COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: June 30, 2009
Decided: July 1, 2009

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RE: American Federation of State, County, and Municipal Employees, AFL-CIO, Council 81, Local 439 v. University of Delaware
C.A. No. 2150-VCL

Dear Counsel:

This matter arises out of a so-called unit clarification petition filed in 2005 by the American Federation of State, County, and Municipal Employees, AFL-CIO, Council 81, Local 439 ("AFSCME") with the Delaware Public Employment Relations Board ("PERB") pursuant to Section 1310 of the Public Employment Relations Act ("Act").[1] The purpose of that petition was to include part-time workers employed in the dining services at the University of Delaware within an existing collective bargaining unit that includes full-time University workers. The University objected to that petition, arguing that those part-time workers are actually employees of Aramark Campus Services, Inc., the operator of all the

[1] 13 *Del. C.* §§ 1301, *et seq.*

University dining services under a contract. The Hearing Officer rejected the University's arguments, holding that the part-time workers were public employees who have a right to organize under the Act and to petition the PERB to secure that right. On review, the PERB affirmed that decision.

The University filed a petition in this court seeking an order reversing the PERB's decision and directing the PERB, on remand, to conduct a proper legal analysis of the employment status of those part-time workers. That analysis, the University contends, is found in *White v. Gulf Oil Corporation*[2] and, if followed, would lead inexorably to the conclusion that the part-time workers are actually Aramark's employees.[3] AFSCME opposes the petition both on jurisdictional grounds and on the merits.

Background

The dispute has its origins in the unusual arrangements relating to full-time food service workers at the University. The existing collective bargaining agreement ("CBA") covering the University's blue collar workforce defines the collective bargaining unit to include (among many other job classifications) all

[2] 406 A.2d 48 (Del. 1979).
[3] In *White*, the Delaware Supreme Court addressed the four-part test used to assess the existence of an employer-employee relation in the area of worker's compensation insurance. The elements of that test are: "(1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages; and (4) who has the power to control the conduct of the employee when he is performing the particular job in question." *Id.* at 51 (quoting *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 393-95 (Del. 1964)) (citations omitted).

food service workers, subject to a series of exclusions that does not categorically refer to part-time workers.[4] Thus, the CBA, on its face, can be read to cover part-time workers of all job descriptions. Nevertheless, it is conceded by AFSCME that it has never understood the CBA to cover part-time workers and that AFSCME does not now represent those workers. The purpose of the PERB petition was to obtain a determination that those part-time workers in the dining services should be included in the collective bargaining unit, as part of an effort to organize those workers.

In 1991, the CBA was amended to reflect the fact that the University had entered into a contract with Aramark to manage the University's food service operations, including the food service employees already represented by AFSCME. The agreement provided, in part, that all food service employees hired in the future would be placed on Aramark's payroll, and would be afforded Aramark's benefits. Employees already on the University's payroll were afforded the right to remain on the University's payroll and to participate in University benefits programs or to move over to Aramark. Aramark also became an additional party employer under the CBA. At paragraph 7 of the 1991 addendum, the University and Aramark

[4] The definition does exclude the category of temporary employees. That category may include some part-time workers, but the two categories are not identical. There could be both temporary part-time employees as well as permanent part-time employees.

agreed that they were "joint employers of all employees[5] performing food service work at the University . . . regardless of the employee's date of hire."[6] As a consequence, for the purposes of determining whether or not all full-time food service workers are "public employees" within the meaning of the Act, the University is treated as their employer, including those hired by Aramark after the 1991 addendum.

In connection with the PERB proceeding, the University and AFSCME also entered into a joint stipulation of facts. Reflecting the state of affairs created by the 1991 addendum, paragraph 7 of that document reads as follows: "[Aramark] and the University are deemed joint employers of all food service employees."[7] The stipulation makes no distinction between full-time and part-time employees and makes no reference to the definition of "employee" under the CBA.

From these few facts, it is obvious the University faced a serious challenge in arguing that its part-time food service workers were not also public employees for the purposes of the Act. Even if it were successful in convincing the PERB to ignore the language of both the CBA and the 1991 addendum, the University needed to contend with the stipulation that is unqualified in scope. And, even if

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[5] "Employees" is a term defined under the CBA to apply only to those workers covered by the agreement.
[6] R. at 9.
[7] *Id.* at 128.

the documentary record were not a problem, the University needed to convince the PERB that two groups of people, one full-time and the other part-time, working in identical circumstances in relation to their hiring, supervision, and work, are so differently situated that only the full-time group is entitled to the protection of the Act.

