

VT SUPERIOR COURT
WASHINGTON UNIT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 496-8-15 Wncv

ADAM HUBACZ
Petitioner

FILED

v.

THE VILLAGE OF WATERBURY, VERMONT
Respondent

DECISION
Cross-Motions for Summary Judgment

Petitioner Adam Hubacz was a Village of Waterbury police officer until the Village Trustees terminated his employment in 2012 following a hearing. He sought Rule 75 review before the federal district court, which remanded the case for a new hearing. As a result of the second hearing, the Trustees again terminated his employment. He then sought Rule 75 review in this court. The parties filed cross-motions for summary judgment. While the parties present the court with several issues attending the circumstances of this extended controversy, the case boils down to an interpretation of the statutes pursuant to which Mr. Hubacz's employment was terminated, 24 V.S.A. §§ 1931–1934.

Background

The basic facts are as follows. While working for the Village as a police officer, Mr. Hubacz applied for a police officer position in a different town. That town required a polygraph examination as part of the application process. Mr. Hubacz appeared for his polygraph, which was to be administered by a State trooper. The examiner conducted an extensive interview before administering the exam. During that interview, Mr. Hubacz disclosed certain unflattering "admissions." The trooper contacted the town that requested the interview and was advised to terminate the exam. No polygraph ever was administered and the town did not offer employment to Mr. Hubacz.

The trooper then wrote down Mr. Hubacz's "admissions" in a report. The report made it back to the Village police chief and town manager. They took minor disciplinary action against Mr. Hubacz but generally found some of the "admissions" to be unfounded and treated others as youthful indiscretions, expressly noting that if everyone was held to a standard of perfection for youthful indiscretions, few of us—including, likely, most police officers and state's attorneys—would have jobs.¹ The chief and town manager had always been pleased with Mr. Hubacz's policework and did not think the revelations and would have a material impact on Mr. Hubacz's work going forward.

¹ For example, in high school, Mr. Hubacz "impersonated" a police officer to get a reaction from suspected drug users. At some point, an insurance company reimbursed him \$10 more than it should have and he kept the \$10.

The report also made its way to then-State's Attorney Thomas Kelly, who saw things much differently. Attorney Kelly unilaterally decided that he would never prosecute any case that involved Mr. Hubacz. He sent a somewhat redacted version of the report to all defense attorneys and pro se defendants in cases that had involved Mr. Hubacz and he publicized the report to the media.

The Village had not intended to terminate Mr. Hubacz's employment, but it had no perceived ability to re-assign him to duties that he could perform without involving the non-prosecution decision. It decided it had to terminate his employment.

The tenure of a police officer is statutorily controlled "unless a municipality has charter provisions providing for tenure of police officers during good behavior with removal only after hearing and for cause." 24 V.S.A. § 1934. The Village had no such charter provisions, so the statutes apply.

The principal statute controlling the termination of a police officer is 24 V.S.A. § 1932. Under § 1932, the Trustees were empowered to terminate Mr. Hubacz's employment on a majority vote following a hearing based on a sufficient finding of negligence, dereliction, or unbecoming conduct. The case proceeded to hearing on the stipulation that the sole asserted basis for termination was Attorney Kelly's non-prosecution decision. The asserted basis was not the conduct underlying the "admissions." The Trustees concluded at that time, in 2012, that the non-prosecution decision met the § 1932 standard and terminated Mr. Hubacz's employment. He has not worked for the Village since.

On review the first time, the federal district court remanded for a new hearing. It ruled that the Trustees had misinterpreted the statute and that § 1932 requires a finding based on the police officer's conduct, not based on the decision of a third party (Attorney Kelly). That ruling is the law of the case. The court made reference to the possibility that the Village might be able to develop evidence to satisfy the § 1932 standard on remand. It also noted that at a new hearing on remand, the Village might consider whether the non-prosecution decision may be a "legal disability" warranting termination pursuant to § 1931, citing *Gadue v. Village of Essex Junction*, 133 Vt. 282 (1975). To be clear, the court did not rule that a non-prosecution decision is a legal disability warranting termination; it only suggested that, applying *Gadue*, it may be.

The Village then charged Mr. Hubacz with a legal disability under § 1931 and with negligence, dereliction, or unbecoming conduct under § 1932. A new hearing was held in 2015. The Trustees embraced the district court's invitation to interpret § 1931 as permitting termination for a legal disability and ruled that the non-prosecution decision is such a disability. The Trustees also based its termination decision on § 1932. Mr. Hubacz seeks review of the 2015 termination pursuant to Rule 75 Review of Governmental Action.

