VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 44-2-20 Oscv

Butler vs. Town of Westmore

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment; Motion for Summary Judgment; Motion for Summary Judgment on Damages ; ; Partial (Motion: 17; 18; 19)
Filer: Philip C. WoodwardMarikate E. Kelley; Philip C. WoodwardMarikate E. Kelley; Paul Brierre
Filed Date: June 01, 2023; June 01, 2023; June 01, 2023

The motion is GRANTED IN PART and DENIED IN PART.

Decision on Cross Motions for Summary Judgment

This is a wrongful termination action filed by Plaintiff Clayton Bulter against the Defendant Town of Westmore.[1] Plaintiff Butler claims that the Town constructively and wrongfully terminated him following an April 2019 selectboard meeting where the selectboard accused him of several workplace misconduct issues and sought to put him on two-weeks of unpaid leave, to which Plaintiff tendered his notice of resignation. Both Butler and the Town have filed cross-motions for summary judgment.[2] Based on the Court's review of the material

[1] Plaintiff Butler's complaint contains 8 different causes of action, but each of these claims arises from or concern the events leading up to the end of Plaintiff's employment with the Town of Westmore in April of 2019 and the events and period immediately following. The additional seven claims, promissory estoppel, breach of the covenant of good faith and fair dealing, wrongful termination in violation of public policy, negligent supervision, intentional interference with contract, violations of due process (Vermont Constitution), and open meeting law violations arise either derive from duties that Plaintiff alleges that the Town owed to him and breached or that arise as part of Plaintiff's overarching theory of wrongful termination. As noted in this decision, there are two key issues: (1) whether Plaintiff's employment with the Town was subject to an implied contract that modified his at-will employment and (2) whether Plaintiff resigned or was constructively terminated that resolve nearly all of these pending claims.

[2] The Town's motion seeks summary judgment and dismissal of all 8 claims pending against it. Plaintiff's motion is for partial summary judgment on the issues of wrongful termination and implied contract. Despite the more limited nature , the issues involved go to the heart of many of his other claims. Along with the extensive replies and detailed briefing, the primary difference in the parties' position is that the Town contends it is entitled to summary judgment on all 8 claims, while Butler contends he is entitled to summary judgment on two issues while the remainder should be decided by a jury due to the contested facts involved.

facts in this case along with the relevant legal analysis, the Court determines that the Defendant Town is entitled to summary judgment on all 8 causes of action.

Factual and Procedural Background

The Town of Westmore hired Plaintiff Clayton Butler in February 2015 on a part-time basis to work on the Town's roadcrew. At the time of his hire, the Town provided Butler with a copy of the Town's personnel policy. There is no dispute that Butler received this document, signed an acknowledgment of its receipt as well as a statement acknowledging that the terms of the handbook and its policies did not create a contract of employment or alter the at-will terms of his employment. Butler received and signed for two updated versions of the Town's personnel policy in December of 2015 and in March of 2016. In October 2017, the Town promoted Butler to Road Foreman with supervisory duties over the road crew and the responsibility for plowing and maintaining the Town's roads. In this role, Plaintiff supervised two other employees, Burton Hinton and beginning in 2019, Reilly Auger.

The Town of Westmore is a small municipal corporation located in Orleans County with a population of under 500 people. The Town is governed by a three-member selectboard. The Town does not have a charter and is governed, primarily, by the by the default provisions of Title 24 V.S.A., Part 2 and Title 17 V.S.A. Chapter 55.[3] The Town does not employ a Town Manager or Town Administrator. Like many small, rural Vermont municipalities, Westmore appears to offer a minimal number of services and employs a minimal number of staff. The Town relies upon elected officers who do not work on an hourly or salaried basis, to perform many of the day-to-day functions of the Town. At three employees, the road department qualified as one of the largest departments within the Town.

From 2017 until April of 2019, Plaintiff Butler served as the Town's Road Foreman. During the bulk of that time, his staff consisted of one employee, Burton Hinton. Hinton initially served as both a member of the road crew, hired in October of 2017, and as a member of the selectboard, but Hinton stepped down his position on the selectboard in March 2018. From that point forward, he served solely as a road crew member. Around the same time as Hinton's

[3] The provisions of title 24 contain the provisions that provide the default provisions for the day-to-day governing and operations of a municipality. Title 17, chapter 55 contains the provisions governing local elections and town meetings.

departure from the selectboard, his relationship with Butler worsened. Over the next twelve months, the evidence indicates that the parties' relationship became contentious.

For purposes of the present motion, both Butler and the Town contest the nature, extent, and even causation of the Butler–Hinton disagreement and related events that led and contributed to the situation between the two. Butler points to several incident reports involving Hinton and damage to Town vehicles and equipment. Butler also notes that Hinton regularly struggled with arriving at the Town's transfer station at the requested 7am time to ensure the site was properly plowed and sanded for the public. The Town points to testimony from witnesses indicating personal animosity and outbursts of anger from Butler.

What is undisputed is that prior to the beginning of 2019, neither the actions of Hinton, nor the actions of Butler were subjected to disciplinary action or scrutiny. Despite the various allegations against Hinton that Butler cites in his briefing, Butler did not impose any discipline or take any disciplinary steps against Hinton, as was his right as supervisor. He also did not ask the selectboard to either investigate or impose discipline on Hinton. Similarly, Hinton did not make any formal complaints about Butler to the selectboard or seek any discipline against Butler for the alleged actions. Both men appear to have made informal complaints to individual selectboard members, and it is uncontested that both the selectboard and others in the Town had a sense of the "feud" between the two.

The situation in the road department appears to have changed at the end of 2018. In December 2018, the selectboard met with Butler to discuss the comments he was making about Hinton and Butler's difficulties supervising Hinton. The selectboard met with Butler on December 13, 2018 in executive session. The selectboard did not take any formal action other than to conduct a one-year performance review of Butler and to hire an additional employee for the road crew, Reilly Auger. In January 2019, Hinton was transferred from the main road crew to the Town's transfer station. This move did not remove Hinton from the road crew, but limited his direct contact with Butler and reduced the amount of time he would perform road crew work. This change does not appear to have resolved that problems between the two men. There is evidence that the distance did not quash the dislike the two men held for each other. As well, moving Hinton out of the road crew on a fulltime basis appears to have fueled allegations on

Hinton's part that Butler was depriving him of overtime and road crew hours, despite a selectboard directive to the contrary.[4]

In late January 2019, the selectboard met again and decided that selectboard member, Peter Hyslop, would supervise Hinton. One result of this decision is that Hyslop, as a selectboard member, became exposed to the day-to-day dealings between Butler, Hinton, Auger, and other Town employees. During this time, Hyslop became aware of allegations that Butler was using the Town's garage to do repairs on personal vehicles. He received calls from individuals complaining about ice and the lack of sand on certain sections of roads. He also encountered resistance from Butler and Hinton to working together.

In March 2019, at the Town's annual meeting, the Town put forward a budget item to increase compensation for all members of the road crew. Several individuals spoke against the increase. There is an allegation that these individuals were encouraged by Hinton to make these statements, and there is another allegation that selectboard members had some forewarning that something like this would occur. This is disputed by both Hinton and the Town. Nevertheless, the selectboard did not intervene in the meeting, and the budget item passed without modification. These objections, however, angered Butler, and he believed Hinton to be responsible for them.[5] At the meeting, Hinton objected to the challenge and indicated that if his raise was removed, then Hinton's raise should be removed as well.

Following the annual town meeting, Hyslop became the selectboard chair. He continued to receive complaints about the conditions of certain road segments. Butler appears to have taken the position that Hinton was no longer part of his responsibility in overseeing the road crew. Auger reported to the selectboard that Butler had made disparaging remarks about Hinton to other roadcrews at the end of March 2019. Hyslop, working with Hinton, and selectboard member William Perkins, working with Butler, engaged both men, separately, for ways to resolve the dispute between them.

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[4] Again, much of the back and forth disputes between the parties is heavily contested, and the Court's recitation of these disputes is simply to indicate that they existed and not to make findings on the substance of this dispute.

[5] While Butler believes that the selectboard should have spoken or interjected at the meeting, it is undisputed that such involvement was entirely discretionary given that the annual meeting is run by the Town Moderator who oversees discussion, introduction of items to the floor, and voting on such items. 17 V.S.A. §§ 2657, 2658. In other words, the selectboard had no legal obligation to make a statement during the town meeting regarding any items on the floor given that the selectboard and its members do not run the annual meeting.

In early April 2019, the Town received a complaint that someone was taking stone from the Town's stockpiles. This turned out to be road crew member Auger. When confronted, Auger is alleged to have said that he received permission from Butler. Butler contests this allegation and states that he was the one that brought Auger's actions to the selectboard's attention. Nevertheless, the selectboard had knowledge of this issue and the contested nature of its cause. In late March, Butler reported to Hyslop that Butler had filed up his truck from the Town's diesel supplies. While Hyslop indicated that he did not approve of this because of the potential for abuse, there were legitimate reasons for Butler to use some fuel given that he used his truck to inspect town roads and because he did not otherwise file for mileage reimbursements. Nevertheless, Hyslop had a sense that this self-reporting did not fully capture Butler's use of town diesel, but it also appears that there were no clear policies governing this practice or controlling access.

On April 11, 2019, the selectboard met in executive session and received statements from Town Clerk Melissa Zebrowski and road crew member Auger. Zebrowski stated to the selectboard that the problems with Butler and Hinton were growing worse, and that she put the blame for the situation with Butler. Auger spoke with the selectboard about the stone incident as well as reporting that Butler had used town equipment to plow a private business, that he had disabled a safety alarm on town equipment, and that he had screamed at a member of the public in a very negative manner while on duty. Auger repeated the allegation that Butler had disparaged Hinton in front of road crews from other towns at a meeting. He also told the selectboard that Butler had set up video cameras in the town garage. Finally, he also stated that Butler had been taking excessive amounts of diesel fuel for his personal truck. Both Zebrowski and Auger expressed concerns that if Butler became aware of their allegations, then he would retaliate against them.[6]

Following this meeting, the selectboard instructed Auger to make recordings. What the selectboard asked Auger to record is disputed. The Town contends that they only asked Auger to take a photograph of the video installation system. From his deposition, Auger appears to have understood a more expansive direction to record the video system and Butler. Regardless of the

[6] Butler in his motions and filings has consistently denied the substance of these allegations and statements.

scope of the request, it is uncontested that Auger recorded both the video system as well as Butler without his awareness.

On April 17, 2019, the selectboard held an emergency meeting with Butler. While there is a factual dispute about the nature of the notice for this meeting, it is undisputed that the selectboard and Butler met in executive session. Prior to the meeting, Butler was not given notice about the details of the meeting other than the selectboard's intent to "get to the bottom of the personnel stuff." At the meeting, the selectboard presented Butler with a memorandum that gave Butler a two-week unpaid suspension from his position. The memo listed several concerns informing the suspension including the allegation that he plowed a private property with town equipment, that he verbally abused a member of the public while on-duty, that he authorized Auger to take stone from the town for personal use, that he disparaged Hinton to others, and that he installed video cameras in the town garage without selectboard permission.

While several parts of the exchange between Butler and the selectboard members are disputed between the parties, there are a few, key undisputed moments.[7] Butler responded to some of the items listed in the memo, but he responded that if the selectboard took any of the items seriously, then they could take his signature on the memo as his two-week notice. Butler, then signed the memo. At least one selectboard member suggested that Butler take the weekend to consider his response. Butler either refused or simply did not respond. He then left his keys and clicker on the table (either by request of the selectboard or on his own accord) and left the meeting.

The selectboard came out of the executive session, and it announced that Butler had resigned by giving his two-week notice. At the same meeting, the selectboard met with Auger and Hinton and delivered them disciplinary memos. Auger received a written verbal warning and Hinton with a written warning that also indicated that he would be returning to work under Butler's supervision.[8] The selectboard also announced these disciplinary decisions in public session following the executive sessions.

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[7] As an executive session, there were no notes, minutes, or recordings made of the meeting. 1 V.S.A. § 313.
[8] It is not clear from the record what difference was intended between a "written verbal warning" and a "written warning." Given that both memos were put in their disciplinary files, the difference appears to be one without distinction.

Following the meeting Butler texted the Town Clerk to indicate that he believed he was "done working for the Town." Zebrowski responded to the text to wish him the best. The Town contends that after this exchange, Butler asked for a final paycheck. Butler disputes this, but it is not disputed that Zebrowski quickly put Butler's final paycheck together and sent it to him on April 22, 2019. Butler also contends that Hyslop made a statement around this time that Butler would never return to work for the Town.

There is evidence to show that the Town had an informal practice of allowing employees to reconsider their resignations prior to their date of departure. It is not clear from the record how widespread this practice was or whether it applied to every employee who resigned. It was not incorporated into the Town's personnel policy. Following his departure, Butler communicated with selectboard member Perkins on April 22, 2019 that he would return to his job if the Town agreed to seven conditions. These conditions included (1) that Auger and Hinton receive "a two-hour ass chewing"; (2) that Auger be suspended without pay for two weeks; (3) that Hinton be suspended without pay for two weeks; (4) that Butler not be challenged in the future by Hinton, Auger, or the selectboard; (5) that Plaintiff be given his job back in writing; (6) that selectboard member Hyslop step down as chair; and (7) that Butler be paid for the two-weeks of suspension. While the Town took no formal action on Butler's offer and conditions, the Town has indicated that the conditions were unacceptable and would not have been approved.

On April 26, 2019, Butler contends that he contacted selectboard member Perkins and asked "Can I have my job back?" Butler contends that this was an unconditional request for re-instatement without conditions, but this is an unreasonable inference. The question was put to Perkins in the context of the prior conditional exchange in which Butler had put forward several conditions. The question is logically and contextually a follow up to the communications four days prior, and it does not state or suggest that Butler had withdrawn his prior conditions.[9] This is further supported by Butler's subsequent and sole communication to the selectboard, which came from Butler's counsel on May 1, 2019, which did modify his position but still contained

[9] By that point, Perkins had resigned from the selectboard, a fact that he did not communicate to Butler. Perkins did not relay any of these communications with Butler after his resignation to the rest of the selectboard.

conditions for returning to work. In that communication, Butler asked if he could be re-instated (1) after his two-week suspension and (2) so long as he did not supervise or work with Hinton.

Butler contends that the April 26th communication could be interpreted as a request for re-instatement without conditions. Such a finding, however, would be a speculative and an unreasonable inference. Nothing from the context or language of this communication supports the proposition that it was intended as an unconditional offer to return to work without conditions. Coming directly after the offer with multiple conditions to which the Town had not responded or rejected, there is no indication that the communication was a new offer. Butler did not state that he was suspending or removing such conditions, and subsequent communications indicate that he continued to have conditions with any re-instatement. While Butler is entitled to have all reasonable doubts and inferences resolved in his favor for purposes of the present motion, the characterization of this communication that Butler offers in his filing is not entitled to this inference. *Fuller v. City of Rutland*, 122 Vt. 284, 289 (1961).

At no point did Butler revoke or withdraw his resignation or make a communication to the selectboard that stated he would return to work without conditions. To the extent that the Town had an informal policy of allowing employees to reconsider their resignations, the record shows that Butler never took advantage of the policy but continued to negotiate and put conditions on his return that did not include any indication that he sought to withdraw the resignation.

In February of 2020, Butler filed the present action seeking damages from the Town. The parties engaged in extensive discovery and preliminary motion practice. In June 2023, the parties began filing cross-motions for summary judgment. This process extended into late August 2023. The Court took the motions and lengthy briefs under advisement.

Legal Analysis

I. Summary Judgment Standard

Before the court are the parties' cross-motions for summary judgment. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The court may enter summary judgment when, "after adequate time for discovery, a party fails to make a

showing sufficient to establish the existence of an element essential to [his or] her case and upon which [he or] she has the burden of proof." *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13 (quotation marks omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. *Carr v. Peerless Insurance Co*., 168 Vt. 465, 476 (1998). However, a non-moving party cannot rely on bare allegations, unsupported generalities, or speculation to defeat a properly supported motion for summary judgment. *See* V.R.C.P. 56(c), (e); *Webb v. Leclair*, 2007 VT 65, ¶ 14 (mem.). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." *Robertson v. Mylan Laboratories, Inc*., 2004 VT 15, ¶ 48. Thus, an opposing party's allegations must be supported by affidavits or other documentary materials which show specific facts sufficient to justify submitting his or her claims to a factfinder. *See Robertson*, 2004 VT 15, ¶ 15; *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

II. Plaintiff's Employment Status

Generally, an employment contract for an indefinite term is an at-will agreement, terminable at any time, for any reason or for none at all. *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995). However, this is a rule of construction which may be overcome by evidence to the contrary, including by modification by a personnel policy. *Taylor v. Nat. Life Ins. Co.*, 161 Vt. 457, 462 (1993). The interpretation of an unambiguous personnel policy and determining whether a personnel policy is ambiguous are questions of law for the court to decide. *Cate v. City of Burlington*, 2013 VT 64, ¶ 15, 194 Vt. 265; *Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 7 (2002). The Vermont Supreme Court has explained the effect of disciplinary procedures in employment manuals as follows:

> Employee manuals or policy statements do not automatically become binding agreements. Whether a particular policy is meant to be a unilateral offer is an issue of proof. Only those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced. General statements of policy will not meet the requirements of a unilateral contract. In contrast, definitive policies, which expressly or impliedly include a promise for specific treatment in specific situations, especially when the employer expects the employee to abide by the

> same, may be enforceable in contract. We note that an employer may not always be bound by statements if it conspicuously and effectively states that the policy is not intended to be part of the employment relationship.

Ross, 164 Vt. 13, 20–21 (internal citations omitted). Here, the Town's employee manual does not create a definitive policy. Although it sets out a general policy of progressive discipline, it reserves a general right to bypass progressive discipline without reservation. Additionally, the manual conspicuously and effectively states in multiple sections and in the employee acknowledgement that it is not intended to be part of the employment relationship.

Butler argues that the personnel policy modified the at-will relationship between the parties because it of Section 39 of the personnel policy that states the "Town's progressive discipline process applies to *any* and *all* employee conduct that the Town in its sole discretion must be addressed by discipline." (emphasis in Pltf's brief). Butler contends that this creates a conditional imperative that if there is discipline, then it must be progressive.[10]

When reviewing contract language, the Court must look to the plain meaning of individual terms, but it must also "read the contract's provisions together, viewing them in their entirety." *Sutton v. Purzycki*, 2022 VT 56, ¶¶ 37, 50 (quoting *In re Cole*, 2008 VT 58, ¶ 19). This is because the primary purpose of contract interpretation is "to give effect to the true intention of the parties." *In re Cronan*, 151 Vt. 576, 579 (1989). Butler's selective quotation of the personnel policy omits the following provisions in Section 39, which state:

> The Town reserves the right in its sole discretion to bypass progressive discipline and to take whatever action it deems necessary to address the issue at hand. That means that more or less severe discipline, up to and including termination may be imposed in a given situation at the Town's sole discretion.
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> * * *
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> The Town will normally adhere to the following progressive disciplinary process, but reserves the right to bypass any or all steps of progressive discipline when it determines, in its sole discretion, that deviation from the process is warranted . . .

(Def. Ex. E., page 18). Thus, to the extent that the Town did commit itself to an if/then conditional imperative, it also reserved or carved out the right to bypass such a process when the

[10] Butler also makes similar arguments with regard to Section 40 of the policy covering termination, but given that the Town never sought to formally terminate Butler, this argument is irrelevant to the present motion, and the severance clause of Section 41 renders this provision potentially valid, regardless of the Court's conclusions regarding the meaning or application of Section 39.

Town chose to do so. This was an idea important enough that the policy states it twice. This language, along with language in Section 6 of the policy, which states that the "town has the right to make and enforce policies, to take whatever action is necessary to operate the Town, direct and discipline the workforce, to discharge employees and trainees at-will . . ." create a plain and unambiguous right for the Town to bypass or deviate from progressive discipline. (Id. at 2). Thus, to the extent that the policy is interpreted as a binding adoption and modification of the terms of employment to include progressive discipline in any and all cases, there is still an exception that this provision only applies when the Town does not, in its sole discretion, determine that it should not apply.

In practice, the Town applied this bypass in a consistent manner with all three employees. While Butler received the highest level of discipline, Hinton received written warning and Auger received a "written verbal warning" that went into each of their employee files.[11] Neither the Town nor Butler have suggested that the use of disciplinary bypass is either an isolated event or a wide-spread practice. While the Court will not presume either way, the contemporaneous evidence does suggest that the deviation is not an isolated event or strictly limited to Butler.

In addition to the comparison of discipline, Butler makes a separate but related contention that the employment contract was modified by practice such that Defendant was required to consider his retraction of his resignation. The uncontested facts, however, do not indicate that this was a consistent practice with the Town or that such practice was known to him prior to his own resignation such that he considered it to be part of his employment relationship or relied upon it in the course of his employment.

In making this determination, the Court does not make a finding or conclusion about the merits or validity of any of the complaints that the Town cited in its memorandum supporting its decision to suspend Butler. The allegations and supporting facts are in dispute, and for the purposes of the present motions, the Court does not make a determination as to the quality of the alleged issues. That is because under the standard of review, the Court does not have to make

[11] As noted above, Auger received a "written verbal warning," which is in effect a written warning. The confusion arises, in part, because the word "verbal" is defined as "of, or relating to, or consisting of words," but can also mean spoken over written. Merriam-Webster Dictionary, available at www.merriam-webster.com/dictionary/verbal (last visited Mar. 10, 2024). Modern legal stylists have advocated the use of the word "oral" in lieu of "verbal" to remove the confusion. *B. Garner*, *Garner's Usage Tip of the Day: verbal; oral*, Law Prose (Feb. 17, 2014), at lawprose.org/garners-usage-tip-of-the-day-verbal-oral/#content.

such a determination. As an at-will employee, Butler had no reasonable expectation that the Town would only impose progressive discipline. The only reasonable expectation under the terms of Butler's employment and the terms of the personnel policy was that the Town could act as it saw fit and impose discipline that it determined was reasonable in any given circumstance.

Based on the foregoing, the Court finds that the personnel policy is unambiguous and did not alter Butler's status as an at-will employee and did not, as a matter of law, create a contractual relationship or modification to the employment relationship that would have prevented the Town from freely choosing to discipline him in a manner that bypassed the progressive discipline process. Plaintiff Butler was and remained an at-will employee of Defendant Town.

III. Constructive Discharge

A. Generally

Standing alone without an accompanying claim that the termination was wrongful because of employer's illegal conduct or breach of an implied contract of employment, an at-will employee's claim for constructive discharge is not an actionable tort. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72 ¶ 10. The court must therefore determine whether Plaintiff has sufficiently alleged and established for purposes of summary judgment that Defendant's conduct was wrongful. This is an objective test and evaluation. *Pena v. Brattleboro Retreat*, 702 F.2d 325, 325 (2d Cir. 1983). "In determining whether or not a constructive discharge has taken place, the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a *reasonable person* in the employee's shoes *would have felt compelled to resign*." *Id.* (quoting *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir.1977) (emphasis added); *see also Brandau v. State of Kansas*, 968 F.Supp. 1416, 1422 (D.Kansas 1997). In making the evaluation of whether the employee was denied the opportunity to exercise a free choice, the Court must look to the totality of the circumstances. *Stone v. University of Maryland Medical Systems, Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (citing *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574 (Fed.Cir.1983)).

In this case, Butler has not alleged sufficient facts to place this issue into dispute, the evidence taken in a light most favorable to Butler demonstrates that the Town, through its

selectboard became aware of a dispute between Butler and Hinton in late 2018 and began to take steps to resolve the dispute. These steps included separating the two employees, re-assigning Hinton to the Town's transfer station, and to have Hinton report to a selectboard member on a temporary basis. Following additional disputes and complaints from other employees, the selectboard chose to impose discipline on Butler, Hinton, and other members of the road crew. The issues of whether this discipline was appropriate or whether the allegations were verifiable and true, were effectively mooted by Butler's intervening resignation. Even to the extent that such claims might have survived, the personnel policy on which Butler relies, does not require the Town to use precise disciplinary steps, which at a minimum gave the Town a good faith basis to impose discretionary discipline, whether or not such discipline was ultimately appropriate.[12] The record before the Court indicates that at a minimum, the Town had some factual basis to make the four allegations of misconduct that form the basis of the Town's discipline decision. Whether additional investigation or process would have sustained or disproven these allegations is both disputed and undetermined. For purposes of this motion, however, the Town entered the April 17th meeting with a good faith basis to impose discipline and did so in what it perceived to be a reasonable and incremental response to what all parties agree was an on-going, roiling dispute between Butler, Hinton, and a growing number of town employees. Butler's response to this discipline was to submit his resignation, which effectively cut off any further steps by either him or the Town to clarify these issues.

At a minimum, the available facts demonstrate that Butler, an at-will employee, was not wrongfully terminated from his position. There are no facts that would support the finding that the Town was acting in an illegal manner or in breach of an employment contract. Even more, the actions of the Town do not violate "the community common sense and common conscience" that might give rise to a claim for wrongful termination under the public policy exception to at-will employment. *Madden v. Omega Optical, Inc.*, 165 Vt. 306, 314 n.3 (1996). [13] For these

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[12] To this end much of Butler's briefing seeks to focus on his innocence or in the alternative, the deeply disputed nature of his disputes with Hinton and other employees. For purposes of the present decision, the Court is not deciding or ruling on the details of these disputes, which appear, in many ways to be subjective accountings by each party and a variety of witnesses. Butler, for example, disputes most of the statements that other witnesses attribute to him. At the same time, there is no dispute that Butler was the road crew supervisor and was involved in disputes with employees under his supervision and with other town officers, like the Town Clerk.

[13] Butler makes the argument that suspending him during plowing season constituted a public safety hazard and threat to the safety of the general public as it significantly compromised the Town's ability to plow and render its public highways safe and passable without him. This position, however, is not consistent with the case law on

reasons, Defendant Town is entitled to summary judgment on Plaintiff Butler's claim of wrongful termination based on public policy (Count IV) and partial summary judgment on the claim of constructive discharge (Count I) as a matter of law.

B. Hostile Work Environment

"The law is certainly no stranger to the notion that an action, binding if voluntary, is released from its conclusiveness if, in the eyes of the law, it is not validly voluntary." *In re Bushey*, 142 Vt. 290, 291–292 (1982). However, "[a] difficult employment environment can generate a voluntary resignation. Involuntariness, in this sense, must be the product of purposeful actions directed at obtaining the resignation." *Id.* at 298; *In re Moriarty*, 158 Vt. 160, 165 (1991). In this case, Butler alleges that his resignation was a result of "difficulties and frustrations" stemming from inadequate selectboard responses to employee conduct. This argument, however, conflates two different issues. In a small municipality, it is not unreasonable to allege or conclude that selectboard members, as well as other town employees, had some general awareness of the disputes between Butler and Hinton. The facts, as alleged and supported by various statements in party and witness depositions, indicate that the issues, which extended over the course of a year, were known, in varying degrees and ways to individuals in the Town, including selectboard members.[14] This was particularly true as neither Butler, nor Hinton, appears to have been reticent about discussing their side of this roiling dispute. Awareness, to some degrees or another, of a dispute is different, however, from being confronted

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public policy exemptions that focus not on the impacts of discipline or termination but on the reasons and basis for such negative employment actions. See *Boynton v. ClearChoiceMD, MSO, LLC*, 2019 VT 49, ¶ 10, n.5 (rejecting a broader interpretation of the public policy exemption in a whistleblower scenario where future harm might occur but is not tied to the underlying discipline); see also *Lo Presti v. Rutland Reg'l Health Servs., Inc.*, 2004 VT 105, ¶¶ 22–24 (finding that discipline arising from a physician's actions done in violation of a workplace policy but consistent with a physician's ethical obligations constituted a violation of public policy). The protection, in other words, is not whether terminating or suspending an employee has the potential to cause harm for lack of the employee's services or skills but whether the basis for the discipline resulted from the employee acting in an ethical manner inconsistent with a workplace policy or because the employee was in the process of trying to prevent real and substantial harm to others in the workplace.

[14] The level of awareness that each selectboard member had is an issue in dispute. Plaintiff points to various depositions to suggest that various board members were aware of significant details, but the actions and statements of Hyslop, Perkins, and others indicate that their awareness of such details as well as the depth of the dispute were more superficial and passing than Plaintiff suggests. If the dispute rested solely on awareness, summary judgment would be inappropriate, but as noted above, both *Bushey* and *Moriarty* hold that constructive termination from a hostile workplace requires some affirmative or purposeful action and merely having awareness that there is an inter-personal dispute within a department is not sufficient.

with the issues and refusing to act or acting in manner that would create a hostile work environment.

The facts in this case indicate that Butler never took disciplinary action against Hinton and never sought to have the selectboard take disciplinary action against Hinton for his alleged issues with arriving on time and damaging town equipment.[15] The facts, even with all reasonable inference given to Butler, indicate that the selectboard became involved, slowly, over the course of several meetings beginning in late 2018. The selectboard's responses were driven by reaction to information and formal complaints, like the April 11th complaints from road crew member Auger and the Town Clerk, rather than evincing any consistent or purposeful effort against Butler. To the extent that Butler felt "frustrated" at the selectboard's inaction, this appears to have arisen because while he would vent about his difficulties to individuals, he never took disciplinary action, nor did he at any time ask the selectboard to act. At most, Butler can only note examples where the selectboard could have acted but did not. This alone is not sufficient as a matter of law to establish a hostile workplace necessary to give rise to constructive discharge.

By way of example, Plaintiff cites, in part, to the selectboard's inaction to the statements that individuals made during the 2019 town meeting in objection to the proposed budget and raise for Butler. Even if the Court infers that Hinton organized and encouraged these statements, there is no evidence that the selectboard or its members participated in the planning or had any specific knowledge that such objections would be made. At most, the evidence allows an inference that board members had some awareness that Hinton had something planned, but there is no evidence or support as to any knowledge of what was planned. Further, the evidence shows that despite these objections, the town members passed the budget and raises without alteration. Given the political success of the item, it is unclear what harm or negative impact the incident had on Butler, apart from subjecting him to negative criticism, which is not uncommon for any public employee to experience. See *Stetson v. NYNEX Service Co.* 995 F.2d 355, 360 (2d Cir. 1993) (noting that criticism of an employee's work, even unfair criticism, is not sufficient to create a constructive discharged). It is also unclear what the selectboard could have done. As

[15] It is not clear from the record if the damage that Hinton is alleged to have done to the town's equipment was the result of negligence, poor job performance, or accidents.

noted above, the selectboard was not in control of the town meeting under 17 V.S.A. §§ 2657, 2658. While board members could have offered a response, the choice was discretionary, and it is equally possible to conclude from the facts that the board saw that the situation was minor and that a response was not necessary. To the extent that the board could have investigated the incident after the meeting and sought to determine whether Hinton had organized the objections, there was simply no need. The item had passed, and as the Town has noted, any investigation would necessarily have involved First Amendment issues, raising the stakes of such an investigatory process without clear benefit to the Town.

The result is that there is no evidence of purposeful selectboard action aimed at creating a hostile work environment or aimed at obtaining Butler's resignation. Instead, the evidence is that the board moved in a reactive, but relatively deliberate manner to address the issues formally raised and brought to the board for action. As the Vermont Supreme Court has noted, "the cases which have found involuntary discharge to have occurred consistently reveal sustained discriminatory acts by management . . . or at the least, a serious infringement of a fundamental right." *Bushey*, 142 Vt. at 298.

