IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MILTON F. MOROZOWICH,	)
	) C.A. No. 99C-07-025 - JTV
Plaintiff,	)
	)
5.	)
	)
HARRIET SMITH WINDSOR, in her official capacity as State Personnel Director; DELAWARE CORRECTIONAL OFFICERS ASSN. (DCOA) a Union, and AMERICAN FEDERATION OF STATE AND COUNTY MUNICIPAL EMPLOYEES (AFSCME), a Local 247, a Local Union,	)
	)
Defendants.	)

Submitted: December 18, 2000
Decided: March 30, 2001

Roy S. Shiels, Esq., Dover, Delaware. Attorney for Plaintiff.

Sherry V. Hoffman, Esq., Wilmington, Delaware. Attorney for State.

Upon Consideration of Defendant's
Motion to Dismiss

VAUGHN, Resident Judge

ORDER

Morozowich v. Windsor, et al.
C.A. No. 00C-07-025
March 30, 2001

Upon consideration of the motion of defendant Harriet Smith Windsor, in her official capacity as State Personnel Director ("the State"), to dismiss the plaintiff's suit for lack of jurisdiction, the plaintiff's response thereto, and the record of this case, it appears that:

1. This is a declaratory judgment action in which the primary relief sought by the plaintiff is "a declaratory judgment establishing the proper construction of 19 *Del. C.* § 1304(b)".[1] This statutory provision is part of the Public Employment Relations Act ("PERA"). The State has filed a motion to dismiss the complaint on the grounds that the relief sought is beyond this Court's jurisdiction. For the reasons which follow, I have concluded that the "proper construction" of 19 *Del. C.* § 1304(b) is a matter within the jurisdiction of the Public Relations Employment Board ("PERB") and the Court of Chancery.

2. Prior to July 8, 1997, the plaintiff was employed by the Department of Correction as a "Teacher (Education Supervisor)". At that time persons employed as teachers by the Department of Correction were members of the Delaware Correctional Officers Association ("DCOA"). Teachers who were supervisors, however, including the plaintiff, were members of the American Federation of State and County Municipal Employees, Local 247 ("AFSCME"). Both DCOA and AFSCME are duly

[1] "Wherefore" clause of Count I of the complaint.

recognized bargaining units for the Department of Correction employees within their respective memberships, and both had collective bargaining agreements ("CBA's") with the Department of Corrections. Both CBA's contained a grievance procedure which provided for several steps, the last of which was arbitration before a third party.

3. The chain of events which led to this suit began with the state budget act for FY 97, which included the following epilogue language"

> The Department of Correction shall investigate the potential for transferring the responsibility for providing inmate education programs to other organizations in FY 1998. If such a transfer is to be implemented, employees currently employed in the Department of Correction, Bureau of Prisons, Office of Education (38-04-11) shall be given the opportunity to apply for positions in other state agencies.[2]

The Department's implementation of this provision resulted in the plaintiff's being demoted to a non-supervisory teacher position with a reduction in salary and job duties. It also resulted in his being moved from AFSCME to DCOA. In the meantime, AFSCME, due to these developments, filed a grievance on behalf of Teacher Supervisors, including the plaintiff, alleging violations of several articles of the CBA. On November 25, 1997 AFSCME, DCOA and the Department of

[2] 70 Del. Laws., C. 425 §211 (July 1, 1996).

Correction signed a memorandum which settled the grievance on terms which included some additional compensation for the affected employees, including the plaintiff. This resolution occurred at an intermediate step of the grievance process, not the final step which involves arbitration.

4. The plaintiff claims that he continues to have a grievance relating to employee rights arising from the merit rules and Title 29, Chapter 59. He contends that these rights, which relate to transfer and classification, were not resolved in the settlement agreement. He wishes to pursue his grievance as to these issues beyond the intermediate stage, to the arbitration stage. He claims that 19 *Del. C.*§ 1304(b) gives him the right to pursue his grievance on his own. This section is preceded by 19 *Del. C*. § 1304(a), which creates the obligation that a public employer bargain with a duly recognized employee organization as the exclusive representative of the group of employees it represents. Section 1304(b) reads in relevant part as follows:

> Nothing contained in this section shall prevent employees individually...from presenting complaints to a public employer and from having such complaints adjusted without the intervention of the exclusive representative for the bargaining unit of which they are a part, as long as the representative is given an opportunity to be present at such adjustment and to make its view known, and as long as the adjustment is not inconsistent with the terms of an agreement between the public employer and the exclusive representative which is then in effect.

The plaintiff contends that this statute gives him a right to pursue his grievance individually, even though the unions may not believe he has such right, so long as he

does not seek an adjustment that is inconsistent with one of the CBA's; that the relief which he seeks is not inconsistent with the CBA's; and that the unions' act of settling the grievance which AFSCME filed, based on provisions of the CBA's, does not preclude him from pursuing individually his grievance based on his merit rules and Title 29 rights. He asks this Court to enter a declaratory judgment adjudging that 19 *Del. C.* § 1304(b) gives him a right to pursue his grievance individually and that the State, therefore, is obligated to cooperate with him in allowing his grievance to move forward to the arbitration phase. Heretofore the State Personnel Office has refused to do so on the grounds that the unions consider the matter fully resolved on the basis of the November 25, 1997, settlement memorandum.

5. The State contends in its motion to dismiss that a public employer's failure to comply with any provision of the Public Employment Relations Act is, by statutory definition, an unfair labor practice;[3] that the Act specifically empowers and directs the Public Employment Relations Board to prevent any unfair labor practices and to issue appropriate remedial orders;[4] that if the plaintiff has a right under 19 *Del. C.* § 1304(b) to pursue a grievance to the arbitration phase under these circumstances, the State's interference with that right and its failure to comply with his request for arbitration is an unfair labor practice;[5] that the PERB, not this Court, has jurisdiction to determine

[3] 19 *Del. C.* §1307(a)(1),(6).

[4] 19 *Del. C.* §1308(a).

[5] The Court does not intend to suggest that the State necessarily admits that it is committing an unfair labor practice. In stating its arguments, however, the State acknowledges

whether an unfair labor practice has occurred; and that appeals from the PERB's decisions regarding alleged unfair labor practices go to the Court of Chancery.[6]

6. The plaintiff responds to the State's contentions by emphasizing that the substantive rights which he wishes to assert do not arise from the CBA's, but from merit rules and Title 29 provisions relating to classification and transfer; that the PERB has statutory oversight of matters relating to the collective bargaining process, employee representation, and disputes arising from CBA's, not merit rules or Title 29 issues; that the PERB's authority to prevent unfair labor practices is an authority to prevent those wrongs which are associated with the collective bargaining process, employee representation and issues arising from CBA's, not separate wrongs arising under the merit rules or Title 29; and that PERB has no jurisdiction to resolve his claim.

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that if the plaintiff has the rights which he asserts, the State's failure to proceed with arbitration would be an unfair labor practice.

[6] 19 *Del. C*. §1309.

7. The Supreme Court has noted that the interaction between the Public Employment Relations Act, on the one hand, and the merit rules and Title 29 on the other, can be "somewhat complex."[7] In this case the plaintiff emphasizes that the rights which he wishes to continue to grieve are merit rules and Title 29 rights over which the PERB has no jurisdiction. He emphasizes that the relief he seeks has nothing to do with a CBA. He argues that the PERB's authority to prevent unfair labor practices goes to issues relating to the collective bargaining process, employee representation, CBA's, and the like, not issues relating to the merit rules. While all of this may be true, the complicating factor in the plaintiff's position is that he relies upon 19 *Del. C.*§ 1304(b), a subsection from the Public Employment Relations Act, as the legal basis for pursuit of his grievance. He asks this Court to establish the "proper construction" of his rights under 19 *Del. C.*§ 1304(b).

[7] *AFSCME, Local 2004 v. State*, Del. Supr., 696 A.2d 387 (1997).

8. The Public Employment Relations Board is empowered by statute to administer the Public Employment Relations Act.[8] This power to administer includes the power to prevent unfair labor practices and to issue appropriate remedial orders.[9] It is an unfair labor practice for a public employer to interfere with or restrain an employee in or because of the exercise of any right guaranteed under the Public Employment Relations Act.[10] It would appear that it is also an unfair labor practice for an employer to refuse or fail to comply with any provision of the Act, regardless of whether a particular provision relates directly to collective bargaining or not.[11] Given the PERB's broad authority to administer the Public Employment Relations

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[8] 19 *Del. C*. §1301, 1306.

[9] 19 *Del. C*. §1308.

[10] 19 *Del. C*. §1307(a)(1).

[11] 19 *Del. C*. §1307(a)(6). It is noted that there is a reference to the PERB's responsibility to regulate collective bargaining in this subsection, but it appears to refer to the PERB's rules and regulations only. The subsection appears to make an employer's violation of any statutory provision of Chapter 13 an unfair labor practice.

Act, and the apparent reach of provisions defining unfair labor practices, the Court does not agree that unfair labor practices are necessarily limited exclusively to those matters pertaining to the collective bargaining process, employee representation, or CBA's. If the plaintiff has a right under 13 *Del. C.* § 1304(b) to pursue his grievance of his merit rules and Title 29 rights, then it would appear that the State's interference with this right, and its refusal or failure to allow him to do so, may constitute an unfair labor practice. Determinations of unfair labor practices are left to the PERB and, on appeal, the Court of Chancery. I conclude that it would be an intrusion into matters entrusted to the PERB and the Court of Chancery for this Court to consider the relief requested by the plaintiff.

9. The complaint alleges a second count claiming that the Department of Correction failed to complete a JAQ process with resulting adverse consequences to the plaintiff. A Court is not obligated to act on a request for a declaratory judgment if such judgment will not terminate the controversy.[12] Since I conclude that the Court is without jurisdiction to act on Count I, thereby leaving that count unresolved, I am not inclined to act upon Count II.

10. Therefore, the motion to dismiss will be granted unless the plaintiff elects, within 60 days, to have the case transferred to the Court of Chancery pursuant to 10 *Del. C*. § 1902.

IT IS SO ORDERED.

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[12] 10 *Del. C*. § 6506

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March 30, 2001

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Resident Judge

oc: Prothonotary
cc: Order Distribution