



IN THE SUPREME COURT OF DELAWARE

SHAWN BRITTINGHAM  
CHRISTOPHER STORY,

Plaintiffs below/  
Appellants,

v.

TOWN OF GEORGETOWN,  
WILLIAM TOPPING,  
RALPH HOLM,

Defendants below/  
Appellees.

OPENING BRIEF OF THE PLAINTIFF BELOW/  
APPELLANTS

DATE: 10.10.11

/s/ Bruce A. Rogers, Esq.  
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## NATURE AND STAGE OF PROCEEDINGS

In March, 2010, Defendant Ralph Holm ("Holm") notified the Plaintiffs (and other officers who are no longer involved in this instance), of a Professional Standards Investigation alleging violations of the Georgetown Police Department Rules, Regulations and Policies. Each Plaintiff was ordered to attend an interview with a police officer outside the Georgetown Police Department, which they did. Following the interviews with the outside officer, Defendants Holm and Topping advised the Plaintiffs of the intent to seek a penalty of written reprimand for the violations alleged. Plaintiffs did not accept the proposed findings and penalties. Defendant Topping thereafter contacted the Delaware Criminal Justice Council to request the convening of a three-person panel to determine if substantial evidence existed to support the penalties imposed.

The three-person panel conducted a public hearing on September 9, 2010. Prior to the hearing, Plaintiffs requested the CJC issue subpoenas for compulsion of witness attendance, provide for Defendants' response to discovery requests for information set forth in 11 Del. C. Ch. 92 and to permit sufficient time to litigate the case in full (rather than restricting the hearing to one day). The CJC Panel denied all requests by the Plaintiffs.

Following the hearing, the Panel announced orally and subsequently in written form, the finding that substantial evidence supported the decision of the Defendants. The CJC - at the behest of Defendants Topping & Holm - did not impose any penalty upon Plaintiffs. See CJC Opinion, A-1.

Following the decision of the CJC. Defendants Topping and Holm imposed penalties substantially

greater than the written reprimand extended at the initial investigation stage. A copy of the penalty rubric sought to be imposed by Defendants (and later actually imposed) is attached. A-11 - A-14.

An appeal of Defendants' decision was filed with the Town Council of Georgetown. After a "hearing" at which no evidence was taken, no testimony heard, no appeal permitted, the Town of Georgetown accepted and imposed the penalty dictated by Topping and Holm.

On September 24, 2010, Plaintiffs sought mandamus in the Superior Court pursuant to 10 Del. C. 564. Opinion p. 4. Plaintiffs requested the matter be remanded for a hearing by a CJC panel consistent with the requirements of 10 Del. C. Ch. 92, to require the provision of copies of transcripts and records in the possession of the Defendants, to restore Plaintiffs' to the status quo ante, and to remove evidence of discipline from

the officers' personnel files. Defendants' moved for summary judgment, claiming no Law Enforcement Officers' Bill of Rights ("LEOBOR") violations had occurred and, even if there were violations, they were not substantiated by the evidence. Opinion p. 4.

The trial court granted the motion for summary judgment, claiming there was no basis for the issuance of the writ or mandamus. The trial court held that, while Plaintiffs were guaranteed a wide range of protections by the LEOBOR, there was no evidence Defendants' violated these protections by failing to perform a ministerial duty. Opinion p. 10. The trial court also invited Defendants' to file a motion for an award of attorney's fees and costs. The trial court subsequently denied the Defendants' application for fees and costs. Opinion, dated August 12, 2011.

Upon the trial court entering its order on the remaining issue of fees and costs, Plaintiffs filed the instant appeal.



## SUMMARY OF ARGUMENT

The decision of the Superior Court in granting the Motion for Summary Judgment on Plaintiffs' Application is not supported by the law, the facts nor the record and is not the product of a logical and deductive process. Further, summary judgment is improper where material facts are in issue and where it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.

## STATEMENT OF FACTS

In 2007, Defendant Police Chief Topping issued a verbal order prohibiting officers from meeting or speaking with the Mayor or members of the Town Council of Georgetown to discuss any matter without first obtaining his permission. Opinion p. 2.

(The trial court mistakenly states that the order applied only to meetings and only to the discussion of police business). On December 23, 2009, after months of attempting to secure changes in procedures, safety issues, personnel matters and concerns, seven off-duty police officers met with town council person Sue Barlow at her home. Opinion p. 2.

