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SERVING AND STRENGTHENING VERMONT LOCAL GOVERNMENTS

LEGAL AND REGULATORY NOTES

Police Chief's Termination Not Supported by Town's Hearing Record

Following two separate meetings in October 2009 at which Vernon Police Chief Kevin Turnley responded to questions about his knowledge of a sex offender's residence in the town, the Vernon Selectboard sent the chief a letter accusing him of dereliction and conduct unbecoming an officer. In the letter, the selectboard informed the chief that his employment was terminated immediately and that it had scheduled a hearing for the chief under 24 V.S.A. § 1932(a). That statute requires that when it is asserted that a police officer "has become negligent or derelict in his official duty, or is guilty of conduct unbecoming an officer," the selectboard must give the officer notice and hold a hearing to determine whether the officer is "guilty of the charges as offered." 24 V.S.A. § 1932(a),(d). *Turnley v. Town of Vernon*, 2013 VT 42.

The selectboard's letter alleged that the chief had "knowingly and deliberately made false statements to the Board and to the public at two public meetings concerning [his] knowledge related to a potential public safety issue, in particular, the residence in the Town of Vernon of a registered sex offender." At the hearing, the selectboard restated these charges and called a series of witnesses to describe the chief's receipt of an email from the state Department of Public Safety regarding the relocation of a sex offender and the chief's subsequent public statements at the October meetings. At the conclusion of the hearing, the selectboard determined that the chief had received notice that the sex offender moved into the town in August 2009 and that thereafter the chief twice made false statements at the October 2009 meetings about his knowledge of the sex offender's presence.

The chief appealed the selectboard's decision to the superior court, which conducted an on-the-record review in accordance with Rule 75 of the Vermont Rules of Civil Procedure. In a Rule 75 appeal, the superior court does not independently weigh the evidence or make its own factual findings, but simply determines whether the local board followed the proper procedure and whether there is enough evidence in the record to support the selectboard's decision. The court must uphold factual findings of a selectboard if any credible evidence supports the conclusion.

The superior court rejected the chief's procedural and due-process claims but reversed the Vernon Selectboard's termination of him. The court concluded that the evidence supported the selectboard's determination that the chief twice made inaccurate statements regarding his awareness of the sex offender's presence. Nevertheless, the superior court was "unable to find evidence in the record to confirm that the [chief's] statements were made with knowledge of their falsehood." In other words, the superior court was unable to determine from the selectboard's hearing record that that the chief had made any intentionally false statements – the basis of the selectboard's dismissal of the chief.

The Vermont Supreme Court affirmed the superior court's reversal, but on different

grounds. It concluded that the Vernon Selectboard failed to make written findings required to support its decision. In its original dismissal letter, the selectboard alleged that the chief had "knowingly and deliberately" made false statements. In its hearing notice, the selectboard used the same phrase. In its final decision, however, the selectboard only found that the chief gave "false testimony" without reference to his state of mind. The selectboard's findings did not make clear whether it actually concluded the chief knowingly and deliberately misled the public, as it had alleged.

According to the Supreme Court, a finding with respect to the chief's intent, (i.e., "knowingly and deliberately") when he made the erroneous statements "was not only an essential mental element of the misconduct charged; the chief's intent also presents the determinative factor in assessing whether the alleged conduct was sufficient to permit dismissal under our officer-tenure statute." While a wide range of public and private behavior might be grounds for dismissal under 24 V.S.A. § 1932(a), the chief's misstatements and his failure to publicly disseminate information regarding a low-level sex offender could not, in and of themselves, constitute dereliction of duty. The selectboard's ultimate finding – that the Vernon chief gave "false testimony" – could be interpreted in one of many ways but was not sufficient to support the selectboard's determination to fire him.

The *Turnley* decision is instructive. On the positive side, Rule 75 and the *Turnley* opinion reinforce local decision making by acknowledging the level of deference that should be afforded local officials in these difficult situations. However, at the same time, the *Turnley* decision sets a fairly high bar – if the termination process is flawed, the record is incomplete, or the final decision is lacking, a reviewing court is likely to vacate the decision – which can result in additional litigation, delay, and significantly increased legal expenses for the town.

When contemplating termination of a police officer under 24 V.S.A. § 1932(a), municipal officials (and the attorneys assisting them) must keep in mind that a legal appeal of a termination decision (which is almost a certainty) will be conducted under Rule 75 of the Vermont Rules of Civil Procedure. In a Rule 75 appeal, the reviewing court will give significant leeway to the local decision and will uphold the local decision if the correct standard was applied and any credible evidence supports the board's conclusion. The primary question for the reviewing court is not whether it would rule differently but whether, based on the evidence contained in the record, a reasonable person could have reached the same decision as the local board.

This naturally places a greater focus and emphasis on process – giving proper notice, holding a fair hearing, issuing a clear decision, and creating a complete record to support that decision. Here a court is going to be far less forgiving to local decision makers. As the *Turnley* decision reminds us, there is no "small town exception" to Rule 75, and getting the *process* right is just as important as getting the *decision* right.

The *Turnley* decision is posted online at http://info.libraries.vermont.gov/supct/current/op2012-098.html.

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