Beyond the contention that the selectboard created a hostile workplace prior to the April 17th meeting, Butler also centers his constructive discharge on the selectboard's actions at the April 17th meeting and thereafter. Looking first at the April 17th meeting, Plaintiff states that he was surprised and caught off guard by the selectboard's proposed discipline. Nevertheless, the proposal or imposition of discipline along with any facts associated with the meeting do not suggest or allow an inference that Butler's resignation was anything but voluntary. *See Bailey v. New York City Board of Education*, 536 F.Supp.2d 259, 266 (E.D.N.Y. 2007) ("W]hen an employee resigns rather than respond to disciplinary charges, the resignation cannot later be construed as a constructive discharge."); *see also Green v. Town of East Haven*, 952 F.3d 394, 405 (2d Cir. 2020) (discussing prior constructive discharge cases and noting that where termination is never mentioned or suggested, then there can be no prima facie case) (discussing *Stetson v. NYNEX Service Co.*, 985 F.2d 355, 360 (2d Cir. 1993)).

After his resignation, Butler contends that he had the right to withdraw his resignation at any time prior to the end of his two-week notice period. While this position treats an informal policy as something akin to a vested right, the debate as to how binding such a policy is on the

Town is largely moot because the record indicates that Butler never revoked or withdrew his resignation. *But see Messina v. 1199 SEIU United Healthcare Workers East*, 453 Fed. Appx. 25, 27 (2d Cir. 2011) (affirming that a grievance regarding actions taken to rescind a resignation made to a company that had previously accepted such revocations was without merit because the company was not bound to accept all rescissions).

As noted above, Butler presented his resignation at the April 17th meeting. At least one member of the selectboard suggested that he take the weekend to consider it. Butler did not agree to do so, but he did not reject the option outright.[16] Following the executive session, the board announced Butler's resignation on the record. While Butler contends that this action began to lock him into his resignation, the acknowledgment did not function as either evidence of the board's intent or force him into his resignation. It was the reporting of an objective fact. Butler had resigned.

Shortly after the April 17th meeting, board member Hyslop is alleged to have stated that Butler would not be getting his job back, but this information was not communicated or known to Butler at the time, and there is no evidence that Hyslop or the board took any action on this statement. *Tulino v. City of New York*, 813 Fed. Appx. 725, 727–28 (2d Cir. 2020) (determining that statements by an employer that an employee "had no place here" was insufficient without further context to give rise to a jury issue that employer sought to compel resignation). Four days later, the Town Clerk communicated with Butler regarding his final paycheck. Butler's version of this conversation differs from the Town Clerk's. Butler contends that he did not request the paycheck, but states that it was offered by the Town Clerk. Accepting Butler's version for the purposes of analyzing this motion, the exchange does not give rise to circumstances that would indicate that Butler was foreclosed from withdrawing his resignation.[17]

The subsequent communications indicate that Butler, while having the opportunity, never revoked his resignation. To this end, Butler remained in communication with selectboard

[16] There is a dispute as to whether Butler outright refused the opportunity or simply refused to respond. Either way, there is no dispute that he did not affirmatively accept or alter his resignation at that time and that his resignation was effective the moment it was delivered. *See Green v. Brenan*, 578 U.S. 547, 564 (2016) (finding that a resignation becomes effective for purposes of a constructive discharge claim "when the employee gives notice of his resignation, not on the effective date of that resignation").

[17] Butler's version of the events indicates a Town that was ready and willing to accept his resignation and move forward, but nothing in these actions either separately or collectively indicated that the Town was not willing to accept Butler's reconsideration.

member Perkins and communicated various conditions that he wanted the Town to impose before he would agree to return. It appears that the selectboard was willing to talk with Butler, but such conversations were never begun.[18] The evidence does not indicate any purposeful action or plan to keep Butler from revoking his resignation or forcing him to remain resigned. This was entirely a decision within Butler's control and power to make, and he elected to keep his resignation in place. To the extent that any of the evidence could support an intent by the Town to refuse Butler's reinstatement, this remains an untested proposition. The question was never put to the Town whether to accept Butler back into his previous position. In the end, Butler never communicated any unconditional withdrawal of his resignation. Instead, Plaintiff placed substantial conditions on his return that were inconsistent with would have required alterations to the scope of his duties. The determination by the Vermont Supreme Court in *Bushey* is equally applicable to the present case:

> By his failure to try to withdraw his resignation under the facts before us, the grievant elected not to test the claim that [Defendant] was intentionally forcing his resignation. Instead his case must now rest on the strength of inferences sought to be drawn from the managerial actions already discussed. For the reasons already noted, those actions do not sustain his contention."

Id. Based on Butler's failure to try to withdraw his resignation or test the Town's position, the record does not support the inference that the Town acted in any way against Butler to block or prevent him from rescinding his resignation. The evidence indicates, even taking all reasonable inference into Butler's favor, that the resignation made on April 17th was never revoked, and this resignation controls the end of Butler's employment as a voluntary act that cuts off any claims of improper or wrongful termination can only be overcome with evidence of a constructive termination. *Pena*, 702 F.2d at 325; *In re Moriarty*, 156 Vt. at 164–65.

In this case, there is no evidence to support a claim of constructive discharge in either the facts leading up to his resignation, the meeting itself where the resignation occurred, or in the two weeks following the notice of resignation. To the extent that Butler might have claimed that

[18] As discussed above, the April 26, 2024 communication on which Butler relies as evidence of his intent to return without conditions does not states as much and any inference that it should have been understood as such is beyond the reasonable inference as it takes a statement out of context and implies more than a reasonable observer would understand. There is a question of how willing the selectboard would have been to have further conversations and meeting with Butler. His conversations with selectboard member are complicated by the fact that Perkins resigned his position in late April but never informed Butler. This question is mooted by the fact that Butler never communicated an unconditioned intent to revoke the resignation or return.

the April 17, 2019 discipline was unfair and wrongful, those claims were waived by his subsequent voluntary resignation. Based on the lack of evidence to support a claim of constructive discharge or sufficient evidence to raise a factual issue on whether his resignation was voluntary, Defendant Town is also entitled to summary judgment on this basis for the remaining portions of Plaintiff Butler's claims for wrongful termination (Count I) as well as Butler's claims for promissory estoppel (Count II); and breach of the covenant of good faith and fair dealing (Count III) as a matter of law. This analysis also gives separate and additional grounds for the Town's motion for summary judgment on Butler's claim of wrongful termination for public policy (Count IV).

IV. Breach of the Covenant of Good Faith and Fair Dealing

In addition to the fact that Plaintiff Butler voluntarily resigned, thereby removing any potential factual claims arising from the Town's disciplinary actions, there is an additional ground on which the Court relies for dismissing Butler's claim for breach of the covenant of good faith and fair dealing. As the Vermont Supreme Court has noted in several decisions, the covenant of good faith and fair dealing does not apply to at-will employment and effectively constitutes "an objection to the other party's freedom to avail itself of the at-will arrangement by terminating the agreement for reasons that the other party does not accept." *LoPresti*, 2004 VT 105, at ¶ 39 (quoted in *Boynton*, 2019 VT 49, at ¶ 6); see also *Ross*, 164 Vt. at 23. In this case, Butler's at-will employment status rendered the covenant inapplicable to him.