Defendant Holm learned of the meeting on the same day it occurred from one of the attendees, Lt. Grose, who lied to Holm about the topic of the meeting. Subsequently, Holm informed each of the Plaintiffs (plus one other officer whose matter was

resolved prior to the CJC hearing), that the officers were being investigated for violation of GPD Regulations. Interestingly, three participating officers were not sanctioned by the Defendants despite being present and participating in the meeting. Opinion p. 2.

Defendant Holm contacted a police officer from an outside agency to conduct interviews of the Plaintiffs. Plaintiffs submit this was in violation of 11 Del. C. Ch. 92. Defendant Holm determined the Plaintiffs had committed the act of insubordination and disregarded the Chief's order. A written reprimand was issued to each Plaintiff. Other officers received no penalties or different, lesser sanctions. Opinion p. 2.

Following the imposition of the sanction by the Defendants, Plaintiffs' sought a hearing pursuant to 11 Del. C. Ch. 92. Defendant Holm contacted the Criminal Justice Council and requested the

appointment of a panel. Opinion p. 3. Plaintiffs' requested the CJC issue subpoenas for witnesses to appear at the hearing, motions to compel the Defendants to provide documents, evidence and proof pursuant to 11 Del. C. Ch. 92, and to permit sufficient time for the hearing to occur. The Panel denied each request. A-15.

The CJC panel determined the decision of the Defendants were supported by substantial evidence, but did not impose penalties, pursuant to a request by Defendant Topping. Opinion p. 3.

Following the CJC Panel decision, Defendant Holm imposed greater sanctions than originally imposed. In October, 2010, Plaintiffs appealed to the Appeals Board of the Town of Georgetown (consisting of the town council, en banc). The town council upheld the decision of Defendants, following an appearance where no evidence was taken, no testimony given and no true "appeal"

occurring. Opinion p. 3.

Plaintiffs' subsequently filed the instant petition for writ of mandamus pursuant to 10 Del. Ch 564. Defendants' moved for summary judgment, which was granted by the trial court below.

Following additional submissions, the trial court denied Defendants' application for fees and costs.

Opinion p . 10-11. This is the appeal of the

Plaintiffs' of the trial court's decision below.

## ARGUMENT

THE DECISION OF THE TRIAL COURT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' APPLICATION IS NOT SUPPORTED BY THE LAW, THE FACTS NOR THE RECORD AND IS NOT THE PRODUCT OF A LOGICAL AND DEDUCTIVE PROCESS. FURTHER, SUMMARY JUDGMENT IS IMPROPER WHERE MATERIAL FACTS ARE IN ISSUE AND WHERE IS IT DESIRABLE TO INQUIRE MORE THOROUGHLY INTO THE FACTS IN ORDER TO CLARIFY THE APPLICATION OF THE LAW TO THE CIRCUMSTANCES.

QUESTION PRESENTED.

Was the trial court's decision in granting the Motion for Summary Judgment on Plaintiffs' application for a writ supported by the law, the facts and the record, the result of a logical and deductive process? Was the trial court's decision in granting summary judgment proper where material facts remain in issue and where it is desirable to inquire more thoroughly into the facts in order to

clarify the application of the law to the  
circumstances?

No specific reference or preservation of these  
questions was presented inasmuch as there was no  
trial or hearing on the application nor the motion  
for summary judgment.

## STANDARD AND SCOPE OF REVIEW

The standard and scope of review for trial court findings of fact and law extends to an appellate review of those facts and law as well as any inferences and deductions drawn by the trial court from the record. Solis v. Tea, Del. Supr. 468 A.2d 1276 (1983, et seq). Questions of fact must be affirmed if they are supported by substantial evidence on the record and are the product of an orderly and logically deductive process. Leavitt v. Bouvier, Del. Supr. 594 A.2d 23 (1991).



## MERITS OF THE ARGUMENT

Summary judgment may not be granted if the record indicates that a material fact is in dispute, or it if seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law of the case at bar. Ebersole v. Lowengrub 180 A.2d 467 (1962); Guy v. Judicial Nominating Commission, 659 A.2d 777 Del. Super., (1995). The burden of proof in such motion is borne by the moving party. Moore v. Sizemore, 405 A.2d 679 (1979). A writ of mandamus is an extraordinary writ, issuable not as a matter or right but only in the exercise of sound judicial discretion. Guy v. Greenhouse, 637 A.2d 827 (1993). It will not issue unless the petitioner has no other adequate remedy at law. State ex rel Lyons v. McDowell, 57 A.2d 94 (1947).

