

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Robert P. Reeder
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Attorney for Defendant

**Re: Robert P. Reeder v. State Representative Nancy Wagner
C.A. No. 06C-09-025 RRC**

Submitted: November 15, 2006
Decided: December 4, 2006

Upon Defendant's Motion to Dismiss
GRANTED.

Dear Mr. Reeder and Mr. Brady:

Before the Court is Defendant's motion to dismiss Plaintiff's complaint. The threshold issue is whether Plaintiff has standing to bring an individual taxpayer lawsuit and/or a class action against Defendant for her alleged violation of 29 *Del. C.* § 5822, which prohibits elected state officials who are also employed by state agencies or educational institutions from being paid more than once for coincident hours of the workday. Because under 29 *Del. C.* 2504 only the Attorney General can bring such a suit, this Court holds that Plaintiff does not have standing to bring his claim. Therefore, Defendant's motion to dismiss is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed his complaint *pro se* on September 5, 2006. The complaint, which demands a trial by jury, states in its entirety:

COMPLAINT¹ SUMMARY OF COMPLAINT

1. Defendant Representative Nancy Wagner is a resident of the State of Delaware residing at
2. Plaintiff Robert P. Reeder is a resident of the State of Delaware residing at
3. At all relevant times hereto on information and belief, Defendant Representative Nancy Wagner was simultaneously employed by the Capital School District/Dover High School and as a State Representative of the State of Delaware.
4. Representative Nancy Wagner, Defendant has violated Delaware State Law on a continuous basis as follows:

COUNT I

Violation of 29 Del. Code Chapter 58. Laws Regulating The Conduct Of Officers And Employees Of the State.

- (a) State Representative Nancy Wagner received dual salary compensation as a teacher at Capital School District/Dover High School and as an elected Representative of the State of Delaware for work performed during concurrent time periods. This dual employment State of Delaware compensation includes but is not limited to 2/21/06, 2/23/06, 2/28/06 and 3/22/06.

WHEREFORE, plaintiff demands the following judgments against defendant.

- (a) An immediate cessation of any and all compensated dual employment behavior.
- (b) A return of funds to the Treasury of the State of Delaware for all dual employment compensated funds that were received within the statute of limitations of this complaint, including the accrual of interest.
- (c) The cost of this action.

¹ Handwritten next to the word “COMPLAINT” are the words “(CACT) CLASS ACTION.” This is the only part of the complaint that implicates class action relief.

In response, on October 13, 2006, Defendant filed a motion to dismiss the complaint alleging four grounds for dismissal. On October 27, 2006 Plaintiff filed both a response to Defendant's motion and a motion for summary judgment. Oral argument on the motion to dismiss was held on November 15, 2006.

II. CONTENTIONS

Defendant makes four arguments in her motion to dismiss. First she argues that Plaintiff has failed to comply with Superior Court Civil Rule 23, which states the requirements for class actions. In particular, Defendant contends that as a *pro se* plaintiff, Plaintiff cannot adequately represent the interests of the potential class. Secondly, Defendant asserts that Plaintiff has failed to state a claim upon which relief can be granted. Third, Defendant claims that Plaintiff lacks standing because under 29 *Del. C.* 2504 only the Attorney General can initiate a suit like the one Plaintiff is attempting to bring. Finally, Defendant alleges that Plaintiff's complaint requests injunctive relief, a remedy that only the Court of Chancery can provide.

In response, Plaintiff contends that he has experience from past cases he has litigated *pro se* which would enable him to fairly represent the class. Plaintiff concedes that he may not have standing to request the relief of the return of funds to the State Treasury; however, he maintains that the Court could still grant his motion for summary judgment, whereby the Court would potentially declare that Defendant engaged in dual employment activities in violation of 29 *Del. C.* § 5822.² Furthermore, Plaintiff asserts that he is not truly seeking injunctive relief, but rather a declaratory judgment, which, he asserts, this Court has the authority to grant.

² Section 5822 requires State employees to have their pay reduced for time missed "during the course of the employee's normal workday . . . while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions." In his summary judgment motion, Plaintiff alleges that Defendant, while employed as a teacher in the Capital School District, left work at least four times in February and March 2006 during her "duty free planning period" to perform her paid legislative duties without adjustment to her teachers' salary. His motion for summary judgment further states that although he has alerted the Attorney General of this alleged violation, there has been no action taken on the matter, thus forcing him to file his lawsuit.

III. DISCUSSION

A. Standard of Review

When deciding a motion to dismiss, “all factual allegations of the complaint are accepted as true.”³ A complaint will not be dismissed under Superior Court Civil Rule 12(b)(6) “unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief.”⁴ Therefore, the Court must determine “whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”⁵

Rule 12(b)(6) also provides that if “matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment.” Although Plaintiff subsequently filed a motion for summary judgment with various attached exhibits, the Court does not need to consider any of the facts presented in that motion to reach the threshold issue of standing. Therefore, Plaintiff’s additional filings do not convert Defendant’s motion to dismiss into a motion for summary judgment.⁶

B. Standing

Defendant argues that Plaintiff lacks standing to bring his claim because under 29 *Del. C.* 2504(3) only the Attorney General can initiate such a suit on behalf of the State.⁷ Section 2504, which outlines the powers and duties of the Attorney General, states in pertinent part:

The . . . Attorney General shall have the following powers, duties and authority . . .

(3) Notwithstanding any other laws, to represent as counsel in all proceedings or actions which may be brought on behalf of or against them

³ *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. Ct. 1972), *aff’d* 297 A.2d 37 (Del. 1972).

⁴ *Id.*

⁵ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁶ *Pfeiffer v. Price*, 2004 WL 3119780 (D. Del.) (noting that the defendant’s motion to dismiss was not converted into a motion for summary judgment because the court did not consider matters outside the pleadings).

⁷ *See generally* 7 Am. Jur. 2d *Attorney General* § 24 (1997) (stating the general rule that the attorney general “alone has the right to represent the state as to all litigation in which the subject matter is of statewide interest”).

in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government.

Plaintiff does not cite to any authority that would give him standing to bring his lawsuit.⁸ In fact, he does not contest Defendant's argument that he lacks standing. In his response to Defendant's motion to dismiss he essentially concedes that "Plaintiff may not have standing to request the relief of the return of any illegal gotten funds by the Defendant to the State Treasury." Plaintiff further conceded this point at oral argument and stated that he would be willing to dismiss that part of his complaint that seeks the return of funds to the State Treasury. Yet Plaintiff still asks the Court to declare that Defendant's actions were in violation of the law and he filed a motion for summary judgment seeking that relief. Plaintiff urges the Court, to quote his own words, to focus on the alleged "deed" (the alleged dual compensation), rather than the "doer" (Representative Nancy Wagner). However, Plaintiff's argument fails because without standing this Court may not consider any part of his complaint.⁹

Because the Court now dismisses the complaint on the issue of standing, it need not reach any issues relative to class actions, or any other issue raised by Defendant.¹⁰

⁸ See *Alston v. DiPasquale*, 2001 WL 34083824 (Del. Super.) ("Plaintiff is suing the [defendants] to insure they act consistently with the provisions of the Delaware code as Plaintiff has interpreted it; however, he has not established a right to bring suit under any of the statutory provisions he has cited.").

⁹ See *Alston v. DiPasquale*, 2002 WL 77116 (Del. Super.) (granting the defendant's motion to dismiss where the plaintiff attempted to initiate a class action suit "in order to mandate certain State agencies to perform administrative functions under Title 7 (Conservation) of the Delaware Code" because the plaintiff had "no authority under case law or the cited statutes to bring the actions he has brought in this Court"). See also *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (noting that "[t]he concept of 'standing,' in its procedural sense, refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance" and that it "is concerned only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy.").

¹⁰ *Murphy v. United Servs. Auto Assn.*, 2005 WL 1249374 (Del. Super.) ("Because the class action claims have been dismissed for lack of standing and for failure to state a claim upon which relief can be granted under 12(b)(6), the Court need not address the Defendants' other contentions regarding the Superior Court Civil Rule 23 class certification requirements."). See generally 67A C.J.S. *Parties* § 16 (2002) ("The question of whether a party has standing goes to the existence of the cause of action").

IV. CONCLUSION

For the above reasons, the Defendant's motion to dismiss the complaint is **GRANTED**. Plaintiff's motion for summary judgment is **DENIED AS MOOT**.

IT IS SO ORDERED.

cc: Prothonotary