SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: ***American Federation of State, County and Municipal Employees, Council 81 v. State of Delaware, Public Employees Relations Board***
C.A. No. N10M-08-075 RRC

Submitted: March 3, 2011
Decided: May 25, 2011

On Plaintiff American Federal of State, County and Municipal Employees, Council 81's Motion for Summary Judgment.
DENIED.

Summary Judgment **GRANTED** to Defendant.

Dear Counsel:

INTRODUCTION

Plaintiff's motion for summary judgment presents a discrete issue of statutory and rule interpretation. Plaintiff contends that that Defendant exceeded its statutorily defined discretion when it determined that only the historically unrepresented employees (i.e., employees who were never part of any existing collective bargaining agreements) were eligible to vote for a collective bargaining representative. As a result, of 1,636 merit employees, only 313 unrepresented employees would be eligible to vote. In turn, Plaintiff filed the instant Writ of Mandamus and a Writ of Prohibition in this Court to compel Defendant to allow all merit employees in the relevant unit to vote.

FACTS AND PROCEDURAL HISTORY

There is no genuine dispute of material fact in this case. Indeed, the parties filed a Stipulated Statement of Facts, which has defined the scope of the material facts of this case. The parties agree that the operative statute is 19 Del. C. § 1311A, which signed into law in 2007.[1] Likewise, the parties agree that Plaintiff duly petitioned for a Bargaining Unit Determination and Certification for Exclusive Compensation Bargaining Representation.[2] Defendant's Executive Director ordered an election for Collective Bargaining Unit #1 ("CBU #1").[3]

Most significantly, it is stipulated by the parties that Defendant limited the electorate to the 313 unrepresented employees of CBU #1, and that CBU # 1 is comprised of 1,636 merit employees.[4] Though not enumerated in the Stipulated Statement of Facts, it is undisputed that the election was stayed by Defendant at Plaintiff's request, pending resolution of the instant issue.[5] Elections which included only the unrepresented as voters were completed for Collective Bargaining Unit Nos. 2 and 6.[6]

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[1] Stipulated Statement of Facts ¶ 5.
[2] Stipulated Statement of Facts ¶ 9.
[3] *Id.* ¶ 18.
[4] *Id.* ("The Executive Director [of Defendant] restricted the vote to only the approximately 313 unrepresented employees out of a possible 1636 merit employees.").
[5] Pltf.'s Opening Br. at 1; Def.'s Answ. Br. at 1.
[6] Stipulated Statement of Facts ¶ 19.

CONTENTIONS OF THE PARTIES

Plaintiff asserts that Defendant exceeded its jurisdiction when it limited the electorate to the 313 unrepresented employees of CBU #1, and that the proper remedy is a Writ of Mandamus compelling Defendant to include the entire employee population of CBU #1 in the electorate. The statute applicable to the instant election is 19 Del. C. § 1311A, which in turn cross-references 19 Del. C. § 1311; under § 1311(c):

> If the Board determines that a petition is properly supported, timely filed and covers the designated appropriate bargaining unit, the Board shall cause an election of all eligible employees to be held within a reasonable time after the unit determination has been made, in accordance with procedures adopted by the Board, to determine if and by whom the employees wish to be represented.

However, the term "eligible employees" is not statutorily defined. Thus, Defendant must promulgate the criteria for those employees eligible to vote; Plaintiff asserts that this is a non-discretionary, ministerial determination that was incorrectly made by Defendant, thereby entitling Plaintiff to a Writ of Mandamus requiring Defendant to redefine "eligible employee" based on what Plaintiff believes to be the appropriate criteria.[7] Plaintiff likewise seeks a Writ of Prohibition to preclude Defendant from conducting the instant election pursuant to the current definition of "eligible employees."[8]

Conversely, Defendant argues "a determination of voter eligibility necessarily implicates discretion."[9] According to Defendant, the inherently discretionary nature of the instant determination renders it inappropriate for Mandamus relief by this Court. Likewise, though not expressly stated in Defenadnt's Answering Brief, Defendant's contention that the instant determination is properly within its jurisdiction and discretion necessarily implies Defendant's view that a Writ of Prohibition is not available to Plaintiff.

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[7] Pltf.'s Opening Br. at 13.
[8] *Id.*
[9] Def.'s Answ. Br. at 11.

