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Case Number 464,2011

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING SUPPLEMENTAL MEMORANDUM

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Following oral argument on March 14, 2012, this matter – Plaintiffs' appeal from denial of a writ of mandamus by the Superior Court – was stayed, pending resolution of another matter filed by Plaintiffs in Superior Court, *Brittingham v. Topping, et.al.*, C.A. No. S11C-01-004 ("*Brittingham 2*").[1] *Brittingham 2* involved a six-count Complaint for damages filed by Plaintiffs which alleged, in the Third Amended Complaint[2]: three counts alleging §1983 "First Amendment" violations; one count of violation of the Delaware Whistleblowers' Protection Act; and one count (by Plaintiff Brittingham only) alleging constructive discharge in violation of the covenant of good faith and fair dealing. (S11C-01-004, D.I. #67).

On a full discovery record, The Superior Court granted Defendants' Motion for Summary Judgment in *Brittingham 2* in its entirety. (S11C-01-004, D.I. #112, July 31, 2014) (*Brittingham 2* Summary Judgment decision is attached as Exhibit 1 hereto). No appeal has been taken as of the filing of this memorandum. Following the *Brittingham 2* decision, this Court, on August 1, 2014, requested Supplemental

[1] For ease of reference, the instant case will be referred to as "*Brittingham 1*" or the "mandamus action"; the §1983/breach of contract case, for which this matter was stayed, will be referred to as "*Brittingham 2*."

[2] It should be noted that Plaintiffs' Third (and final) Amended Complaint, upon which the Court granted summary judgment, contained no claims for alleged "LEOBOR" violations, such as those raised in the instant mandamus action. The only claims were the six counts noted above. While the Superior Court decision below, denying mandamus, noted that Plaintiffs had also alleged LEOBOR violations in *Brittingham 2*, it was referring to the (then) Complaint existing at the time of its decision. *Brittingham 1*, 2011 WL 2650691, fn. 1 (June 28, 2011). Plaintiffs' "LEOBOR" claims were abandoned with the filing of the First, Second and Third Amended Complaints in *Brittingham 2*. (*See* S11C-01-004, D.I. ## 1, 42, 66, 67).

Memoranda from the parties in the instant case. Plaintiffs filed their Opening Supplemental Memorandum on August 14, 2014. This is Appellees/Defendants' Answering Supplemental Memorandum.

Contrary to statements in Plaintiffs Opening Memorandum ("Op. Mem."), the Superior Court in *Brittingham 2* did not "summarily dismiss [Plaintiffs claims in that matter] without hearing." (Op. Mem. at 2; *see also* at pp. 3, 4). Nor did the Court grant summary judgment "on [a] limited record"; it did so on a full, comprehensive record, including written discovery, admissions, and depositions of all key witnesses. It is clear that, in its 51-page written decision in *Brittingham 2*, the Court engaged in an exhaustive review of the claims and evidence. (*See e.g*. Ex.1, pp. 17-35).

Although arising out of the same set of operative facts, the claims at issue in *Brittingham 2* (constitutional, "whistleblower" and constructive discharge) were very different from the technical LEOBOR-based claims asserted in this mandamus action. Thus, the summary judgment decision of July 31, 2014 in *Brittingham 2* does not speak directly to this matter except in one very important respect. One of Plaintiffs' primary claims in this mandamus action – and one of the issues focused upon by the parties and the Court at oral argument – is Plaintiffs' claim that their "First Amendment" rights were violated because they were disciplined whey they went outside the chain of command to complain about departmental issues that the

Chief was not addressing to their satisfaction. Plaintiffs claim—although the record suggests otherwise[3]—that they were prohibited from addressing these issues at the CJC hearing. The CJC (properly) refused to rule upon a constitutional question. In *Brittingham 2*, The Superior Court thoroughly, and finally, put any "First Amendment" claims to rest, engaging in the well-settled analysis applied by the federal courts in public employee First Amendment claims. Engaging in this analysis, as applied to the specific facts set forth in discovery, the Superior Court held that "because Defendants' employment decisions did not violate the First Amendment, Plaintiffs do not have a free speech claim under the First Amendment. (Exhibit 1, p. 46). This question of law now being settled and *res judicata* in this matter, the remedy Plaintiffs seek of going back to the CJC to argue constitutional issues is clearly moot.

Even assuming *arguendo* the trial court below committed an abuse of discretion in denying the prerogative writ of mandamus on any of the bases asserted, Plaintiffs' claims for relief in the mandamus action are moot or futile for other reasons as well.[4] At the time the Complaint for a Writ of Mandamus was filed, both Plaintiffs were still employed by Georgetown Police Department, and sought certain

[3] *See Appellee's Appendix, e.g.* A-80-82; A-93-96; A-101-102; A-107-08; A-110-14; A-116-19; A-121-24.

[4] *See Parker v. State of Delaware, Dept. of Corrections*, 813 A.2d 1141, 2003 WL 133603 (Del. 2003)(mandamus denied where changed circumstances rendered relief sought moot).

relief with respect to their employment. However, that is no longer the case. Plaintiff Shawn Brittingham quit his job in May 2011 to accept a position with the Milford Police Department, and Plaintiff Christopher Story quit his job in January 2014 to accept a position with the Laurel Police Department.[5] It would certainly be irregular at best, and extrajudicial at worst, to convene a new CJC panel for the purpose of having the Georgetown Police Department present evidence of past disciplinary violations against individuals who are no longer employed as police officers by that agency, and who are, in fact, employed by other police agencies with no interest in this matter. To the extent the standing discipline would have any effect on Plaintiffs' ongoing employment at GPD, that issue has been mooted by their departure. Plaintiffs' claims for any monetary harm from the discipline were subsumed within *Brittingham 2*, and those claims have been rejected as a matter of law. Finally, the writ of mandamus cannot be used to purge Plaintiffs' (prior) employment or internal affairs files with Georgetown Police Department—which is not a clear ministerial duty a Court could compel. *See Smith v. Dept. of Public Safety*, 1999 WL 1225250, *13 (Del.Super. 1999), *aff'd* 765 A.2d 953 (Del. 2000).

