

VT SUPERIOR COURT  
STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 496-8-15 Wncv

ADAM HUBACZ  
Petitioner

2018 DEC 21 A 8:40

v.

THE VILLAGE OF WATERBURY, VERMONT  
Respondent

DECISION FOLLOWING REMAND

This case is on remand from the Vermont Supreme Court following its decision on interlocutory review. *Hubacz v. Village of Waterbury*, 2018 WL 1660050, 2018 VT 37. The court and the parties discussed the status of this case in light of the Supreme Court's decision at a status conference on July 10, 2018. The parties have divergent views of the Supreme Court's decision or, at least, how it affects this case.<sup>1</sup> In Mr. Hubacz's view, this case should proceed directly to a damages hearing before the superior court.<sup>2</sup> In the Village's view, the court should apply the interlocutory decision to the underlying record and rule in its favor on the wrongful termination issue. The parties also differ on whether there is any basis for a remand to the municipality for further hearing, whether any municipal entity exists to hear such a remand, and Mr. Hubacz's right to damages regardless of the interlocutory decision.

The parties have briefed their positions at length following the interlocutory decision and the status conference in this court at which the issues were discussed. The court has considered the Supreme Court's interlocutory decision, the record of municipal proceedings, the various court proceedings, and the parties' arguments in detail and now concludes as follows.

Mr. Hubacz was a police officer for the Village of Waterbury until the Village decided to terminate his employment. The legal controversy arose out of an unclear statutory regime controlling the termination of the employment of municipal police officers, 24 V.S.A. §§ 1931–1932, and the complication of related case law, *Gadhue v. Village of Essex Junction*, 133 Vt. 282 (1975). As a result, determining and applying the law proved to be difficult for both the federal district court of Vermont and the superior court. In its recent interlocutory decision, the Vermont Supreme Court has clarified and harmonized both the statutes and the case law.

<sup>1</sup> The court declines to address Mr. Hubacz's argument that applying the Supreme Court's decision to this case would be "retroactive" in some improper manner. The Court specifically directed this court to resume proceedings "consistent" with the Court's decision, not to ignore it.

<sup>2</sup> The Village no longer exists as such. See generally 2017, No. M-19 (Adj. Sess.). Because the Village's formal existence has no effect on this decision, the court declines to further analyze the merger of the Village into the new Edward Farrar Utility District. For ease of reference only, the court continues to refer to the respondent as the Village.

The Village of Waterbury Trustees decided to terminate Mr. Hubacz's employment in 2012 following a hearing. In their 2012 decision, the Trustees found that the Washington County State's Attorney had decided to refuse to prosecute any of Mr. Hubacz's cases. By stipulation of the parties, no evidence was presented at the hearing—and there is no finding—as to *why* the State's Attorney made that decision. The Trustees further found that, with such a small police force, the Village had no ability to keep Mr. Hubacz productively employed but occupied with work outside the scope of the prosecutor's nonprosecution decision.<sup>3</sup> It therefore terminated his employment. It cited 24 V.S.A. § 1932 as support for its legal authority to do so.<sup>4</sup>

Mr. Hubacz sought Rule 75 review of the termination decision in the federal district court. That court concluded, among other things, that the termination decision, as framed by the Village, was not authorized by § 1932 but might be authorized by 24 V.S.A. § 1931, as the court understood § 1931 as interpreted by *Gadhue*.<sup>5</sup> Rather than so rule, it remanded to the municipality for consideration, among other things, of whether Mr. Hubacz's termination was properly authorized by § 1931. The court did not conclude that the Village lacked authority to terminate Mr. Hubacz or that his termination was wrongful. It neither “overturned” nor “reversed” the termination.

On remand, the Village held another evidentiary hearing and issued another termination decision (the 2015 decision). It essentially concluded that the *same* rationale for Mr. Hubacz's termination that appeared in its 2012 decision, although framed under § 1932, supported termination under § 1931, as suggested by the federal district court, although it also clearly found that the State's Attorney's nonprosecution decision was due to concerns about his credibility as a witness given the constitutional obligation of a prosecutor to disclose such concerns to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963).<sup>6</sup> It also purported to conclude that Mr. Hubacz's termination was warranted under § 1932 based on the conduct underlying the nonprosecution decision as opposed to the nonprosecution decision itself.

Mr. Hubacz then sought Rule 75 review in this court. This court ruled that the Village's purported *new* decision under § 1932 was no different in substance than its decision under § 1931, which was that the nonprosecution decision itself, along with the inability to productively employ Mr. Hubacz otherwise, warranted his termination. This court interpreted § 1931 (and *Gadhue*) to *not* permit termination solely on that basis. It concluded that the case should be remanded to the Village once more.

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<sup>3</sup> In other words, there was no reasonable way to give Mr. Hubacz a “desk job” or some other work that would keep him employed but not conflict with the State's Attorney's nonprosecution decision.

<sup>4</sup> 24 V.S.A. § 1932 (a) provides that a municipal government may remove a police officer who “has become negligent or derelict in the officer's official duty, or is guilty of conduct unbecoming an officer.”

<sup>5</sup> 24 V.S.A. § 1931(a) provides that police officers “shall hold office during good behavior, unless sooner removed for cause.”

<sup>6</sup> Mr. Hubacz had been, as the expression goes, “*Brady* listed.”

Before any remand occurred, this court approved the Village's motion for interlocutory review. It certified one question only for review, which the Supreme Court accepted and recently resolved:

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 made clear as a general matter that § 1931, under *Gadhue*, permits the termination of an officer for "cause" generally. Section 1932, which applies more specifically to cases of negligence, dereliction of duty, and unbecoming conduct, describes three varieties of cause but does not limit the breadth of cause under § 1931. See *Hubacz*, 2018 VT 37, ¶¶ 11–16.

The Court further held that a State's Attorney's nonprosecution decision may supply cause for termination if (a) that decision cannot be reasonably accommodated without terminating the officer and (b) there is a valid basis for the nonprosecution decision.<sup>7</sup> See *Hubacz*, 2018 VT 37, ¶¶ 17, 18, 20. Moreover, a prosecutor's conclusion that *Brady v. Maryland*, 373 U.S. 83 (1963), would compel disclosures about the police officer's credibility to the defense, and thus would put the prosecution's cases at risk, is a valid basis for a nonprosecution decision. See *Hubacz*, 2018 VT 37, ¶¶ 20–23.

In this case, the Village *twice* has found that (1) the State's Attorney determined to not prosecute any of Mr. Hubacz's cases, and (2) the Village had no reasonable ability to keep Mr. Hubacz employed while keeping his employment activities outside the scope of the nonprosecution decision. In its second decision, the Village found that (3) the nonprosecution decision had a valid basis, which was that *Brady* would have required the State's Attorney to make disclosures to the defense in Mr. Hubacz's cases that could have affected his credibility as a witness. Thus, under § 1931, as interpreted by the Vermont Supreme Court, Mr. Hubacz's termination by the Village was not wrongful. However, the third necessary finding (a valid basis for the nonprosecution decision) was not described in the original termination decision.

The question, then, is whether the determination that Mr. Hubacz was lawfully terminated relates back to the original hearing and 2012 decision by the Village, in which case Mr. Hubacz has no viable damages claim, or only relates back to the second hearing and 2015 decision by the Village, in which case Mr. Hubacz may have a claim for damages for lack of employment between his initial termination and the 2015 decision.

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<sup>7</sup> The Vermont Supreme Court did not address the municipality's authority to terminate in a case in which there is a nonprosecution decision that cannot be accommodated without termination and has an asserted valid basis, such as a *Brady* determination, but that valid basis is alleged to be a pretext or otherwise an exercise of bad faith. The interlocutory question certified to the Supreme Court did not include that issue and the court need not speculate about it now. Prosecutorial discretion no doubt is "broad" and there has been no claim or asserted evidentiary basis for any conclusion that the nonprosecution decision in this case exceeded the boundaries of prosecutorial discretion. *State v. Hazelton*, 2009 VT 93, ¶ 9, 186 Vt. 342.

The court concludes that Mr. Hubacz has no viable damages claim remaining in this case for the following reason. The Village's initial 2012 termination decision lacked a finding now clarified by the Vermont Supreme Court as required—that there was a valid basis for the nonprosecution decision. However, in 2012, the parties had specifically stipulated that the State's Attorney had decided to not prosecute Mr. Hubacz's cases and that *why* he had made that decision would not be addressed at the termination hearing. Mr. Hubacz disputed the underlying conduct that gave rise to the nonprosecution decision and how he was treated at the pre-polygraph interview. However, he has *never* disputed that the nonprosecution decision was based on him being *Brady* listed.

Ultimately, though the initial termination decision lacked a necessary finding, the second (2015) termination decision that included that finding was not predicated on a new, different, or separate basis for termination. Both termination decisions were fundamentally based on the prosecutor's same nonprosecution decision and the same reason for it. The remand order from the federal district court in between those decisions kept the administrative proceeding in an interlocutory phase. See *Ott Rutland, LLC v. Vermont Dep't of Taxes*, No. 2006-308, 2006 WL 5838196, at \*1 (Vt. Nov. 2006) (unpub.) (discussing interlocutory nature of remand mandate). In 2015, the omitted finding was supplied. It could not have been made in 2012 because of the parties' stipulation, at which time they were unaware of what the Supreme Court would ultimately require as a necessary element. In these circumstances, the valid basis found in 2015 has retroactive effect as support for the 2012 termination, and thus Plaintiff does not have a claim for damages for wrongful termination.

The Village lawfully terminated Mr. Hubacz's employment. There is no cognizable damages claim or other relief available in this case. There is no cogent basis for relief under Rule 75 in this case.

#### ORDER

For the foregoing reasons, the Village's termination of Mr. Hubacz's employment is affirmed.

Dated at Montpelier, Vermont this 20<sup>th</sup> day of December 2018.

Mary Miles Teachout  
Mary Miles Teachout  
Superior Judge