IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN BRITTINGHAM & CHRISTOPHER STORY,	:	No.: 464,2011
Plaintiffs Below-Appellants,	:	
v.	:	
TOWN OF GEORGETOWN, WILLIAM TOPPING & RALPH HOLM,	:	
Defendants Below-Appellees.	:	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

APPELLEES' ANSWERING BRIEF

LIGUORI & MORRIS

/s/ James E. Liguori, Esquire
JAMES E. LIGUORI, ESQUIRE
Bar ID No.: 415
/s/ Gregory A. Morris, Esquire
GREGORY A. MORRIS, ESQUIRE
Bar ID No.: 3014
46 The Green
Dover, DE 19901
(302) 678-9900
jliguori@lmylaw.com
gmorris@lmylaw.com
Attorney for Defendants-Below Appellees

DATED: November 15, 2011

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ATTACHED AS EXHIBIT "B" IS A COPY OF *Smith v. Department of Public Safety of the State of Delaware*, 2000 WL 1780781 (Del. Supr.)

ATTACHED AS EXHIBIT "C" IS A COPY OF *Smith v. The Department of Public Safety of the State of Delaware et al*, 1999 WL 1225250 (Del. Super.)

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NATURE AND STAGE OF PROCEEDINGS

On March 18, 2010, Defendant Captain Ralph Holm, gave written notice to Plaintiffs Shawn Brittingham, Bradley Cordrey and Christopher Story of an internal investigation alleging violations of Georgetown Police Department Rules and Regulations. The Plaintiffs were ordered to attend interviews conducted by Detective Eric Richardson of the City of Dover Police Department designated by Georgetown Chief Topping to conduct the internal investigation allegations regarding the alleged violations of Georgetown Police Departments Rules and Regulations.

The Plaintiffs were notified at the conclusion of the investigation in writing on May 25 and May 26, 2010 that the Department intended to impose a penalty of a Written Reprimand as a result of the allegations made against them. The Plaintiffs requested a hearing be held on the allegations made against them and the proposed penalty. Plaintiff's requested a trial board comprised of officers outside the Georgetown Police Department.

The hearing board was selected by the Criminal Justice Council and was comprised of three members from three separate Delaware Police Departments.

On September 9, 2010, a due process hearing was held before that panel. After the hearing an oral decision was announced supporting Defendants' claims. On September 15, 2010 the panel entered an order whereby it reiterated and substantiated the charges of insubordination against Plaintiffs. Neither the Georgetown Police Department or Plaintiffs asked the panel to recommend a particular penalty.

As a result of the finding of the Trial Board, punishment was imposed upon each officer. On September 22, 2010, the Plaintiffs pursuant to Town of Georgetown employee disciplinary rights appealed their discipline to the Town Council of the Town of Georgetown.

Curiously, on or about September 24, 2010 the Plaintiffs filed a Writ of Mandamus with the Superior Court while their Appellate remedies were not yet exhausted.

On October 18, 2010, the appeal of the Plaintiffs' discipline was heard by the Town Council. Each disciplinary action was upheld by the Council.
On October 19, 2010, the Defendants, through counsel, filed an answer to the Writ of Mandamus petition.

The Defendants moved for summary judgment claiming there were no Law Enforcement Officer Bill of Rights

(LEOBOR) violations and even if there were, they were technical in nature and not substantiated by the evidence. After full and complete briefing by all the parties, the Superior Court granted the Defendants motion for summary judgment. The Court determined there was no basis for the issuance of the Writ of Mandamus. The Superior Court determined there were no violations of Plaintiffs rights under LEOBOR or any other meritorious reason to interject itself in the routine disciplinary proceedings of the Georgetown Police Department. The Superior Court also invited Defendants' to file a motion for attorney's fees and costs. On August 12, 2011, the Superior Court denied the Defendants application for attorney's fees and costs.

On August 16, 2011, the Appellees filed their Notice of Appeal with the Delaware Supreme Court. On August 29, 2011, this Honorable Court entered an order setting the briefing schedule. On October 10, 2011, the Appellants filed their Opening Brief. On October 24, 2011, the Appellees filed a Motion to Affirm. On October 26, 2011, this Honorable Court denied the motion to affirm. This is Appellees Answering Brief.

SUMMARY OF ARGUMENT

I. **DENIED.** THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR COMMIT LEGAL ERROR WHEN IT DECLINED TO EXERCISE ITS MANDAMUS JURISDICTION SINCE THERE WERE NO VIOLATIONS OF PLAINTIFFS' RIGHTS UNDER THE LAW ENFORCEMENT OFFICERS BILL OF RIGHTS.

STATEMENT OF FACTS

Plaintiffs Shawn Brittingham, Bradley Cordrey and Christopher Story were employed by the Defendant, Town of Georgetown, as sworn police officers (see paragraph #4 of Complaint). (A-88, 106, 116) Plaintiff Brittingham's rank was that of Corporal (A-281). Plaintiff Cordrey's rank was that of Patrolman First Class (A-281). Plaintiff Storey's rank was that of Patrolman First Class. (A-281).

Defendant William Topping is the Chief of Police for Georgetown Police Department. (A-145) Defendant Ralph Holm is the Captain of Police for the Georgetown Police Department. (A-8)

On December 11, 2007, Chief Topping called a mandatory meeting of all officers in the Department. (A-146) The meeting was also attended by the Town Manager and the Mayor. (A-100) At the meeting, Chief Topping gave a verbal order that any contacts with the Town Manager or the Town Council about internal police business go through the Police Departments chain of command. (A-146) The Plaintiffs acknowledged in their testimony that the verbal order was clear to them. (A-89, 109, 116) At the trial Board Plaintiffs all admitted they consciously violated that order. (A-90, 109, 118) (Emphasis added)

At a later date an e-mail was sent by Chief Topping to all officers which stated the following:

> Mr. Dvornick has recently received a letter from someone in this department speaking ill of another member of this department. This letter was not signed by the writer so, as with all anonymous correspondence, it carries no weight. What it does carry is a severe penalty for violating the chain of command and for going outside of this department in an effort to discredit an officer of this agency. I am going to remind each and every officer and civilian of this department of the fact that if you are caught and you will be caught, doing this you will disciplined. This type of behavior does nothing to improve the working conditions of the department and, quite frankly does not present a very good opinion of this agency to either the Council or the Town Manager. Any and all correspondence dealing with matters within the police department will go through the office of the Chief of Police. There are no exceptions for this policy. (A-1)

There is no dispute that Plaintiffs received this email from Chief Topping.

During the next two years, Plaintiffs and other officers complained about department morale, equipment and Captain Ralph Holm's supervision. (A-95-96, 110-111) Not one of the officers (including Plaintiffs obviously) pursued any grievances despite their ability to do so pursuant to (1) the Department's Manual; (2) the Fraternal Order of Police; or (3) the Town Personnel Manual. (A-148) In December 2009, various Georgetown Police Department officers met in the parking lot of the Georgetown Fire Company and decided to discuss internal police issues with

a member of council in direct violation of an order of Chief Topping. (A-91) As a matter of fact, seven officers including Plaintiffs met for three hours with Councilwoman Sue Barlow at her residence on December 23, 2009. (A-93, 109, 129) The Plaintiffs and other officers discussed numerous internal Georgetown Police Department issues with her. (A-93) Their intent was to go above the chair of command with their grievances. The meeting concluded by Mrs. Barlow stating she would address the raised issues with the Town Manager when he returned from Christmas vacation. (A-134, 213-214)

Shortly after the meeting at Mrs. Barlow's home (later that same evening), one of the officers who attended the clandestine meeting received a text from Captain Holm concerning his whereabouts. (A-130) That officer, Lt. Grose texted back to Captain Holm that he and other officers were at an FOP meeting to discuss dues. (A conscious deception to cover up their collective whereabouts in an attempt to disguise their actual, incorrect, violation of Department rules) (A-131) Additionally, Patrolman Locklear stated under oath that then Lt. Shaffer called him after the meeting and told him to say, if asked, "they were at the Fire House discussing FOP dues". (A-138)

Once a higher ranking officer became aware of the December 2009 meeting, the Department notified Plaintiffs Brittingham, Cordrey and Story of an internal inquiry into alleged violations of the Code of Conduct. (A-2, 4, 6) The notice informed Plaintiffs they violated the Patrol and Code of Conduct directives by engaging in the following:

A. Going outside the structure of this department in an effort to bring influence to bear upon the Chief of Police.
B. Making a public statement criticizing the department or members thereof that was likely to impair the operation of this department without regard to the statement truth or falsity.
C. Insubordination by ridiculing superior officers in the presence of others to include subordinate officers.

The notice set forth the alleged facts and specific citations of the Code of Conduct. (A-2-7)

Chief Topping with the consent of the Town of Georgetown requested and designated the services of Sergeant Eric J. Richardson of the Dover Police Department to conduct an investigation. Sergeant Richardson conducted an interview of each of the Plaintiffs and other individuals. (A-11, 19, 27) After Sergeant Richardson completed his investigation, Captain Holm reviewed the investigative reports. (A-8, 13, 19) Captain Holm ultimately decided that three of the four violations were either unsubstantiated or exonerated the Plaintiffs. (A-8-

10, 16-18, 27-29) Captain Holm determined that the charge of insubordination as to each Plaintiff was substantiated. *Id.* The official notice of reprimand stated the charge of "open defiance of the authority of the superior officer or his orders, including the directives of the Department" was substantiated. *Id.* The recommended discipline for such charge was a written reprimand. (A-13, 21, 29)

The Plaintiffs chose not to accept such discipline but elected to have a hearing pursuant to the Law-Enforcement Officers Bill of Rights (LEOBOR) before a three member trial board. (A-15, 23, 31) A panel of three police officers from different Delaware jurisdictions were appointed to hold a hearing as to the allegations made against the Plaintiffs. (A-34-35, 70, 73)

Prior to the scheduled hearing Plaintiffs' counsel filed a Motion to Compel documents which they believed the Town of Georgetown had to produce prior to such hearing. (A-42-46)The Motion to Compel was denied by the Criminal Justice Council Hearing Board. (A-47-48) The Board's decision was based on many factors but relied mainly on the fact the Plaintiffs' had failed to identify any exculpatory documents that had not been produced; that Plaintiff's counsel confused the LEOBOR rules with Superior Court

Criminal Rule 16; and the fact that they could object to any documents to be admitted as evidence that had not been produced to them. (A-47-48) Counsel for Defendants stated at the hearing there was absolutely no exculpatory evidence and there were no documents Defendants intended to use that had not been already produced. (A-79) Defendants' counsel maintained an "open file" practice and agreed to produce any or all documents if they existed. (A-80) As a matter of fact, Defendants' Counsel took the entire file to Plaintiffs' Counsel's office and allowed him to review it without restriction. (A-80)

The Plaintiffs' counsel also made a request that the Criminal Justice Council Trial Board compel certain witnesses to testify at the hearing. (A-36-37) The Board rightfully held that the Criminal Justice Council did not have authority to compel the testimony of witnesses or the production of documents. (A-34-35, 70, 73)

A hearing was held before the Criminal Justice Council Hearing Board on September 9, 2010. (A-70) The Criminal Justice Council Board restricted each side to three hours to present their case. The Plaintiffs' case lasted approximately 2 hours. (A-41, 198-251) The Defendant's case was even shorter.

After hearing all the evidence presented by both sides and arguments from both sides, the Board concluded "as a matter of law there is substantial evidence in the record to prove that each of the three officers violated this section the Code of Conduct by openly defying Chief Topping's December 11, 2007 verbal order and going outside the chain of command to discuss internal police matters with Sue Barlow, a member of the Town Council." (A- 49-58) The decision by the Board was based upon Plaintiffs own admissions (emphasis added) they were aware of Chief Topping's December 11, 2007 verbal order and they "consciously disregarded" (emphasis added) the order when they met with Mrs. Barlow. *Id.* The Board found the Plaintiffs had the ability to properly air their dissatisfaction with the Georgetown Police Department by filing grievances available to all town employees. (A-57) The Plaintiffs intentionally chose not to follow the proper procedures and went outside the chain of Command. (A-57-58) The Board ultimately held that they were not justified "in taking matters into their own hands and to violate a direct order by the chief". *Id.* The Board was not asked to recommend a penalty. (A-58)

As a result of the finding of the Criminal Justice

Council Board, punishment was imposed upon each officer. (A-59-61) Plaintiff Story received a 2 week suspension without pay, 7 day reduction in rank to Patrolman and place on disciplinary probation for one year. (A-59) Plaintiff Brittingham received a 4 week suspension without pay, 14 day reduction in rank to Patrolman First Class and placed on disciplinary probation for one year. (A-60) Plaintiff Cordrey received a 2 week suspension without pay, 7 day reduction in rank to Patrolman and placed on disciplinary probation for one year. (A-61)

The Plaintiffs appealed their discipline to the Town Council. (A-65-69) On October 18, 2010, the appeal was heard (emphasis added) by the Town Council. (A-65) At the hearing, the Georgetown Police Department offered into evidence revised letters of Disciplinary Action. (A-62-64) Each disciplinary action was upheld by the Council. (A-65-69)

LEGAL ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO EXERCISE ITS MANDAMUS JURISDICTION SINCE THERE WERE NO VIOLATIONS OF PLAINTIFFS' RIGHTS UNDER THE LAW ENFORCEMENT OFFICERS BILL OF RIGHTS.

QUESTION PRESENTED

Whether the Superior Court abused its discretion when it declined to exercise its mandamus jurisdiction since there were no violations of Plaintiffs' rights under the Law Enforcement Officers Bill of Rights?

STANDARD AND SCOPE OF REVIEW

The standard of review in an appeal of a denial by the Superior Court to issue a Writ of Mandamus is whether there was an abuse of discretion. *Parker v. State of Delaware Dept. of Corrections,* 813 A.2d 1141, 2003 WL 133603 (Del. Supr.) (Attached as Exhibit "A) citing *Ingersoll v. Rollins Board of DE, Inc.*, 272 A.2d 336 (Del. 1970) *Smith v. Department of Public Safety of the State of Delaware*, 2000 WL 1780781 (Del. Supr.) (Attached as Exhibit "B")

ARGUMENT

A Writ of Mandamus is an extraordinary remedy, which a Court will not issue unless Plaintiffs establish a "clear right" to the performance of a duty and that no other adequate remedy is available. *Schargin Gas Co. v. Evans,*

418 A.2d 997 (Del. 1980). The issuance of a Writ Mandamus falls within judicial discretion and is not a matter of right. *Guy v. Greenhouse*, 637 A.2d 287 (Del. 1993). The Superior Court may issue a Writ of Mandamus "to an inferior court, public official, or agency to compel the performance of a duty to which the petition has established a clear right." *Clough v. State*, 686 A.2d 158, 159 (Del. 1996). As a condition precedent to the issuance of the writ, the petitioner must demonstrate that a) he has a clear right to the performance of the duty; b) no other adequate remedy is available; and c) the public official or agency has arbitrarily failed or refused to perform a duty. *Id.*

Plaintiffs were not entitled to a Writ of Mandamus because Defendants complied with the legal requirements of LEOBOR. Plaintiffs allege that Defendants violated LEOBOR in the following manner:

a. failure to provide Plaintiffs with specific findings of fact and recommendation of the investigator.

b. failure to delineate the proper insubordination charge.

c. failure to comply with the requirements for full disclosure of all written records and evidence.

d. failure to support the initial complaint by substantial evidence.

e. failure to conduct the investigation by an authorized member of the Department.

f. failure to protect their First Amendment Rights to Free Speech by disciplining them for defying an order of the Chief of Police.

g. failure to require all members of the department to obey orders.

h. failure by the Criminal Justice Council compelling defendants to produce documents and giving additional time to present their case.

The Plaintiffs alleged that a Writ of Mandamus should have been issued because the Defendants failed to provide the specific findings of fact and recommendations of the investigator. This allegation is simply not true. After the investigation was completed, Captain Holm reviewed Detective Richardson's reports and from them derived that each officer received a written notice that set forth the findings of fact and recommendations as to each allegation. (A-8-10, 16-18, 24-26) Captain Holm advised the Plaintiffs that three of the four violations were either unsubstantiated or exonerated the Plaintiffs. *Id.* The

Plaintiffs were given a second notice advising they were being officially charged with insubordination and the facts supporting such charge. (A-11-12, 19-20, 27-28) Clearly, the Plaintiffs were informed of the investigative findings and recommendations as required by 11 Del. C. § 9200(c)(11).

The Plaintiffs also alleged that a Writ of Mandamus should have been issued since the Defendants failed to delineate the proper insubordination charge. This allegation is also without merit. All of the written notices clearly advised each Plaintiff that they were being charged with insubordination as a result of their intentional ignoring of an Order given by Chief Topping to follow the chain of command within the Department. (See notices A-2-7, 11-12, 19-20, 27-28) The notices could not have been anymore clear. Plaintiffs were fully informed of the allegations against them. Each Plaintiff was not only aware of the allegation but each admitted to the allegation during their interview with Detective Richardson and during their testimony before the Criminal Justice Council Board. During the interview and the Criminal Justice Council Board Hearing, the Plaintiffs were represented by counsel. The notices sent to each Plaintiff clearly complied with

LEOBOR. 11 Del. C. § 9200 (4) (11). Since there was no violation of LEOBOR, Plaintiffs request for a Writ of Mandamus was without merit. This fact was noted in the Superior Court's decision (See p. 8-9 of Superior Court decision).

The Plaintiffs also argue that Defendants failed to support the initial complaint by substantial evidence. This allegation is also without merit. 11 Del. C. § 9200(c)(3) states "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." At the time the Plaintiffs were given official notice of the charge of insubordination on May 25 and May 26, 2010, they had admitted to Detective Richardson they were aware of the order given by Chief Topping and they consciously disregarded such order when they met with Councilwoman Barlow. Other officers who also met with Councilwoman Barlow confirmed the Plaintiffs ignored the order when they were questioned by Detective Richardson. The admissions of Plaintiffs and the other officers clearly established that Plaintiffs consciously disregarded the order of Chief Topping. Such statements

constitute substantial evidence under any reasonable standard. Again, this was noted by the Superior Court (*Id.* at p. 8).

The Plaintiffs argue that Defendants failed to comply with the requirements of full disclosure of all written records and evidence. In their Motion to Compel, the Plaintiffs requested that the Criminal Justice Council Board order Defendants to produce an internal investigation control log, the complete record of the non-departmental investigator be produced in its entirety and records required pursuant to 11 Del. C. § 9200 (c) (4) (7) (10) (11). The specific sections that deal with production of documents are set forth in 11 Del. C. § 9200 (c) (7) (10). 11 Del C. § 9200 (c) (7) provides "a complete record, either written, taped or, if taped transcribed as soon as practicable, shall be kept of all interviews held in connection with administrative investigation upon notification that substantial evidence exists for seeking an administrative sanction of the law enforcement officer. A copy of the record shall be provided to the officer or the officers counsel at the officers expense based upon request." In this case, copies of all transcribed statements taken of Plaintiffs and other witnesses were

provided to Plaintiff and their counsel prior to the Board hearing. This exchange of information occurred in full, when counsel for Defendants personally met with Plaintiffs' Counsel at Plaintiff's counsel's office in Georgetown and allowed Plaintiff's counsel full access to the file which included the transcribed statements. Defendants clearly complied with the requirements set forth in 11 Del. C. § 9200 (c) (7).

11 Del. C. § 9200 (c)(10) states the officer or his representative "will be provided access to transcripts, records, written statements, written reports, analysis and video tapes pertinent to this case if they are exculpatory, intended to support any disciplinary action or to be introduced into departmental hearing on the charges involved."

Counsel for Defendants stated at the hearing there were no exculpatory materials which existed in this case. (A-79) All of the documents introduced by Defendants at the hearing were produced to Plaintiffs' Counsel prior to the hearing. At no time did Plaintiffs counsel ever object that Defendants Counsel attempted to offer any documentary evidence which had not been previously produced. Counsel for the Criminal Justice Council Board stated this point

when the Motion to Compel was denied. Counsel for the Criminal Justice Council Board advised Plaintiffs' Counsel could object to any document coming into evidence if it was not produced prior to the hearing. (A-47-48) This did not occur because Plaintiffs' Counsel had full access to all documents in Defendants file and were provided all documents as required under 11 Del. C. § 9200 (c)(10). The Plaintiffs request that the Defendants produce a internal investigation control log or a complete record of the non-departmental investigator is not supported by any portion of LEOBOR. The Defendants complied with the production of discovery as set forth in LEOBOR. As such, Plaintiffs' claim that they are entitled to a Writ of Mandamus on this issue is without merit and the complaint was properly dismissed by the Superior Court. The evidence Plaintiff's had was the exact same evidence Defendant's had.

The Plaintiffs also alleged the Defendants violated LEOBOR by having Detective Eric Richardson conduct the investigation and interviews. The Defendants designated Detective Eric Richardson, of the City of Dover Police Department, as an authorized member of the department to conduct the interviews and investigation of the Plaintiffs and other officers. The Law-Enforcement Officers' Bill of

Rights does not state that a police agency may not designate an officer from another police agency to conduct an investigation and interviews. (See 11 Del. C. §§ 9200-9209). Thus, Plaintiffs' were not entitled to a Writ of Mandamus based upon this allegation. In fact the lower court stated "having an investigator outside the Georgetown Police Department was an added protection for Plaintiffs" and there was no violation of Plaintiffs' rights (*Id.* at p. 7). (Emphasis added)

The Plaintiffs also allege the Defendants violated LEOBOR by failing to protect their First Amendment Rights to Free Speech by disciplining them for defying an order of the Chief of Police. If the Plaintiffs believed their civil rights were violated, they could have filed an appropriate civil rights complaint. Thus, the Plaintiffs have an adequate remedy of law and a Writ of Mandamus is not appropriate in this case. It is worth noting that, contemporaneously with this action Plaintiffs had, in fact, brought a separate civil action in the Superior Court seeking monetary damages based upon the same allegations raised in their Writ of Mandamus petition herein. (A-267-280)

The Plaintiffs also alleged Defendants violated LEOBOR

by not requiring all members of the department to obey orders. The Defendants always adamantly denied that they did not require all members to obey orders. There was no evidence offered to the Superior Court to prove this spurious allegation. This allegation, even if true, would not be a violation of LEOBOR. The Superior Court correctly noted that Plaintiffs made a bare assertion without evidence (emphasis added) that Defendants did not require all members to obey orders. The Superior Court held that such "bare assertion has no basis in LEOBOR, nor does it present a cognizable issue to the Court". (*Id.* at p. 7)

The Plaintiffs also allege the Criminal Justice Council Board violated LEOBOR by not issuing subpoenas to witnesses, compelling Defendants to produce documents, and giving additional time to present their case. Allegations as to the Criminal Justice Council Board were not properly before the Superior Court since they were not named in the mandamus action. Thus, a Writ of Mandamus could not be issued against a party who was not named in the pending action. This was specifically noted by the Superior Court (*Id.* at p. 7). Notwithstanding, Plaintiffs had full time to present, in an open forum, all aspects of their case and ended their presentation well before their allotted time.

The allegations made by the Plaintiffs in this case are almost identical to the allegations made in the case of *Smith v. The Department of Public Safety of the State of Delaware et al,* 1999 WL 1225250 (Del. Super.) (Attached as Exhibit "C"). The Superior Court decision in *Smith* was later affirmed by the Delaware Supreme Court. *Smith v. Department of Public Safety of the State of Delaware,* 765 A.2d 953 2000 WL 1780781 (Del. Supr.) (Attached as Exhibit "B").

The allegations made by the Plaintiffs in *Smith* also included:

a. failure to provide Plaintiffs with specific findings of fact and recommendation of the investigator.

b. failure to delineate the proper insubordination charge.

c. failure to comply with the requirements for full disclosure of all written records and evidence.

d. failure to support the initial complaint by substantial evidence.

e. failure to conduct the investigator by an authorized member of the Department.

The relief sought in the complaint in *Smith* was also

identical to the relief sought in this matter as well. The relief sought by the Plaintiff in *Smith* and Plaintiffs in this case was to request the matter be remanded for a hearing in compliance with LEOBOR.

The Superior Court rejected a request for a Writ of Mandamus in the *Smith* matter for a number of reasons which were ultimately affirmed by this Honorable Court. The Superior Court held that the alleged violations were mere technical violations not worthy of issuing a Writ of Mandamus. The Court in *Smith* stated "ordinarily a Writ of Mandamus is utilized to compel a public body to take a particular action. In the case at bar, it would be senseless to compel the State Police to conduct the disciplinary investigation and proceedings again in compliance with LEOBOR. The only logical remedy would be declare the proceedings void and compel the State Police to remove the matter from the Plaintiffs record. However, the *Henderson* case suggests that such is not proper pursuant to mandamus." *Id.* at p. 13

As in the Smith case, the alleged LEOBOR violations set forth in Plaintiffs' complaint are technical in nature even if they were proven to be true, which is not the case. The Plaintiffs' in this case do not even allege procedural

or substantive due process violations as was done in *Smith*. This fact provides even more support for the Superior Court declining to exercise jurisdiction over the request for a Writ of Mandamus.

The Plaintiffs in this case repeatedly admitted and reveled in the prospect of their attempted "coup" to Detective Richardson and the Criminal Justice Council Board that they consciously and purposefully disregarded an order of Chief Topping for which they were disciplined. The Plaintiff in *Smith* also admitted to wrongdoing. This was an important fact relied upon by the Court in *Smith*. *Id.*

The Defendants in this case respectfully submit the facts do not "include allegations sufficiently egregious or compelling to warrant the Court interjecting in the routine disciplinary proceedings" of a municipal agency. As in *Smith*, the Superior Court below declined to exercise jurisdiction over the matter pursuant to a Writ of Mandamus for the same reasons set forth in *Smith* which was later affirmed by this Court.

It is also worth noting that in addition to filing a separate civil action in the Superior Court, the Plaintiffs also filed a complaint with the Delaware Personnel Employment Relations Board making the very same allegations

which they ultimately dismissed on their own prior to a hearing. (emphasis added) The Plaintiffs simply filed frivolous actions in numerous forums in an effort to harass Defendants and pursue litigation for improper purposes which justified the Superior Court's dismissal of their petition for a Writ of Mandamus.

The Defendants have provided a very detailed factual and legal argument as to each of the alleged violations of LEOBOR in their Opening Brief. Defendants respectfully submit were no violations of LEOBOR based upon such argument. The Superior Court's opinion clearly establishes there were no violations of LEOBOR justifying a Writ of Mandamus. The Appellees have failed to submit specific arguments in their opening brief why such findings are erroneous. The Appellees also fail to present any alleged issues of fact which would have prevented the Court from granting the motion for summary judgment. The Plaintiffs chose not to submit any specific argument in their Opening Brief. Plaintiffs failure to provide argument or submit proof as to the LEOBOR violations only provides further support that dismissal of the Writ of Mandamus complaint was proper by the Superior Court. It can only be assumed Plaintiffs did not submit specific arguments in their

Opening Brief because they realize there are no valid arguments or they just intentionally chose to ignore their obligation to present such arguments to this Court for no legitimate reason. This same approach was taken by the Plaintiffs in the Superior Court.

For all of the above reasons, this Honorable Court should affirm the decision of the Superior Court denying Plaintiffs' request for a Writ of Mandamus.

CONCLUSION

Based upon the above case law and facts, the Appellees respectfully request this Honorable Court affirm the decision of the Superior Court.

LIGUORI & MORRIS

/s/ James E. Liguori, Esquire
JAMES E. LIGUORI, ESQUIRE
Bar ID No.: 415
/s/ Gregory A. Morris, Esquire
GREGORY A. MORRIS, ESQUIRE
Bar ID No.: 3014
46 The Green
Dover, DE 19901
(302) 678-9900
jliguori@lmylaw.com
gmorris@lmylaw.com
Attorney for Defendants-Below
Appellees

DATED: 11/15/11

EXHIBIT “A”

813 A.2d 1141, 2003 WL 133603 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 813 A.2d 1141, 2003 WL 133603 (Del.Supr.))

H

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.
Hubert E. PARKER, Petitioner Below-Appellant,
v.
STATE OF DELAWARE DEPARTMENT OF CORRECTIONS, Respondent Below-Appellee.

No. 538, 2002.
Submitted Nov. 13, 2002.
Decided Jan. 6, 2003.

Inmate sought writ of mandamus compelling correctional officials to provide him with reasonable medical care by treating him for Hepatitis C with Interferon injections administered at the Delaware Psychiatric Center. The Superior Court, Sussex County, denied petition. Inmate appealed. The Supreme Court held that inmate's informed consent to medical treatment for hepatitis C at Sussex Correctional Institute rendered moot his petition for writ of mandamus compelling correctional officials to provide him with reasonable medical care by treating him for Hepatitis C with Interferon injections administered at the Delaware Psychiatric Center.

Affirmed.

West Headnotes

Mandamus 250 ⇐16(1)

250 Mandamus
250I Nature and Grounds in General
250k16 Mandamus Ineffectual or Not Beneficial
250k16(1) k. In General. Most Cited Cases
Inmate's informed consent to medical treatment for hepatitis C at Sussex Correctional Institute rendered moot his petition for writ of mandamus compelling correctional officials to provide him with reasonable medical care by treating him for Hepatitis C with Interferon injections administered at the Delaware Psychiatric Center.