STANDARD OF REVIEW

Though captioned as a motion for summary judgment, Plaintiff effectively seeks the award of a Writ of Mandamus, pursuant to 29 Del. C. § 10143;[10] in this Court, "a writ of mandamus issues to require of an inferior court or administrative body the performance of a clear legal duty."[11] Such a writ is appropriate "only when a plaintiff is able to establish a clear legal right to the performance of a non-discretionary duty."[12] For purposes of a writ of mandamus, a "non-discretionary" or "ministerial" duty is one which is "prescribed with such precision and certainty that nothing is left to discretion or judgment."[13] Put another way, a ministerial act "is one that must be performed in a prescribed manner without regard to the actor's judgment as to its propriety or impropriety."[14]

With respect to the Writ of Prohibition sought by Plaintiff, such writs are "designed primarily to keep the administration of justice in orderly channels" by "prevent[ing] the unwarranted assumption of power over persons or matters which are not within the legitimate cognizance of a particular tribunal, or it prevent[ing] a tribunal from exceeding its jurisdiction in matters over which it admittedly has cognizance."[15] This Court holds exclusive jurisdiction over Writs of Prohibition directed to administrative entities.[16]

This Court exercises *de novo* review of an agency's interpretation and application the relevant statutes.[17] Issues of statutory interpretation are "ultimately the responsibility of the courts;" consequently, this Court "may

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[10] "Any person aggrieved by the failure of an agency to take action required of it, by law, may bring an action in the Court for an appropriate writ of mandamus."
[11] *Mason v. Bd. of Pension Trustees*, 468 A.2d 298, 300 (Del. Super. Ct. 1983) (citation omitted).
[12] *Darby v. New Castle Gunning Bedford Ed. Ass'n.*, 336 A.2d 209, 210 (Del. 1975) (citation omitted).
[13] *Id.* at 211. (citation omitted).
[14] *Id.* (citation omitted).
[15] *Petition of Hovey*, 545 A.2d 626, 628 (Del. 1988) (citations omitted).
[16] *Petition of Barbee*, 693 A.2d 317, 319 (Del. 1997) ("Exclusive original jurisdiction to direct the writ of prohibition to administrative bodies and other nonjudicial entities lies with the Superior Court, whose decision is subject to [the Supreme Court of Delaware's] appellate review.") (citations omitted).
[17] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999).

accord due weight, but not defer, to an agency interpretation of a statute administered by it."[18]

However, the instant dispute also implicates Defendant's application of its own "regulation[s];" as relevant herein, an agency's "regulation" is "any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard. . . ."[19] This Court's review of an "agency action"[20] regarding its own regulations is more circumscribed; as provided by 29 Del. C. § 10141(e):

> Upon review of regulatory action, the agency action shall be presumed to be valid and the complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner and that the complainant suffered prejudice thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful.

Thus, notwithstanding this Court's *de novo* review of an agency's interpretation of a statute, this Court nonetheless applies a deferential standard of review to an agency's construction of its own regulations.[21]

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[18] *Id.* (citation omitted); *see also Delaware State University v. Am. Ass'n. of University Professors*, 2002 WL 385350, *3 (Del. Ch. Ct. 2002) (noting, in the context of an appeal of an Unfair Labor Practice determination (a determination over which the Court of Chancery retains appellate jurisdiction, pursuant to 19 Del. C. § 1309), that "[c]onclusions of law made by the PERB are reviewed by this court on a *de novo* basis. In undertaking such a review, this court bears in mind the PERB's expertise in labor law and the relevance of that expertise in formulating policy under statutes like PERA. Nonetheless, in the end, the court remains obligated to conduct a plenary review of a PERB decision when the issue is the proper construction of statutory law and its application to undisputed facts.") (citations omitted).

[19] 29 Del. C. § 10102(7). For purposes of the Administrative Procedures statute, an "agency" is defined as: "any authority, department, instrumentality, commission, officer, board or other unit of the state government authorized by law to make regulations, decide cases, or issue licenses." *Id.* § 10102(1).

[20] "'Agency action' means either an agency's regulation or case decision, which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind or the grant or denial of relief or of a license, right or benefit by any agency or court, or both." 29 Del. C. § 10102(2).

[21] *DiPasquale*, 735 A.2d at 383 n.9 ("[A] reviewing court may be expected to defer to the construction placed by an administrative agency on regulations promulgated or enforced by it, unless shown to be clearly erroneous.") (citation omitted).

DISCUSSION

In this case, Defendant acknowledges that, by the literal terms of its current rule defining eligibility to vote, all 1,636 merit employees in CBU #1, including those already represented by an affiliate of Plaintiff, would be eligible to vote in the instant election.[22] Under Public Employment Relations Board Rule 4.3(b), "[a]ll public employees who are included within the designated bargaining unit and who were employed as of the end of the pay period which immediately precedes an election or who were on approved leave of absence shall be eligible to vote."

At the same time, Defendant is "empowered to administer [the Public Employment Relations Act] under the rules and regulation which it shall adopt and publish."[23] To this end, Defendant notes that it is vested with the discretion to suspend the application of the rules in the pursuit of "the orderly administration of [the statute]."[24] Indeed, the very rules themselves confer this authority on Defendant; Rule 1.9 states:

> These regulations set forth rules for the efficient operation of the Board and the orderly administration of the Act. They are to be liberally construed for the accomplishment of these purposes and may be waived or suspended by the Board at any time and in any proceeding unless such action results in depriving a party of substantial rights.

