

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 150 M.D. 2016

STEVE RAMOS, SCOTT ARMSTRONG, and JAMES WILLIAMS,

Petitioners,

v.

ALLENTOWN EDUCATION ASSOCIATION,
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, and
ALLENTOWN SCHOOL DISTRICT

Respondents.

**BRIEF OF RESPONDENT, PUBLIC SCHOOL EMPLOYEES'
RETIREMENT SYSTEM, IN SUPPORT OF ITS
PRELIMINARY OBJECTIONS AND MOTION TO DISMISS**

Dated: May 20, 2016

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TABLE OF CONTENTS

I. MATTER BEFORE THE COURT.....2

II. STATEMENT OF QUESTIONS INVOLVED..3

III. FACTS.....4

IV. ARGUMENT8

V. RELIEF12

I. MATTER BEFORE THE COURT

Steve Ramos, Scott Armstrong and James Williams (“Petitioners”) filed an Application for Summary Relief and a Petition for Review in the Nature of a Complaint for Declaratory and Equitable Relief in the Commonwealth Court against the Allentown Education Association (“AEA”), the Allentown School District (“ASD”), and the Public School Employees' Retirement System (“PSERS”) seeking: (1) a permanent injunction against a provision in the AEA and ASD collective bargaining agreement allowing the AEA President to be on “full release” from professional duties; (2) elimination of any retirement credit credited by PSERS to the AEA President while on full release time; and (3) restitution to the ASD for the AEA President’s salary paid while on full release time. Based on subsequent filings, it appears Petitioners are attempting to challenge the constitutionality of the “leave for service with a collective bargaining organization” provision set forth in the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 et seq. (“Retirement Code”). *See, Petitioner’s Response to PSERS’ Preliminary Objections*, ¶4, ¶6 and ¶10.

PSERS filed Preliminary Objections and a Motion to Dismiss for failure to Exhaust Administrative Remedies on the issue of whether the AEA President is entitled to retirement credit while on full release time.

II. STATEMENT OF QUESTIONS INVOLVED

(1) Does this Court lack original jurisdiction because Petitioners failed to exhaust administrative remedies?

Suggested Answer: Yes

(2) Have Petitioners failed to set forth a claim for which relief can be granted?

Suggested Answer: Yes

III. FACTS

Since 1990, the collective bargaining agreement between the AEA and ASD contained the following provision:

For the term of this Agreement, the President shall be entitled to full released (sic) time from Professional duties to conduct Association business during the work day, without loss in wages, benefits or other contractual advantages. Any grants, stipends, awards or other alternative financial arrangements made between the AEA and PSEA/NEA for President's released time shall be remitted to the District.

See Petition for Review, ¶14- ¶17 and *Answer of ASD*, ¶14-¶17. While on full release time, the AEA President leaves the classroom for the entire period of the full release time and instead performs full-time work for the AEA but continues to receive wages and benefits from ASD that is not reimbursed by AEA. *See Petition for Review*, ¶19- ¶27 and *Answer of ASD*, ¶19-¶27. During full release time, the ASD reported the AEA President to PSERS as an active member not on a leave of absence and submitted both employer and member contributions based on full-time service and the actual salary paid to the AEA President.¹ *See Petition for Review*, ¶44- ¶45 and *Answer of ASD*, ¶44.

Petitioners allege that this practice of allowing full release time violates Article VIII, Section 8 of the Pennsylvania Constitution and is against public

¹ It appears from the pleadings that the current AEA President was placed on a higher pay scale when she was on full release time. *See Petition for Review*, Exhibit H.

policy by pledging the credit of the Commonwealth to someone working in a private capacity. Petitioners further allege that ASD and AEA lacked the capacity to bargain away control of public employment and AEA was unjustly enriched by receiving full-time services paid for by ASD. With respect to PSERS, Petitioners allege that the AEA Presidents are not entitled to receive any retirement credit. PSERS agrees that the AEA President is not entitled to receive retirement credit while on full release time under the facts presented in the pleadings.