Termination pursuant to 24 V.S.A. § 1931

Section 1931(a) provides that municipal police officers "shall be sworn and shall hold office during good behavior, unless sooner removed for cause, or in the case of temporary police officers, for the term specified." 24 V.S.A. § 1931(a). However, the only removal procedure in

the statutory regime appears in § 1932, which is expressly limited to instances of negligence, dereliction, and unbecoming conduct.

The Trustees' ruling on "legal disability" depends on their interpretation of § 1931, in which they relied on an extension of *Gadue v. Village of Essex Junction*, 133 Vt. 282 (1975). The relevant portion of *Gadue* is as follows:

Because of the manner in which the case was disposed of below, only one issue is presented for our appellate consideration. Does the Village of Essex Junction have the authority to dismiss a police officer for physical disability [an alleged heart condition]? The court below, finding no specific authorization to this effect in either the Vermont statutes or the personnel rules of the village, concluded that such authority does not exist. The court was persuaded that the village was restricted by its own rules because the Legislature "clearly intended that the various municipalities adopt procedures whereby these matters could be taken into consideration." It should be pointed out, however, that while 24 V.S.A. § 1121 empowers municipalities to adopt personnel regulations, this authority is conveyed through the permissive "may" and should not be read as necessarily restricting a village's dismissal power to local rules which it may or may not adopt.

More importantly, both 24 V.S.A. § 1931 and the village's personnel rules provide for removal for "cause." The more precise question, therefore, is whether "cause" may be interpreted to include physical disability. We do not hesitate to answer this question in the affirmative. The discharge of public employees physically or mentally *unable to perform the duties of their offices* has been upheld in numerous decisions. And two recent California decisions have specifically held that physical disability is "sufficient cause" for removal of a policeman. But we need not base our decision entirely on related case law from other jurisdictions. The detriment to the public which would result from the lack of authority to discharge a physically disabled policeman is itself a sound basis for concluding that physical disability may be "cause" for dismissal. Denial of this authority would constitute an unreasonable result which we will not presume that the Legislature intended.

Our disposition of this appeal is limited to the single issue properly before us at this time. We hold only that the court below erred in concluding as a matter of law that the village was without authority to remove a police officer for physical disability.

Id. at 283-84 (emphasis added, citations omitted). The Trustees construe the *Gadue* ruling to apply to a *legal* disability although it was a physical disability that was actually addressed in that case. They construe Attorney Kelly's non-prosecution decision as having created a legal disability on the part of Mr. Hubacz.

The court does not accept this interpretation of *Gadue*. The alleged disability in *Gadue*, and the reason for needing to terminate that police officer, was something intrinsic to the officer that made him unable to perform the duties of his office: a heart condition. He could not carry out the functions of the job due to his own personal medical condition.

Here, by contrast, there is no condition intrinsic to Mr. Hubacz that made him incapable of performing the duties of his office. It was the unilateral decision of a third party, Attorney Kelly, that forms the basis of what the Trustees call a "legal disability" and induced the Village to terminate Mr. Hubacz. Otherwise, nothing indicates that Mr. Hubacz ever was less than perfectly capable of fulfilling his duties as a police officer.

Disability as a cause for termination, as described in *Gadue*, refers to some characteristics personal to the officer that make him unable to fulfill job duties. The concept of a legal disability might apply if an officer were physically capable of the work but unable to pass a required firearms certification, despite a good faith effort. The court concludes that the Trustees misapplied the holding of *Gadue* when they concluded that a "legal disability" could be created by the discretionary decision of a third party, and that such a 'disability' could be grounds for removal under § 1931. Under the Trustees' analysis, a States Attorney who simply did not like a police officer personally, or who did not like working with him or her, could make a unilateral decision not to prosecute that officer's cases, and thereby create a legal disability, which could then turn into grounds for removal. Such a scenario would be at odds with the statutory scheme of § 1931 and § 1932, which set the standards for removal of police officers in the absence of specific charter provisions. It appears that the Trustees determined that because they concluded that Attorney Kelly's decision was not an unreasonable one, there were sufficient grounds for a legal disability. However, if there were cause to terminate Mr. Hubacz, it would have to be not based on a third-party discretionary decision, but because the conduct underlying his purported admissions was sufficiently negligent, derelict, or unbecoming to justify removal. That issue is addressed expressly by § 1932, not § 1931.

