

STATE OF MICHIGAN  
COURT OF APPEALS

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PATRICK J. DEVLIN,

Plaintiff-Appellant,

v

CIVIL SERVICE COMMISSION,  
DEPARTMENT OF TREASURY, and GAMING  
CONTROL BOARD,

Defendants-Appellees.

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UNPUBLISHED  
February 11, 2010

No. 287826  
Ingham Circuit Court  
LC No. 08-000770-AS

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction). The court found that plaintiff had failed to exhaust his administrative remedies and that it therefore lacked jurisdiction. We affirm.

Plaintiff argues on appeal that the court erred by relying on the fact that he failed to exhaust his administrative remedies because Const 1963, art 11, § 5 provides an exception for plaintiffs seeking injunctive relief and mandamus in the circuit court, and because exhaustion of administrative remedies would have been futile. We review de novo the circuit court's ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(4). *Papas v Michigan Gaming Control Bd*, 257 Mich App 647, 656; 669 NW2d 326 (2003). Jurisdictional questions are also reviewed de novo as questions of law. *Id.* at 656-657. Motions for summary disposition involving questions of subject-matter jurisdiction are properly brought under MCR 2.116(C)(4), and summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies. *Id.* at 656.

Defendant Michigan Gaming Control Board (MGCB) employed plaintiff as a compliance officer. In late 2007, the MCGB posted a position opening for the Deputy Director of the Licensing Division. Plaintiff believed that he was well qualified for the position and submitted his application. Plaintiff was not selected for the position. Plaintiff filed a grievance with defendant Civil Service Commission (CSC) in February 2008, alleging that the person who received the position was not qualified and that the CSC had failed to fulfill its constitutional mandate to determine the qualifications of applicants based exclusively on merit. See Const 1963, art 11, § 5. Plaintiff's grievance on the issue remained pending in the administrative

process at the time of the hearing on defendants' motion for summary disposition. Plaintiff also complained that four licensing agents of the MGCB were similarly hired in disregard of the CSC's constitutional obligation to evaluate all candidates based on merit.

The CSC is an administrative agency rooted in the constitution. Const 1963, art 11, § 5. "Pursuant to Const 1963, art 11, § 5, the CSC, among other things, shall make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service." *Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 576; 531 NW2d 790 (1995). The CSC also functions to resolve employment disputes of state employees. *Womack Scott v Dep't of Corrections*, 246 Mich App 70, 80; 630 NW2d 650 (2001).

It is well settled that a civil service employee must exhaust his administrative remedies before filing suit in circuit court. *Mollett v City of Taylor*, 197 Mich App 328, 337; 494 NW2d 832 (1992). The doctrine of exhaustion of administrative remedies is premised on the following maxims: (1) an untimely resort to the courts may result in delay and disruption of an administrative scheme; (2) any type of appellate review is best made after the agency has developed a full record; (3) resolution of the issues may require the technical competence of the agency; and (4) the administrative agency's settlement of the dispute may render a judicial resolution unnecessary. *Id.*

Plaintiff argued below that Const 1963, art 11, § 5 does not only establish the civil service and prescribe the method of selecting and promoting civil service employees, but that the last sentence of Const 1963, art 11, § 5 gives someone in his position the authority to seek injunctive relief and superintending control directly from the circuit court without first exhausting his administrative remedies. The cited language provides, "Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state." Const 1963, art 11, § 5. Plaintiff argued that this provision provides an exception to the exhaustion requirement and effectively gives him standing to grieve the hiring of other employees.

Exhaustion of administrative remedies is not an inflexible doctrine and is not required if review of the agency's final decision would not provide an adequate remedy. *IBM Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977). Moreover, administrative remedies need not be pursued where the process is, essentially, "an exercise in futility and 'nothing more than a formal step on the way to the courthouse.'" *OPEIU Local 512*, 209 Mich App at 577 (citation omitted). The exhaustion requirement may also be disposed of when there are no issues in controversy other than a constitutional challenge because a review board would not have the ability to address the constitutional claim and a court would have the authority to resolve the determining constitutional issue. *Id.* at 578.

Plaintiff cites *Calcaterra v Civil Service Comm*, 52 Mich App 27; 216 NW2d 613 (1974), and *Marsh v Dep't of Civil Service*, 142 Mich App 557; 370 NW2d 613 (1985), as cases in which this Court has upheld the constitutional exception to the exhaustion requirement. However, in *OPEIU Local 512*, 209 Mich App at 578, the Court determined that the "constitutional exception" to the exhaustion requirement was an outgrowth of the "futility exception," and held that "the exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge." The *OPEIU Local 512* Court discussed

*Calcaterra* and *Marsh*, and distinguished them by finding that, in those cases, “the plaintiffs’ theories were that they had suffered unconstitutional discrimination as prohibited by both Const 1963, art 11, § 5, and an independent statute that provided a right to sue in the circuit court.” *OPEIU Local 512*, 209 Mich App at 577-578. In contrast, the Court observed that the grievances presented by the plaintiff in *OPEIU Local 512* presented factual and policy issues that were intermingled with the underlying constitutional question, and therefore should have been left to the administrative process. *Id.* at 579.<sup>1</sup>

Here, as in *OPEIU Local 512*, there was no independent statutory cause of action that would have given plaintiff an independent right to sue in circuit court. Moreover, the mere presence of a constitutional issue, or an argument couched in constitutional terms, does not excuse the exhaustion requirement when there are factual issues in need of development and resolution by the agency. *Id.* at 578. This is true even if the administrative agency would not be able to provide all the relief requested. *Id.*; see also *Papas*, 257 Mich App at 664.

The instant case involves many questions of fact and departmental policy intermingled with the underlying constitutional question. Plaintiff asserted that he applied for a position for which he was well qualified, and alleged that while the MCGB administered some written essay questions and interviewed some candidates, he was neither asked to answer questions nor was he interviewed. However, there were no facts presented regarding the CSC’s function in the process, or the manner in which plaintiff’s candidacy was evaluated. Factual questions also existed concerning whether the hiring process comported with the CSC’s own requirement of appointing employees based on merit, efficiency, and fitness. For example, assuming that plaintiff satisfied the applicable definition of a “candidate,”<sup>2</sup> factual questions exist concerning which procedures of competitive examination and evaluation were utilized by the CSC to assess plaintiff’s merit and fitness as required by Const 1963, art 11, § 5.

In any event, plaintiff argues that it would be futile to file a technical grievance with the CSC regarding his allegations because he did not believe that he would be defined by CSC rules as a “candidate” for the deputy director position, resulting in a lack of standing to file a grievance over the decision. Additionally, plaintiff did not believe that he would have standing to have a grievance considered regarding the other regulations officer and manager positions for which he did not apply. However, a mere expectation that an administrative agency will decide a certain way is not sufficient to satisfy the futility exception. *Huron Valley Schools v Secretary of State*, 266 Mich App 638, 649-650; 702 NW2d 862 (2005); *W A Foote Mem Hosp v Dep’t of Pub Health*, 210 Mich App 516, 524; 534 NW2d 206 (1995). Courts will not presume futility in the

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<sup>1</sup> Unlike the plaintiffs in *Calcaterra* and *Marsh*, the plaintiff in *OPEIU Local 512* asserted no independent statutory claims that would have allowed it to sue directly in the circuit court. See *OPEIU Local 512*, 209 Mich App at 575-576.

<sup>2</sup> The CSC defines “candidate” as “a qualified person who requested to be considered for appointment to a specific position in the classified service and who was considered the appointing authority.”

administrative review process, and should assume that administrative agencies will discover and correct their own errors. *Huron Valley Schools*, 266 Mich App at 649.

Plaintiff also asserts that the administrative review process would be lengthy, and leave unlawfully hired employees in their respective positions. But even if a remedy is attended with delay, expense, annoyance, or even some hardship, it is not sufficiently “inadequate” to authorize judicial intervention before exhaustion of the administrative remedy. *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 360; 733 NW2d 107 (2007). As the court below noted, “there is nothing preventing Plaintiff from re-filing his complaint following exhaustion and raising the same arguments and claims he has raised in the present case.”

In sum, plaintiff submitted his grievance for consideration in the CSC’s administrative process, and then filed this suit prior to an administrative determination of the validity of the grievance. There are many questions of fact remaining with respect to plaintiff’s individual claims that require resolution separately from the constitutional question of whether the CSC evaluated the candidates’ qualifications based on merit. Allowing the administrative process to make a determination would fulfill the purposes of the exhaustion requirement by preventing the judicial disruption of an administrative scheme and allowing the development of a full record by the agency prior to judicial involvement. See *Mollett*, 197 Mich App at 337. The circuit court did not err by determining that plaintiff’s case did not present an exception to the exhaustion of administrative remedies requirement.

Because we find no error in the circuit court’s determination that it lacked subject-matter jurisdiction over plaintiff’s complaint, we do not consider the remainder of plaintiff’s arguments on appeal.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Brian K. Zahra