IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| ELLIOTT ROSARIO, | : | |
| | : | C.A. No. 05M-12-004 WLW |
| Petitioner, | : | |
| | : | |
| v. | : | |
| | : | |
| TOWN OF CHESWOLD, | : | |
| | : | |
| Respondent. | : | |

Submitted: February 16, 2007
Decided: March 2, 2007

**ORDER**

Upon Plaintiff's Motion for Summary Judgment. Deferred.

Benjamin A. Schwartz, Esquire of Schwartz & Schwartz, Dover, Delaware; attorneys for the Petitioner.

William W. Pepper, Sr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Respondent.

WITHAM, R.J.

The Petitioner, Elliott Rosario, moves for summary judgment on his petition for a writ of mandamus.

## FACTS

On September 21, 2005 Petitioner was notified in writing that he was suspended/placed on administrative leave from his duties as a Cheswold police officer. This letter was hand delivered by Cheswold police officer Susan Kline, who was the acting officer in charge at that time. On October 20, 2005 another notice was issued to the Petitioner. The letter was captioned "NOTICE OF SUSPENSION WITH INTENT TO TERMINATE." The letter stated that Cheswold Chief of Police Glenn Condon conducted an internal investigation of the allegations against the Petitioner. The letter set out six alleged violations of Police Department policies. Chief Condon concluded that the investigation revealed the allegations were "substantiated" and, in light of this finding, it was determined that the Petitioner "be terminated." The letter was sent by Chief Condon on October 21, 2005 to the Petitioner's Pennsylvania address. On or before October 25, 2005 Chief Condon became aware of a change in the Petitioner's address. Because the Petitioner delayed informing the Police Department of his new address and failed to maintain a hard line phone, both required by Department policy directives, the Chief added and found substantiated an additional allegation to his October 20 investigation report. Chief Condon sent a letter to the Petitioner, at his new address, detailing this addition and providing another copy of the October 20 "NOTICE OF SUSPENSION WITH INTENT TO TERMINATE."

On December 5, 2005 the Petitioner filed a Petition for a Writ of Mandamus and Complaint. In the Petition for Writ of Mandamus the Petitioner states that the Respondent violated the Law-Enforcement Officers' Bill of Rights ("the LEOBOR") and this violation entitled him to a writ of mandamus reinstating him as a police officer with the Respondent. Following discovery, the Petitioner now seeks summary judgment on the Petition for Writ of Mandamus.

## STANDARD OF REVIEW

In deciding this motion the Court must keep in mind the standard for granting a writ of mandamus and the standard for granting a motion for summary judgment. First, the Superior Court has jurisdiction to award a writ of mandamus based on the codification of the power by the General Assembly.[1] Our Supreme Court has stated that "the basis for issuance and scope of relief available through a writ of mandamus under Delaware law are both quite limited."[2] The writ "is issuable not as a matter of right, but only in the exercise of sound judicial discretion."[3] It is not issuable unless the petitioner has no other adequate remedy.[4] It can only issue "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

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[1] *See* 10 *Del.C.* § 564.

[2] *Guy v. Greenhouse*, 637 A.2d 827 (Del. 1993) (Table).

[3] *Id*.

[4] *State ex rel. Lyons v. McDowell*, 57 A.2d 94, 97 (Del. Super. 1947) (citing *Marbury v. Madison*, 5 U.S. 137, 152 (1803)).

certainty that nothing is left to discretion or judgment."[5]

If a writ of mandamus is issuable, the Court can then consider the appropriateness of summary judgment. Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[6] The facts must be viewed in the light most favorable to the non-moving party.[7] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[8] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[9] The burden of proof is initially borne by the moving party.[10] However, if the movant can make such a showing, "the burden shifts to a non-moving party to demonstrate that there are material issues of fact."[11]

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[5] *Guy*, 637 A.2d 827.

[6] Super. Ct. Civ. R. 56(c).

[7] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

[8] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

[9] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[10] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole v. Lowengrub*, 180 A.2d 476 (Del. 1962)).

[11] *Id.* at 681 (citing *Hurtt v. Goleburn*, 330 A.2d 134 (Del. 1974)).

## PARTIES' CONTENTIONS

The Petitioner contends that there are no remaining issues of fact and therefore he is entitled to summary judgment in his favor on the mandamus portion of this case. The Petitioner argues that he is entitled to judgment as a matter of law because a hearing was not scheduled within 30 days following the conclusion of the internal investigation as required by the LEOBOR.[12] The Petitioner maintains that it was not his obligation to ask for a hearing. Rather, it was the Respondent's duty to provide one. The Petitioner cites *In re Massey*, 2002 WL 1343828 for both of these propositions. The Petitioner argues that *Massey* requires that because the Respondent did not hold the required hearing, this Court must reverse the decisions of the Respondent to take action against him and order the Respondent to reinstate him to his former position with full pay, back pay and benefits.

The Respondent, Town of Cheswold, contends that the hearing required by 11 *Del.C.* § 9203 was not provided because the Petitioner refused to return calls or accept and respond to letters sent by Chief Condon in an effort to set up such a hearing. The Respondent argues that the Petitioner's conduct amounted to a waiver of his right to a hearing or that the Petitioner is estopped to complain about the lack of a hearing. The Respondent cites no case law or statute for this proposition. Additionally, the Respondent suggests that the Petitioner is not entitled to mandamus in this case because he cannot establish a clear legal right to the performance of a nondiscretionary duty.

