[Cite as *State ex rel. Waiters. v. Szabo*, 2010-Ohio-5249.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94599

STATE OF OHIO, EX REL. CHERYL D. WAITERS

RELATOR

vs.

FRED S. SZABO, COMMISSIONER, ET AL.

RESPONDENTS

JUDGMENT: WRIT DENIED

Writ of Procedendo
Motion Nos. 431748, 433494, 433495, and 433496
Order No. 438605

RELEASE DATE: October 27, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Relator, Cheryl D. Waiters, avers that she is an employee of the City of Cleveland who works as an electrician assigned to Cleveland Hopkins Airport. The respondents include: the commissioner of the airport; the Director of the Department of Port Control; the mayor; the Director of the Department of Finance; and the city [collectively, "the municipal respondents"]. Additionally, the International Brotherhood of Electrical Workers, Local 38 ("the union") is also a respondent.

{¶ 2} On June 8, 2007, the city terminated Waiters. The union filed a grievance challenging the termination. In a March 10, 2008 opinion and award, the arbitrator ruled that Waiters was to be reinstated to her former position "subject to any ordinary and customary Fitness-for-Duty Examination." Exh. A to relator's affidavit (in support of her motion for summary judgment) at 25. The arbitrator retained jurisdiction to consider all wages and benefits which Waiters may have lost "[t]o the extent that the grievant shows that she has made reasonable efforts to mitigate damages * * *." Id.

{¶ 3} The city filed an application to vacate the arbitration award. The court of common pleas denied the application and confirmed the arbitration award. *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, Cuyahoga Common Pleas Case No. CV-659325 (Feb. 11, 2009). This court affirmed that

judgment in *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, Cuyahoga App. No. 92982, 2009-Ohio-6223 (released, November 25, 2009; journalized December 7, 2009).

{¶ 4} On January 29, 2010, Waiters commenced this action and requests that this court issue a writ of mandamus ordering her reinstatement and compensation net of mitigation as well as other relief. Waiters filed a motion for summary judgment. The municipal respondents filed a motion for summary judgment and the union filed a motion to dismiss. For the reasons stated below, we grant respondents' motions, deny relator's motion and enter judgment for respondents.

{¶ 5} A review of the filings by the parties reflects that the city was in the process of reinstating Waiters and that the arbitrator had already determined in a July 28, 2008 opinion and award at the remedy phase that Waiters was not entitled to back pay or benefits from her discharge through June 5, 2008. This court instructed the parties to file an update of the status of relator's claims and, specifically, to inform the court of the status of proceedings before the arbitrator. The union and relator both filed responses. The city did not respond.

{¶ 6} Relator and the union acknowledge that the city reinstated Waiters on June 28, 2010. Regarding her request for reinstatement, Waiters has received the relief which she requested and this action in mandamus is moot.

{¶ 7} Waiters and the union acknowledge that her matter is pending before the arbitrator. She specifically states that the arbitrator held a hearing in the remedy phase (regarding her claim for back pay and benefits) in August 2010.

{¶ 8} The fundamental criteria for issuing a writ of mandamus are well-established. "In order to be entitled to a writ of mandamus, relator must show (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State, ex rel. National City Bank v. Bd. of Education* (1977), 52 Ohio St. 2d 81, 369 N.E.2d 1200." *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St. 2d 41, 42, 374 N.E.2d 641. Of course, all three of these requirements must be met in order for mandamus to lie.

{¶ 9} The record in this action reflects that the city and the union are actively litigating relator's claim for back pay and benefits before the arbitrator. As the arbitrator's ruling regarding reinstatement demonstrates, the city or the union may seek judicial review of the arbitrator's ruling.

{¶ 10} In light of the ongoing arbitration, Waiters has not demonstrated that she has a clear legal right to relief in mandamus or that the municipal respondents have a clear legal duty to acquiesce in her request for back pay and benefits. The union's pursuit of a grievance on her behalf ultimately secured her

reinstatement and the union continues to pursue her interests before the arbitrator. Furthermore, Waiters has not persuaded this court that we have the authority to conduct proceedings which would duplicate those before the arbitrator and determine whether Waiters is entitled to any back pay and benefits net of mitigation. Cf. *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803 (discussing claim preclusion and issue preclusion).

{¶ 11} Waiters also complains that she does not have an adequate remedy in the ordinary course of the law because she is not a party to the arbitration. This argument ignores the fact that the union is pursuing the grievance for her and she has already received the benefit of reinstatement. Rather, as noted by the arbitrator in the March 10, 2008 opinion and award, Waiters is an employee covered by the collective bargaining agreement between the city and the union. Exh. A to relator's affidavit at 2. That is, the collective bargaining agreement provides a grievance procedure as a remedy and Waiters is the beneficiary of that remedy. As a consequence, Waiters has not demonstrated that she lacks an adequate remedy.

{¶ 12} Waiters has, therefore, failed to establish each of the criteria for mandamus. We must, therefore, deny her request for relief in mandamus.

{¶ 13} Similarly, we deny her request for attorney fees for this action. Waiters has not demonstrated any statutory basis for the claim for attorney fees.

Likewise, the record does not support her contention that the city acted in bad faith. The city pursued its right to seek judicial review of relator's reinstatement. At the conclusion of the judicial process, the city began the process for reinstating Waiters, including fitness-for-duty examinations (which were authorized by the arbitrator). See the affidavit of counsel for the union attached to the union's motion to dismiss. In *Calloway v. Wasik*, Cuyahoga App. No. 92304, 2009-Ohio-6215 approximately four months elapsed between the Civil Service Commission's determination that the employee should be reinstated and reinstatement. This court found that there was no evidence of bad faith. Likewise, we find that the record in this action does not support relator's assertion of bad faith.

{¶ 14} Accordingly, the municipal respondents' motion for summary judgment is granted, the union's motion to dismiss is granted and relator's motion for summary judgment is denied. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B). Relator to pay costs.

Writ denied.

JAMES J. SWEENEY, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR