

**Catherine M. Dusman, Plaintiff v. The Board of Directors of
Chambersburg Area School District, and the Chambersburg Area School District, Defendants**
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No.
2013 – 2085

HEADNOTES

Preliminary Objections; Demurrer; Writ of Mandamus; Extraordinary Relief; School Administrator Contracts

1. Mandamus is an extraordinary writ and used to compel a governmental body to perform a mandatory duty. Borough of Plum v. Tresco, 606 A.2d 951, 953 (Pa. Cmwlth. 1992).
2. In order to prevail in an action for mandamus, the Defendant must have a mandatory duty and a requirement to perform that mandatory duty. The Plaintiff must have a clear legal right to performance of that duty, and no other appropriate remedy available. Borough of Plum v. Tresco, 606 A.2d 951, 953 (Pa. Cmwlth. 1992).
3. Mandamus is not an available remedy where the relief requested would be futile or ineffectual. Petsinger v. Department of Labor & Industry, Office of Vocational Rehabilitation, 988 A.2d 748, 758 (Pa. Cmwlth. 2010).
4. “A writ will not issue, where a body such as the board of school directors clothed with discretionary powers has acted, to compel what would actually be a reversal of its decision.” Ickes v. Costlow, 193 A. 287 (Pa. Super. 1937).

Appearances:

J. McDowell Sharpe, Esq., *Attorney for Plaintiff*

Jan G. Sulcove, Esq., *Attorney for Defendants*

Opinion

Before Herman, P.J.

Procedural History

Plaintiff, Catherine M. Dusman, filed a Complaint in Mandamus on June 3, 2013. Defendant, Chambersburg Area School District (CASD), filed preliminary objections on June 20, 2013. Plaintiff filed an Amended Complaint on July 2, 2013. Defendant filed the instant preliminary objections on July 19, 2013. The parties submitted briefs in support of their positions. Oral argument was held on October 10, 2013. The matter is now ready for decision.

Factual Background

Ms. Dusman was hired as an assistant superintendant of elementary education with CASD on August 23, 2005. In 2007, she entered into a contract with CASD, effective August 1, 2004 until July 31, 2008. This contract, pursuant to 24 P.S. § 10-1077, would renew for another four-year term unless CASD chose to end it and gave notice of that decision 150 days prior to its end. In 2008 the board did not act to end the contract within 150 days and the contract renewed for a term of August 1, 2008 to July 31, 2012 (hereinafter “2008 Contract”). In March of 2009 the Board passed a resolution seeking to create a new four-year term from August 23, 2009 to August 22, 2013 (hereinafter “2009 Resolution”). Ms. Dusman alleges in the Complaint that she previously entered into a written contract with CASD that created a new term from July 1, 2009 until June 30, 2013 (hereinafter “2009 Written Contract”). Ms. Dusman does not have a signed copy of this contract, but alleges that CASD has the signed copy. CASD denies the existence of this contract.

On March 13, 2013, CASD decided, by resolution, to eliminate the assistant superintendant position which Ms. Dusman held and placed her in a director’s position with the same pay and benefits. Ms. Dusman’s last day as assistant superintendant was on August 22, 2013.

Ms. Dusman’s position is that either the 2008 Contract or the 2009 Written Contract controlled at the time her position was eliminated. Under neither contract did the CASD provide the required 150 day Notice and, therefore,

the March 13, 2013 Board decision did not eliminate her position. CASD's position is that the 2009 Resolution is controlling and the Notice given under that Resolution satisfies the 150 day requirement.

I. Demurrer – Did plaintiff allege the necessary facts in the Amended Complaint that would allow the Court to Order reinstatement of Plaintiff by Writ of Mandamus

Mandamus is an extraordinary writ and used to compel a governmental body to perform a mandatory duty. Borough of Plum v. Tresco, 606 A.2d 951, 953 (Pa. Cmwlth. 1992). In order to prevail in an action for mandamus, the Defendant must have a mandatory duty and a requirement to perform that mandatory duty. The Plaintiff must have a clear legal right to performance of that duty, and no other appropriate remedy available. Borough of Plum v. Tresco, 606 A.2d 951, 953 (Pa. Cmwlth. 1992). Mandamus is not a matter of right and is only granted at the Court's discretion. Keith v. Com., Pennsylvania Bd. of Probation and Parole, 464 A.2d 659, 661 (Pa. Cmwlth. 1983). Mandamus is not an available remedy where the relief requested would be futile or ineffectual. Petsinger v. Department of Labor & Industry, Office of Vocational Rehabilitation, 988 A.2d 748, 758 (Pa. Cmwlth. 2010). Finally, "a writ will not issue, where a body such as the board of school directors clothed with discretionary powers has acted, to compel what would actually be a reversal of its decision." Ickes v. Costlow, 193 A. 287 (Pa. Super. 1937).

The standard for addressing a challenge to the sufficiency of a complaint is "whether on the facts alleged in the complaint the law states with certainty that no recovery is possible, accepting as true all well-pled allegations of material fact and inferences reasonably deducible therefrom and resolving any doubts in favor of overruling the demurrer." Pratter v. Penn Treaty American Corp., 11 A.3d 550 (Pa Cmwlth 2010).