Court Below-Superior Court of the State of Delaware, in and for Sussex County, C.A. No. 01M-12-007.

Before HOLLAND, BERGER, and STEELE, Justices.

ORDER

*1 This 6th day of January 2003, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, Hubert Parker, filed this appeal from the Superior Court's dismissal of his petition for a writ of mandamus. Parker sought a writ compelling correctional officials to provide him with reasonable medical care by treating him for Hepatitis C with Interferon injections administered at the Delaware Psychiatric Center. The Superior Court dismissed the petition when Parker, the day after the hearing on his petition, signed an informed consent form accepting the Department of Correction's proposal to treat Parker with Interferon and Ribavirin at the Sussex Correctional Institute (SCI). The State has filed a motion to affirm the Superior Court's judgment on the ground that it is manifest on the face of Parker's opening brief that his appeal is without merit. We agree and affirm.

(2) Parker filed his petition for a writ of mandamus in December 2001. He alleged the Department of Correction (DOC) and Correctional Medical Services (CMS) were violating his civil rights by refusing to provide him with reasonable medical care for treatment of Hepatitis C. Parker asserted that he could not receive adequate Interferon treat-

813 A.2d 1141, 2003 WL 133603 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 813 A.2d 1141, 2003 WL 133603 (Del.Supr.))

ment at SCI because he suffers from depression and bipolar disorder, and SCI would not be able to deal with the suicidal tendencies that Parker alleged would be a likely side effect of the Interferon treatment.

(3) The Superior Court held an evidentiary hearing on August 21, 2002. The Superior Court found, as a matter of fact, that DOC had offered to treat Parker at SCI with Interferon injections but that Parker had refused due to the alleged psychiatric risks. The Superior Court also found as a matter of fact, that two psychiatrists had determined that the DOC's proposed course of treatment would be safe. The Superior Court, therefore, concluded that Parker's demand to receive treatment at the Delaware Psychiatric Center was not reasonable and that Parker had refused adequate treatment without justification. The Superior Court further noted, however, that Parker testified under oath at the hearing that he no longer objected to the DOC's proposed form of treatment. The day after the hearing, the Superior Court received a letter from DOC's counsel enclosing a copy of an informed consent form signed by Parker, withdrawing his prior objections. Based on Parker's informed consent to DOC's proposed form of treatment, which made the request for mandamus relief moot, the Superior Court dismissed Parker's petition.

(4) The Superior Court may issue a writ of mandamus to compel a public official to perform a duty when the petitioner has established a clear legal right to the relief sought.[FN1] On appeal, this Court reviews the denial of mandamus relief for abuse of discretion.[FN2] In this case, we find no abuse of the Superior Court's discretion in dismissing Parker's petition. Parker's informed consent to medical treatment rendered his petition for a writ of mandamus moot. While Parker seems to argue on appeal that his consent was coerced, not informed, we find nothing in the record to support this contention. Accordingly, we find no abuse of the Superior Court's discretion in denying Parker's attempts to reargue the dismissal of his petition.

FN1. *Clough v. State,* 686 A.2d 158, 159 (Del.1996) (citing *Milford 2nd St. Players v. Delaware Alcoholic Bev. Control Comm'n,* 552 A.2d 855 (Del.Super.Ct.1988)).

FN2. *Ingersoll v. Rollins Broad. of DE, Inc.,* 272 A.2d 336 (Del.1970).

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

Del.Supr.,2003.
Parker v. State of Delaware Dept. of Corrections
813 A.2d 1141, 2003 WL 133603 (Del.Supr.)

END OF DOCUMENT

EXHIBIT "B"

765 A.2d 953, 2000 WL 1780781 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 765 A.2d 953, 2000 WL 1780781 (Del.Supr.))

H

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.
Kevin J. SMITH, Plaintiff Below, Appellant,
v.
DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF DELAWARE, Brian J. Bushweller, Secretary, Department of Public Safety, the Division of State Police of the State of Delaware, Colonel Alan N. Ellingsworth, Superintendent of the Delaware State Police, Gerald R. Pepper, Deputy Superintendent of the Delaware State Police, Michael Neal, Captain, Delaware State Police, Troop 7, Defendants Below, Appellees.

No. 537,1999.
Submitted Nov. 28, 2000.
Decided Nov. 30, 2000.

Court Below: Superior Court of the State of Delaware, in and for Sussex County, C.A. No. 99M-04-007.

Before VEASEY, Chief Justice, WALSH and BERGER, Justices.

ORDER

*1 This 30th day of November 2000, upon consideration of the briefs of the parties and oral argument, the Court concludes that the Superior Court did not abuse its discretion in declining to issue a writ of mandamus in this matter. Accordingly, we affirm.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

Del.Supr.,2000.
Smith v. Department of Public Safety of State
765 A.2d 953, 2000 WL 1780781 (Del.Supr.)

END OF DOCUMENT

EXHIBIT "C"

Not Reported in A.2d, 1999 WL 1225250 (Del.Super.)
(Cite as: 1999 WL 1225250 (Del.Super.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.
Kevin J. SMITH Plaintiff,
v.
THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF DELAWARE, Brian J. Bushweller, Secretary, Department of Public Safety, the Division of State Police of the State of Delaware, Colonel Alan N. Ellingsworth, Superintendent of the Delaware State Police, Gerald R. Pepper, Deputy Superintendent of the Delaware State Police, Michael Neal, Captain, Delaware State Police, Troop 7, Defendants.

No. Civ.A. 99M-04-007.
Oct. 26, 1999.

Bruce A. Rogers, Georgetown, DE, for plaintiff.

W. Michael Tupman, Dover, DE, for defendants.

MEMORANDUM OPINION

GRAVES, J.

Introduction

*1 This matter is before the Court on Defendants' Motion To Dismiss pursuant to Superior Court Civil Rule 12(b). The motion has evolved to one for summary judgment. For the reasons more particularly set forth below, Defendants' motion is granted.

Nature and Stage of Proceedings

On April 9, 1999, Plaintiff, Kevin J. Smith, filed a complaint against the following Defendants: The Department of Public Safety of the State of Delaware; Brian J. Bushweller, Secretary, Department of Public Safety; The Division of State Police of the State of Delaware; Colonel Alan N. Ellingsworth, Superintendent of the Delaware State Police; Gerald R. Pepper, Deputy Superintendent of the Delaware State Police; Michael Neal, Captain, Delaware State Police, Troop 7. The complaint alleges that Defendants violated Plaintiff's rights under the Law Enforcement Officers' Bill of Rights, Provisions of the Delaware State Police Divisional Manual, and the United States Constitution and seeks a writ of mandamus, declaratory judgment, and damages.

Defendants did not file an Answer to the Complaint. Rather, on May 5, 1999, Defendants filed a Motion to Dismiss Plaintiff's Complaint pursuant to Superior Court Civil Rules 12(b)(1) and 12(b)(6). The motion was noticed for presentation before the Court on June 18, 1999. Plaintiffs filed a Response to State Defendants' Motion to Dismiss on May 26, 1999. The Defendants renoticed the date of presentation of the motion for July 2, 1999. Defendants filed a Reply in Support of Motion to Dismiss on June 28, 1999.

Defendants' motion was presented to the Court on July 2, 1999. The Court held a conference in the matter on October 15, 1999. The motion was taken under advisement.

Statement of Facts [FN1]

FN1. The facts are viewed in a light most favorable to Plaintiff, and they are taken from the pleadings and from information made available by Plaintiff at oral argument. In fact, in connection with the portion of the motion seeking dismissal for failure to state a claim, all allegations in the Plaintiff's complaint must be accepted as true. *See Barni v. Kutner*, Del.Super., 76 A.2d 801, 806 (1950); *Plant v. Catalytic Constr. Co.*, Del.Super., 287 A.2d 682, 685 (1972), *aff'd*, Del.Supr., 297 A.2d 37 (1972).

The Plaintiff, Kevin J. Smith, is employed as a

police officer with the Delaware State Police. The Delaware State Police (the "State Police") is a political subdivision of the Delaware Department of Public Safety (the "Department of Public Safety"). At the time of the incident giving rise to Plaintiff's Complaint, Brian J. Bushweller was the Secretary of the Department of Public Safety; Alan N. Ellingsworth was Superintendent of the State Police; Gerald R. Pepper was the Deputy Superintendent; and Michael Neal was a Captain in the State Police assigned to Troop 7.

On December 2, 1998, Plaintiff was engaged in a private conversation with other police officers and recruits in a private duty room at a police barracks. Plaintiff made comments which were overheard by an unintended police officer (the "Officer") who took offense to Plaintiff's remarks. The Officer reported the incident to an officer within his Division who subsequently reported it to Lieutenant Louis O'Day of Troop 7. According to Plaintiff, this report occurred outside the chain of command for reporting such incidents.

Lieutenant O'Day interviewed the Officer on December 11, 1998, and interviewed Plaintiff on December 16, 1998. Plaintiff alleges that Lieutenant O'Day did not comply with the procedures mandated by 11 *Del. C.* Ch. 92 (The Law Enforcement Officers' Bill of Rights) or the State Police Divisional Manual. Lieutenant O'Day directed Plaintiff to apologize to the Officer and to consider the meeting of December 16, 1998, as a counseling session. Plaintiff complied with his commander's instruction.

*2 On December 18, 1998, Lieutenant O'Day reported the incident to Captain Neal in his capacity as commander of Troop 7. Captain Neal rejected Lieutenant O'Day's resolution of the matter and directed him to issue a Summary Disciplinary Action Form to Plaintiff including an eight hour (one work day) suspension without pay. Defendant Neal did not perform an investigation beyond his conversation with Lieutenant O'Day. Plaintiff alleges that Captain Neal's reaction to the incident reflects an "institutional concern over ongoing departmental issues involving minority officers, divisional policies and a perception that certain officers were treated differently than others."

On December 18, 1998, Lieutenant O'Day issued a Summary Disciplinary Action Form suspending Plaintiff for eight hours without pay. The complaint was executed by Lieutenant O'Day and Defendant Neal. On January 24, 1999, Superintendent Pepper signed the form and increased the suspension to sixteen hours (2 work days). Plaintiff appealed the decision in accordance with Divisional Policy and requested an Appeal Hearing

On February 1, 1999, Plaintiff was presented with a revised Disciplinary Action Form under the signature of Lieutenant Pete Schwartzkopf, Captain Neal and Superintendent Pepper. According to Plaintiff's Complaint the sole revision to the form was the "resume of violation," although Plaintiff does not detail in what manner the revised form was different from the original.

A hearing was scheduled to hear Plaintiff's appeal of the disciplinary action on March 10, 1999. Plaintiff alleges that Superintendent Pepper offered to continue the March 10 hearing to a later date if Defendant would waive his procedural rights under 11 *Del.C.*, Chapter 92 and the Divisional Manual. Plaintiff refused to waive such rights and a hearing was held before the Appeal Panel on March 11, 1999, at which time evidence was taken and witnesses presented. The hearing was several hours in length and counsel represented Plaintiff at that hearing. The Appeal Panel affirmed the decision of Superintendent Pepper to suspend Plaintiff for sixteen hours.

Following this decision, Plaintiff filed a complaint with this Court. In Counts I and II of the Complaint, Plaintiff alleges that Defendants violated Plaintiff's rights under the Law Enforcement Officers' Bill of Rights ("LEOBOR") (11 *Del.C.* Ch. 92) and provisions of the Delaware State Police Rules and Regulations Manual (the "Divisional

Manual"). Specifically, Plaintiff alleges that Defendants violated LEOBOR in multiple respects including but not limited to the following:

a. Plaintiff was not informed of the name, rank, and command of the officer in charge of the investigation, in violation of 11 *Del.C.* § 9200(c)(3);

b. The violation complained of to Lieutenant O'Day and later to Defendant Neal was not supported by substantial evidence, in violation of 11 *Del.C.* § 9200(c)(3);

c. The violation [sic] [FN2] was not completed by an authorized member of the department, in violation of 11 *Del.C.* 9200(c)(3);

FN2. The Court believes Plaintiff intended to use the word "investigation" rather than "violation".

*3 d. The Plaintiff was not informed in writing of the nature of the investigation prior to being questioned, in violation of 11 *Del.C.* 9200(c)(4);

e. No record, written, taped or otherwise, was maintained of any interview conducted in connection with the investigation, in violation of 11 *Del.C.* 9200(c)(7);

f. No records were provided to the Plaintiff nor the Plaintiff's counsel after specific request for same was made, in violation of 11 *Del.C.* 9200(c)(7);

g. Neither Plaintiff, after being charged with violating departmental rules and regulations, nor Plaintiff's counsel, were provided access to transcripts, records, written statements, written reports, analyses or video tapes pertinent to the case, despite demand by the Plaintiff and his counsel that such evidence be produced, in violation of 11 *Del.C.* § 9200(c)(10).

h. Plaintiff nor his counsel were informed in writing of the investigative findings and any recommendations for further action at the conclusion of the administrative investigation;

i. Defendants failed to schedule Plaintiff's required hearing within thirty days following the conclusion of the internal investigation, in violation of 11 *Del.C.* 9204;

j. Defendants failed to provide Plaintiff with any specific findings of facts, basis for the decision in writing and conclusions, in violation of 11 *Del. C.* § 9207.

Plaintiff alleges that the Defendants violated the Delaware State Police Rules and Regulations Manual, i.e., the Divisional Manual, as to items VII-5-1-8, 10, 15-20, inasmuch as the provisions of LEOBOR and these provisions of the Divisional Manual are virtually identical and must be read *in pari materia.*

Counts III and IV of the Complaint allege that by failing to comply with the requirements of LEOBOR and the Divisional Manual, Defendants violated Plaintiff's procedural and substantive due process rights under the Fourteenth Amendment to the United States Constitution. Plaintiff alleges that the Defendants violated his procedural due process rights in that they obtained evidence used against Plaintiff through an interview of him in which it was indicated that no disciplinary action would be taken.[FN3] Plaintiff alleges that Defendants acted arbitrarily and capriciously in disciplining Plaintiff and that the "subsequent prosecution of Plaintiff reflected a conscious decision to make an example of Plaintiff so as to deflect criticisms of these Defendants by other officers" and reflects a "policy by Defendants to punish non-minority officers more strictly, in direct response to other complaints, litigation and issues then existing involving Defendants and minority officers." [FN4] Plaintiff's Complaint, paragraphs 47 and 48.

FN3. The Court does not read paragraphs 35 through 37 of Plaintiff's complaint as

alleging that Defendants intentionally tricked Plaintiff into thinking no disciplinary action would be taken in an effort to secure evidence that they could use against him. Reading these provisions in conjunction with the facts related in the complaint, they indicate that Plaintiff got the impression during his first interview with Lieutenant O'Day that he would not be disciplined and consequently, he may have said things that he would not have said had he known that disciplinary action would be taken.

FN4. This language in Plaintiff's complaint is suggestive of an equal protection argument; however, Plaintiff does not indicate in his separate counts or in his response to the Motion to Dismiss that he is raising any equal protection claims.

Plaintiff's Complaint seeks relief as follows:

a. Ordering a Writ of Mandamus issue against the Defendants requiring them to perform their duties in accord with 11 *Del.C.* Ch. 92 and the Delaware State Police Divisional Manual;

*4 b. Ordering a Writ of Mandamus issue against the Defendants herein requiring them to strike the Disciplinary Action from Plaintiff's permanent personnel file inasmuch as the discipline imposed upon Plaintiff was based upon information and evidence obtained in violation of the clear provisions of 11 *Del. C.* Ch. 92 and the Divisional Manual;

c. Enter a judgment declaring that the present practice and policy of the Defendants as it relates to summary punishment violates 11 *Del.C.* Ch. 92 and the Delaware State Police Divisional Manual;

d. Ordering a writ of mandamus vacating the decision of the Summary Appeals Board, said decision being in violation of 11 *Del.C.* Ch. 92 and the Divisional Manual or, in the alternative entering an order and/or judgment ordering the decision be stricken;

e. Awarding Plaintiff fees, costs and expenses (including reasonable counsel fees) associated with the prosecution of this matter;

f. Awarding Plaintiff compensatory damages sufficient to compensate him for losses sustained as a result of Defendants' conduct herein;

g. Awarding Plaintiff such other relief as this court deems just and appropriate.

Summary of the Arguments

In support of their motion, Defendants essentially make three arguments. First, Defendants argue that the Court does not have subject matter jurisdiction over Plaintiff's Complaint because Plaintiff is essentially appealing the decision of the Appeal Panel and the Court does not have appellate jurisdiction over such matters. Second, Defendants maintain that Plaintiff's Complaint fails to state a claim for violation of either his procedural or substantive due process rights. Third, Defendants assert that the only potential basis for jurisdiction over Plaintiff's complaint is pursuant to a mandamus action and a mandamus action is inappropriate because the Plaintiff is requesting that the Court interfere with discretionary duties of Defendants which cannot be compelled by mandamus.

Plaintiff maintains that this Court has subject matter jurisdiction pursuant to both 10 *Del.C.* § 542(a) (the "Officer Omission Statute") and § 564 (the "Mandamus Statute"). Plaintiff maintains that a Mandamus action is appropriate because Plaintiff is seeking the Court's enforcement of a clear ministerial duty which will not require the Court to interfere in matters within the Defendants' discretion. Plaintiff argues that his complaint states a clear claim for both procedural and substantive due process because disciplinary action was taken against Plaintiff *before* he was granted a hearing and because his claims of the "retaliatory" nature of the

Defendants' actions encompass a substantive due process violation.

This Court heard the motion on July 2, 1999, and it held a conference thereon on October 15, 1999. At the October 15, 1999, conference, facts were presented which the Court incorporates into this decision on the pending motion.

Discussion

I. Standard of Review

*5 Defendants have moved to dismiss Plaintiff's Complaint pursuant to Superior Court Civil Rules 12(b)(1) (lack of jurisdiction over the subject matter) and 12(b)(6) (failure to state a claim upon which relief can be granted).[FN5] Because the Court employs facts outside of the pleadings, the pending motion has become one for summary judgment. Super. Ct. Civ. R. 12(b).

FN5. Superior Court Civil Rule 12(b) reads:

> (b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, ... (6) failure to state a claim upon which relief can be granted,....

The Superior Court is a court of general common-law jurisdiction; however, as to matters embraced within a statute, it exercises jurisdiction, special, limited, and summary and not according to the course of common law. *Stidham v. Brooks*, Del.Super., 5 A.2d 522 (1939). The Court will dismiss a case pursuant to Superior Court Civil Rule 12(b)(1) when it lacks jurisdiction over the subject matter of a plaintiff's complaint.

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore*, Del.Supr., 405 A.2d 679, 680 (1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. *Burkhart v. Davies*, Del.Supr., 602 A.2d 56, 59 (1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp. v. Catrett, supra*. If however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. *Ebersole v. Lowengrub*, Del.Supr., 180 A.2d 467, 470 (1962).

II. Application of Law to the Facts

A. Failure to State a Claim

Count III and Count IV of Plaintiff's Complaint allege that Defendants violated Plaintiff's procedural and substantive due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.[FN6] Defendants assert that Plaintiff's Complaint fails to state a claim for violation of the due process clauses under either the Delaware or United States Constitutions.