Based on this additional ground, Defendant Town is entitled to summary judgment on Plaintiff Butler's claim of breach of the covenant of good faith and fair dealing (Count III) as a matter of law.

V. Negligent Supervision

Plaintiff's claim for negligent supervision relies on the existence of some underlying tort. *Haverly v. Kaytec*, 169 Vt. 350, 357 (1999). Butler has alleged that his colleagues were difficult to supervise and that the Town did not take sufficient corrective action. Butler, however, does not allege that they committed any actionable tort against him that Defendant could have prevented by means of employee supervision. Restatement (Second) of Agency § 213 (1958).

Further complicating Butler's claim is that in his capacity as Hinton and Auger's direct supervisor, Butler never took or sought disciplinary action against either employee.[19]

Construing the evidence that give the most favorable inferences to Defendant, the record indicates that there is no evidence of either negligence or other tortious conduct by the employees of the Town against Butler. Defendant Town is therefore entitled to summary judgment as to the claim of negligent supervision (Count V).

VI. Tortious Interference

> To bring a valid claim of tortious interference with a prospective economic advantage, a plaintiff must plead: (1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional act of interference on the part of the interferer; (4) damage to the party whose relationship or expectancy was disrupted; and (5) proof that the interference caused the harm sustained.

Skaskiw v. Vermont Agency of Agriculture, 2014 VT 133, 198 Vt. 187. Here, Plaintiff has failed to put sufficient facts in dispute to meet elements three and five of tortious interference. Under Vermont law, Defendant Town is the proper defendant in actions against municipal officers. 24 V.S.A. § 901(a). However, Plaintiff has not sufficiently alleged that members of the selectboard individual actions interfered with his contractual relationship against the town—rather than simply properly acting as agents of the town with respect to his employment. Butler's argument on this point is that he would have named the individual town officer except for the requirements of 24 V.S.A. § 901a, which requires all actions against a municipality to be brought in the name of the municipality, even if they extend against individual officers. This position, however, does not take into account that Section 901a only covers officers, employees, and volunteers of a municipality to the extent that the underlying actions fall within the "scope of employment." In this case, there is no evidence that the selectboard acted beyond its authority as a selectboard, which has final oversight over town employees and their employment with the Town.

[19] In his briefing, Butler recites the numerous incident reports involved with Hinton damaging or destroying town equipment. It is unclear from these documents whether Hinton intentionally, recklessly, or negligently caused these damages or if they were the result of accidents or other unavoidable situations. Similarly, despite Butler's briefing about Hinton's persistent tardiness, there is no evidence or indication that Butler took disciplinary action or sought the selectboard to take action against Hinton for these alleged violations. Given that Butler was in charge of the day-to-day management of the road crew, it would be inconsistent to conclude that the Town had breached its duty to supervise the road crew parties in relation to Butler when Butler never exercised either his prerogative to supervise or directly laid the issue before the selectboard, which relied upon Butler to manage and lead the department.

Tortious interference requires the tortfeasor to interfere with a business or contractual relationship between the plaintiff and a third-party. *Gifford v. Sun Data, Inc.*, 165 Vt. 611, 613 (1996). In this case, Butler urges the Court to view the selectboard as different than the Town and the board's actions as effectively interfering with Butler's employment relationship with the Town. This reasoning is unsustainable for the following reasons.

First, it divides the principal and agent relationship in a manner that is inconsistent with agency law. The relationship between an agent and a principal is defined by a series of intertwining duties and obligations. An agent is obligated to several duties of loyalty and to act with authorization. See, e.g., Restatement (Second) of Agency §§ 376–398, 432–441 (laying out the various duties of loyalty, fiduciary, communication, care, skill, and good conduct flowing between a principal and agent). The liability of an agent to a third-party is also defined by the Restatement, which limits and modifies the liability of the agent under such circumstances. In this particular situation, Section 357 of the Restatement states that an agent "who intentionally or negligently fails to perform duties to his principal is not thereby liable to a person whose economic interests are thereby harmed." Restatement (Second) of Agency§ 357 (1958).

While the Court could envision a scenario where an agent, such as a town employee or officer, acted in such a manner as to fail the duties within their position or the scope of their office (and agency to the municipality), a party would have to establish that the actions went beyond scope of their office and the limitations of Section 357 of the Restatement. In effect, that the agent went beyond their scope of authority and acted in a manner completely outside of the agency relationship. In this case, there is no evidence of any a breakdown in the agency relationship between the selectboard members and the Town. While there is, for the purposes of the present motion, a dispute as to whether the actions of the board constituted failures to strictly perform their duties and whether their application of discipline was correct and appropriate, there is nothing in the facts to suggest that the board went beyond the scope of their office such that they created liability that would fall outside of Section 357.

Second, Butler's position is that the provisions of Section 357 can be overcome if there is evidence of malice, bad faith, ill will, spite, hostility, or deliberate intent to harm. *Preyer v. Dartmouth College*, 968 F.Supp. 20, 26 (D.N.H. 1997). In *Preyer*, the allegation was that the plaintiff's supervisor made derogatory statements based on race and acted to prevent her from

securing a permanent position with the college. As *Preyer* describes this exception, it falls into both the exception of liability going beyond the general rule of agent immunity under the Section 357 as well as the requirements of 24 V.S.A. § 901a. In *Preyer*, the cause of action was against the individual supervisor, not against Dartmouth College, the employer. In this case, Butler has not alleged or filed a cause of action against any of the individual selectboard members. While he has sought to assign these causes of action to the Town under 24 V.S.A. § 901a, that statute explicitly limits the Town's liability and the obligation to name the Town as a defendant to actions taken within the scope of employment. By not naming the individual selectboard members as defendants or alleging specific actions of malice or ill will to them as individuals, Butler cannot turn to this exception and use the provisions of Section 901a to effectively bring a claim of tortious interference against the principal.

