

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. Municipal Construction	:	
Equipment Operators' Labor Council,	:	
	:	
Relator,	:	
	:	
v.	:	No. 16AP-492
	:	
Ohio State Employment Relations Board	:	(REGULAR CALENDAR)
and	:	
Utility Workers Union of America, AFL-CIO,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on February 7, 2017

On brief: *Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A., and Stewart D. Roll*, for relator.

On brief: *Michael DeWine*, Attorney General, and *Michael D. Allen*, for respondent State Employment Relations Board.

On brief: *Goldstein Gragel LLC, Joyce Goldstein, and Richard L. Stoper, Jr.*, for respondent Utility Workers Union of America, AFL-CIO.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

I. Background and Procedural History

{¶ 1} Relator, Municipal Construction Equipment Operators' Labor Council ("MCEO"), has filed this original action seeking a writ of mandamus ordering respondent

Ohio State Employment Relations Board ("SERB") to vacate its June 30, 2016 order directing its "Representation Section" to proceed with a mail-ballot election process to select union representation for a bargaining unit of certain Cleveland municipal employees. Additionally, relator seeks a writ ordering SERB to provide a hearing, pursuant to Ohio Adm.Code 4117-5-05, before considering the election petition.

{¶ 2} Pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate of this court who examined the evidence and issued the appended decision which includes findings of fact and conclusions of law. The magistrate recommends this court grant SERB's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Relator has filed objections to the magistrate's decision.

{¶ 3} As a preliminary matter, we note that the magistrate issued his decision recommending we grant SERB's motion to dismiss on September 7, 2016. On September 13, 2016, relator filed a motion requesting an addition to the magistrate's findings of fact, which the magistrate denied in an order dated September 14, 2016. The next day, September 15, 2016, relator filed a "motion for orders" to (1) set aside the magistrate's September 14, 2016 order, and (2) grant relator's September 13, 2016 motion. That same day, relator filed its objections to the magistrate's decision. We now address both relator's objections to the magistrate's decision and the merits of relator's September 15, 2016 motion for orders.

II. Objections to the Findings of Fact

{¶ 4} Relator sets forth several objections to the magistrate's findings of fact. First, relator asks this court to amend Finding of Fact No. 1 to include additional statements. In its entirety, Finding of Fact No. 1 states "MCEO represented certain City of Cleveland employees under a collective bargaining agreement ('CBA') that was in effect from March 31, 2013 to March 31, 2016." (Mag.'s Decision at ¶ 20.) Relator objects to this finding of fact as incomplete and asks this court to additionally state:

On January 30, 2003, in Case No. 2002-REP-02-0116, SERB recognized the CEO Union as the exclusive labor representative for those persons employed by Cleveland as water plant operators, stationary engineers, and boiler room operators (the "Bargaining Unit Employees").

Since that recognition, the CEO Union has successfully represented these Bargaining Unit Employees by negotiating collective bargaining agreements ("CBA") with Cleveland, successfully prosecuting numerous grievances and defending disciplinary charges made against the members of these Bargaining Unit Employees. Article 45 of the current CBA is titled, "Duration." It states:

This contract represents a complete and final understanding of all bargainable issues between the City and the CEO Union and it shall be effective as of April 1, 2013 and remain in full force and effect through March 31, 2016.

It is noteworthy that neither this nor any other CBA text identifies the described dates as the term of the CBA. Cleveland and the CEO Union are treating their CBA as still being in effect and not having expired while they are negotiating for and making progress in their negotiations for a successor CBA. That activity is proceeding pursuant to SERB's decision in *In re Crestline Exempted Village School District Board of Education*, SERB 2006-003 (3-21-2006).

(Objs. to Mag.'s Decision at 2-3.)

{¶ 5} These statements appear to be an attempt by relator to state an ultimate legal conclusion as fact in order to limit the magistrate's subsequent legal analysis. Indeed, contrary to relator's assertion that the agreement was still in effect, R.C. 4117.09(E) provides a maximum term of three years for a collective bargaining agreement, and states that extensions of the CBA "do not affect the expiration date of the original agreement." Thus, finding no error in this finding of fact, we overrule relator's objection to Finding of Fact No. 1.

{¶ 6} Relator next objects to Finding of Fact No. 2 because it again referenced the CBA's expiration date, and relator again asserts the agreement did not actually expire. However, Article 45 of the CBA plainly states the contract shall "remain in full force and effect through March 31, 2016." We find no error in Finding of Fact No. 2, and we overrule relator's objection in this regard.

{¶ 7} Relator's third and final objection to the magistrate's findings of fact relates to Finding of Fact No. 10. Here, relator argues the magistrate mischaracterized SERB's

motion to dismiss when the magistrate stated SERB filed a motion to dismiss on the basis that the complaint "fails to state a claim pursuant to Civ.R. 12(B)(6)." Instead, relator argues the magistrate should have quoted from SERB's motion, which argued for dismissal "pursuant to Civ.R. 12(B)(6) because relator cannot satisfy the perquisites that would entitle it to relief." (July 18, 2016 SERB Mot. at 2.) Relator then suggests that if the magistrate had quoted verbatim from SERB's complaint, the magistrate would have been compelled to conclude that SERB did not present a proper Civ.R. 12 motion because SERB's language was not a verbatim recitation of Civ.R. 12(B)(6).

{¶ 8} Notably, relator cites no case law for the proposition that a party must recite the language of Civ.R. 12(B)(6) exactly in order to warrant relief. It appears from the magistrate's decision that he understood the relief SERB sought, and the magistrate did not err in paraphrasing SERB's complaint in the Findings of Fact. Thus, we overrule relator's objection to Finding of Fact No. 10.

III. Objections to Conclusions of Law

{¶ 9} In addition to its objections to the findings of fact, relator also objects to the magistrate's conclusions of law. In its first five objections to the conclusions of law, relator objects to the magistrate's conclusion of law that the complaint fails to state a claim upon which relief can be granted and must be dismissed under Civ.R. 12(B)(6) because the complaint "does not set forth a clear legal right to the relief sought from SERB, nor present a basis for a clear legal duty for SERB to perform the requested act." (Mag.'s Decision at ¶ 32.)

{¶ 10} As the magistrate noted, a relator seeking mandamus must demonstrate (1) relator has a clear legal right to the relief prayed for; (2) respondents have a clear legal duty to provide the requested relief; and (3) relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Gill v. School Emps. Retirement Sys. of Ohio*, 121 Ohio St.3d 567, 2009-Ohio-1358, ¶ 18.¹

{¶ 11} As to the first prong, we agree with the magistrate that relator does not have a clear legal right to prevent SERB from ordering the election. Though relator asserted in its complaint, and again in its objections, that SERB violated R.C. 4117.07(C)(6) when it

¹ The underlying proceedings before SERB were governed by R.C. Chapter 4117 and the current mandamus is governed by R.C. Chapter 2731.

issued its order directing the election, the magistrate appropriately concluded that the CBA had expired for purposes of R.C. 4117.07(C)(6) and that none of the restrictions set forth in the statute apply here. Relator continues to argue that there is a dispute as to whether the CBA had actually expired, but we note, as the magistrate did, that R.C. 4117.09(E) provides that CBA contracts "shall contain an expiration date that is [no] later than three years from the date of execution," and that "extensions do not affect the expiration date of the original agreement." Both the CBA itself and the relevant statute direct that the CBA had expired for purposes of SERB ordering an election, and despite relator's repeated assertions to the contrary, the magistrate did no err in concluding that SERB did not violate R.C. 4117.07(C)(6) when it ordered the election. Thus, we overrule relator's first five objections to the magistrate's conclusions of law as all five of those objections relate to this same issue.

{¶ 12} Relator additionally argues, in its sixth objection to the magistrate's conclusions of law, that the magistrate erred in his interpretation of Ohio Adm.Code 4117-5-05(D). More specifically, the magistrate determined SERB did not violate Ohio Adm.Code 4117-5-05(D) when it did not hold a hearing on the representation petition because there were no other disputed issues. Relator asserts there were two additional "disputed issues": (1) whether the term of the CBA had expired, and (2) whether the CBA remained in effect while relator and the municipal employees engaged in negotiations for a successor CBA. We agree with the magistrate that these issues were not "disputed issues" within the meaning of Ohio Adm.Code 4117-5-05(D) because the law is clear under R.C. 4117.09(E) that the CBA had expired, and the law was equally clear under R.C. 4117.07(C)(6) that SERB could order the election.

{¶ 13} Though relator argues that *In re State Emp. Relations Bd. v. Crestline Exempted Village School Dist. Bd. of Edn.*, SERB No. 2004-ULP-08-0465 (Mar. 21, 2006), stands for the proposition that the terms of the CBA remain in full force and affect during the negotiation of a successor agreement, we agree with the magistrate's careful distinction between the "terms" of an agreement and the "term," or duration, of the agreement. *Crestline* does not direct that the duration of an agreement has not expired just because negotiations for a successor agreement are ongoing. Accordingly, because we conclude there were no other "disputed issues" within the meaning of Ohio Adm.Code

4117-5-05(D) requiring SERB to hold a hearing before ordering the election, we overrule relator's sixth and final objection to the magistrate's conclusions of law.

{¶ 14} As to relator's September 15, 2016 motion for orders, relator's request for additional findings of fact are another attempt to state ultimate legal conclusions under the guise of "findings of fact." To the extent relator disagreed with either the magistrate's findings of fact or conclusions of law, the appropriate course of action was for relator to file objections to the magistrate's decision pursuant to Civ.R. 53(D)(3)(b)(iii), which relator did. Because relator's motion was both procedurally inappropriate and substantively addressed in relator's objections, we deny relator's September 15, 2016 motion for orders.

IV. Conclusion

{¶ 15} After examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration to relator's objections, we overrule all of relator's objections and adopt the magistrate's findings of fact and conclusions of law. Additionally, we deny relator's September 15, 2016 motion for orders. Accordingly, we grant SERB's motion to dismiss the complaint and deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

KLATT and BRUNNER, JJ., concur.

APPENDIX

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MAGISTRATE'S DECISIONRendered on September 7, 2016

*Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A., and Stewart D. Roll, for relator.**Michael DeWine, Attorney General, and Michael D. Allen, for respondent State Employment Relations Board.**Goldstein Gragel LLC, Joyce Goldstein, and Richard L. Stoper, Jr., for respondent Utility Workers Union of America, AFL-CIO.*

IN MANDAMUS
ON RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

{¶ 16} Relator, Municipal Construction Equipment Operators' Labor Council ("MCEO"), began this original action with a complaint filed on July 5, 2016 against respondent, State Employment Relations Board ("SERB"). Relator's complaint seeks a writ of mandamus ordering SERB to vacate its June 30, 2016 order entitled "Direction

to Mail-Ballot Election," which directs its "Representation Section" to proceed with a mail-ballot election process to determine union representation for a bargaining unit composed of certain Cleveland municipal employees. Relator also seeks a writ ordering SERB to provide a hearing pursuant to Ohio Adm.Code 4117-5-05 before considering the election petition.

{¶ 17} In addition to seeking a writ of mandamus, relator moved for a temporary restraining order, preliminary injunction, and permanent injunction. Relator further applied for an alternative writ of mandamus. These aspects of the complaint were denied by magistrate's orders rendered on July 8 and July 13, 2016.

{¶ 18} By order dated August 4, 2016, the magistrate granted intervention by intervenor/respondent Utility Workers Union of America, AFL-CIO ("UWUA"), the entity that seeks to replace relator in representation of the bargaining unit.

{¶ 19} Currently before the magistrate is SERB's motion to dismiss the complaint pursuant to Civ.R. 12 (B)(1), lack of subject-matter jurisdiction, and Civ.R. 12(B)(6), failure to state a claim upon which relief can be granted.

Findings of Fact:

{¶ 20} 1. MCEO represented certain City of Cleveland employees under a collective bargaining agreement ("CBA") that was in effect from March 31, 2013 to March 31, 2016.

{¶ 21} 2. UWUA filed a Petition for Representation Election on May 4, 2016, after expiration of the above three-year CBA between the city and MCEO on March 31, 2016.

{¶ 22} 3. SERB rendered its order on June 30, 2016 denying MCEO's request for an Ohio Adm.Code 4117-5-05 hearing on the representation petition and directing its representation section to proceed with the mail-ballot process.

{¶ 23} 4. MCEO filed its complaint on July 5, 2016 seeking a writ of mandamus directing SERB to withdraw its order and direction for a representation election, hold an Ohio Adm.Code 4117-5-05 hearing, and strike the representation election petition of UWUA.

{¶ 24} 5. Contemporaneously with its complaint in mandamus, on July 5, 2016, MCEO filed motions for a temporary restraining order, preliminary injunctive relief, and permanent injunctive relief to enjoin SERB from taking any action to facilitate the representation election.

{¶ 25} 6. On July 5, 2016, MCEO filed an application for an alternative writ of mandamus.

{¶ 26} 7. On July 7, 2016, Magistrate Macke held a telephone conference with counsel for MCEO and SERB.

{¶ 27} 8. On July 8, 2016, Magistrate Macke entered an order denying an alternative writ of mandamus.

{¶ 28} 9. On July 13, 2016, Magistrate Macke entered an order denying MCEO's renewed request for an alternative writ and denying injunctive relief on the basis that this court does not have the power to grant injunctive relief in an original action.

{¶ 29} 10. On July 18, 2016, SERB filed a motion to dismiss this action on the basis that the complaint does not plead the necessary elements for issuance of a writ of mandamus, fails to state a claim pursuant to Civ.R. 12(B)(6), and the Tenth District Court of Appeals lacks subject-matter jurisdiction.

{¶ 30} 11. On July 20, 2016, the court appointed Magistrate Davis to hear the case.

{¶ 31} 12. On August 4, 2016, Magistrate Davis entered an order granting UWUA's motion to intervene.

Conclusions of Law:

{¶ 32} It is the magistrate's decision that this court grant SERB's motion to dismiss the complaint in mandamus and deny the writ. The complaint does not set forth a clear legal right to the relief sought from SERB, nor present a basis for a clear legal duty for SERB to perform the requested act. As a result, the complaint fails to state a claim upon which relief can be granted and must be dismissed under Civ.R. 12(B)(6). The magistrate further concludes that SERB's jurisdictional arguments under Civ.R. 12(B)(1) are premature, because they require the court to consider the substance of a claim that relator has failed to state ab initio.

{¶ 33} The magistrate notes as a preliminary matter that relator incorrectly suggests that the Ohio Rules of Civil Procedure do not apply to this action, and any motion under those rules is not well-taken. Relator asserts that SERB matters are special proceedings created by statute, and that Civ.R. 1(C)(7) limits the scope of the civil rules to exclude such actions. While the underlying proceedings before SERB may constitute special statutory proceedings, relator has chosen to pursue an original action seeking a writ from this court, a step that lies entirely outside the statutory process. Pursuant to Loc.R. 2(B) of the Tenth District Court of Appeals, the civil rules govern original actions in this court, and SERB's motion under Civ.R. 12 is proper.

{¶ 34} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.* In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975). As such, a complaint for a writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6), if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling it to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995).

{¶ 35} In order for a writ of mandamus to issue, the relator must demonstrate (1) that relator has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts requested, and (3) that relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983). In a mandamus proceeding, courts are not authorized to create a legal duty to be enforced; it is the duty of the legislative branch of government to do so. *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, ¶ 18.

{¶ 36} SERB first argues in this case that relator has an adequate remedy at law through the administrative appeals process under R.C. 119.12. MCEO counters that an appeal *after* an election that would establish a new representative union is not comparable to the relief sought here, which would entirely forestall the election from which the appeal might be taken. The magistrate concludes that, as the action is currently postured in the preliminary pleading stage, the legal remedy of a subsequent appeal is arguably not adequate or comparable in effect.

{¶ 37} MCEO, however, fails to meet the other two prongs to obtain a writ of mandamus. MCEO does not have a clear legal right to prevent the ordered election, and SERB has no clear legal duty to withdraw its order.

{¶ 38} R.C. 4117.07 (C)(6) states that SERB may not conduct a representation election under certain conditions:

The board may not conduct an election under this section in any appropriate bargaining unit within which a board-conducted election was held in the preceding twelve-month period, *nor during the term of any lawful collective bargaining agreement* between a public employer and an exclusive representative.

Petitions for elections may be filed with the board no sooner than one hundred twenty days or later than ninety days before the expiration date of any collective bargaining agreement, or after the expiration date, until the public employer and exclusive representative enter into a new written agreement.

For the purposes of this section, extensions of agreements do not affect the expiration date of the original agreement.

(Emphasis added.) None of the restrictions set forth in the statute apply here. In particular, the magistrate rejects MCEO's assertion that the prohibition against holding representation elections "during the term of any lawful collective bargaining agreement" must be extended to prohibit elections during post-agreement bargaining periods.

{¶ 39} MCEO relies on *In re State Emp. Relations Bd. v. Crestline Exempted Village School Dist. Bd. of Edn.*, SERB No. 2004-ULP-08-0465 (Mar. 21, 2006), for the proposition that the *terms* of a CBA remain in full force and effect after the expiration of

the agreement while the parties negotiate a new successor agreement. MCEO asserts that as long as the terms of an agreement continue to govern the labor relation between the parties, the agreement is essentially in effect, and the R.C. 4117.07 (C)(6) restriction applies.

{¶ 40} The distinction between extending the "terms" of an agreement and the "term," i.e., duration, of that agreement is important. While the terms and conditions of employment defined in an expired CBA may remain in full force during a post-expiration negotiation period, as SERB ordered in *Crestline*, that does not compel the conclusion that the duration (term) of the agreement itself has not expired. R.C. 4117.07(C)(6) specifically references the "expiration date" of such agreements, and goes so far as to specify that even formal extensions agreed by the parties will not affect the expiration date of the original agreement. This is consistent with a related section governing the duration of CBA contracts: R.C. 4117.09(E) provides that such agreements "shall contain an expiration date that is [no] later than three years from the date of execution," and that while the parties may extend the agreement, "the extensions do not affect the expiration date of the original agreement."

{¶ 41} Pursuant to the governing statutes, therefore, it is clear that even if the status quo of the conditions of employment may be maintained during negotiation over successor agreement, the agreement has nonetheless expired, and SERB is free to undertake actions consistent with a new representation election. Any other reading of R.C. 4117.07(C)(6) is unworkable and would essentially neutralize the intent of the statute and prevent SERB from accepting all petitions from competing unions, given the high likelihood of active negotiations after any such CBA expiration. There is no statutory obstacle to SERB's issuance of the order at issue.

{¶ 42} In the alternative, MCEO also asserts that SERB's order must be vacated because SERB affirmatively declined to hold a hearing on the representation petition pursuant to R.C. 4117.07(A)(1) and Ohio Adm.Code 4117-5-05. The latter provides that SERB, upon determining that "a question or questions of representation * * * exist," shall issue to the parties a "notice of hearing *or inquiry*." (Emphasis added.) Ohio Adm.Code 4117-5-05(A). Ohio Adm.Code 4117-5-05(D) states:

If the board determines from the *investigation* that there is a question of majority representation requiring an election *and that there are no other disputed issues*, the board may direct an election without a hearing.

(Emphasis added.)

{¶ 43} The only "disputed issue" argued by MCEO here is whether the ongoing negotiations between MCEO and the employer after expiration of the prior CBA prevented SERB from granting UWUA's election petition. As determined above, this was not grounds for dispute because the law is clear that SERB could so order. In the absence of a disputed issue, SERB could proceed under Ohio Adm.Code 4117-5-05 on the basis of an "inquiry" or "investigation," rather than a hearing.

{¶ 44} MCEO has not established a clear legal duty on the part of SERB to hold a hearing, or a clear legal right to impede SERB from proceeding with the representation election pursuant to UWUA's petition. The complaint for mandamus filed by MCEO, on its face, fails to meet the standards required for issuance of a writ of mandamus. It is the magistrate's decision that this court grant SERB's motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

/S/ MAGISTRATE
MARTIN L. DAVIS

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).