FN6. Section 1 of the Fourteenth Amendment to the United States Constitution reads:

> Section 1. All persons born or naturalized in the United States, and subject to

> the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Plaintiff's Complaint does not specifically state whether Plaintiff suffered a violation of a liberty or property interest. However, the allegations set forth in paragraphs 38 and 49 of his Complaint suggest that Plaintiff is alleging a deprivation of both.[FN7] Thus, the Court shall address whether the Defendants' failure to comply with LEOBOR and the Divisional Manual operated to deprive Plaintiff of liberty and property interests in violation of his procedural and substantive due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. In so far as Plaintiff's Complaint makes no allegations concerning deprivations of rights afforded by the Delaware Constitution, the Court shall not confront this issue, although the analysis would surely conclude the same as the analysis of the federal issue.

> FN7. Paragraph 38 of Plaintiff's Complaint reads, "Defendants have gravely damaged Plaintiff's standing and association in the community and stigmatized Plaintiff in manner [sic] which adversely affects his employment opportunities, within and outside the Division of State Police."
>
> Paragraph 49 of the Plaintiff's Complaint reads, "As a direct and proximate result of the aforesaid acts, omissions and commissions on the part of Defendants herein, the Plaintiff suffered severe and permanent harm, will incur loss of earnings, has been damaged in his career, and his reputation in the past and will continue to be so damaged in the future."

1. Procedural Due Process

*6 In Count III of his Complaint, Plaintiff maintains that Defendants denied Plaintiff his procedural due process rights by failing to adhere to the specific requirements of LEOBOR and the Divisional Manual with regard to the disciplinary action taken against him. In their Motion To Dismiss, Defendants argue that procedural due process only requires that Plaintiff be given notice of the charges pending against him and that Plaintiff be given the opportunity to be heard on such charges. Defendants maintain that Plaintiff was not denied procedural due process because his Complaint acknowledges that he was given notice of the charge against him and a hearing to defend himself against such charges.

a. Did Plaintiff have a protected Property Interest?

"An employee has a property interest in his employment protected by due process only if a source independent of the Federal Constitution, such as state law, creates the right. *Barber v. City of Lewes*, Del.Super., C.A. No. 95C-08-006, Graves, J. (Jan.1997) Mem. Op. at 13. (citations omitted) (*"Barber"*). "The 'hallmark' of a property interest 'is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." *Sturgess v. Negley*, D.Del., 761 F.Supp. 1089, 1095 (1991) (citation omitted) (*"Sturgess"*). In *dicta*, the Delaware District Court concluded that 11 *Del. C.* § 9203 arguably prevented termination of a police officer without cause and therefore created a property interest in an officer's employment.[FN8] *Id.* Moreover, the Court reads *Burge v. City of Dover*, Del. Ch., C.A. No. 954-K, Allen, Ch. (June 8, 1987) (Mem.Op.) (*"Burge"*) as concluding that Section 9203 of Title 11 of the Delaware Code creates a property interest in a police officer's status as a police officer and confers upon a police officer the right to notice and a hearing before any disciplinary action that would terminate his pay.

> FN8. The Delaware District Court concluded that a town ordinance prohibited termination of the police officer without

> cause, and consequently, relied upon the town ordinance rather than 11 *Del.C.* § 9203 as the basis for the creation of the officer's property interest in his employment.

However, citing authority from the United States Court of Appeals for the Sixth Circuit, Defendants argue that a two-day suspension without pay is in the manner of routine discipline and not significant enough to trigger protections of the due process clause. *See Carter v. Western Reserve Psychiatric Habilitation Center*, 6th Cir., 767 F.2d 270, 272 n. 1 (1985). The *Sturgess* and *Burge* cases involve actual terminations and not just suspensions; thus, they are not necessarily conclusive as to the issue of whether a two-day suspension without pay is a deprivation of a property right sufficient to violate the protections of the Fourteenth Amendment.

The Court did not locate any Delaware authority which specifically addressed this issue. Moreover, the Court found no authority in the Delaware District Court or the Third Circuit which definitively answered this question; although, the courts have touched upon the topic without committing to any standard upon which lower courts may rely. *See e.g., Ferraro v. City of Long Branch*, 3rd Cir., 23 F.3d 803, 807 (1994) (The Third Circuit has declined to hold that termination of employment is necessary for a due process violation); *Hopkins v. Mayor & Council of Wilmington*, D.Del., 600 F.Supp. 542, 547 (1984) (Stating that the case of *Hayes v. City of Wilmington*, D. Del., 451 F.Supp. 696 (1978), recognized that a city employee's interest in uninterrupted receipt of his salary and continuation of benefits of employment is significant in the context of due process. The Court noted, "When deprivation of that [employment] interest is temporary in nature, as in the case of a short, finite disciplinary suspension, the impact on the individual is most often less severe than when termination of employment has been imposed. A lesser degree of process is acceptable in connection with temporary suspension if the government interest is strong and immediacy is great. [citations omitted]). *Compare Clark v. Township of Falls*, 3d Cir., 890 F.2d 611, 619 (1989) (A six-week temporary assignment pending completion of an investigation of employee was not tantamount to deprivation of employee's property interest in his employment).

*7 Courts from other jurisdiction have addressed the issue with inconsistent results. *See e.g. Carter* at 270, 272 n. 1 (1985); *Garraghty v. Jordon*, 4th Cir., 830 F.2d 1295, 1299 (1987) (Court held that a five day suspension was not a *de minimus* deprivation since plaintiff lost compensation and other benefits of the employment for the period of the suspension); *Hershinow v. Bonamarte*, 7th Cir., 735 F.2d 264, 265 (1984) (Court held that a suspension without pay is not a deprivation subject to the protection of due process where employee remains employed and retains his tenure rights); *Jones v. Bd. of Ed. of Township High School District No. 211, Cook County*, N.D. Ill., 651 F.Supp. 760, 763 (1986) (Court refused to follow *Carter v. Western Reserve Psychiatric Habilitation Center* and held that a teacher had a cognizable property interest in not being suspended for three days without pay, where reason for teacher's suspension could negatively impact teacher's employment record).

In this case, the Court need not decide whether Plaintiff had a property interest sufficient to trigger the protection of due process because, assuming *arguendo* that he did have such an interest, he was afforded all the process due under the Fourteenth Amendment for reasons more particularly discussed in subsection II.A .1.c. of this discussion.

b. Did Plaintiff have a protected Liberty Interest?

In *Barber*, this Court reviewed the criteria for establishing the deprivation of a liberty interest in the context of employment. The Court noted:

> An employment action implicates a Fourteenth Amendment liberty interest only if it (1) is based on a charge against the individual that might seriously damage his standing and associations in his community by impugning his good name, reputa-

tion, honor or integrity; or (2) if the charge imposed such a stigma as to foreclose his freedom to take advantage of other employment opportunities. To establish a claim based on a deprivation of a protected liberty interest, the employee must establish at a minimum that (1) he had a liberty interest; and (2) defamatory statements were made about him. Stigma to reputation alone is not sufficient to invoke a liberty interest under the Fourteenth Amendment. *The stigma must be accompanied by a deprivation of present or future employment.* [emphasis added] [citations omit- ted].

Barber at 22. In the case *sub judice,* the Plaintiff is still employed with the Delaware State Police: hence, he has not suffered a deprivation of employment. Moreover, he has never alleged that the Defendants made or disseminated defamatory statements about him. Consequently, he has not been deprived of a liberty interest in violation of his due process rights.

c. Did Plaintiff receive the process due him?

Assuming that Plaintiff had a property interest in his employment and his suspension without pay was a deprivation subject to the protections of due process, the Court finds that Plaintiff was afforded the process he was due. Due Process does not require that each individual receive the procedural guarantees provided for by the state law which bestows the property interest. *Hennigh v. City of Shawnee,* 10th Cir., 155 F.3d 1249, 1256 (1998). *See also Giovanni v. Lynn,* 5th Cir., 48 F.3d 908, 912 (1995), *reh'g den.* (May 3, 1995), *cert. den.,* 116 S.Ct. 167 (1995) (The court held that the mere failure to accord procedural protections called for by a state law does not of itself amount to a denial of due process). The procedural process due an employee with a recognized property interest includes an "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Barber* at 26, *citing, Cleveland Bd. Of Educ. V. Loudermill,* 470 U.S. 532, 546 (1985).

*8 This Court has recognized the requirements of the procedural process due in employment termination cases as follows: (1) clear notice of the charge being considered; (2) a reasonable time interval to marshall facts and evidence to respond; (3) an explanation of the evidence supporting the charges; and (4) an opportunity to present plaintiff's side of the case in a manner which will allow a decision maker to weigh both sides. *Id.* at 26-27, *citing, Hawkins v. Board of Public Education,* D.Del. 468 F.Supp. 201 (1979). These four factors will hereafter be referred to as the *"Barber* Test".

Defendants maintain that Plaintiff received all the process due him because he admits that he had notice of the charges against him and the intent to take disciplinary action and that he had a hearing to defend himself against the charges. Plaintiff's Complaint does acknowledge these things. See Plaintiff's Complaint, Para. 20 and 23. However, Plaintiff alleges that the Defendants' failure to comply with LEOBOR and the Divisional Manual violated his constitutional rights. Not all violations of LEOBOR or the Divisional Manual necessarily constitute a denial of due process. Consequently, it is necessary to evaluate the allegations in Plaintiff's Complaint within the framework set forth in the *Barber* Test to determine whether any of them rise to the level of constitutional violations.[FN9]

FN9. Plaintiff alleges that the policies set forth in the Divisional Manual are virtually identical to those of LEOBOR. Thus, the Court's analysis of the LEOBOR violations will likewise apply to the Divisional Manual violations.

The *Barber* Test requires that an employee be given clear notice of the charges imposed against him. Plaintiff's Complaint notes that Plaintiff was given a Summary Disciplinary Action Form and a "revised" Disciplinary Action Form containing an amendment to the "resume of violation." Plaintiff's Complaint, paras. 17, 20, 21. No where in Plaintiff's Complaint does he allege that he was not apprised of the charges against him. Consequently,

the Court finds that Plaintiff had notice of the charges against him and the first prong of the *Barber* Test is satisfied.

The second prong of the *Barber* Test requires that an employee be given a reasonable time to marshall facts and evidence to respond to the charges against him. Plaintiff's Complaint reflects that he was given the first Summary Disciplinary Action Form on December 18, 1998. He received the "revised" Disciplinary Action Form on February 1, 1999. His hearing before the Appeal Panel was held on March 11, 1999. Thus, Plaintiff had at a minimum thirty-nine days to prepare his defense in this matter. Thirty-nine days is a reasonable period of time to prepare a defense for a routine disciplinary proceeding particularly under the circumstances of this case. Moreover, the Plaintiff complains that Defendants did not schedule his hearing within 30 days of the conclusion of the internal investigation in violation of LEOBOR which suggests that Plaintiff clearly felt that he had more than ample time to prepare his defense. Thus, the second prong of the *Barber* Test is satisfied.

*9 The third prong of the *Barber* Test requires that an employee be given an explanation of the evidence supporting the charges.

Plaintiff's Complaint makes these three allegations:

1. No record, written, taped or otherwise, was maintained of any interview conducted in connection with the investigation, in violation of 11 *Del.C.* 9200(c)(7);

2. No records were provided to the Plaintiff nor the Plaintiff's counsel after specific request for same was made, in violation of 11 *Del.C.* 9200(c)(7);

3. Neither Plaintiff, after being charged with violating departmental rules and regulations, nor Plaintiff's counsel, were provided access to transcripts, records, written statements, written reports, analyses or video tapes pertinent to the case, despite demand by the Plaintiff and his counsel that such evidence be produced, in violation of 11 *Del.C.* § 9200(c)(10).

It is these violations that Plaintiff argues primarily triggers his procedural due process claim. But this Plaintiff, who had his attorney with him at the hearing, candidly acknowledges an awareness of the evidence and witnesses available that supported the allegations. There is no claim of surprise in the complaint. Under these circumstances, I do not find technical violations of the statute to violate due process. Thus, the Court finds that the third prong of the *Barber* Test is satisfied.

The fourth prong requires that the employee be given an opportunity to present his side of the case in a manner which will allow a decision maker to weigh both sides. Plaintiff's complaint acknowledges that a hearing was conducted where evidence was taken and witnesses presented. Thus, it appears that Plaintiff received an opportunity to present his side of the case in accordance with the requirement of Prong 4 of the *Barber* Test.

In so far as the Court finds that the facts of this case satisfy the four prongs of the *Barber* Test, Plaintiff's Complaint fails to state a claim for violation of his procedural due process rights and Defendants are entitled to a dismissal of such claim.

2. Substantive Due Process

Defendants argue that Plaintiff fails to state a claim for violation of substantive due process because substantive due process does not protect a person's property or liberty interests in his employment.

This Court has previously held that property and liberty interests in employment are not protected by substantive due process. *Barber* at 34. [FN10] The rationale behind this conclusion is that because employment rights are not fundamental rights created by the Constitution they do not receive the protection of substantive due process. *Id.*

FN10. The *Barber* decision relied upon *McKinney v. Pate,* 11th Cir., 20 F.3d 1550 (1994), *cert. den.,* 513 U.S. 1110 (1995) and *Sutton v. Cleveland Bd. of Educ.,* 6th Cir. 958 F.2d 1339 (1992) in concluding that an employee's statutory right to employment is not protected by substantive due process. The Court's research does not indicate that the United States Supreme Court has addressed this issue. In *Barber,* this Court noted that the Third Circuit remanded the case of *Homar v. Gilbert,* 3rd Cir., 89 F.3d 1009 (1996) to the District Court for the Middle District of Pennsylvania for a decision on this issue. The Court's research does not reveal that a decision has been rendered by the District Court or the Third Circuit on this issue since the *Barber* decision. While at least one state court has declined to follow *McKinney* and *Sutton* since *Barber,* it appears as though most jurisdictions citing the cases have followed their lead on the issue. *See e.g. Martin v. Nebraska Dept. Of Public Institutions,* Neb.App., 584 N.W.485 (1998) (declined to follow *McKinney*).

Plaintiff maintains that substantive due process is at issue because he alleges that the disciplinary action taken against him was retaliatory. "[D]isciplinary action taken in retaliation for the exercise of civil and political rights is impermissible and constitutes a violation of the affected persons right to substantive due process." *Burge v. City of Dover,* Del. Ch., C.A. No. 954-K, Allen, Ch. (June 8, 1987) Mem. Op. at 12 (*"Burge"*).

*10 However, neither Plaintiff's Complaint nor his response to Defendant's Motion to Dismiss gives any clear indication for what the Defendants' disciplinary action was in retaliation. In fact the word "retaliation" does not even appear in Plaintiff's Complaint. It is possible that the Plaintiff is suggesting that Defendants' action was in retaliation for the comments he made and for which he was disciplined. However, Plaintiff has failed to make any allegation which remotely suggests that his comments were within the categories of speech afforded protection under the United States Constitution.[FN11] To the extent Plaintiff perceives and argues that the action taken was done to blunt reaction by minority Troopers, this also fails. Even if true, Plaintiff does not show how disciplining for the conduct alleged is "retaliatory". Retaliatory against what is not answered. Thus, the Complaint fails to state a substantive due process claim and Defendants' are entitled to a dismissal of such claim.

FN11. The Plaintiff's Complaint does not elaborate as to the nature of the comments for which he was disciplined. Defendants' maintained at oral argument and in their motion that the comments were racial slurs. Plaintiff did not deny or contradict Defendants' characterization of his comments at oral argument or in his briefs. Potentially, Plaintiff is arguing that Defendants acted in retaliation for Plaintiff exercising his First Amendment right to free speech. Racial slurs uttered in the workplace are not generally protected speech under the First Amendment because such comments generally do not constitute a comment on a matter of public concern. *See Karins v. City of Atlantic City,* N.J.Supr., 706 A.2d 706, 715 (1998); *Medvik v. Ollendorf,* Mo.App., 772 S.W.2d 696, 702 (1989). Therefore, any retaliation argument grounded in his exercise of his First Amendment right would likely fail even if Plaintiff had made the necessary allegations in his Complaint.

B. Lack of Subject Matter Jurisdiction

Defendants' Motion to Dismiss argues that this Court lacks subject matter jurisdiction over Plaintiff's Complaint. Plaintiff's Complaint maintains that this Court has jurisdiction over the action

pursuant to 10 *Del.C.* Ch.5 and Ch. 65. Specifically, Plaintiff maintains that the Court has jurisdiction to hear proceedings in mandamus pursuant to 10 *Del. C.* § 564 [FN12] and to hear proceedings for declaratory judgment pursuant to 10 *Del. C.* § 6501. [FN13] Plaintiff's Response to State Defendants' Motion to Dismiss also maintains that the Court has jurisdiction over this matter pursuant to 10 *Del.C.* § 542(a).[FN14]

FN12. 10 *Del. C.* § 564 reads in relevant part as follows:

> Proceedings in mandamus shall be begun by the filing of a complaint in the Superior Court, upon which complaint a summons shall issue requiring the defendant to appear and file an answer within the time prescribed by the rules of the Court.

FN13. 10 *Del. C.* § 6501 reads in relevant part as follows:

> In cases of actual controversy, ... the Superior Court ... upon petition, declaration, complaint, or other appropriate pleadings, may declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

FN14. 10 *Del. C.* § 542(a) reads:

> The Superior Court shall have full power and authority to examine, correct and punish the contempts, omissions, neglects, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers, within the State.

Defendant's argue that this Court lacks subject matter jurisdiction for several reasons as follows:

1) Superior Court does not have jurisdiction over appeals from the Appeal Panel of the Delaware State Police and Plaintiff is really seeking an appeal of its decision.

2) Superior Court should decline to hear the proceedings in mandamus because mandamus only lies to require the performance of a clear legal or ministerial duty and Plaintiff seeks relief for a discretionary duty.

3) The Declaratory Judgment Act does not expand or alter the jurisdiction of the Court but is only available when there is an independent basis for jurisdiction and Plaintiff has presented no such basis.

4) Section 542 of Title 10 is not a basis for jurisdiction because that section does not provide the Court with jurisdiction to review routine government acts.

1. Declaratory Judgment Act

The Declaratory Judgment Act does not expand or alter the jurisdiction of a court. *See* 10 *Del.C.* Ch. 65. In order for a court to issue declaratory relief, the court must have an independent basis for jurisdiction over the cause of action. *Democratic Party of the State of Delaware v. Department of Elections for New Castle County*, Del.Super., C.A. No. 94C-08-227, Ridgely, P.J. (Sept. 6, 1994) Mem. Op. at 7(*"Democratic Party"*). Thus, the Court must ascertain whether there is an independent basis for jurisdiction over Plaintiff's Complaint.

2. Appellate Jurisdiction

*11 This Court has previously held that it does not have jurisdiction to hear appeals from decisions rendered by an appeal panel pursuant to LEOBOR because such jurisdiction has not been conferred by either the Constitution or statutes of this State. *Wescott v. City of Milford Police*, Del.Super., C.A. No. 94A-01-002, Toliver, J. (Jan. 26, 1996) (Op. and Order). Moreover, neither of the parties have presented any authority for the existence of an appeal to this Court from decisions rendered pursuant

to the Divisional Manual.[FN15] However, Plaintiff's Complaint does not merely seek an appeal of the decision of the Appeal Panel. Rather, Plaintiff seeks a declaration or a writ of mandamus directing the State Police to comply with the dictates of LEOBOR and the Divisional Manual. Again, Plaintiff maintains this Court has jurisdiction pursuant to 10 *Del.C.* § 542 and 10 *Del.C.* § 564. Below I discuss whether either of these provisions provide a basis for jurisdiction.

> FN15. The Divisional Manual provides for an appeal from the hearing or Appeal Board to the Secretary of Public Safety, but only in cases where suspension exceeds five days. Divisional Manual at p. VII-5-13.

3. Officer Omission Statute

Plaintiff maintains that the Court has jurisdiction in this matter pursuant to 10 *Del.C.* § 542(a) (" § 542(a)"). This section reads:

> (a) The Superior Court shall have full power and authority to examine, correct and punish the contempts, omissions, neglects, favors, corruptions and defaults of all justices of the peace, sheriffs, coroners, clerks and other officers, within the State.

10 *Del.C.* § 542(a). The Court must ascertain whether Delaware police officers are "other officers" within the meaning of § 542(a). In the case of *In re Tull*, Del.Super., 78 A. 299 (1910) the Superior Court held that a town alderman was an "officer" within the context of § 542(a) where the alderman was vested with the administration of criminal law. Further, in *Maull v. Warren*, Del.Super., C.A. No. 91C-05-216, Barron, J. (April 24, 1992) (*"Maull"*), the Superior Court held that it has jurisdiction pursuant to 10 *Del.C.* § 542(a) to review disciplinary action taken in alleged violation of LEOBOR.

However, the Court disagrees with the interpretation of § 542(a) set forth in *Maull*. The Court stands by its interpretation of that section as set forth in its decision in *Maryland and Olive Avenues Neighborhood Association, Inc. v. Mayor & City of Rehoboth Beach*, Del.Super., C.A. No. 94A-10-001 (Oct. 18, 1995) (*"MONA"*). In *MONA* this Court declined to find that § 542(a) provided the Court jurisdiction to review the Rehoboth City Manger's certification of a referendum petition in which the City Manager's authority extended merely to determine whether a referendum petition had the sufficient number of qualified signatures to put it before the City Council. This Court concluded that § 542(a) "only permits Superior Court to remedy defects in the administration of justice and does not contemplate Superior Court review of the propriety of governmental acts...." *MONA* at 12. As noted in *MONA*, the Court's authority to act under § 542 is founded "in the idea that the malpractice of such inferior tribunals, *acting under the supervision of the court*, was a contempt of its authority, as the court having general supervision of the administration of justice." *Id* at 13. The Court does not read § 542(a) as authorizing its review of routine police disciplinary proceedings.

4. Writ of Mandamus

***12** The Superior Court has jurisdiction to award a writ of mandamus. *Knight v. Ferris*, Ct. Err. & App., 11 *Del.* 283 (1881). The General Assembly has codified the jurisdiction of this Court to issue the writ of mandamus in 10 *Del.C.* § 564. *Democratic Party* at 7. "[T]he basis for issuance and scope of relief available through a writ of mandamus under Delaware law are both quite limited." *Guy v. Greenhouse*, Del.Supr., 637 A.2d 827 (1993).[FN16] On this point the Delaware Supreme Court has noted:

> FN16. The citation given refers to the Atlantic Digest table of unpublished decisions. A more helpful citation is *Guy v. Greenhouse*, Del.Supr., No. 285, 1993, Walsh, J. (Dec. 30, 1993) Order at 2.

Mandamus is issuable not as a matter of right, but only in the exercise of sound judicial discretion.

Moreover, when directed to an administrative agency or pubic official, mandamus will issue only to require performance of a clear legal or ministerial duty. For a duty to be ministerial and thus enforceable by mandamus, the duty must be prescribed with such precision and certainty that nothing is left to discretion or judgment. [citations omitted].
Id. Moreover, mandamus will not lie unless the plaintiff has no other adequate remedy. *State ex rel. Lyons v. McDowell*, Del.Super., 57 A.2d 94, 97 (1947).

Plaintiff's Complaint alleges that Defendants violated LEOBOR by failing to comply with the specific dictates of the statute concerning disciplinary procedure. The requirements for disciplinary investigations are specific and do not leave room for discretion.[FN17] Thus, the actions mandated by the statute are ministerial rather than discretionary. Thus, a writ of mandamus may be the proper way to remedy LEOBOR violations and some Delaware cases have suggested such. *See e.g. Knox v. The City of Elsmere*, Del.Super., C.A. NO. 93M-12-001, Silverman, J. (May 10, 1995) (Town police officer sought writ of mandamus to compel employer to grant him a hearing pursuant to LEOBOR. The case was before the Court on a motion for summary judgment and the Court denied motion stating that a material dispute of facts existed. Thus, the Court never reached the merits of the case and the issue of jurisdiction or the availability of a writ of mandamus was never raised.); *Maull v. Warren*, Del.Super., C.A. No. 91C-05-216, Barron, J. (April 24, 1992) (*"Maull"*) (The Court suggested that a mandamus action pursuant to 10 *Del.C.* § 542(a) would be proper basis for the Court to assume jurisdiction over case in which plaintiff alleged violations of LEOBOR).

FN17. The conditions for investigations are set forth in 11 *Del.C.* § 9200(c) as follows:

> (c) Whenever a law-enforcement officer is under investigation or is subjected to questioning for any reason which could lead to disciplinary action, demotion or dismissal, the investigation or questioning shall be conducted under the following conditions:
>
> (1) The questioning shall be conducted at a reasonable hour, preferably at a time when the officer is on duty unless the gravity of the investigation in the opinion of the investigator is of such degree that immediate questioning is required.
>
> (2) The questioning shall take place at the agency headquarters or at the office of the local troop or police unit in which the incident allegedly occurred as designated by the investigation officer or unless otherwise waived in writing by the officer being investigated.
>
> (3) The law-enforcement officer under investigation shall be informed of the name, rank, and command of the officer in charge of the investigation. All questions directed to the officer shall be asked by and through no more than 2 investigators. 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.
>
> (4) the law-enforcement officer under investigation shall be informed in writing of the nature of the investigation prior to being questioned.
>
> (5) Interview sessions shall be for reasonable periods of time. There shall be times provided for the officer to allow for such personal necessities and rest

periods as are reasonably necessary.

(6) Except upon refusal to answer questions pursued in a valid investigation, no officer shall be threatened with transfer, dismissal or other disciplinary action.

(7) A complete record, either written, taped or, if taped, transcribed as soon as practicable, shall be kept of all interviews held in connection with the administrative investigation upon notification that substantial evidence exists for seeking an administrative sanction of the law-enforcement officer. A copy of the record shall be provided to the officer or the officer's counsel at the officer's expense upon request.

(8) If the law-enforcement officer under interrogation is under arrest or may reasonably be placed under arrest as a result of the investigation, the officer shall be informed of the officer's rights, including the reasonable possibility of the officer's arrest prior to the commencement of the interrogation.

(9) Upon request, any officer under questioning shall have the right to be represented by counsel or other representative of the officer's choice, who shall be present at all times during the questioning unless waived in writing by the investigated officer. The questioning shall be suspended for a period of time if the officer requests representation until such time as the officer can obtain the representative requested if reasonably available.

(10) An officer who is charged with violating any departmental rules or regulations, or the officer's representative, will be provided access to transcripts, records, written statements, written reports, analyses and video tapes pertinent to the case if they are exculpatory, intended to support any disciplinary action or are to be introduced in the departmental hearing on the charges involved. Upon demand by the officer or counsel, they shall be produced within 48 hours of the written notification of the charges.

(11) At the conclusion of the administrative investigation, the investigator shall inform in writing the officer of the investigative findings and any recommendation for further action.

(12) All records compiled as a result of any investigation subject to the provisions of this chapter and/or a contractual disciplinary grievance procedure shall be and remain confidential and shall not be released to the public.

In fact, "mandamus is the proper remedy to compel reinstatement of officers or employees illegally discharged, removed, or *suspended* in violation of the civil service law...." 55 C.J.S. *Mandamus* § 233 (1998); *See also, Bahramian v. Papandrea,* Conn.Supr., 440 A.2d 777 (1981) (Where regulation gave city planning director the right to have his department head report the reasons for his removal in writing, Court found that plaintiff would be entitled to writ of mandamus ordering his restoration to his position where he could demonstrate department head failed to comply with such regulation). However, at least one Court has held that it would refuse to grant mandamus where a police officer was suspended for a year and the year had already passed by the time the matter was before the court for decision. The Court held that the matter was moot and further held, without citing any authority, that a writ of mandamus does not lead to a quashing of the officer's record of conviction. *See Henderson v. Mayor of Medford,* Mass.Supr., 75 N.E.2d 642 (1947) (*"Henderson"*).

*13 The *Henderson* case highlights the odd

posture presented by the case at hand. Ordinarily a writ of mandamus is utilized to compel a public body to take a particular action. In the case at bar, it would be senseless to compel the state police to conduct the disciplinary investigation and proceedings again in compliance with LEOBOR. The only logical remedy would be to declare the proceedings void and compel the State Police to remove the matter from the Plaintiff's record. However, the *Henderson* case suggests that such is not proper pursuant to mandamus.

Nevertheless, the Court need not decide whether mandamus is available to Plaintiff under the circumstances of this case. For purposes of this decision the Court assumes that mandamus is available to Plaintiff; however, the Court, in its discretion, declines to exercise jurisdiction over the matter. "In Delaware, mandamus is 'a prerogative writ in the supervisory sense, issued exclusively by the Superior Court, not of course, but only in the exercise of a sound judicial discretion.' " *Democratic Party* at 7 (citation omitted). The LEOBOR violations set forth in Plaintiff's complaint are technical in nature. The Complaint does not allege violations which rise to the level of procedural or substantive due process violations. Moreover, Plaintiff never alleges that he was falsely accused of the action for which he was disciplined. In the Court's estimation, Plaintiff's complaint does not include allegations sufficiently egregious or compelling to warrant the Court interjecting in the routine disciplinary proceedings of a state agency. Thus, the Court declines to exercise jurisdiction over the matter pursuant to a writ of mandamus.

Conclusion

For the reasons more particularly set forth above, Defendants' motion is granted in its entirety. Plaintiff's Complaint is dismissed.

IT IS SO ORDERED.

Del.Super.,1999.
Smith v. Department of Public Safety of State
Not Reported in A.2d, 1999 WL 1225250 (Del.Super.)

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