In the case at bar, Plaintiff Below/Appellant sets forth in great detail in their complaint the

LEOBOR violations committed by the Defendants and the consequences which flowed from these violations. These violations severely prejudiced Plaintiffs in the presentation of their claim to the CJC Panel. The decision of the CJC panel itself noted that, while the Defendants decision as presented was supported by substantial evidence, there remained questions which the panel could not resolve. A-10. The errors made in the underlying LEOBOR investigation, trial board and penalties imposed by Defendants, were compounded when the Town of Georgetown upheld the decision of the Defendants based solely upon the CJC order. At the Town Appeal Board hearing, no evidence was taken, no testimony given, no appeal provided; the council simply adopted the CJC opinion in a perfunctory manner, upheld the decision of the Defendants and ratified increased penalties for the Plaintiffs. The trial court failed to address any

of these allegations in the order below.

Plaintiffs' below/Appellants cited no fewer than sixteen violations of the LEOBOR statute in their application for writ or mandamus. The trial court failed to address all but seven of these allegations in its order granting summary judgment. See Opinion of June 28, 2011.

The trial court erroneously held in its opinion and order that "Plaintiffs acknowledge that an investigation and hearing took place, and do not deny that they committed the charged act." Opinion p. 6. In fact, the Plaintiffs contend the investigation which occurred was fatally flawed when viewed in light of the guarantees of the LEOBOR and that the alleged violation was not, in fact, a proper exercise of rule making authority by the Chief, in derogation of Plaintiffs' First Amendment and LEOBOR rights.

Plaintiffs below relied upon the decision of

Judge Witham of the Superior Court in Rosario v. Town of Cheswold, 2007 WL 914899 (Del. Supr., attached). There, as here, a similar question was presented. In Rosario Judge Witham held that the passage of the LEOBOR was done so as to "provide law enforcement officers with enhanced procedural safeguards (citing Know v. City of Elsmere, 1995 WL 339096 (Del. Super). Judge Witham went on to state:

"Other Delaware courts have held that the requirements for disciplinary investigations under LEOBOR are specific and do not leave room for discretion. These courts have stated that mandamus may be appropriate because the actions mandated by the statute are ministerial rather than discretionary. In fact, other Delaware courts have suggested that a writ of mandamus may be the proper way to remedy LEOBOR violations. This Court takes these suggestions to the next level and finds that,

given these facts and the scheduling and holding of a hearing is a nondiscretionary duty, the writ is an appropriate method for addressing the LEOBOR violation. Additionally, issuance of the writ is appropriate given the Petitioner does not have another adequate remedy to address the denial of his right to a hearing. Rosario, p. 7-11. This is the identical situation in the case at bar. The decision by the Defendants, the CJC and the Town are all based upon determinations which were based in violation of the nondiscretionary requirements of 11 Del. C. Ch. 92. It is precisely these deficiencies which must be remedied by relief sought in the writ.

Defendants below took the position that the requirements of 11 Del. C. Ch 92 do not apply to the hearing before the three person panel of the CJC. If this position is true, the General

Assembly has enacted a statutory scheme where rights are created for which there is no remedy for their violation.

Defendants further claimed that they had abundantly and completely complied with the legal requirements set forth in the LEOBOR. However, the record as it appears before the trial court below does not contain a scintilla of evidence supporting this position. The trial court takes great liberties in finding the actions of the defendants technically or substantially comply with the requirements of LEOBOR. In reality, the trial court failed to address many of the violations set forth in the Plaintiffs' pleadings and recounted in their brief on the issue of summary judgment.

Where, as here, the record upon which the trial court relies does not support the conclusions drawn, summary judgment is inappropriate. Further, where, as here, it is desirable to inquire more

thoroughly into the allegations of the Plaintiffs in order to determine if the law was properly applied to the facts, summary judgment is inappropriate. Taken together, the failure of the trial court to address the plethora of cited deficiencies, the failure to address the Plaintiffs' lack of any recourse other than a writ and the failure of the trial court to address the fact that the result of its opinion and order renders the LEOBOR statute a paper tiger (rights without remedies), require the motion to be set aside, the opinion and order vacated and the matter remanded for proceedings consistent with the Court's mandate.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the opinion and order of the trial court below must be vacated and the matter remanded for proceedings consistent with the mandate of this Court.

DATE: 10.10.11

/s/ Bruce A. Rogers, Esq.

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below/Appellants

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SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DELAWARE 19947  
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Re: *Brittingham et al. v. Town of Georgetown et al.*  
C.A. No. S10M-09-023 RFS

*Upon Defendants Motion for Attorneys Fees. Denied.*

Submitted: July 25, 2011  
Decided: August 12, 2011

Dear Counsel:

Summary judgment was previously entered in favor of Respondents by Memorandum Opinion dated June 28, 2011. Plaintiffs' petition for writ of mandamus was dismissed, and Defendants' motion for summary judgment was granted.

Defendants have requested attorneys fees. There is no statutory basis to award them. Absent bad faith or a Civil Rule 11 violation, Defendants must pay their own legal expenses.

According to the Supreme Court in *Baker v. Rapuano v. Pantano*, 882 A.2d 232 (Del.2005):

Delaware follows the "American Rule," whereby a prevailing party is generally expected to pay its own attorney's fees and costs. This Court has recognized limited equitable exceptions to that rule, including the exception for "bad faith" conduct during the litigation. Although there is no single,

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comprehensive definition of “bad faith” that will justify a fee-shifting award, Delaware courts have previously awarded attorney’s fees where (for example) “parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims.” The bad faith exception is applied in “extraordinary circumstances” as a tool to deter abusive litigation and to protect the integrity of the judicial process.

In the writ of mandamus case, Defendants claim bad faith is shown because an earlier Superior Court case declined to exercise jurisdiction in similar circumstances.

*Smith v. The Dept. of Public Safety of the State of Delaware*, 1999 WL 1225250 (Del. Super.), aff’d, 2000 WL 1780781 (Del.). In *Smith*, the defendants moved for summary judgment on the plaintiff’s mandamus petition, which alleged violations of the Law Enforcement Officer’s Bill of Rights (“LEOBOR”) and legal due process. *Smith* observed that mandamus may be the appropriate way to remedy such violations. However, the Court declined to exercise jurisdiction because the LEOBOR violations were technical in nature and did not give rise to due process violations.

Counsel for plaintiff in *Smith* represented Plaintiffs in this suit. Lawyers are not handcuffed by the lack of success with earlier arguments. *Smith* does not stand for a bright line rule of law that a mandamus petition can never be filed in LEOBOR cases. A court’s choice to exercise jurisdiction is discretionary. Plaintiff’s counsel cannot be charged with bad faith in this context.

Defendants argue that Plaintiffs have engaged in a pattern of harassment that would support a finding of bad faith. In December 2010, Lester Shaffer and Jennifer Shaffer, his wife, filed a Complaint in Superior Court against Topping, Holm, the Town of Georgetown and others 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. Because Plaintiffs' failed to timely file an answer to plaintiffs' motion to dismiss, the Complaint was dismissed. *Shaffer v. Topping*, C.A. No. S10C-12-016 THG (March 31, 2011). Reasons other than bad faith may explain the failure.

In January 2011, Plaintiffs in this case, as well as Plaintiff Lester F. Shaffer, filed a breach of contract suit against the same Defendants. The Complaint alleged violation of LEOBOR, retaliation, civil conspiracy, abuse of official power/violation of due process, slander, breach of town and departmental policies. Defendants moved to dismiss the case. By letter dated July 6, 2011, Defendants motion to dismiss was partially granted. Defendants' First Amendment retaliation claim was not dismissed.

Upon review, bad faith has not been established to award attorneys fees under the Court's inherent power nor under Rule 11(c). The circumstances surrounding the litigation were not egregious. Plaintiffs' counsel did not assert wholly meritless legal positions. Therefore, Defendants' request is denied.

IT IS SO ORDERED.

Very truly yours,

  
Richard F. Stokes

RFS/cv  
cc: Prothonotary

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.<sup>1</sup>

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.<sup>2</sup> Mandamus is a prerogative writ, issuable not as of right, but only in the exercise of sound judicial discretion.<sup>3</sup> When directed to an administrative agency

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<sup>1</sup>In 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.

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

<sup>3</sup>*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.<sup>4</sup> A ministerial duty is one which is prescribed with such precision and certainty that nothing is left to discretion or judgment.<sup>5</sup> Mandamus will not lie unless the plaintiff has no other remedy.<sup>6</sup>

Both parties argue the merits of *Smith v. The Dep't. of Public Safety of the State of Delaware*.<sup>7</sup> 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.<sup>8</sup>

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

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<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>1999 WL 1225250 (Del. Super.), *aff'd*, 2000 WL 1780781 (Del.).

<sup>8</sup>*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*<sup>9</sup> 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

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<sup>9</sup>2007 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> If the moving party makes this showing, the burden shifts to the non-moving party to establish any material issues of fact.<sup>13</sup> If the non-moving party cannot make this showing, summary judgment must be granted.

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

<sup>11</sup>*Id.*

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

<sup>13</sup>*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.**



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Richard F. Stokes, Judge

Original to Prothonotary