Thus, assuming that Defendant's deviation from Rule 4.3(b) was for the "efficient operation" and "orderly administration" of the statute, the instant determination of voter eligibility was properly within its discretionary powers under Rule 1.9. It would follow that, given the discretionary nature of the grant of authority found in Rule 1.9, mandamus relief would be inappropriate; rather than being a command "prescribed with such precision and certainty that nothing is left to discretion or judgment"[25] Rule 4.3(b) is inherently susceptible to Defendant's discretion and judgment as to how to best provide for the "efficient operation" and "orderly administration" of the statute.

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[22] Def.'s Answ. Br. at 9-10.
[23] 19 Del. C. § 1306.
[24] Def.'s Answ. Br. at 10.
[25] *Darby v. New Castle Gunning Bedford Ed. Ass'n.*, 336 A.2d 209, 211 (Del. 1975) (citation omitted).

Rule 1.9 is limited only by the requirement that Defendant may not waive or suspend the rules if such action deprives a party of "substantial rights." If Defendant's determination on voter eligibility did result in such a deprivation, then Rule 1.9 does not apply to Defendant's instant determination of voter eligibility, and the literal terms of Rule 4.3(b) would in fact be "prescribed with such precision and certainty that nothing is left to discretion or judgment."[26]

This analysis is complicated by the obvious reality that, under either Defendant or Plaintiff's differing views of the correct electorate for CBU #1, parties' rights will be affected. Given Defendant's determination that 313 unrepresented employees, from a total of 1,636 merit employees, are eligible to vote, it is indisputable that the remaining 1,323 merit employees have been deprived of the right to vote. On the other hand, Defendant notes that, if those employees who are already represented by Plaintiff's affiliates are deemed eligible to vote, an election to determine whether CBU #1 is represented by Plaintiff or not represented at all is effectively a *fait accompli* because those employees represented by Plaintiff's affiliates would comprise an allied supermajority of the electorate; thus, the 313 unrepresented individuals would be deprived of the right to have a meaningful influence on the election.[27]

Nonetheless, this Court concludes that, on balance, Defendant's determination of the bargaining unit's electorate was discretionary, rather than ministerial. Although this particular issue has not been decided under Delaware law, the principles underlying Delaware's Public Employment Relations Act, together with the statutory prescribed presumption of validity that accompanies Defendant's construction of its own regulations,[28] confirm the discretionary nature of the instant determination. In turn, mandamus relief is inappropriate, and Plaintiff's motion must be denied.

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[26] *Id.*

[27] Def.'s Answ. Br. at 10. However, Plaintiff contends that the 313 unrepresented employees simply have the right to vote in the election, which is not impaired by allowing all 1,636 to vote; Plaintiff submits that the 313 employee minority does not have the right to be protected from a *de facto* selection of an incumbent union, even if the election may well be a "forgone conclusion." Pltf.'s Reply Br. at 4. Under this view, the application of Plaintiff's criteria for eligibility to vote would not impinge upon the minority's rights, because the minority's rights are limited to the right to cast a vote.

[28] 29 Del. C. § 10141(e).

Defendant constructed its own rules in such a way as to exclude historically represented employees from eligibility to vote in the instant election. Given the literal terms of Rule 4.3(b), this decision was necessarily predicated on Defendant's discretionary authority to waive or suspend the application of any other Rule, as provided by Rule 1.9, *supra*. It follows that, in reaching the instant decision, Defendant considered how best to accomplish the purposes of the Public Employment Relations Act and weighed the "substantial rights" at issue.[29] This alone confirms that the Board's actions herein were not those that "must be performed in a prescribed manner without regard to the actor's judgment as to its propriety or impropriety."[30]

Finally, to the extent that Rule 1.9 limits Defendant's discretion to those decisions which do not impair any party's "substantial rights," Defendant's instant determination of voter eligibility necessarily implies that Defendant weighed the competing considerations of the unrepresented employees' interests and the historically represented employees' interests, and Defendant concluded that the "efficient operation" and "orderly administration" of the Public Employment Relations Act were best served by limiting the electorate to the 313 unrepresented employees. Although Defendant's assertion that "a determination of voter eligibility necessarily implicates discretion"[31] is not consistent with the formulaic terms of Rule 4.3(b), from a broader perspective, Defendant maintains significant discretion in interpreting and applying its own rules and may "liberally construe[] [the rules] for the accomplishment of [the Public Employment Relations Act's] purposes."[32]

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[29] Public Employment Relations Board Rule 1.9.

[30] *Darby*, 336 A.2d at 210 (citation omitted).

[31] Def.'s Answ. Br. at 11.