The PERB rejected the University's contention that it needed to apply the four-part analysis in *White* to determine whether the part-time food service workers were employed by the University (and, thus public employees for the purposes of the Act) or by Aramark (and, thus subject to the jurisdiction of the National Labor Relations Board). Citing to and relying on both the 1991 addendum and the joint stipulation, the PERB concluded that "there is no issue as to which of these entities [Aramark or the University] is the sole employer necessitating"[8] the application of that test. Instead, it saw the only issue to be "what, if any, impact their joint employment has on the representation status of the employees."[9] After noting the identity of circumstances facing both full-time and part-time food service workers, the PERB concluded that "it would be logically inconsistent to conclude that the

[8] *Id.* at 190.
[9] *Id.*

part-time employees are so differently situated as to remove them from the protections of the statute."[10]

Subject Matter Jurisdiction

AFSCME challenges this court's subject matter jurisdiction, suggesting that the matter proceed in the Superior Court pursuant to a common law writ of certiorari, or another common law writ.[11] AFSCME is correct that there is no express statutory grant of power for this court to hear an appeal from a unit clarification petition brought under 13 *Del. C.* § 1310. In contrast, Section 1309 of the Act expressly provides for appeals to this court by any party adversely affected by a decision of the PERB under either Section 1308 (Disposition of Complaints) or Section 1315 (Binding Interest Arbitration). The omission of Section 1310 from this list strongly suggests that the General Assembly did not intend to allow appeals from decisions made pursuant to that section.

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[10] *Id.* at 191.

[11] 10 *Del. C.* § 562 preserves the jurisdiction of the Superior Court to issue all common law writs, including the writ of certiorari. Moreover, the Delaware Administrative Procedure Act, 29 *Del. C.* § 10101 *et seq.*, generally directs that appeals from administrative decisions be taken to the Superior Court. For a thorough discussion of the somewhat confused state of the law regarding the availability of the writs of certiorari or mandamus to review agency decisions for abuse of discretion, see *Holland v. Zarif*, 794 A.2d 1254, 1269-70 nn. 38-41 (Del. Ch. 2002). Here, the Act specifically empowers the Court of Chancery to hear appeals from certain decisions of the PERB (Section 1309) and to hear all actions alleging violations of the provisions of Section 1316 prohibiting strikes by public employees (Section 1317). Thus, as the court observed in *Holland*, considerations of efficiency suggest "that all petitions by complainants for judicial review under the Act be presented to one court, rather than balkanizing review duties." 794 A.2d at 1270.

The University points to case law addressing the power of the Court of Chancery to review an administrative action, even in the absence of statutory or constitutional authority, where the underlying action was arbitrary or capricious or an abuse of discretion or where the unavailability of review could raise serious constitutional due process problems.[12] Plainly, there are no constitutional due process issues evident from this record. Moreover, given the long history of the University and Aramark treating full-time food service employees as their joint employees, and taking full account of the record before the PERB, including the joint stipulation, there is little to suggest that the decision at issue was in any regard arbitrary or capricious, or the result of an abuse of discretion. Thus, the circumstances in *Holland v. Zarif* justifying the use of this court's equitable power to review an agency's action are completely lacking in this case.

The University also suggests that the Court of Chancery may exercise a non-statutory power to review administrative action where a party will suffer substantial, adverse collateral consequences in different proceedings, citing *AFSCME Locals 1001 and 320 v. Wilmington.*[13] In support, the University refers without elaboration to the possibility that it might be issue precluded from relitigating the employment status of part-time workers in other proceedings, such

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[12] *Holland*, 794 A.2d at 1267.
[13] 858 A.2d 962, 966-67 (Del. Ch. 2004).

as unemployment or workers compensation matters. It is clear from the PERB's decision that the Board did not independently examine the conditions of employment of the part-time food service workers to determine whether or not they are public employees for the purposes of the Act. Rather, and most pertinently, for those purposes it relied on the joint stipulation of the parties and the treatment of similarly situated full-time workers. Thus, it is unclear whether the decision constitutes a finding of an actual employment relationship that threatens the University with any adverse collateral consequences in some other proceeding. Moreover, it is impossible for the court to assess the likelihood or severity of any such threatened collateral consequence without knowing a good deal more than is presented in the petition. For example, it would be useful to know how the University deals with those issues with regard to the full-time food service workers whose employment is entirely controlled by Aramark but who are deemed by the CBA and the 1991 addendum to be jointly employed by the University. Does the University find itself prevented from contesting the existence of an employment relationship for those purposes? If not, why not?

Finally, the University argues that AFSCME waived its objection to subject matter jurisdiction in its answer. Because the University has failed to establish a basis for the exercise of jurisdiction, there is no need to consider whether or not

AFSCME in fact waived its right to object. In the end, whatever jurisdiction the court has to review an administrative action where no statutory or constitutional basis to do so exists remains largely discretionary in nature. Unless the petitioner can show substantial entitlement to relief from arbitrary, or capricious, or unlawful actions, the court will not exercise that discretion. In this case, the University has failed to show that the PERB's decision was arbitrary or capricious or otherwise unlawful. Thus, there is no basis on which this court could act to overturn the PERB's decision.

For all the foregoing reasons, the Petition is DISMISSED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor