

VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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2017 MAY 30 A 7 55

CIVIL DIVISION
Docket No. 496-8-15 Wncv

ADAM HUBACZ
Petitioner

FILED

v.

THE VILLAGE OF WATERBURY, VERMONT
Respondent

DECISION

The Village's Motion for Interlocutory Review

Petitioner Adam Hubacz was a Village of Waterbury police officer until the Village Trustees (the Village) terminated his employment in 2012 following a hearing. The ensuing protracted litigation over his termination has generated numerous rulings by the Village, the federal district court of Vermont, this court, and the Vermont Supreme Court. Most recently (April 10, 2017), this court granted summary judgment in Mr. Hubacz's favor on the Village's liability and remanded the case to the Village for further proceedings. The Village now seeks permission, over Mr. Hubacz's objection, to appeal that ruling on an interlocutory basis. V.R.A.P. 5(b)(1).

The controversy initially arose when then-State's Attorney for Washington County unilaterally decided to not prosecute any of Officer Hubacz's cases due to certain "admissions" made by Mr. Hubacz to unflattering conduct in his past. Though the Village itself did not determine that the underlying conduct warranted termination, when it was faced with the non-prosecution decision of the State's Attorney at the time, it terminated Mr. Hubacz's employment, relying on 24 V.S.A. § 1932, which authorizes adverse employment action against municipal police officers for negligence, dereliction of duty, and unbecoming conduct. The basis for termination was the non-prosecution decision, not the underlying conduct. Mr. Hubacz sought review of governmental action in the federal district court of Vermont, where Judge Sessions ruled that the unilateral action of a third party cannot be a basis for termination pursuant to § 1932. The court remanded the case to the Village for a new hearing.

After a hearing on remand, the Village determined that the non-prosecution decision was a "legal disability" warranting termination pursuant to 24 V.S.A. § 1931, as construed in *Gadue v. Village of Essex Junction*, 133 Vt. 282 (1975). In addition, the Village also ruled that Mr. Hubacz's termination was also proper pursuant to § 1932.

Mr. Hubacz then sought review of governmental action in this court, which rejected the Village's "legal disability" theory under § 1931. It also rejected the Village's ruling under § 1932, which again was predicated on the non-prosecution decision rather than negligence, dereliction of duty, or unbecoming conduct as shown by Mr. Hubacz's own conduct. With no

lawful basis for termination having been shown, Mr. Hubacz's request for a remedy, which had never been addressed, became ripe for consideration. This court remanded the case to the Village for "further proceedings consistent with this decision."

The Village now seeks interlocutory review prior to conducting a hearing on the claim for a remedy. The issue of remedy is likely to be complex and require considerable resources on the part of the parties and the Village to address, as it is unclear whether between the first hearing in 2012 and the second one in 2015 plaintiff should be treated as a terminated employee or a nonterminated employee. The outcome of an appeal could change the importance of this issue and the need to devote resources to it.

This case is well suited to interlocutory review in the spirit of Rule 5(b)(1) and *In re Pyramid Co.*, 141 Vt. 294 (1982). The primary issue of whether the State's Attorney's non-prosecution decision is a lawful basis for termination under § 1931 is a legal issue that has already been examined by different tribunals with results showing that there exists substantial ground for difference of opinion. Moreover, determination of this legal issue will govern whether there is or is not a basis to proceed to a hearing on remedy, and thus will materially advance the termination of the litigation. Interlocutory review would benefit all parties and the Village and the courts in that it would be the most efficient path toward ultimate resolution of the case.

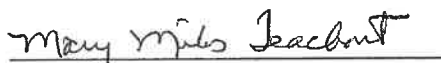
The court certifies the following question for interlocutory review:

Is a State's Attorney's unilateral decision to refuse to prosecute any cases investigated by a particular municipal police officer, alone, a sufficient basis for termination of the officer pursuant to 24 V.S.A. § 1931?

The court is not certifying for review the issue of whether termination was proper under § 1932. Both the federal district court and this court determined that it was not, and while the Village sought to give a revised explanation at the second hearing for its basis for termination based on § 1932, the record shows that its basis at the second hearing was fundamentally the same as the basis at the first hearing, which was rejected by both the federal and state courts. There is no showing that there exists substantial ground for disagreement on that legal issue. The court is aware that the Vermont Supreme Court may nonetheless "not hesitate to reach issues outside its scope [scope of certified question for interlocutory review] where they are fairly raised by the order appealed." See *State v. Carpenter*, 138 Vt. 140, 146 (1980) (noting that a question certified for interlocutory review "is a landmark, not a boundary").

The Village's Motion for Interlocutory Review is *granted* as set forth above. This case is stayed in the Superior Court pending further action by the Supreme Court. V.R.C.P. 62(d)(2).

Dated at Montpelier, Vermont this 26th day of May 2017.


Mary Miles Teachout
Superior Judge