

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

STATE OF DELAWARE, Office of)	
Management and Budget,)	
)	
Plaintiff in Error,)	
)	C.A. No. 09A-08-012 CLS
v.)	
)	
PUBLIC EMPLOYMENT)	
RELATIONS BOARD ("PERB"),)	
)	
Defendant in Error.)	

Date Submitted: December 6, 2011
Date Decided: March 29, 2011

On Plaintiff in Error's Petition for a Writ of *Certiorari*. **GRANTED.**

ORDER

Ilona M. Kirshon, Esq., Deputy Attorney General, Department of Justice, 820 N. French Street, 6th Floor, Wilmington, DE 19801. Attorney for Plaintiff in Error.

Sherry V. Hoffman, Esq., Deputy Attorney General, Department of Justice, 820 N. French Street, 5th Floor, Wilmington, DE 19801. Attorney for Defendant in Error.

Scott, J.

Introduction

Before this Court is the State of Delaware, Office of Management and Budget's Petition for a Writ of *Certiorari*. The Court has reviewed the parties' submissions. For the reasons that follow, the Petition for a Writ of *Certiorari* is **GRANTED** and the decision of the Public Employment Relations Board is **REVERSED** and **REMANDED**.

Facts

The Public Employment Relations Act¹ (the "Act") gives State employees the power to collectively bargain. The Act was amended on August 2, 2007 to expand the scope of bargaining to include compensation bargaining for merit employees. All eligible merit employees must be assigned to one of twelve categories existing in the Act.² The question answered in the hearing below was whether Justice of the Peace Court Constables ("Constables") and Court Security Officers were included in the first category, known as Unit 1.³

At the Public Employment Relations Board's ("PERB") request, the State, through the Office of Management and Budget, Labor Relations and Employment Practices Office ("State"), provided a list of statewide merit employee positions to

¹ 19 *Del. C.* § 1303.

² 19 *Del. C.* § 1311A.

³ 19 *Del. C.* § 1311A(b)(1): "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."

be included in Unit 1. Court Security Officers and Constables were included in Unit 1.

On or about August 22, 2008, the Constables sent a letter to the PERB contesting their inclusion in Unit 1, arguing that their position is not a “similar” position to the other positions in Unit 1. The Constables contend they belong in Unit 9. The State opposed this petition and a hearing took place on October 24, 2008 for the purpose of receiving evidence to determine whether the Constables belong in Unit 1. The issue decided below was whether the Constables belong in Unit 1, when the Executive Director was actually presented with the question of whether the Constables properly belong in Unit 1 or Unit 9 with other law enforcement positions.⁴

The State presented witnesses and entered documents into evidence in support of its position that the Constable classification is most appropriate for Unit 1. The State contends: (1) the primary duty of both Court Security Officers II (the second level in the Court Security class series) and Constables is to provide court security; (2) the PERB has already agreed that Court Security Officers II belong in Unit 1; (3) Constables share a community of interest with the Court Security

⁴ In their letter dated August 18, 2008, but received by PERB on August 22, 2008, the Constables state: “We are sending you this information to help you understand why the Justice of the Peace Constables, Class Code 26607, are, by State Code, required to remain under the Law Enforcement and Public Safety Job Class Specification.” The letter states their objection to inclusion in Unit 1 while at the same time stating they belong in Unit 9 with the other law enforcement positions. Therefore, the issue presented to the Executive Director was whether the Constables belong in Unit 1 or Unit 9.

Officer II classification since they have similar duties, skills, and working conditions; (4) Court Security Officers II and Constables receive the same training, have the same reporting structure, must abide by the same policies and procedures, as well as follow the same standards of conduct and performance; (5) Court Security Officers and Constables have a representational history under 19 *Del. C.* § 1310, where they were part of the same non-compensation bargaining unit in the past; and (6) Constables are not appropriate for inclusion in any of the other eleven statutorily created bargaining units.

The Hearing Officer, also the Executive Director of the PERB (“Executive Director”), rendered a decision on April 14, 2009, finding that the Constables do not belong in Unit 1. On April 21, 2009, the State requested a review of the Executive Director’s decision by the full board. The Constables filed a response on May 4, 2009. After a public session was held on June 17, 2009, the decision of the Executive Director was affirmed by the PERB on July 28, 2009.

In reaching her conclusion that the Constables were not sufficiently similar to other positions within Unit 1, the Executive Director relied upon the State of Delaware Human Resource Management Classification and Compensation Section website to obtain the job classifications of Constables and Court Security Officers, the Justice of the Peace Court Constable and Court Security Officer Handbook, and the testimonies of Constables Prange and Kennedy.

Issues

In their petition for a writ of *certiorari*, the State asserts the following issues: (1) whether the Public Employment Relations Board erred as a matter of law when it affirmed the decision of the Executive Director, which was based on facts from the Office of Management and Budget's web page when that information was not part of the record; and (2) whether the Public Employment Relations Board erred as a matter of law in affirming the decision of the Executive Director, who failed to apply the "community of interest" standard in 19 *Del. C.* § 1310 when concluding the Justice of the Peace Constables did not belong in 19 *Del. C.* § 1311A Merit Unit 1.

Standard of Review

A common law writ of *certiorari* is "a form that calls up, for review, the record from the lower court or tribunal."⁵ All writs of *certiorari* to this Court must be granted.⁶ The purpose is not to review the merits of the case, but to determine whether an error of law occurred below.⁷ A writ of *certiorari* is different than an appeal because "review on *certiorari* is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings."⁸ The review

⁵ *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1212 (Del. 2008) (citations omitted).

⁶ 10 *Del. C.* § 562.

⁷ *Maddrey*, 956 A.2d at 1212.

⁸ *Id.* at 1213 (citations omitted).

is limited to errors of law that appear on the face of the record below.⁹ The Court may consider a writ of *certiorari* only after the judgment is final and the petitioner has no other available basis for review.¹⁰ Having already determined that this case meets the threshold requirements for a writ of *certiorari*, the issue becomes whether PERB committed two errors of law in affirming the decision of the Executive Director.¹¹

Discussion

I. *The Public Employment Relations Board Erred as a Matter of Law When It Affirmed the Decision of the Executive Director That Was Based On Evidence Outside the Record.*

The PERB committed an error of law by affirming the decision of the Executive Director because that decision was based on evidence outside the record without giving the parties notice. Although administrative agency hearings are less formal than courts of law, “it is improper for an administrative agency to base a decision on information outside the record without notice to the parties.”¹² Being quasi-judicial in nature, administrative agency hearings must adhere to the fundamental principles of justice, such as due process.¹³

⁹ *Metrodev Newark, LLC v. Justice of the Peace Court No. 13*, 2010 WL 939800, *4 (Del. Super.).

¹⁰ Maddrey, 945 A.2d at 1213. (citations omitted).

¹¹ This Court previously denied the Defendant in Error’s motion to dismiss on April 29, 2010 finding that the Plaintiff in Error has satisfied the writ of *certiorari* standard of review.

¹² *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998) (citing *Delaware Alcoholic Beverage Com’n v. Alfred I. du Pont Sch. Dist.*, 385 A.2d 1123, 1127 (Del. 1978).

¹³ *Id.* (citation omitted).

The PERB attempts to draw a comparison between the procedural facts in this case and those of *Delaware Alcoholic Beverage Control Commission v. Alfred I. du Pont School District*¹⁴ but, the facts are easily distinguished. The decision in that case was on appeal, whereas this case is on a writ of *certiorari*. In that case, the Delaware Supreme Court found the information relied upon the by hearing officer, although outside the record, did not provide any more information than the hearing officer had prior to receiving the information.¹⁵ There was also “no indication that the decision was based on this undisclosed evidence.”¹⁶ That is not the same situation as the present case. Here, the Executive Director based part of her decision on the information obtained from the State’s website, which was outside the record.¹⁷ The two cases are not analogous.

The PERB concedes the Executive Director relied upon evidence outside the record, committing an error of law, when it states: “the Executive Director considered facts about the security officer positions in the State merit system provided on the web page maintained by a section of the OMB.”¹⁸ The State contends, and the PERB does not dispute, that the evidence relied upon by the Executive Director was outside the record without notice to the parties. Instead,

¹⁴ 385 A.2d 1123 (Del. 1978).

¹⁵ *Id.* at 1127.

¹⁶ *Id.*

¹⁷ See *In Re: State of Delaware, Justice of the Peace Court Constables, and State of Delaware*, PERB Representation Petition 07-12-608(a) (April 14, 2009).

¹⁸ PERB’s Answer Brief p. 6.

the PERB affirmed the decision of the Executive Director concluding the evidence outside the record was evidence properly taken under administrative notice.¹⁹

The PERB contends the Delaware Rules of Evidence provide guidance in administrative hearings and the administrative notice taken in this case was in accord with D.R.E. 201. However, the Executive Director failed to comply with D.R.E. 201(e) which also requires the parties be given notice of the facts to be judicially noticed and an opportunity to be heard.²⁰ The fact that the State was on notice of the nature of the hearing and that the information was publicly available is not sufficient.²¹ D.R.E. 201(e) explicitly states each party “is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.” By taking administrative notice of facts outside the record without first giving the parties notice and an opportunity to be heard, the Executive Officer committed an error of law. In affirming that error of law, the PERB also committed an error of law.

¹⁹ In its opinion, the PERB “found the administrative notice taken by the Executive Director to be appropriate to the proceedings where the information was publically available and the OMB was on notice of the nature of the hearing.” *Id.* at p. 7.

²⁰ D.R.E. 201(e) states: “A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.”

²¹ *Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008) (a judge may take judicial notice of a fact outside the record so long as the fact is not reasonably in dispute and the parties have an opportunity to challenge it).

II. *The Public Employment Relations Board Did Not Err As a Matter of Law in Affirming the Decision of the Executive Director Who Failed to Apply the “Community of Interest” Standard in Determining Whether the Constables Belong in Unit 1.*

In relying on the statutory language to determine whether the Constables belong in Unit 1, the Executive Director did not commit an error of law and the PERB did not commit an error of law in affirming that decision. The PERB is empowered to administer the Public Employment Relations Act.²² State merit employees are permitted to collectively bargain for compensation pursuant to 19 *Del. C.* § 1311A. The statute requires employees to be classified in one of the twelve bargaining units articulated in subsection (b).²³ The standard to determine inclusion in a bargaining unit is described in subsection (b):

The Board shall determine the proper assignment of job classifications to bargaining units and the bargaining unit status of individual employees and shall provide for certified bargaining representatives to combine bargaining units or portions of bargaining units of employees they represent within the bargaining units defined in this section *based upon job classifications* of the employees represented.²⁴

Even though the Executive Director applied the correct test to determine the appropriate compensation bargaining unit for the Constables, she relied upon information outside the record, *i.e.*, the job classifications found on the State’s

²² 19 *Del. C.* § 1306

²³ The subsection states “[f]or purposes of bargaining pursuant to this section, employees *shall* be classified in the following bargaining units, each of which shall independently bargain compensation.” (emphasis added).

²⁴ Emphasis added.

website that were not introduced into evidence. As a result of the reliance on evidence outside the record, this case is reversed and remanded.

Conclusion

Based on the forgoing, the State of Delaware, Office of Management and Budget's Petition for Writ of *Certiorari* is **GRANTED** and the decision of the Public Employment Relations Board is **REVERSED** and **REMANDED**.

IT IS SO ORDERED.

/S/ CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.