

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUPERIOR COUNTY**

AMERICAN FEDERATION OF STATE)
COUNTY AND MUNICIPAL EMPLOYEES)
COUNCIL 81,)

Plaintiff,)

v.)

C.A. No. 08M-02-078-JEB

STATE OF DELAWARE, OFFICE OF)
MANAGEMENT AND BUDGET, AND THE)
PUBLIC EMPLOYMENT RELATIONS)
BOARD,)

Defendants.)

Submitted: August 5, 2008
Decided: September 24, 2008

OPINION

AFSCME's Petition for a Writ of *Mandamus*. Granted.

State's Petition for a Writ of *Certiorari*. Moot.

State's Motion for a Stay of Proceedings. Denied.

Appearances:

Perry F. Goldlust, Esquire and Saagar Shah, Esquire, Wilmington, Delaware.
Attorney for Plaintiff AFSCME.

Ilona M. Kirshon, Esquire, Deputy Attorney General, Wilmington, Delaware.
Attorney for Defendant State of Delaware.

Laura L. Gerard, Esquire, Deputy Attorney General, Wilmington, Delaware.
Attorney for Public Employment Relations Board.

JOHN E. BABIARZ, JR., JUDGE.

In this case, three parties are dealing with the implementation of a relatively new statute¹ which is part of the Public Employment Relations Act (“PERA”). The Plaintiff is the American Federation of State, County and Municipal Employees, Council 81 (“AFSCME”), a union. The Defendants are the State of Delaware, Office of Management and Budget (“the State”) and the Public Employment Relations Board (“PERB” or “the Board”). The controversy pertains to 19 Del. C. § 1311A, a statute which authorizes for the first time collective bargaining for State merit employees. AFSCME has filed with the Court a petition for a writ of mandamus seeking an order compelling the PERB to grant AFSCME’s motion to dismiss an appeal filed by the State on grounds of untimeliness and also to enforce the Executive Director’s decision that bargaining unit 11, one of 12 statutory bargaining units, is ready to begin collective bargaining. The State has filed a petition for a writ of *certiorari* asking this Court to reverse the Board’s decision and a motion to stay the collective bargaining process..

The Court heard oral argument which centered upon whether a letter decision of the Executive Director, dated November 9, 2007, was a final order. That letter plainly stated that all Unit 11 positions were exclusively represented by AFSCME

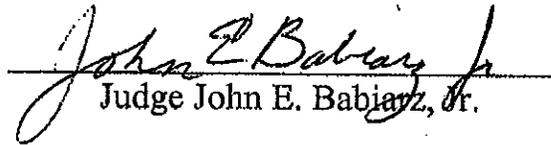
¹This section became effective August 2, 2007, when the Governor signed 76 Del. Laws, c. 178.

and that Unit 11 was eligible to begin collective bargaining. The Court found that this letter was a final, appealable order and that under the Board's five-day rule for appeals, the State's November 26, 2007, appeal to the Board was untimely. The Court ordered the parties to submit memoranda on the question of whether a writ of mandamus should issue and, if so, what the appropriate remedy is.

The Board's regulations resolve the timeliness dispute. Regulation 7.4 provides that review of an Executive Director's decision must be filed with the Board within five days of the date upon which the party is served with the decision. (Exh. 3 Bd. Memorandum on Mandamus). Board Regulation 1.9 provides that the Board rules are to be liberally construed, but Regulation 1.10 states that "[n]otwithstanding the provisions of Regulation 1.9. . . the Board shall strictly construe all time limitations contained in the Act or in these Regulations." In other words, the State had precisely five days from receiving the Director's decision to file an appeal with the Board. The Court concludes that the appeal was untimely and that the Board must vacate its decision, leaving intact the decision of the Executive Director. A writ of *mandamus* is appropriate where, as here, the plaintiff has a clear right to the performance of a non-discretionary duty and there is no legal remedy available.² The

²*Darby v. New Castle Gunning Bedford Education Assoc.*, 336 A.2d A.2d 209, 210 (Del. 1975)(citing 2 Woolley on Delaware Practice 1126, § 1655).

petition for a writ of *mandamus* is granted and the matter is remanded to the Board with instructions to vacate its Opinion and reinstate the Executive Director's decision that the parties did not need to carry out the provisions for voluntary recognition and that Unit 11 was ready to begin collective bargaining. The petition for a writ of *certiorari* is moot, and the motion to stay is denied. The matter is remanded to the Board for further proceedings consistent with this Opinion.


Judge John E. Babiarz, Jr.

JEB,Jr./ram/bjw
Original to Prothonotary