Third and distinct from the principal agent issues, Butler's theory of liability under this claim assumes that there is a distinction between the selectboard, acting as the selectboard, and the Town as a municipal corporation. Under 24 V.S.A. § 872, the selectboard has general oversight and supervision or the town and authority to perform all function not assigned by law to another officer. This power has been interpreted to create broad authority for the selectboard to act on behalf of the municipal corporation. *L'Esperance v. Town of Charlotte*, 167 Vt. 162, 169–70 (1997). In small municipalities, such as Westmore, there is no other municipal authority to rival the scope and power of the selectboard to conduct the business of the Town. Therefore, when the selectboard acts, the Town acts. Again, this is not to suggest that a poor decision by a selectboard is without review or recourse per se, but it is to say that there is insufficient difference between the actions and decision of the selectboard and the municipal corporation that would be necessary to sustain a claim of tortious interference between the selectboard members and the municipal corporation's relationship with another entity. To posit otherwise would be to breathe life into a platonic idea of the municipality that exist in the shadows beyond the actions and authority of the board. This is neither the intent nor the function of selectboards under Vermont law.

Fourth, even with all reasonable inferences given to Butler, the facts do not support the type of malice and ill will, which would be necessary to sustain a claim of tortious interference by the selectboard. The primary fact on which Butler's claim rests are the actions taken by the

board and other town officers after his termination, but these facts, which moved along his exit process do not demonstrate either malice or ill will for three reasons. First, they are not objectively bad or illegal acts. Second, they, at most, violate an informal policy. Third, Butler's actions as noted above did not include any action to revoke or undo his resignation. To the extent that Butler contends that the selectboard's actions were malicious, they do not overcome or alter the core fact that Butler voluntarily resigned and never revoked his resignation.

Based on this analysis, Defendant Town is entitled to summary judgment as to Plaintiff Butler's claim of tortious interference (Count VI).

VII. Due Process

In order to support a due process claim, Plaintiff Butler must show that he had a constitutionally protected right to employment. *Nelson v. Town of St. Johnsbury Selectboard*, 2015 VT 5, ¶ 36. This right must arise from a particular statutory or contractual source. *Id.*; *Handverger v. City of Winooski*, 2011 VT 130, ¶ 9. It is only after the claim to a property interest is established that the right to due process and specific process triggers. *Nelson*, 2015 VT 5, at ¶ 44. In this case, Butler claims both a right to employment (property interest) and the right to a hearing (due process) from the Town's employee handbook.[20] As noted above in Section I of this Decision, Butler was and remained an at-will employee without a property interest in the position and by extension no constitutionally protected right to such employment. In this respect, the analysis terminates because there is no claim to due process without an animating property interest.

In this case, however, there is the intervening impact of Butler's resignation. As noted by the Town, the Town never sought to terminate Butler. He resigned. As the Court has determined, this was a voluntary resignation and not a constructive termination. Therefore, even to the extent that the Court could consider a property interest, Butler's actions gave rise to his departure from employment with the Town, rendering the claim for due process without basis in fact or law.

[20] Even if the handbook did not lay out specific process for termination, the existence of a property interest would trigger certain due process rights for Butler in a termination context. *Nelson*, 2015 VT 5 at ¶¶ 44–46; see also *Hallsmith v. City of Montpelier*, 2015 VT 83, at ¶¶ 9–12 (applying analogous federal due process clause protections of the 14th Amendment).

Based on this analysis, Defendant Town is entitled to summary judgment as Plaintiff Butler's claim of due process violations under the Vermont Constitution (Count VII).

VIII. Open Meeting Law

Under Vermont Law, a municipality has the right to go into executive session to consider and discuss employee discipline. 1 V.S.A. § 313(a)(4). This right to go into executive session does not impair the right of an employee to seek a public hearing if formal charges are brought. Id. The right to go into executive session for this purpose does not require the board to make a finding that premature public knowledge would result in a substantial disadvantage to one or more parties, as subsection 313 (a)(1) requires. See 1 V.S.A. § 313(a)(1); *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, 104 (1993).

In this case, the Town noticed an emergency meeting for April 17, 2019. The Town Clerk posted notice of this meeting in compliance with 1 V.S.A. § 312(d)(1).[21] It properly invoked the executive session provisions of Section 313(a)(4), and the board began to lay out the proposed discipline and issues to Butler. As an at-will employee, Butler was not entitled to additional due process or specific hearing procedures for this intermediate discipline. To the extent that Butler had any right to seek a public hearing on these disciplinary issues, he did not invoke this right. Under Section 313(a)(4), this is his right to invoke or waive. Instead, as the Town notes, Butler tendered his resignation and left the meeting.

Under these facts there is no evidence that Butler requested public process, and there is no legal basis to conclude that the selectboard had an obligation to stay the proceedings and convene them as a public hearing or to notice them as such. There was also—once Butler delivered his resignation—no action for the board to take. After Butler chose not to oppose the discipline but to resign, the matter was effectively ended, and there was no further action or decision for the board to take either in executive or public session. The record indicates that the board came out of executive session, announced the resignation, and adjourned shortly thereafter.

[21] Butler contests whether notice of the meeting was properly posted, but he does not point to specific evidence that would establish a factual basis to deny or refute the Town Clerk's testimony regarding posting. *Mello v. Cohen*, 168 Vt. 639, 641 (1998) (mem.).

There is also the issue of 1 V.S.A. § 314, which allows for a safe harbor and curative period before violations of public meeting can give rise to damages. Under Section 314, an individual who is aggrieved by the actions of a town taken in derogation of open meeting law must first give the town a chance to cure the violation. In this case, however, the notice sent by Butler's attorney came after Butler's resignation, which left nothing to cure. There was no public hearing to be conducted. Butler had voluntarily resigned leaving no further public hearing or decisions to occur.

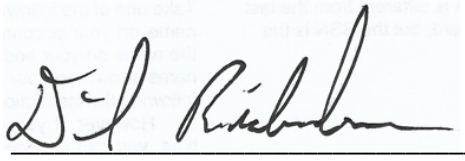
Finally, Butler's briefing on the issue of his right to a public hearing cannot overcome the facts that formal charges were never brought against him, and no termination proceedings commenced.

Based on this analysis, Defendant Town is therefore entitled to summary judgment as to Plaintiff Butler's claim of open meeting law violations (Count VIII).

ORDER

Based on the Court's conclusions and analysis under V.R.C.P. 56, summary judgment in favor of Defendant Town of Westmore is appropriate and is hereby **Granted** on all eight counts in Plaintiff's complaint. Defendant's Partial Motion for Summary Judgment concerning Plaintiff's requests for attorney's fees and punitive damages is **Dismissed as Moot** based on the present decision. Defendant shall draft a proposed final judgment in accord with this decision. Plaintiff Butler's Motion for Summary Judgment is **Denied**.

Electronically signed on 3/20/2024 12:53 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge