

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY**

<b>MILLSBORO FIRE COMPANY,</b>	:	
	:	<b>C.A. No: K14A-05-001 RBY</b>
_____ <b>Appellant,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>THE DELAWARE STATE FIRE</b>	:	
<b>PREVENTION COMMISSION AND</b>	:	
<b>DAGSBORO VOLUNTEER FIRE</b>	:	
<b>COMPANY,</b>	:	
	:	
<b>Appellee.</b>	:	

*Submitted: October 2, 2014*

*Decided: October 21, 2014*

*Upon Consideration of Appellant's  
Petition for Writ of Certiorari*  
**GRANTED**

**ORDER**

Robert C. McDonald, Esquire, of Silverman, McDonald & Friedman, Wilmington, Delaware for Appellant.

Patricia Davis Olivia, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware for Appellee The Delaware State Fire Prevention Commission

Bruce A. Rogers, Esquire, of Bruce A. Rogers, P.A., Georgetown, Delaware for Appellee Dagsboro Volunteer Fire Company.

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Young, J.

## SUMMARY

Millsboro Fire Company (“Appellant”) brings a petition for writ of *certiorari* from a decision of the Delaware State Fire Prevention Commission (“the Commission”) setting the boundary line between its and Dagsboro Volunteer Fire Company’s (“Dagsboro” and/or “Appellee Dagsboro”) respective fire districts. The two fire companies have a storied past concerning the contested boundary area that dates back to May 1983. The current action arises from the Commission’s April 2014 decision, in which it ruled in favor of Dagsboro, concerning the disputed territory. Appellant’s main contention is that the Commission improperly disregarded its previous March 2007 ruling on this issue (“2007 Order”), and as such, Appellant’s petition for writ of *certiorari* should be granted. The Court finds that the Commission should have addressed its prior 2007 Order. In failing to do so, the Commission proceeded irregularly in making its January 2014 decision. Thus, Appellant’s petition for writ of *certiorari* is **GRANTED** and the decision is remanded to the lower tribunal.

## FACTS AND PROCEDURES

Appellant and Appellee Dagsboro have a long history of boundary disputes, concerning the geographic areas served by their respective fire companies. The origin of the present matter dates back to May 3, 1983, when both parties submitted geographic descriptions of their fire districts to the Commission. Appellant and Appellee Dagsboro operated harmoniously pursuant to these descriptions for almost twenty-four years until 2007, when a boundary dispute arose requiring the intervention of the Commission. The contested area included the former site of a

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Vlasic Pickle Plant, which had been historically served by both fire companies. The Commission issued an order on March 20, 2007, which resolved the contest over the disputed area by splitting it between the two fire companies.

In 2013, it came to the attention of Appellant, that the local 911 Call Center was dispatching calls to Dagsboro instead of Appellant, for areas determined to be within Appellant's boundary line by the 2007 Order. It appears that the 911 Call Center continued to use maps reflecting the boundary lines as they existed in 1983. After being informed by Appellant that they were using the wrong maps, the 911 Call Center redirected calls to the contested area in accordance with the 2007 Order and resultant map. On August 16, 2013, upon learning of this change, Appellee Dagsboro wrote to the Commission requesting a fact finding hearing to resolve the proper apportionment of the territory in question. On January 21, 2014, the Commission held a hearing to determine the boundary dispute, this time resetting the lines in Dagsboro's favor. The Commission later reaffirmed its ruling on April 15, 2014, after Dagsboro informed the Commission that Appellant had refused to abide by the January order. Appellant presently appeals this ruling to this Court.

### **STANDARD OF REVIEW**

A petition for writ of *certiorari* "is simply a form that calls up, for review, the record from the lower court or tribunal."<sup>1</sup> "The purpose of the writ is to permit the higher court to review the conduct of a lower tribunal of record."<sup>2</sup> However, the scope

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<sup>1</sup> *Maddrey v. Justice of Peace Court No. 13*, 956 A.2d 1204, 1213 (Del. 2008).

<sup>2</sup> *Id.*

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of review by the higher court is limited to the consideration only of the record below, and does not involve fact-finding or weighing of the evidence.<sup>3</sup>

As an initial matter, petitioners must meet two obligatory conditions: (1) the judgment must be final; and (2) there can be no other available basis for review.<sup>4</sup> A court will grant the petition only where the tribunal below has done at least one of the following three acts: (1) exceeded its jurisdiction; (2) committed errors of law; or (3) proceeded irregularly.<sup>5</sup> A court is viewed as having exceeded its jurisdiction where “the record fails to show that the matter was within the lower tribunal’s personal and subject matter jurisdiction.”<sup>6</sup> A court commits an error of law “when the record affirmatively shows that the lower tribunal proceeded illegally and manifestly contrary to the law.”<sup>7</sup> Finally, a court proceeds irregularly where “the lower tribunal failed to create an adequate record for review.”<sup>8</sup> If any of these three prongs is met, the court will grant a writ of *certiorari* and reverse the lower court’s decision.<sup>9</sup>

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<sup>3</sup> *Reise v. Bd. of Bldg. Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000).

<sup>4</sup> See Victor B. Wolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware*, at § 894 (1906); *In re Butler*, 609 A.2d 1080, 1081 (Del. 1992).

<sup>5</sup> *In re Butler*, 609 A.2d 1080, 1081 (Del. 1992).

<sup>6</sup> *Christiana Town Ctr. LLC v. New Castle Cnty.*, 2004 WL 2921830, at \*2 (Del. Dec. 16, 2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

## DISCUSSION

The Court begins by noting the confusion concerning the appropriate standard of review applicable to Appellant’s petition. Although filing a petition for writ of *certiorari*, Appellant’s opening brief invokes the standard employed in ordinary appeals from administrative boards: whether the decision below was free from errors of law and was based upon substantial evidence.<sup>10</sup> Appellee Dagsboro, similarly makes its arguments within this analytical framework.<sup>11</sup> The Delaware Supreme Court has explicitly distinguished petitions for writ of *certiorari* from ordinary appeals: “[a] writ of *certiorari* is not a *substitute* for, or the functional equivalent of, an appeal.”<sup>12</sup> Moreover, “[r]eview on a writ of *certiorari* issued by the Superior Court differs fundamentally from appellate review because review on *certiorari* is on the record and the reviewing court may not weigh the evidence or review the lower tribunal’s factual findings.”<sup>13</sup> It follows that, were this Court to inquire into the “substantial evidence” standard, it would go beyond the proper scope of review on a writ of *certiorari*.<sup>14</sup> Presumably aware of this distinction, Appellant reformulates its argument in its reply brief, focusing instead on the writ of *certiorari* standard. Appellant does, however, continue to insist that the substantial evidence standard is

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<sup>10</sup> See Appellant’s Opening Brief at 4-5.

<sup>11</sup> See Dagsboro’s Answering Brief.

<sup>12</sup> *Maddrey*, 956 A.2d at 1213 (emphasis in original).

<sup>13</sup> *Id.* (internal quotations omitted).

<sup>14</sup> *Christiana Town Ctr.*, 2004 WL 2921830 at \*2.

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also applicable to the instant matter. In the face of clear language from the Supreme Court indicating otherwise, this Court is not convinced. The Court analyzes Appellant's petition under the writ of *certiorari* standard.<sup>15</sup>

As an initial matter, all parties agree that Appellant's petition is properly before this Court. Specifically, the judgment below was final, and there is no other available basis for review.<sup>16</sup> The parties' dispute centers instead upon whether any of the remaining three prongs of the writ of *certiorari* standard have been met.<sup>17</sup> In its reply brief, Appellant posits that all three prongs were implicated by the proceedings below. First, Appellant argues that the Commission exceeded its jurisdiction. Citing 16 *Del. C.* § 6607(a)(3) and (4), from which the Commission takes its power to consider and resolve boundary disputes, Appellant contends that the Commission improperly heard the case as there was no dispute.<sup>18</sup> It is Appellant's position that the 2007 Order resolved the fire companies' boundary dispute. The matter before the Commission in January of 2014, instead concerned the mistaken use of maps by the

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<sup>15</sup> This Court notes, that as a practical matter, its decision would not change were this Court to apply the ordinary administrative board appeal standard. As discussed *infra*, the Court is troubled by the Commission's failure to consider its prior 2007 Order in determining the boundary line. This decision appears to exclude relevant evidence and cannot be said to be based upon "substantial evidence" as required by the standard on an administrative board appeal.

<sup>16</sup> See *Wolley*, *supra* at § 894; *Butler*, 609 A.2d at 1081.

<sup>17</sup> See *Butler*, 609 A.2d at 1081 (on petition for writ of *certiorari*, court reviews proceedings below to determine whether the lower tribunal (1) exceeded its jurisdiction; (2) committed errors of law; or (3) proceeded irregularly).

<sup>18</sup> 16 *Del. C.* § 6607(a)(3) states in relevant part: "[the Commission] shall have authority...to resolve boundary disputes between or among such fire companies." 16 *Del. C.* § 6607(a)(4) states in relevant part: "[the Commission] shall have the authority to enter binding orders resolving boundary disputes between fire companies."

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911 Call Center. According to Appellant, 16 *Del. C.* § 6607(a)(3) and (4) authorize review by the Commission only in the event of a *boundary* dispute. Therefore, the Commission exceeded its jurisdiction by resetting the boundaries in the absence of such a dispute.

Appellant's second point stems largely from the same line of argument. The Commission is said to have implicated the second writ of *certiorari* prong, committing an error of law by, again, resetting the boundary line. As per Appellant's contention, 16 *Del. C.* § 6607(a)(3) and (4) authorize the Commission to review and rule upon boundary lines only where there is a *boundary* dispute. Contending that the dispute before the Commission on January 21, 2014 pertained to the use of maps by the 911 Call Center and not boundary lines, Appellant posits that the Commission acted contrary to the governing statute. The 2007 Order is argued to have resolved the boundary dispute between the parties. It would follow, then, that the Commission did not have the authority in January of 2014, to reset the boundary line in favor of Dagsboro.

Finally, Appellant addresses the third writ of *certiorari* prong, by arguing that the Commission conducted irregular proceedings during the January 2014 hearing by failing to consider its 2007 Order. Appellant reasons that the 2007 Order, which granted them purview over the contested geographic area, was controlling at the time of the January 2014 hearing. Alleging that the Commission may not even have been aware of its previous ruling, Appellant contends that it was irregular conduct for the Commission to reset the boundary line without mention or contemplation of the 2007 Order. Moreover, the Commission's ruling at the conclusion of the January 2014 hearing, altered the boundary lines as determined by its 2007 Order. Specifically, the

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2014 ruling reset the line in favor of Dagsboro.

For this Court in the instant matter, the dispositive prong of the petition standard is the third prong: the extent to which the decision below was the result of irregular proceedings. Concluding that the Commission's conduct was irregular, this Court grants Appellant's petition. In particular, this Court is concerned by the Commission's disregard of its 2007 Order in its January 2014 resetting of the boundary line in Dagsboro's favor. A Court will grant a petition for writ of *certiorari* as a result of irregular proceedings below where, "the lower tribunal failed to create an adequate record for review."<sup>19</sup> Specifically, "it is settled law that a quasi-judicial tribunal must state the basis for its decisions, in order to allow judicial review."<sup>20</sup> Although the Commission articulated its reasons for resetting the boundary line, it did so without referencing the 2007 Order. The Commission was, of course, free to rule contrary to its prior order; but in doing so silently, the Commission failed to create a record for review. The parties and this reviewing Court are left to guess as to the Commission's reasoning. In granting the Appellant's petition for writ of *certiorari*, this Court remands the Commission's decision with the specific instructions to explain the overturning of the 2007 Order.

The Court notes that, in addition to the above contentions, the parties might address in any future procedures whether or not certain of Appellant's arguments can be properly raised in a petition before this Court. In its briefing, the Commission asserted that Appellant cannot claim that the Commission lacked jurisdiction to reset

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<sup>19</sup> *Christiana Town Ctr.*, 2004 WL 2921830, at \*2.

<sup>20</sup> *Reise*, 746 A.2d at 274 (internal quotations omitted).

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the boundary line, as that was not presented in the proceedings below. As a general matter, “the Court cannot consider [an issue] for the first time on [*certiorari*] review,” where an “issue does not appear in the record.”<sup>21</sup> Appellant responds to the Commission by arguing that its core argument in the proceedings below was that the 2007 Order controlled. The Court understands Appellant’s argument to mean that, by implication, this position necessarily asserts that the Commission lacked the jurisdiction to alter the boundary line. In any further considerations of this matter, that is a matter to be analyzed.

### **CONCLUSION**

Appellant’s petition is **GRANTED**. The matter is remanded to the Commission for action consistent with this opinion.

**IT IS SO ORDERED.**

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/s/ Robert B. Young  
J.

RBV/lmc  
oc: Prothonotary  
cc: Counsel  
Opinion Distribution  
File

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<sup>21</sup> *Upshur v. Justice of the Peace Ct. No. 17*, 2005 WL 2615391, at \* 3 (Del. Super. Ct. Oct. 13, 2005).