In Official Opinion No. 83-11 dated October 19, 1983, the Attorney General opined that a person on leave from employment as a public school employee to work full-time for a public school employee labor union is not entitled to active membership in PSERS. In 1992, the General Assembly amended the Retirement Code to permit a school employee to receive retirement credit if placed on an approved leave of absence to work full time for a labor union. *See*, Act of November 30, 1992 (P.L. 844, No.112), 24 Pa.C.S. §§ 8102 and 8302(b). An “approved leave of absence” now included “a leave of absence . . . which has been approved by the employer for . . . , service with a collective bargaining organization.” 24 Pa.C.S. § 8102. The definition of “leave for service with a collective bargaining organization” states:

Paid leave granted to an active member by an employer for purposes of working full time for or serving full time as an officer of a Statewide employee organization or a local collective bargaining representative under the act of July 23, 1970 (P.L.563, No.195), known as the Public Employe Relations Act:

Provided, That greater than one-half of the members of the employee organization are active members of the system; that the employer shall fully compensate the member, including, but not limited to, salary, wages, pension and retirement contributions and benefits, other benefits and seniority, as if he were in full-time active service; and that the employee organization shall fully reimburse the employer for such salary, wages, pension and retirement contributions and benefits and other benefits and seniority.

24 Pa.C.S. § 8102.² Thus, based on the plain language of the Retirement Code, an active member is permitted to receive retirement credit while working for a collective bargaining organization provided: (1) at least half the members of the organization are members of PSERS; (2) the employer approves the leave; (3) the collective bargaining organization reimburses the employer for the member's salary and benefits; (4) the member works full-time; and (5) the employer reports only the salary the member would have earned as a school employee. *See, Kirsch v. Public School Employees' Retirement Board*, 929 A.2d 663 (Pa. Cmwlth. 2007) affirmed 985 A.2d 671 (Pa. 2009).

Here, ASD did not place the AEA President on a "leave with collective bargaining organization" and the AEA did not reimburse ASD for the salary and benefits of the AEA President while on full release time. Thus, the AEA President does not meet the requirements for being on a "leave with collective bargaining organization" set forth in the Retirement Code. Without complying with the

² The definition was amended shortly thereafter by the Act of July 1, 1995, (P.L. 159, No. 29) to remove the Commonwealth as one of the entities to be fully reimbursed by the union, and, instead, the union is to reimburse the employer the full amount.

provisions of a “leave with collective bargaining organization,” credited service, salary and contributions must be removed based on the 1983 Attorney General’s Opinion.

IV. ARGUMENT

Generally, this Court lacks original jurisdiction, either in law or in equity, when an adequate administrative remedy is provided for by statute or regulation and the petitioner has not first exhausted that remedy. *Canonsburg General Hosp. v. Dep't of Health*, 422 A.2d 141, 144 (Pa. 1980) (“Well-settled case law of this Court precludes a party challenging administrative decision making from obtaining judicial review, by mandamus or otherwise, without first exhausting administrative remedies. . . . Judicial review without either a proper record or an administrative adjudication would constitute ‘premature interruption of the administrative process.’”) (internal citations omitted); *Interstate Traveller Servs., Inc. v. Dep't of Envtl. Resources*, 406 A.2d 1020, 1023 (Pa. 1979); *Packler v. State Employees' Retirement Board*, 408 A.2d 1091 (Pa. Cmwlth. 1979); *O'Brien v. State Employees' Retirement System*, 469 A.2d 1008 (Pa. 1983), *cert. denied*, 469 U.S. 816 (1984). Admittedly, the determination of the constitutionality of the Retirement Code is not a right the Board possesses. *Borough of Greentree v. Board of Property Assessments, Appeals & Review*, 328 A.2d 819 (Pa. 1974). Yet, because constitutional arguments may, and sometimes must, be raised at the level of administrative adjudication to preserve the right to raise them on appeal, if necessary, the Board will address a claimant's constitutional allegation. *Newlin Corp. v. Commonwealth, Dept. of Environmental Resources*, 579 A.2d 996 (Pa. Cmwlth. 1990). Indeed, the

administrative process can eliminate and/or clarify the justiciable facts underlying a constitutional claim.