[32] Public Employment Relations Board Rule 1.9. Although Delaware courts do not defer to an agency's statutory interpretation, they afford "due weight" to the agency's interpretation of its own regulations, and an agency's construction of its own regulations is presumed valid. *See supra* note 18; 29 Del. C. § 10141(e). Indeed, the Court may afford "substantial" weight to an agency's technical expertise in defining a statutory term. *DiPasquale*, 735 A.2d at 382 n.8 (noting that when an agency defines a term "by bringing its technical expertise to bear thoughtfully on the question through a rulemaking process in compliance with the Administrative Procedures Act, it is to be expected that a reviewing court would accord substantial weight to the agency's interpretation of the statute."). Similarly, as one authority has noted, the weight due to a specialized agency's interpretations is often substantial. Annotation, Norman J. Singer & J.D. Shambie Singer, *Role of Agency Interpretation of Enabling Legislation*, 3 SUTHERLAND STATUTORY CONSTRUCTION § 65:5 (7th Ed. 2010) ("A general policy of judicial liberality towards

In this case, Defendant considered that employees who were historically represented by Plaintiff's affiliates were already represented by an exclusive bargaining representative and juxtaposed this with the inherent dynamics of the electorate; the 313 employees who did not have exclusive bargaining representatives would have their votes diluted to an effective nullity, thereby assuring that, after the election, those 313 employees were also represented by Plaintiff's affiliates. Under these circumstances, Plaintiff did not have cognizable "substantial rights" affected by the Board's determination; to the extent that this determination adversely affected the rights of the 1,636 represented employees, as provided by Rule 4.3(b), such rights were susceptible to Defendant's discretion to invoke Rule 1.9 and "liberal[ly] construe[]" the rules to suspend Rule 4.3(b). While statutory interpretation is exclusively for the Courts, this Court may nonetheless assign "due weight" to Defendant's labor expertise in the construction and application of Rules 4.3(b) and 1.9.[33] Further, pursuant to statute, Defendant's determination is presumed valid and Plaintiff bears the burden of proving that Defendant's action was "taken in a substantially unlawful manner and that [Plaintiff] suffered prejudice thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful."[34] This Court finds that Defendant's utilization of Rule 1.9 to invoke its discretion to "suspend" the terms of Rule 4.3(b) when defining voter eligibility for CBU #1 was a proper interpretation; as stated, there was nothing unlawful or otherwise untoward about the Board's determination of voter eligibility.

Given this Court's determination that Defendant's application of the rules was correct and that Defendant appropriately exercised its discretion in reaching the instant determination of voter eligibility, its actions cannot be classified as "ministerial."[35] In turn, mandamus relief is not appropriate.[36] Similarly, given this Court's holding that Defendant was acting within its discretion, it necessarily follows that Defendant did not exceed the scope of its

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agency interpretations of the scope of their own statutory powers is manifest in decisions giving broad legal effect to agency actions. . . . Similarly, administrative interpretation, practice and usage is accorded great weight as an extrinsic aid in the interpretation of statutes by the courts.") (citations omitted).

[33] *See supra* note 18.

[34] 29 Del. C. § 10141(e).

[35] *See supra* text accompanying note 13.

[36] *See supra* text accompanying note 12.

jurisdiction or otherwise misuse its jurisdiction; consequently, a Writ of Prohibition is not appropriate.[37]

CONCLUSION

For the foregoing reasons, Plaintiff is not entitled to a Writ of Mandamus. Consequently, Plaintiff's motion for summary judgment in this action is **DENIED**.[38] Although Defendant did not move for summary judgment, it necessarily follows that, on this undisputed factual record, Summary Judgment should be awarded to Defendant.[39]

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary

[37] *See supra* note 15; *see also Paolino v. Ind. Accident Bd.*, 771 A.2d 800, 805 (Del. Super. Ct. 1997) ("[D]iscretion in favor of the writ should be sparingly exercised and particularly so when the decision below was discretionary. . . .").

[38] The relief sought by Plaintiff implicates an issue of policy that is more properly directed to the General Assembly. *See, e.g.*, *Collison v. Green*, 2 A.2d 97, 108 (Del. 1938) ("[I]t is the province of the legislature and not of the courts to pass upon matters of policy."); *In re Adoption of Swanson*, 623 A.2d 1095, 1099 (Del. 1993) ("[O]ur courts do not sit as a superlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law.") (citations omitted).

[39] *See Bank of Del. v. Claymont Fire Co. No. 1*, 528 A.2d 1196, 1199 (Del. 1987) (holding that, when a party moves for summary judgment under analogous Chancery Court Rule 56 and "the state of the record is such that the nonmoving party clearly is entitled to such relief, the trial judge may grant final judgment in favor of the nonmoving party" *sua sponte* because "[t]he form of the pleadings should not place a limitation upon the court's ability to do justice.") (citation omitted).