It also must not be forgotten that Plaintiffs *admitted* knowingly and deliberately violating a direct order from the Chief, which gave rise—as it must—to

[5] The Superior Court in *Brittingham 2* rejected Plaintiff Brittingham's claim of "constructive discharge." Exhibit 1 at pp. 47-50.

a substantiated violation of Insubordination.[6] Thus, were another hearing to be held (and Plaintiffs claims of constitutional "justification" having now been rejected as a matter of law), the new panel would be compelled to reach the identical conclusion. The only effect of a new hearing would be a wasteful expenditure of administrative resources to prosecute and rule upon a moot, stale, settled matter.

Similarly, due to the admissions of violation in this case, all of Plaintiffs' complaints about the conduct of the investigation prior to the hearing (including the appointment of Dover Detective Richardson to conduct the interviews) become moot. Having the investigation conducted by someone other than Richardson (whether within or outside GPD) would result in the same admissions by Plaintiffs and an unavoidable finding of substantial evidence, which would lead to a CJC hearing, just as happened previously. Moreover, the provision Plaintiffs rely on to challenge Richardson's role as interviewer[7], 11 *Del.C.* §9200(c)(3), was amended in 2014 to make clear that it is permissible to appoint an officer from outside the department where the investigation cannot be properly conducted internally within a small police department. *See* Exhibit 2, H.B. 397 (signed 7/21/14). Thus, were

[6] While Plaintiffs claim "discovery violations" under LEOBOR, they have offered nothing in this litigation, beyond mere argument, to suggest that they were not provided with any documents to which they were entitled under 11 *Del.C.* Ch. 92. *See* A-32, 38-40, 47-48.

[7] Appellants' counsel himself, at the March 14, 2012 oral argument, correctly stated that it was Captain Holm (an authorized member of GPD) who reviewed Detective Richardson's results of investigation (which were the transcribed interviews) and recommended the initial proposed penalty, which was a letter of reprimand—rejected by Plaintiffs.

any investigation to be initiated today, under the current 11 *Del.C.* §9200(c)(3), GPD would be explicitly authorized to have an outside officer conduct the investigation. Even prior to the amendment of the section, §9200(c)(3) was not so clear that it was "prescribed with such precision and certainty that nothing is left to discretion,"[8] such that GPD should have known it was prohibited from appointing an outside officer to conduct the interviews, as a matter of necessity, since approximately 11 members of the 14 man police force were involved or conflicted out in some way. Also, the ultimate investigatory review and penalty recommendation fell to Captain Holm, an "authorized member" of the department.

Plaintiffs cite *Rosario v. Town of Cheswold*, 2007 WL 914899 (Del. Super. 2007), for the proposition that because their constitutional and other claims at law were rejected on summary judgment in *Brittingham 2*, that this somehow proves they have no "adequate remedy at law" and are entitled to a mandamus here. First, the nature of the claims before the Court in *Brittingham 1* and *Brittingham 2* – although arising out of the same facts – are "apples and oranges."[9] Secondly, Plaintiffs were not "denied" a remedy at law in *Brittingham 2*; they were allowed to litigate their claims for three and one half years, but ultimately *lost* their case.

[8] *Guy v. Greenhouse*, 637 A.2d 827 (Del. 1993)(cited below in *Brittingham 1*, 2011 WL 2650691, *2 (Del. Super. 2011).

[9] As LEOBOR issues were not among the claims before the Court on summary judgment in *Brittingham 2*, there is certainly no "disagreement within the trial courts" of the various counties, as to how to address LEOBOR violations, as suggested by Plaintiffs. (Op. Mem. at p.5).

Finally, *Rosario* is inapposite to the instant case, as it simply stands for the limited proposition that a police employer has a nondiscretionary duty to schedule a hearing before firing or disciplining an officer, and mandamus is an adequate remedy where this duty is breached. In this case, a CJC hearing was properly scheduled by GPD, and Plaintiffs do not dispute this point.

It is of course well-settled that a writ of 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." *Smith*, *supra* at *13. In *Smith*, the court declined to issue the writ for alleged violations of LEOBOR which were only "technical in nature" and which did not rise to the level of due process violations, and where Plaintiff never denied his guilt. *Id*.

The same is true here. The trial court below properly declined to exercise its discretionary jurisdiction, finding that there was no clear violation of a ministerial duty, no due process violations, and no reason "to interject itself in the routine disciplinary proceedings of the GPD." *Brittingham 1*, 2011 WL 2650691, *4 (June 28, 2011). This Court may only reverse the trial court's denial of a writ if it finds an abuse of discretion. Plaintiffs have set forth nothing to suggest that the trial court abused its broad discretion in denying a prerogative writ in this case.

Far from having "no adequate remedy" for their claims, Plaintiffs have repeatedly and exhaustively litigated all manner of alleged violations purportedly arising from the Barlow meeting for four years, in both administrative and judicial fora – but have failed to prevail on any of these claims. (*See Brittingham 2* at pp.7-8). For the reasons set forth herein, and in Defendants' Answering Brief, this Court should affirm the well-reasoned decision of the Superior Court in this matter.

Respectfully submitted,

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