Termination pursuant to 24 V.S.A. § 1932

Attorney Kelly's non-prosecution decision put the Village Trustees in an awkward and difficult situation. Its police chief and town manager plainly did not think that Mr. Hubacz should be terminated for negligent, derelict, or unbecoming conduct. Nevertheless, they charged him with it for purposes of the second hearing as an alternative to the legal disability rationale. The Village had no charter provision permitting termination due to a non-prosecution decision alone where that decision is not based on conduct otherwise warranting dismissal.

The Trustees purported to find a violation of § 1932. They did not, however, rule that the actual conduct underlying Mr. Hubacz's admissions was negligent, derelict, or unbecoming such that termination was warranted. Instead, the rationale of the Trustees' § 1932 decision is inextricably tethered to Attorney Kelly's unilateral non-prosecution decision. This is patent in the way the Trustees framed the § 1932 issue in their decision on remand:

A police officer must be able to perform the official duties required by the position, which includes developing cases for prosecution and testifying in court.

Here, Mr. Hubacz cannot perform his official duties: cases investigated by Mr. Hubacz have not and will not be prosecuted by the Washington County State's Attorney. Consequently, he has become negligent and derelict in his official duties as a Police Officer when he cannot testify in court or otherwise be involved in the prosecution of cases.

This is largely what we concluded in our initial January 2012 decision. Mr. Hubacz cannot function as a police officer with the State Attorney's on-going refusal to prosecute in effect. On remand, the question that we examined was whether Mr. Hubacz's actions led to or were a part of State's Attorney Kelly's decision or whether this was a decision made outside of any action by Mr. Hubacz.² The evidence adduced during the three days of hearings shows in clear and persuasive manner that the State's Attorney's decision was the direct and proximate result of Mr. Hubacz's actions.

Village Findings and Conclusions 10–11 (dated July 8, 2015) (emphasis added, footnotes omitted). This is precisely the wrong inquiry, however. The issue on remand under § 1932 was whether Mr. Hubacz's *conduct* was negligent, derelict, or unbecoming, not whether Attorney Kelly based his decision on his own evaluation of Mr. Hubacz's conduct. As framed by the Trustees, the issue was no different from merely terminating Mr. Hubacz due to the non-prosecution decision alone, something the federal district court expressly ruled it could not do under § 1932. There was no dispute that Attorney Kelly received the "report" and then made and advertised his non-prosecution decision.³

There was no proper factual basis found for termination under § 1932. The Trustees in 2015 decided on termination for the same reason they did in 2012, although the federal court had already ruled that a decision made by a third party could not support termination as a matter of law.

The results

The *Gadue* decision refers to some policy interests apparent in that case: "The detriment to the public which would result from the lack of authority to discharge a physically disabled policeman is itself a sound basis for concluding that physical disability may be 'cause' for dismissal. Denial of this authority would constitute an unreasonable result which we will not presume that the Legislature intended." *Gadue*, 133 Vt. at 284 (1975). There is no "unreasonable result" in this case.

² The Village's dilemma would be identical if the non-prosecution decision were completely unrelated to Mr. Hubacz's conduct or even based on whim or personal animosity. It still would be stuck with a police officer whose cases would not be prosecuted. This demonstrates the folly of the Trustees' "causation" approach to this matter.

³ To the extent that one might read the Trustees' decision to mean that based on Mr. Hubacz's conduct, Attorney Kelly's decision was reasonable, the court notes that the Trustees were not sitting in review of the state's attorney's exercise of *his* discretion; it was reviewing Mr. Hubacz's conduct.

Attorney Kelly's non-prosecution decision was not an effective basis for termination under § 1931. Mr. Hubacz's disputed conduct was not found to be a basis for termination pursuant to § 1932.

This case is here for Rule 75 review. The court concludes that Mr. Hubacz was wrongfully terminated, as there were insufficient grounds for termination under either § 1931 or § 1932. The case must be remanded to address the consequences of this decision.⁴

ORDER

For the foregoing reasons, the Village's motion for summary judgment is denied and Mr. Hubacz's is granted. The case is remanded to the Trustees for further proceedings consistent with this decision.

Dated at Montpelier, Vermont this 7th day of April 2017.

Mary Miles Teachout
Mary Miles Teachout
Superior Judge

⁴ A remand order keeps the case in an interlocutory phase and is not a final judgment. *Ott Rutland, LLC v. Vermont Dep't of Taxes*, No. 2006-308, 2006 WL 5838196, at *1 (Vt. Nov. 2006). In appropriate circumstances, however, interlocutory review may be permitted. Motions for interlocutory review "must be filed within 10 days after entry of the order or ruling appealed from." V.R.A.P. 5(b)(5)(A).