of a *certiorari* review is extremely limited and Delaware law mandates that the “reviewing court will not decide any question that was not raised in the tribunal below.”²² However, once again, Jordan is simply wrong. This alleged ambiguity is clearly resolved by the Town Code. It provides, in part, that the “positions of the Police Chief, Head of Maintenance and Town Clerk can only be dismissed with majority approval by the Mayor and Town Council.”²³ The corollary to this is that

²⁰ Milton Town Code §26-11(m).

²¹ Policy II-11 of the Milton Employee handbook.

²² *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, at *4 (Del. Super. July 19, 2006).

²³ Milton Town Code §26-11 (K).

any other employee may be dismissed by a Hearing Officer. Jordan did not hold one of those three positions. Thus, she could be terminated by a Hearing Officer. It is important to mention that the only issue Jordan raised with respect to the Hearing Officer related to the Hearing Officer's alleged bias against her. The fact that Jordan questioned the potential bias of the Hearing Officer confirms that Jordan knew that the Code and Handbook were not ambiguous and that she knew that the Hearing Officer would make the decision on her termination.

Jordan also argues that the Hearing Officer was biased against her because the Hearing Officer had a close relationship with Chief Phillips. The Hearing Officer denied having any animosity towards Jordan prior to the start of the hearing. Jordan testified that she had heard from other people that the Hearing Officer was heavily involved with Chief Phillips in her first suspension. However, Jordan acknowledged that she was not terminated by the Town Council at that time and that the Town Council actually transferred her from a job in the Police Department to the Town Hall to prevent the Chief from retaliating against her. I also note that there is no evidence in the record suggesting that Chief Phillips was at the root of the allegations against Jordan. The case against Jordan started when Jacobi complained to a Staples employee that the police department was not receiving rebates and learned from that Staples employee that Jordan was listed on the Town's Staples account. Jacobi then reported this to Chief Phillips, who asked Detective Boone to investigate. Detective Boone testified that Chief Phillips told him that he did not want to be involved in the investigation of Jordan. There is simply no evidence in the record supporting Jordan's allegation that the Hearing Officer was biased against her. Indeed, all of the evidence suggests that Chief Phillips had no involvement in the investigation of Jordan.

IV. Notice

Jordan argues that she was not provided with adequate notice of the reasons for the disciplinary proceedings against her. The principal purpose of a notice is to alert a party to the nature and substance of the action against the party. “The notice ensures that each party is provided adequate opportunity to prepare and thereafter properly advocate its position, ultimately exposing all relevant factors from which the finder of fact may make an informed judgment.”²⁴

The Town Code states that if the Personnel Officer or Mayor are considering dismissing an employee who has completed a probationary period, “the employee must be notified, in writing, that such action is being considered and provided the reasons for the proposed action.”²⁵ On October 1, 2010, Mayor Newlands sent a letter to Jordan informing her that she was “being suspended without pay based on the evidence that led to the charges against [her] [on] September 28, 2010.” The notice also advised Jordan that she had an opportunity for a pre-termination hearing in front of a majority of the Town Council, if she so elected.

The Town argues that Jordan was aware of the reasons for the disciplinary proceedings against her because she was arrested and charged with seven counts of theft for stealing the Staples Rewards that rightfully belonged to the Town. The Town argues that the Mayor’s letter made it clear that he was referring to those charges as the basis for the proceedings against Jordan.

Jordan attended her pre-termination hearing accompanied by her attorney. During the hearing, Jordan’s attorney questioned Detective Boone, Catherine Jacobi, and Mayor Newlands. Jordan was also provided with the opportunity to present her side of the case to the Hearing Officer. At no point prior to the start of the hearing or during the hearing did Jordan argue that the notice was

²⁴ Am. Jur. 2d Notice §2 (2012).

²⁵ Milton Town Code §26-11(L).

defective or that she did not know the reasons for her pre-termination hearing. The scope of a *certiorari* review is extremely limited in scope and Delaware law mandates that the “reviewing court will not decide any question that was not raised in the tribunal below.”²⁶ As such, this argument was not properly raised below. Moreover, Jordan knew why she was being terminated. I can tell from her testimony and exhibits introduced through her testimony that she was aware of the charges against her and was well prepared to defend the allegation that she was using Staples Rewards that belonged to the Town.

The Hearing Officer found that Jordan had committed misconduct and was also insubordinate. Jordan argues that there is nothing in the record to support a finding of insubordination. I find that it does not matter. The Hearing Officer found that Jordan stole \$187 in Staples Rewards that rightfully belonged to the Town. This is theft and certainly qualifies as misconduct and that alone is an adequate reason for the Hearing Officer to terminate Jordan’s employment.

CONCLUSION

I have affirmed the Hearing Officer’s decision to terminate Sherry Jordan’s employment with the Town of Milton.

²⁶ *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, at *4 (Del. Super. July 19, 2006).

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley