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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

Superior Court of Delaware,
New Castle County.
STATE of Delaware, OFFICE OF MANAGEMENT AND, BUDGET, Plaintiff in Error,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD ("PERB"), Defendant in Error.
C.A. No. 09A-08-012 CLS.

April 29, 2010.

On Defendant in Error's Motion to Dismiss. **DENIED.**

Sherry V. Hoffman, Deputy Attorney General, Wilmington, Delaware, Attorney for Defendant in Error.

Ilona M. Kirshon, Deputy Attorney General, Wilmington, Delaware, Attorney for Plaintiff in Error.

SCOTT, J.

*1 The Public Employment Relations Board ("PERB" and "Defendant in Error") is charged with assigning state merit employees to bargaining units pursuant to 19 *Del C.* § 1311A. [FN1] On July 28, 2009, PERB affirmed the decision of a Hearing Officer concluding that the Justice of the Peace Constables should not be included in bargaining unit # 1. [FN2] In response, the State of Delaware's Office of Management and Budget ("Plaintiff in Error") filed a Writ of Certiorari with this Court. On October 29, 2009, PERB filed a Motion to Dismiss the Writ of Certiorari.

FN1. 19 *Del. C.* § 1311A (b) reads in pertinent part "For purposes of bargaining pursuant to this section, employees shall be classified in the following bargaining units, each of which shall independently bargain compensation."

FN2. Bargaining unit # 1 includes "Labor, maintenance, trade and service workers which is composed of generally recognized blue collar and service classes including mechanics, highway, building and natural resource maintenance, skilled craft, equipment operators, toll collectors, food service, custodial, laundry, laborers, security officers and similar classes." 19 *Del. C.* § 1311A (b)(1)

Two threshold requirements must be met before this Court has jurisdiction to consider a Writ of Certiorari: (1) the judgment must be final; and (2) there can be no other available basis for review. [FN3] If those two requirements are met, this Court can then consider whether an agency committed errors of law, exceeded its jurisdiction, or proceeded irregularly. [FN4]

FN3. ***Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1213 (Del.**2008)

FN4. ***Id.***

It appears to the Court that Plaintiff in Error has met the two jurisdictional threshold requirements for this Writ of Certiorari. First, PERB's decision constitutes a final agency action. [FN5] Second, although 19 *Del. C.* § 1309 provides some relief to Plaintiff in Error, the relief is limited to appealing to the Court of Chancery for unfair labor practices and for binding arbitration cases. PERB's decision does not fall into either category. Accordingly, the Court concludes that there was a final agency action and that Plaintiff in Error has no other basis of review. Therefore, both threshold requirements are satisfied.

FN5. See *Abbott Laboratories v. Gardener*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1966) (Indicia of final agency action include: (1) whether further agency action is planned; (2) whether further agency

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> action is necessary before the court will have any direct effect on the party seeking review; (3) whether the question is merely one of law; and (4) whether there is a statutory bar to access to the court)

Having determined that the two threshold requirements are satisfied, the Court must now consider whether the issues raised in the writ are reviewable. Plaintiff in Error has raised several claims that, if taken as true for purposes of this Motion to Dismiss, may constitute errors of law committed by PERB. For instance, Plaintiff in Error contends that the Hearing Officer supported her interpretation of 19 *Del. C.* § 1311A with evidence outside of the record. Plaintiff in Error contends this was an error of law because "it is improper for an administrative agency to base a decision on information outside of the record without notice to the parties." [FN6] Plaintiff in Error argues PERB committed an error of law by affirming the Hearing Officer's decision that was based on evidence outside of the record. Without ruling on the merits of the claim, it is sufficient for this Court to merely acknowledge that Plaintiff in Error has raised a claim that would constitute an error of law properly reviewable by a Writ of Certiorari. Accordingly, Defendant in Error's Motion to Dismiss is **DENIED.**

> FN6. *Turbitt v. Blue Hens Lines, Inc.*, 711 A.2d 1214, 1216 (Del.1998), citing to *Delaware Alcoholic Beverages Com'n v. Alfred I du Pont Sch. Dist.*, 118 N.H. 241, 385 A.2d 1213, 1217 (Del.1978)

Based on the Court's ruling, the parties are instructed to submit further briefing regarding the proper statutory interpretation of 19 *Del. C.* § 1311A.

IT IS SO ORDERED.

Not Reported in A.2d, 2010 WL 1732894 (Del.Super.)

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