In the *Response to PSERS' Preliminary Objections*, Petitioners, for the first time, enunciated that they are essentially challenging the constitutionality of the “leave with collective bargaining organization” contained in the Retirement Code regardless of whether the AEA reimburses ASD. See, *Petitioner's Response to PSERS' Preliminary Objections*, ¶4, ¶6 and ¶10.³ Through the admissions of ASD, PSERS can correct the record in accordance with the 1983 Attorney General Opinion by removing all credited service, salary and contributions reported while the AEA President was on full release time and not on a “leave with collective bargaining organization.” By removing retirement credit, Petitioners’ claims that “PSERS’ provision of credit for full release time violates public policy” and the granting of “credit for full release time [is] contrary to the Retirement Code” becomes moot. *Petitioner's Response to PSERS' Preliminary Objections*, ¶4. Thus, a finding that the AEA President was not a school employee while on full release time because she was not on a “leave with a collective bargaining organization” is essential before

³ PSERS presumes that Petitioners’ reference to “PSERS’ provision of credit for full release time” in ¶4 of its *Response* refers to the “leave with collective bargaining organization” set forth in the Retirement Code because PSERS is not a party to the collective bargaining agreement at issue in this matter and, as enunciated above, cannot credit service unless a member is on a “leave with a collective bargaining organization.”

Petitioners can proceed with the present action.⁴ Otherwise, Petitioners would be challenging the constitutionality of the “leave with a collective bargaining organization” with no actual aggrieved conduct or party. The Supreme Court recently opined that:

The claim of mootness, by contrast, stands on the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect. Such an argument, like all claims disputing the existence of a case or controversy, is intertwined with the precept that Pennsylvania courts do not issue purely advisory opinions. *See, e.g., Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 203, 888 A.2d 655, 659 (2005). In *In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978), for example, this Court dismissed as moot a case in which a patient had objected to having a mental health facility administer medication against his will. The case was dismissed because by the time it reached this Court the plaintiff was no longer a patient at the facility, and hence, “there was nothing for the lower court to enjoin, nor can this Court now order the injunctive relief sought below.” *Id.* at 211, 382 A.2d at 120-21; *see also Allen v. Birmingham Twp.*, 430 Pa. 595, 244 A.2d 661 (1968) (finding moot an appeal of a common pleas court's refusal to enjoin an excavation where the excavation had been completed); *Strassburger v. Phila. Record Co.*, 335 Pa. 485, 487, 6 A.2d 922, 923 (1939) (dismissing as moot an appeal from the denial of an injunction of a shareholder's meeting where the meeting had already occurred).

Burke v. Independence Blue Cross, 103 A.3d 1267, 1271 (Pa. 2014). Pre-enforcement review in this matter by the Board is appropriate and required.

Consequently, there is an adequate and available administrative remedy to

⁴ Once PSERS issues a determination, a member receives appeal rights to the Executive Staff Review Committee (“ESRC”). The member has a right to appeal an ESRC denial to the Board under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1, et seq., and would be afforded a formal evidentiary hearing. 22 Pa. Code §§ 201.2a. and 201.4(a). The member may then appeal to the Commonwealth Court. *See* 42 Pa.C.S. §763.

Petitioners' underlying claim regarding the AEA Presidents. Petitioners are attempting to circumvent the Board's administrative process of reviewing the circumstances surrounding the employment of the AEA President to determine whether she is a school employee. As a result, the Petition should be dismissed.

V. RELIEF

Based upon the foregoing arguments and authorities, PSERS respectfully requests that this Honorable Court grant PSERS' Preliminary Objections and dismiss the Petition.

Respectfully submitted,

Dated: May 20, 2016

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