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[12] *See* 11 *Del.C.* § 9204.

## DISCUSSION

The Court begins by noting that the outcome of this matter depends on interpretation of the LEOBOR provision regarding scheduling and notice of a hearing, 11 *Del.C.* § 9204. The issue is what the General Assembly intended when it wrote that "a hearing shall be scheduled." Our courts have held that the General Assembly enacted the LEOBOR to "provide law-enforcement officers with enhanced procedural due process safeguards."[13] In *Massey*, our court held that an officer is not required to ask for a hearing; the employer is obligated to provide a hearing.[14] If the obligation to provide a hearing is on the employer, then, logically, the obligation to schedule the hearing should also be on the employer. This interpretation is made even clearer by reading the adjacent language regarding notice. The statute states that "[t]he officer shall be given written notice of the time and place of the hearing."[15] Clearly, this means that the employer seeking to discipline or terminate the officer is charged with the duty to notify the officer. Therefore, based on the foregoing, the Court holds that the statute places the onus on the employer, in this case the Respondent, to schedule a hearing. Because that hearing was not scheduled in this case, the Respondent violated the LEOBOR.

Next, the Court must determine whether mandamus is the appropriate relief for

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[13] *Knox v. City of Elsmere*, 1995 WL 339096 (Del. Super.).

[14] 2002 WL 1343828, at *2.

[15] 11 *Del.C.* § 9204.

a violation of the LEOBOR. Other Delaware courts have held that the requirements for disciplinary investigations under LEOBOR are specific and do not leave room for discretion.[16] These courts have stated that mandamus may be appropriate because the actions mandated by the statute are ministerial rather than discretionary.[17] In fact, other Delaware courts have suggested that a writ of mandamus may be the proper way to remedy LEOBOR violations.[18] This Court takes these suggestions to the next level and finds that, given these facts and that the scheduling and holding of a hearing is a nondiscretionary duty, the writ is the appropriate method for addressing the LEOBOR violation. Additionally, issuance of the writ is appropriate given that the Petitioner does not have another adequate remedy to address the denial of his right to a hearing. While proving a violation of the Whistleblowers' Protection Act[19] would entitle the Petitioner to be reinstated, it would not address the violation of the LEOBOR. Additionally, the breach of contract occurred because the LEOBOR was not followed; damages for breach of contract would not address the violation of the procedures required by the LEOBOR. In fact, in a case where violations of the LEOBOR were alleged this Court stated that "'mandamus is the proper remedy to compel reinstatement of officers or employees illegally discharged, removed, or

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[16] *See Smith v. Department of Public Safety of State*, 1999 WL 1225250, at *12 (Del. Super.).

[17] *Id*.

[18] *See Id*. (citing *Knox v. City of Elsmere*, 1995 WL 339096 (Del. Super.); *Maull v. Warren*, 1992 WL 114111 (Del. Super.)).

[19] 19 *Del. C.* § 1701 et seq.

suspended in violation of the civil service law.'"[20]

Decision on this mandamus action is appropriate on summary judgment because there are no material facts left to be disputed at a hearing on the matter.[21] The only factual issue that the Respondent raised in his reply to the Petitioner's motion for summary judgment was whether or not the Petitioner received phone calls and letters from Chief Condon attempting to schedule a hearing. However, since the Court has already held that the statute places the onus for scheduling the hearing on the employer, the Respondent, whether or not these phone calls and letters were made and received is irrelevant to determining if the writ should issue.

Clearly, the Petitioner is entitled to an appropriate remedy. The Petitioner contends, citing *Massey*, that, if the writ should issue, the remedy is to reverse the decisions of the Respondent to take action against him and to order the Respondent to reinstate him to his former position with full pay, back pay and benefits. *Massey* does not stand for that proposition. Instead, the *Massey* Court found only that the petitioner was entitled to "an appropriate remedy."[22] The *Massey* Court stated that "[a]t this point, two years removed from the [petitioner's] dismissal, [the Court] would like to hear further from the parties as to what that appropriate remedy might

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[20] *Smith*, 1999 WL 1225250, at *12 (quoting 55 C.J.S. *Mandamus* § 233 (1998); citing *Bahramian v. Papandrea,* Conn.Supr., 440 A.2d 777 (1981)).

[21] 10 *Del. C.* § 564. The Court notes that, according to the statute, such a hearing would be conducted without a jury, for "[a]ny questions of fact arising from the pleadings shall be heard and determined by the Court."

[22] 2002 WL 1343828, at *2.

be." Eventually a hearing was held in that case on the issue of damages. Judge Vaughn determined the Town of Camden had to pay the officer for lost wages and medical bills. However, no writ was issued.

This Court finds that given the fact over a year has passed since action was taken against the Petitioner, the best approach is to follow the *Massey* Court's lead and ask the parties to address what is the appropriate remedy in this case. A hearing will be held at the convenience of the parties to receive input on that issue. The parties will inform this Court within 30 days of the issue to be resolved at the hearing.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution