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Via LexisNexis File & Serve
and First Class Mail

Perry F. Goldlust, Esquire
Perry F. Goldlust, P.A.
702 King Street, Suite 600
Wilmington, DE 19801

Ms. Alicia A. Brooks
202 Ermine Drive
New Castle, DE 19710

Re: *American Federation of State County and Municipal Employees, Council 81, Local 640 v. Brooks*
C.A. No. 5395-VCN
Date Submitted: December 9, 2011

Dear Ms. Brooks and Mr. Goldlust:

Appellant American Federation of State, County, and Municipal Employees, Council 81, Local 640 (the "Union") appeals the decision of the Public Employee Relations Board (the "PERB") according to which the PERB: (1) deferred resolution of an unfair labor practices charge (the "Charge") to a grievance and

arbitration process mandated by the collective bargaining agreement (the "CBA") Alicia Brooks ("Brooks"), the Charging Party, was subject to as a member of the Union; and (2) retained jurisdiction over the Charge. This Court has jurisdiction over this appeal pursuant to 19 *Del. C.* § 1309(a).

The Charge has its origins in a dispute between Brooks and her former employer, the Delaware Department of Health and Social Services (the "DHSS"). The DHSS was a party to the CBA with the Union. The CBA covered Delaware employees holding the position of Certified Nursing Assistant with the DHSS; Brooks was formerly one such employee.

In February 2009, Brooks was notified of DHSS's intent to terminate her. Unhappy with this turn of events, Brooks sought the Union's assistance in challenging her termination. On February 19, 2009, the Union filed a grievance with the DHSS on Brooks's behalf. The Union's efforts were unsuccessful and Brooks was terminated. Following Brooks's receipt of a termination letter, for a period of time, the Union did not respond to her inquiries and pleas for further assistance, although the Union later represented her as she continued to pursue the

grievance process.[1] Ultimately, she filed the Charge with the PERB alleging that the Union's failure to respond to her requests for assistance and its allegedly shoddy drafting of the initial grievance constituted unfair labor practices.

The Charge was first heard by a Hearing Officer. Regarding the Union's failure to communicate with Brooks, the Hearing Officer found that, "while questionable, [it] does not rise to the level of an unfair labor practice."[2] Concerning the allegation that the initial grievance was shoddily drafted, the Hearing Officer determined that the "sufficiency of the [initial] grievance is an issue within the exclusive province of the contractual grievance and arbitration procedure and possibly arbitration."[3] Because the alleged statutory violation turned upon the resolution of contractual issues, the Hearing Officer deferred the matter, and the Charge was stayed pending exhaustion of the contractual grievance

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[1] Under the CBA, a grievance could be appealed up to a Step Five Grievance Hearing, after which arbitration could be pursued. Appellant Below-Appellant AFSCME, Council 81, Local 640's Opening Br. in Supp. of Its Mot. for Summ. J., Ex. 2 (Hearing Officer's Decision & Deferral Order, ULP No. 09-08-701) 5-6. The Steps Three, Four, and Five Hearings—and, ultimately, the arbitration proceedings—in which the Union represented Brooks were all held after she filed the Charge. *See id.*
[2] *Id.* at 8.
[3] *Id.*

and arbitration process.[4] The Hearing Officer noted that the deferral was not a final resolution of the Charge, however, and that the PERB would retain jurisdiction over the Charge to ensure the adequacy of its resolution through the arbitration process.[5] The Hearing Officer's decision was appealed to the PERB, which unanimously affirmed it in an Order;[6] the Union appealed the PERB's Order to this Court. In late July 2011, Brooks agreed to a settlement of her grievance against the State of Delaware (the "Settlement"), under which she also settled all claims against the Union and its officers.[7]

Despite the Settlement, the Union continues to press its appeal and seeks a decision from this Court regarding whether the PERB properly retained jurisdiction over the Charge after deferring the issues related to contract interpretation to the arbitration process. But, the Settlement resolved the claims underlying the Charge. "Delaware law requires that a justiciable controversy exist

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[4] *Id.* at 10.
[5] *Id.*
[6] Appellant Below-Appellant AFSCME, Council 81, Local 640's Opening Br., Ex. 3 (PERB Review of the Hearing Officer's Order of Dismissal, ULP No. 09-06-669) 5.
[7] Letter from Perry F. Goldlust, Esquire, to the Court (Dec. 7, 2011), Attachment (Brooks Settlement Agreement).

before a court can adjudicate properly a dispute brought before it."[8] In order to avoid wasting judicial resources on academic disputes, Delaware law requires that a case not be moot.[9] Settlement is one means to resolve a controversy that may render it moot, and, thus, foreclose later attempts to contest pre-settlement rulings.[10] Unless an exception to the mootness doctrine can be found, this appeal should be dismissed as moot.

The Union relies upon one of the recognized exceptions to the mootness doctrine: "situations that are capable of repetition but evade review."[11] While this is a situation that is likely to recur, and it is understandable that the Union would want certainty regarding the PERB's ability to retain jurisdiction over a charge against the Union, in comparable circumstances, a future case would, most likely, not evade review if pursued timely, vigorously, and diligently.

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[8] *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 208 (Del. 2008) (quoting *Warren v. Moore*, 1994 WL 374333, at *2 (Del.Ch. July 6, 1994)).
[9] *Id.*
[10] *See id.* at 209.
[11] *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 824 n.5 (Del. 1997).

The instant appeal was pursued timely,[12] but due to difficulties serving Brooks, over six months elapsed between the time the appeal was filed and service upon her was perfected.[13] After Brooks was served, a schedule for the Union's Motion for Summary Judgment was set and briefs were timely filed. This Court then issued a letter to the parties questioning whether this Court had jurisdiction to hear the appeal; responses were due 15 days later. The Union responded by the deadline, but Brooks, a *pro se* litigant, never responded; as a result, this case languished for some time. Recently, the Union informed the Court that Brooks had entered into the Settlement in late July 2011, and that prompted the Court to raise mootness concerns.

Although time was lost in this proceeding, considering that the issue presented by the Union is a fairly straightforward, narrow legal issue, it certainly seems capable of resolution in a timely manner before resolution of the underlying

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[12] A Notice of Appeal was filed one day after the related Order was issued by the PERB. *See* Notice of Appeal.

[13] Brooks apparently contests whether service upon her was ever perfected. *See* Letter from Alicia A. Brooks to the Court (Oct. 16, 2010). Regardless, the earliest that she was properly served, if at all, was October 9, 2010. *See* Return of Service.

substantive claims. Therefore, the argued exception does not apply,[14] since, as noted by the United States Supreme Court: "In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of . . . jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation."[15]

For the foregoing reasons, this appeal is dismissed as moot and the matter is remanded to the PERB.

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[14] Beyond the issue of mootness, other considerations counsel against resolving this appeal on the merits. It has been about a year since Brooks has filed any papers with this Court or been in any way actively involved with this case. Furthermore, since she has settled with the State of Delaware and the Union, she has little incentive to expend more time and money litigating this abstract point of law. This suggests that the full benefit of the adversary system would not be available in further proceedings before this Court or on an appeal of its decision. *See State of Del., Diamond State Port Corp. v. Int'l Longshoremen's Ass'n., Local 1694-1*, 2011 WL 891201, at *2 (Del. Ch. Feb. 24, 2011). "Moreover, this is a question fundamentally within the jurisdiction of the administrative body specifically charged with responsibility for public employment relations in Delaware," and "[j]udicial interference in the work of an administrative body is best left to real and immediate disputes." *Id.*

[15] *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). It should also be noted that the action challenged by the Union has only superficially been defended in this proceeding. The Court has not had (and does not have) the benefit of that adversarial crucible so accurately characterized as tending to assist the Court in achieving the "right" answer.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K