IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FRANK GIRARDI, JR., Plaintiff	:	NO. 16 - 1302
	:	CIVIL ACTION - LAW
vs.	:	
JERSEY SHORE AREA SCHOOL DISTRICT, Defendant	:	Motion for Peremptory Writ

OPINION AND ORDER

Before the court is Plaintiff's Motion for Peremptory Writ, filed September 9, 2016 simultaneously with his Complaint in Mandamus, in both of which he seeks to be reinstated to his former teaching position in Defendant School District and awarded back pay. Argument on the motion was held October 14, 2016.

Plaintiff alleges that he has been employed as a tenured professional employee of the Defendant School District, that he was served by Defendant with a Statement of Charges and Notice of Hearing on November 2, 2015, that he has been denied salary and benefits since November 3, 2015, that at no time has the Board of School Directors taken action to dismiss him and that, as a result, he is entitled to mandatory relief: reinstatement with payment of back wages and benefits. Plaintiff cites The School District of Philadelphia v. Ellis Jones, 139 A.3d 358 (Pa. Commw. 2016) and Serge Vladimirsky v. The School District of Philadelphia, 2016 Pa. Commw. LEXIS 346, for the proposition that school board action, not just school district action, is required before a tenured professional employee may be terminated. Plaintiff argues that no such school board action was taken here and that he is thus entitled, under Jones and Vladimirsky, to reinstatement. Whether Plaintiff is correct cannot be determined

at this time, however, as the principles of election of remedies and exhaustion of administrative remedies prevent this court from reaching the issue.

As stated above, Defendant was served with a Statement of Charges and Notice of Hearing on November 2, 2015, pursuant to Section 1127 of the School Code, which provides in relevant part as follows:

> Before any professional employe having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employe with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. A written notice signed by the president and attested by the secretary of the board of school directors shall be forwarded by registered mail to the professional employe setting forth the time and place when and where such professional employe will be given an opportunity to be heard either in person or by counsel, or both, before the board of school directors and setting forth a detailed statement of the charges.

24 P.S. Section 11-1127. The notice indicated that a hearing was scheduled for November 16, 2015 and would be held if Plaintiff delivered a written request for a hearing to the Superintendent's office within ten days. Plaintiff chose to forgo the hearing, however, and instead elected to seek arbitration of the matter under the District's Collective Bargaining Agreement, in accordance with Section 1133 of the School Code, which provides in relevant part as follows:

> Nothing contained in sections 1121 through 1132 shall be construed to supersede or preempt a provision of a collective bargaining agreement in effect on July 23, 1970, or on any date subsequent thereto, negotiated by a school entity and an exclusive representative of the employes in accordance with the act of July 23, 1970 (P.L. 563, No. 195), known as the "Public Employe Relations Act," which agreement provides for the right of the exclusive representative to grieve and arbitrate the validity of a professional employe's termination for just cause or for the causes set forth in section 1122

> of this act; however, no agreement shall prohibit the right of a professional employe from exercising his or her rights under the provisions of this act except as herein provided.

24 P.S. Section 11-1133. Plaintiff filed a grievance on November 6, 2015, in which he stated that he "was placed on unpaid suspension without just cause" and that he wished to be "reinstated forthwith, … receive retroactive pay with statutory interest, … [and] made whole in all respects".

Because of a prior attempted termination of Plaintiff's employment by the District and the entry by the parties into a Last Chance Agreement at that time, the District claimed that Plaintiff was not entitled to arbitrate the instant matter and filed a petition for an injunction seeking to prevent the process. That request was denied by the Honorable Richard A. Gray on February 4, 2016, and that decision is currently on appeal in the Commonwealth Court. In the instant petition for a writ of mandamus, Plaintiff seeks the same relief sought in the grievance/arbitration, to be reinstated and awarded his back pay. Plaintiff argues that the delay in the arbitration process caused by the District's objection to such provides a basis for relief in this court.

As noted above, before a professional employee may be dismissed, he is entitled to a hearing and, pursuant to Section 1131, if the employee "considers himself or herself aggrieved by the action of the board of school directors" he may take an appeal by petition to the Superintendent of Public Instruction at Harrisburg, 24 P.S. Section 11-1131, and may appeal the Superintendent's decision to the Commonwealth Court. 24 P.S. Section 11-1132. Section 1133 allows for an alternative process, that chosen by Plaintiff here, of grieving the matter and submitting such to arbitration. That section makes it clear, however, that only one remedy may be chosen: "Professional employes shall have the right

to file a grievance under the collective bargaining agreement or request a hearing pursuant to section 1121 through 1132, but not both." 24 P.S. Section 11-1133. As stated by the Commonwealth Court in Neshaminy School District v. Neshaminy Federation of Teachers, 84 A.3d 391, 400 (Pa. Commw. 2014), "where a public employee may pursue either a statutory hearing or a grievance arbitration to challenge discipline, the decision to pursue one constitutes an election of remedies." A grievance "effects an irrevocable waiver of the School Code remedy." Id. at 399. Thus, Plaintiff is bound to seek his remedy through the arbitration process.

Even were Plaintiff permitted to pursue both avenues of relief simultaneously, he nevertheless would still not be entitled to relief in this court. His request for relief is based on an alleged failure of the School District to comply with Section 1127 of the School Code. The Code provides a statutory remedy for violations thereof, and "where a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the other exclusion of other methods of redress." Jackson v. Centennial School District, 501 A.2d 218, 220 (Pa. 1985). Therefore, the Pennsylvania Supreme Court concluded in Jackson, *supra*, "the statutory remedy set forth in section (C) of the School Code provides the exclusive procedure whereby a terminated professional employee can seek judicial review of administrative determinations." Id. The Court stated: "It is obvious that the legislature intended for the terminated professional employee to thoroughly litigate his or her claim *before the Board of School Directors and then appeal an unfavorable decision first to the Secretary of Education, and ultimately to the Commonwealth Court*." Id. at 219 (emphasis added). Seeking relief in the court of common pleas is not part of that statutory

remedy and, like the Court in Jackson, this court rejects Plaintiff's attempt to "defeat the legislatively prescribed procedure." Id. at 222.

Indeed, the remedy of mandamus has specifically been held to be *not available* to professional employees seeking relief for a violation of the School Code because "an individual who does not exercise his statutory appeal rights cannot later reclaim those rights 'under the guise of a petition for mandamus.'" Dotterer v. School District of the City of Allentown, 92 A.3d 875, 881 (Pa. Commw. 2014). *See also* Merritt v. West Mifflin Area School District, 424 A.2d 572, 574 (Pa. Commw. 1981), *citing* Board of Public Education for the School District of Pittsburgh v. Gooley, 399 A.2d 148 (Pa. Commw. 1979), where the Commonwealth Court held that "an action in mandamus cannot lie where a professional employee fails to pursue the statutory remedy provided by the Code."

Because the arbitration process has been initiated by Plaintiff, he has restricted his remedy to that process regardless of the delays caused by related litigation.[1]

[1] The court does not mean to imply that Plaintiff will not be entitled to a hearing before the Board if the Board succeeds in its efforts to enjoin the arbitration based on the Last Chance Agreement. In fact, the Board has argued in that litigation that Plaintiff is entitled to *only* a hearing before the Board. Thereafter, however, Plaintiff must seek review by the Secretary of Education and the Commonwealth Court, and not this court.

ORDER

AND NOW, this day of October 2016, for the foregoing reasons, Plaintiff's Motion for Peremptory Writ is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: William Hebe, Esq., 17 Central Avenue, Wellsboro, PA 16901
Austin White, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson