



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE TOWN OF CHESWOLD, a municipal §
corporation of the State of Delaware, §
PETER DAIKOS, individually and in his §
official capacity of Mayor of the Town §
of Cheswold, RICHARD ZIEGENHORN, §
individually, and in his official capacity as §
Vice Mayor of the Town of Cheswold and §
Member of the Town of Cheswold Town §
Council, CONCHETTA EDEL, RICHARD §
H. SEENEY, JAMES O. PLUMMER, III, §
and ROBERT W. SINE, individually and in §
their official capacities as members of the §
Town of Cheswold Town Council, §

No. 445, 2006

Court Below: Superior Court
of the State of Delaware in and
for Kent County

CA No. 05C-08-037

Defendants Below-
Appellants,

v.

ROBBIN VANN,

Plaintiff Below-
Appellee.

Submitted: January 18, 2007

Decided: April 23, 2007

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 23rd day of April 2007, upon consideration of the briefs of the parties
and their contentions at oral argument, it appears to the Court that:

(1) The Town of Cheswold brings this interlocutory appeal of the Superior Court's decision that Robbin Vann, the former Police Chief of Cheswold, was denied due process when the Town Council voted to terminate Vann's employment because the Town Council was not impartial.¹ Having concluded that Vann was denied due process, the Superior Court stated it "need not determine whether the Town Council had just cause to terminate Vann as Police Chief."² Cheswold makes two arguments in this appeal. First, Cheswold argues that the Superior Court failed to apply a presumption that the Town Council acted honestly and impartially when rendering its decision to terminate Vann's employment. Second, Cheswold argues that Vann waived his right to claim that the Council was biased. We find insufficient evidence in the record to overcome the presumption that the Town Council acted honestly and impartially. Additionally, the record establishes that Vann failed to seek the recusal of any member of the Town Council from deciding whether there was just cause to fire him and therefore Vann waived his claim of bias which he made for the first time on appeal. Accordingly, we reverse and remand this matter for further proceedings consistent with this order.

(2) According to Vann's counsel on appeal, some time prior to March 8, 2005, Peter Diakos, Mayor of Cheswold, decided to hire former Council Member

¹ *Vann v. Town of Cheswold*, 2006 WL 2382798 (Del. Super.).

² *Id.* at *4.

Ed Ryan as Town Manager. Vann was informed that the Town Council had not passed a resolution hiring Ryan, but instead doctored the minutes to indicate that such a resolution was passed. Vann began to investigate but then turned the matter over to the Delaware State Police and the Office of the Attorney General because he perceived that there was a conflict of interest.

(3) On March 8, 2005, Mayor Diakos sent Vann a letter proposing Vann's termination based on fifteen enumerated reasons.³ A public hearing concerning Vann's termination was convened before the Town Council on May 24, 2005 as required by 11 *Del. C.* § 9301. The Town Solicitor announced that the Mayor would not participate because he would be a witness. The Vice Mayor presided. In response to an inquiry of the Town Solicitor, he and the remaining members of the Town Council expressed on the record that they would base their decision solely upon the evidence presented. Vann's attorney also asked the members of the Town Council if they could make a decision that is contrary to the Mayor and the Town Manager. After affirmative responses were given, no objection of bias nor any request for recusal was raised at the public hearing by Vann or his counsel.

³ Those reasons include failure to follow the Mayor's directives, failure to meet with the Town Council, contracting without authorization with Verizon for cell phones that Vann used personally, giving a key to the evidence room to another officer in contradiction of the Mayor's directive, not being present in his office during business hours, leaving equipment in his unlocked office, being disrespectful to the Mayor, purchasing supplies without authorization, physically threatening the Mayor, improperly scheduling of officers, falsifying information given to the Mayor, and refusing to follow other written Town policies.

(4) The Mayor and Ed Ryan, the newly appointed Town Manager, then testified about the allegations set forth in the Mayor's March 8 letter. Ryan explained that despite the Town's Administrative Policy No. 5, Vann authorized overtime for officers without obtaining the necessary approval. He also testified that Vann obtained three cell phones, one for himself, one for his wife, and one for a fellow officer, in the name of the Town without approval. No payment had been made for several months, and as of February 24, 2005, the cell phone bill exceeded \$800.00. The next day, the Town Council voted unanimously to terminate Vann's employment as Chief of Police.

(5) Vann appealed the Town Council's decision to the Superior Court. For the first time, Vann raised the issue of bias and a denial of due process. On July 26, 2006, the Superior Court found that the Town deprived Vann of his right to due process of law when it terminated his employment. Specifically, the Superior Court held:

The particular events in this case expose a deficiency, affecting the integrity of Vann's hearing. The Council members have a conspicuous base for bias against him, because of his role in the investigation into the Ryan appointment and the (at least superficial) interests of the individuals opposed to Appellant's position. Indeed, in the original "9301 hearing," the Town's witnesses in support of Vann's termination, presented to the panel chaired by the Vice-mayor, were Mayor Diakos and Town Manager Ryan. That, inherently, suggests a conflict of interest, or at the very least the appearance of it, for the Town Council members empanelled for the hearing. Although the Town Council would not be affected if Vann were terminated, the Town Council, Mayor, Vice Mayor, and Town Manager, would

continue to work together after the hearing. Accordingly, Vann must be provided a forum for due process, where both the presence and appearance of fairness and justice exist.⁴

The Superior Court certified Cheswold's interlocutory appeal which we accepted.

(6) The Delaware General Assembly has established the procedure for police chief removal.⁵ Section 9301(a) provides:

No chief of police or police superintendent of a legislatively authorized police department within this State, excluding municipalities with a population greater than 60,000, shall be dismissed, demoted or otherwise removed from office unless there is a showing of just cause and such person has been given notice in writing of the specific grounds for such action and an opportunity to be heard in the chiefs's [sic] or the superintendent's own defense, personally and/or by counsel, at a public hearing before the elected governing body of the jurisdiction. Such public hearing, unless otherwise specified by charter, shall be held not less than 5 nor more than 30 days after such notice.⁶

Here, notice of the grounds for dismissal was given in writing, a timely public hearing was convened before the elected governing body of the Town, and Vann was given the opportunity to present his defense personally and by counsel.

(7) While it is clear that due process requires any tribunal to be impartial, the record in this case does not include sufficient evidence to overcome the presumption that the members of Town Council acted with honesty and integrity.

⁴ *Vann v. Town of Cheswold*, 2006 WL 2382798 (Del. Super.).

⁵ 11 Del. C. § 9301(a).

⁶ *Id.*

The mere fact that the Town Council would continue to work after the public hearing with the Mayor and Town Manager is insufficient to show bias. In fact, the members of Council said they could make a decision contrary to the Mayor and Town Manager. In addition, the investigation of Vann's alleged wrongdoing does not show bias of the remaining Council members. As the United States Supreme Court explained in *Withrow v. Larkin*, "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry."⁷ Thus, in order to succeed on his claim that he was denied due process on the basis that the Town Council was biased, Vann must point to specific facts in the record that rebut the presumption of honesty and impartiality.

(8) We have reviewed the record in this case and find that the neutrality of the Town Council was addressed at the outset of the proceeding. Before any witnesses were sworn in, the Town Solicitor announced that the Mayor would not participate in deciding the matter because he was a witness. The remaining members of the Town Council were asked by the Town Solicitor whether they were able to make their decision based solely on the evidence.⁸ They answered

⁷ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

⁸ Specifically, counsel for the Town Council explained:

I just have one other statement before we swear the witnesses. I'm sure that all of you have talked to Chief Vann, and you know, you have to make your decision solely upon the evidence presented at this hearing. And if any members of Council are unable to do that, Mr. Mayor, we should know that at this point in

affirmatively. The Council members were also questioned by Vann's counsel on whether they would be able to make a decision contrary to Ryan and Diakos.⁹ Again, they confirmed their impartiality. Without specific evidence to the contrary, the presumption that the Town Council acted impartially must be applied. The Superior Court erred when it did not do so in this case.

(9) Finally, Cheswold argues that Vann waived any claim of bias based upon his failure to object at the hearing. We agree. The circumstances Vann relies upon on appeal to show bias were known to him and his counsel at the time of the public hearing. Neither Vann nor his counsel sought to disqualify any member of the Town Council from hearing his case. "A party who fails to raise a disqualification issue may not seek to set aside the results of a [hearing] when knowledge of the disqualification was known by the party during [the hearing]."¹⁰ Accordingly, the disqualification issue was waived.¹¹

time. And they would have to make their decision solely upon the evidence presented here that you hear at this hearing. Is there any problem with that with member of Council?

⁹ Specifically, Vann's counsel asked the members:

The next question should be in this case is whether the Board can make a decision that is contrary to Mr. Ryan and Mr. Diakos. Would you be willing to work with them if you find that there is not just cause, that this was a witch hunt or something along those lines? Are you all eligible and able to render a fair decision in light of the fact that you will have to work with these people?

¹⁰ *Copland v. Manuel*, 1994 Del. LEXIS 370 (Del. Nov. 22, 1994).

¹¹ *Id.*

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED**. The matter is **REMANDED** for further proceedings consistent with this order. Jurisdiction is retained.

BY THE COURT:

/s/Henry duPont Ridgely
Justice