

SUPERIOR COURT
OF THE
STATE OF DELAWARE

MAR 1 1992
DEPARTMENT OF JUSTICE
CIVIL DIVISION

SUSAN C. DEL PESCO
JUDGE

COURT HOUSE
WILMINGTON, DE. 19801

Submitted: March 13, 1992
Decided: May 28, 1992

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Re: *Capital School District v. State of Delaware, Public Employment Relations Board and Capital Support Association - Civil Action No. 91M-09-7*

Gentlemen:

Capital School District (the school district) has petitioned this Court for a writ of mandamus. The school district seeks an order directing the Public Employment Relations Board (PERB) to adjudicate the merits of the school district's Petition For Amendment of Existing Certified Bargaining Unit or Unit Clarification. The petition concerns a collective bargaining unit (the unit) consisting of custodians, clerks, maintenance mechanics and ground crew

employees represented by the Capital Support Association, DSEA/NEA (the union). The school district seeks to have certain employees in supervisory positions separated from the unit.

Prior to a July, 1990, amendment to the Public School Employment Relations Act (14 *Del. C.* §§ 4001-4018) the unit's bargaining rights were governed by Title 19. The July, 1990, amendment made Title 14 applicable to school support personnel as well as professional employees, and gave school support personnel an option to be governed by Title 14; the union exercised its option and elected to be governed by Title 14.

On January 23, 1991, the school district filed a petition with the PERB requesting an amendment of certification and/or unit clarification. The school district sought to remove the positions of Chief Custodian I and II, Maintenance Supervisor, and Night Supervisor from the unit because they are "supervisory employees." 14 *Del. C.* § 4010(d) requires the Board to separate supervisory and nonsupervisory employees into separate bargaining units for all units created subsequent to July 18, 1990.

The school district's petition was dismissed by an order of the Executive Director of the PERB on May 8, 1991. Referring to § 4010(d), the opinion stated:

Had the legislature intended for supervisors and nonsupervisory employees to be considered inappropriate in all bargaining units, including those determined to be appropriate [sic] prior to July 18, 1990, by operation of law alone, it was incumbent upon it to so provide. To the contrary, it imposed the restriction only upon those bargaining units created subsequent to July 18, 1990. To require the PERB to reconsider all units, which include both supervisory and nonsupervisory employees, upon the request of either party solely on the basis of the amended statute would contravene the express intention of the legislature and constitute an improper usurpation of legislative authority.

The dismissal was affirmed by the PERB on June 7, 1991. The school district's petition for a writ of mandamus was filed with this Court on September 10, 1991.

The writ of mandamus is a common law remedy which may be issued by a court of law to compel an inferior tribunal, board or agency to perform an official duty. *Schagrin Gas Co. v. Evans*, Del. Supr., 418 A.2d 997, 998 (1980); *Capital Educators Ass'n v. Camper*, Del. Ch., 320 A.2d 782, 786 (1974). The issuance of a writ of mandamus is a matter of judicial discretion, and is available to the petitioner who can show that it "has a clear right to performance of the duty, and no other adequate remedy." *Schagrin*, 418 A.2d at 998. "[I]f the complaining party's right to the performance of an official duty is doubtful and not clearly established, or if the official duty sought to be compelled is discretionary rather than ministerial in nature, mandamus will not issue." *Kelley v. Delaware Alcoholic Beverage Control Commission*, Del. Super., 423 A.2d 507, 509-510 (1980); *Capital Educators Ass'n*, 320 A.2d at 786.

The school district relies on the provisions of Title 14, Chapter 40 to support its contention that the PERB has a duty to separate the supervisory employees from the collective bargaining unit. Section 4010(f) states:

(f) Any bargaining unit designated as appropriate prior to the effective date of this chapter, for which an exclusive representative has been certified, shall so continue without the requirement of a review and possible redesignation until such time as a question concerning appropriateness is properly raised under this chapter. The appropriateness of the unit may be challenged by the public school employer, 30 percent of the members of the unit, an employee organization, or the Board not more than 180 days nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on the date of the passage of this chapter . . . (emphasis supplied)

Based upon the requirements of § 4010(f), the school district had standing as a public school employer to challenge the appropriateness of the unit, and the challenge was made within the proper time period before the expiration of the collective bargaining agreement. The school district contends that since these statutory requirements were met, the PERB had a duty to consider its challenge to the appropriateness of the bargaining unit and to remove the supervisory employees from it. The PERB, on the other hand, argues that the statute does not require it to remove supervisory employees from bargaining units created prior to July 18, 1990, and that the school district has not shown a compelling reason for the unit to be changed.

Title 14, Section 4010(e) states that "[p]rocedures for redefining or modifying a unit shall be set forth in the rules and procedures established by the Board." Rule 3.4(1) requires the Executive Director to validate whether petitions for exclusive recognition (Rule 3.1), bargaining unit determination and certification (Rule 3.2), and decertification (Rule 3.3) satisfy the technical requirements set forth in their respective rules. Although Rule 3.1(9) requires petitions for modification to be decided in accordance with regulations 3.3 through 3.5, Rule 3.4 is unclear as to the scope of the Executive Director's review of petitions for the modification of existing bargaining units.

Rule 3.4(8) discusses the modification of bargaining units:

(8) **Modification of a Bargaining Unit** - In the event that there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created, or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public school employer or the exclusive representative may file a petition with the Board which shall include the following:

- (a) The name of the employer;
- (b) The name of the exclusive representative;
- (c) A description of the bargaining unit;
- (d) A brief statement explaining the reasons for a modification of the bargaining unit.

The Executive Director ruled that since the school district had not alleged that there had been any substantial modification in the duties or working conditions of the unit or presented any compelling reason for the PERB to consider modifying the unit, the petition should be dismissed. The PERB subsequently affirmed the Executive Director's decision.

Considering the applicable statutes and PERB rules, it does not appear that the school district has a clear right to the PERB's consideration of its petition for modification or clarification of the unit. The PERB has a statutory right to "issue, amend and rescind such rules and regulations as it deems necessary . . .". 14 *Del. C.* § 4006(h)(1). The PERB has issued Rule 3.4(8), which defines the circumstances when it will consider the modification of an existing unit. This rule does not conflict with § 4010(f). Section 4010(f) states that bargaining units which were designated as appropriate before July 18, 1990, will continue without the need for review until a question of appropriateness has been properly raised. The PERB has defined in Rule 3.4(8) the situations in which such a question is proper.

In order for a writ of mandamus to issue, the petitioner must have a clear right to

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performance of the duty. *Schagrin*, 418 A.2d at 998. Since there is no clear right in this case, the school district's petition is DENIED.

IT IS SO ORDERED.

Very, truly yours,



Susan C. Del Pesco

SDP/msg

Original to Prothonotary