Here, Ms. Dusman has alleged a clear right and a duty on the part of the Defendant to act on that right. Specifically, Ms. Dusman's Amended Complaint alleges that either the 2008 Contract or the 2009 Written Contract were controlling. She has alleged that CASD violated the contracts and 24 P.S. § 10-1077 by failing to give her proper notice when it eliminated her position. Therefore, Ms. Dusman has alleged that either of the two contracts were renewed by statute, and she is entitled to reinstatement to her position. Cf. Petsinger v. Department of Labor & Industry, Office of Vocational Rehabilitation, 988 A.2d 748, 757-58 (Pa. Cmwlth. 2010) (denying plaintiff's mandamus claim for reinstatement to a former position where he could not identify a clear right to reinstatement).

CASD's demurrer is based upon the fact that they do not believe the 2009 Written Contract ever existed. Further, they believe that the 2009 Resolution was in effect at the time that they eliminated the position. Therefore, CASD's belief is that since the 2009 Resolution is controlling, that Ms. Dusman has not identified a clear right.

In response to this demurrer, Ms. Dusman contends that to grant such an objection would be premature because discovery has not yet been conducted. We agree. Accepting alleged facts in the Amended Complaint as true, we cannot simply accept CASD's position that the 2009 Resolution is dispositive of the matter. The Complaint avers that the 2008 Contract was in effect or the 2009 Written Contract was in effect. It also avers that the 2009 Resolution was a unilateral contract created by the board, and not consented to by Ms. Dusman.

Further, we are not convinced that the 2009 Resolution was a viable contract. It is axiomatic that a contract requires an offer and consent. Here, CASD's position is that it unilaterally decided to change the 2008 Contract term to the term of the 2009 Resolution. At oral argument, it was CASD's rational for this unilateral action that nothing in the school code prevents the school board from adopting an employment contract before the old one ends. CASD explained that the reason for this type of action is to keep an employee at the district for as long as possible if the current board expects a change in the composition of the board in the future and wishes to keep certain policies or administrators in place. While there may be nothing in the school code prohibiting such action, we find this contradicts basic contract law. There still remains the possibility that this resolution was the result of negotiations with Ms. Dusman. For that reason, this matter is still an issue of fact and cannot be decided until discovery is conducted.

Finally, we must address whether it is possible to issue a writ of mandamus since the position of Assistant Superintendent of Elementary Education was abolished by CASD. CASD argues that because the board eliminated the position using its rightful discretionary powers, the Court cannot now substitute its own discretion for that of the board's and revive the nonexistent position. As stated above in Ickes, we are prohibited from issuing the writ where the board has exercised its discretionary powers and our action would be a reversal of their decision. At first glance, Defendant's argument is compelling. However, Plaintiff counters this argument in noting that the school board lacked the authority, pursuant to 24 P.S. § 10-1077, to eliminate the position if Ms. Dusman's employment contract was still in effect. Allowing a school board to end a contract by eliminating a position contradicts the notice protections provided by § 10-1077. We agree with this rebuttal. Section 10-1077 exists to protect the employment security of

superintendent positions. If the board could override § 10-1077 and end any superintendent's contract simply by eliminating the position, then § 10-1077 would be rendered useless. Therefore, we find that if it is determined that the 2008 Contract or the 2009 Written Contract was in effect at the time the position was eliminated, the board did not have the discretionary power to eliminate Ms. Dusman's position and was bound to keep that position in effect until her contract was properly extinguished. We cannot determine this until discovery has been conducted and the issue of which contract was in effect at the time the position was eliminated is put properly before the Court.

II. Scandalous and Impertinent Material

Defendant's final argument is that the references to CASD's malfeasance or misfeasance in the Complaint are scandalous or impertinent and should be stricken pursuant to Pa. R. Civ. P. 1028(a)(2). To be scandalous or impertinent, an averment must be immaterial to the cause of action. Plaintiff has alleged that a 2009 Written Contract exists and that she is unable to produce it because it is in the control of CASD. CASD claims that they have no such document. Further, the rules of civil procedure require that if a claim is based on a writing, the party must attach the writing to the complaint or explain why they do not have a copy of the document. Pa. R. Civ. P. 1019. Since CASD contends no such document exists, and Plaintiff's claim is, partly, based on the allegations that this document does exist, the only conclusion Plaintiff can come to is that this 2009 written contract was either lost or is being concealed. Such acts would be either malfeasance or misfeasance.

These averments relate directly to the claim that the 2009 Written Contract is valid, and explain why the Plaintiff cannot produce it. Further, these statements are required by the rules of procedure to explain why the document is not attached. Therefore, the averments are not scandalous or impertinent.

Conclusion

In light of the foregoing discussion, Defendant's preliminary objections will be overruled. The issues raised in the demurrer are premature and cannot be determined until discovery has been conducted. Further, the references to CASD's misfeasance and malfeasance are not scandalous or impertinent. Defendant, CASD, will be ordered to file a response to the Complaint.

ORDER

NOW THIS 8th day of January 2014, upon review and consideration of the Defendants' Preliminary Objections, oral argument; and the briefs in support:

THE COURT HEREBY ORDERS:

1. Defendants' objection in the form of a demurrer to the Amended Complaint is **OVERRULED** pursuant to the attached opinion.
2. Defendants' objection regarding scandalous and impertinent material is **OVERRULED** pursuant to the attached opinion.

IT IS FURTHER ORDERED that Defendant will file an Answer to the Amended Complaint within twenty (20) days of receipt of this order.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2), (b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.