

Superior Court of Delaware.

Charles BRICE, Appellant,
v.
STATE OF DELAWARE, DEPARTMENT OF
CORRECTION, Appellees.

No. 96A-09-004.

June 23, 1997.

Upon Appeal From a Decision of The Merit Employee Relations Board. AFFIRMED.
[David A. Boswell](#), Wilmington.

Elizabeth D. Maron, Wilmington.

ORDER

[TERRY](#), Associate Judge.

*1 This is an appeal by Charles Brice (“Brice”) who is employed by the Department of Corrections. He thought that he had been treated unfairly when he was wrongfully denied a promotion and so he went through a lengthy grievance procedure and after obtaining no relief there, he went before the Merit Employees Relations Board. The Board held a hearing and determined that Brice was, indeed, wrongfully denied a promotion in violation of the Merit System Rules and it awarded him the position with back pay. It, however, denied his request for attorney's fees on the theory that the statute does not confer any power on the Board to make such an award. The statute in question is found at [29 Del. C. § 5931](#) and it reads in part as follows:

The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules.

Brice says that the phrase “otherwise make employees whole” by necessary implication includes the power to award a successful grievant attorney's fees. Otherwise, a successful grievant who has incurred substantial fees to successfully right a wrong would not be made whole if attorney's fees are paid out of his award. Also, in many cases a grievance might not include any request for

monetary benefits and, therefore, an employee could not be made whole if he has to vindicate non-economic rights at his own expense.

Brice appears to concede that attorney's fees should not be imposed in all cases where the grievant prevails but he does contend that the Board has the power to apply equitable principles and thereby impose fees in those instances where the Department acted in bad faith. I am asked to rule that the Board does have the power to impose attorney's fees in favor of Brice and then to remand the matter so that the Board may consider whether it is necessary and appropriate to make such an award in order to make him whole.

A number of Delaware cases have held that a court may not impose attorney's fees on the losing party absent statutory authority or a contractual undertaking.^{FN1} This is the standard that has invariably been applied in the law courts in Delaware. The rule has been expanded in equity where the Court of Chancery has the power to assess attorney's fees where equity requires, such as when one of the parties is guilty of bad faith. That is the rule set out in *Loretto Literary & Benevolent Institution v. Blue Diamond Coal Co.*^{FN2} As I apprehend Brice's argument, he believes that the phrase contained in [§ 5931](#) to "make employees whole" while not specifically authorizing the imposition of attorney's fees by the Board, nevertheless confers a broad equitable jurisdiction on the Board to grant broad relief such as restitution of a job and back benefits. This would necessarily include an award of attorney's fees where applicable as part of this equitable process in order to make an employee whole.

[FN1. *Burge v. Fidelity Bond and Mortg. Co.*, Del.Supr., 648 A.2d 414, 421 \(1994\) \(citing *Tandycrafts, Inc. v. Initio Partners*, Del.Supr., 562 A.2d 1162, 1164 \(1989\)\); *Slawik v. State*, Del.Supr., 480 A.2d 636, 639 \(1984\); *Casson v. Nationwide Ins. Co.*, Del.Super., 455 A.2d 361, 369 \(1982\).](#)

[FN2. Del. Ch. 444 A.2nd 256 \(1982\).](#)

*2 An argument akin to this one was made in *Casson v. Nationwide Insurance Co.*, where the Superior Court was asked to apply equitable principles in order to make the plaintiff whole in a case where the insurance company was accused of taking an unjustified position.^{FN3} However, the Court refused to go that far and declined to award attorney's fees at law without legislative authority. It noted in respect to the insurance statutes that authority to award attorney's fees is conferred in some sections of the insurance code and that its omission from the section under consideration implied a legislative intent not to confer such power in that type of case.

[FN3. 455 A.2d at 368.](#)

The General Assembly has enacted numerous statutes which specifically allow attorney's fees to be imposed against the State or other parties in specific circumstances. In cases for wages owed to an employee appointed in contravention of law or the Merit Rules attorney's fees may be imposed at [29 Del. C. § 5943\(d\)](#); attorney's fees may be imposed against employees in wage cases at [19 Del. C. § 1113\(c\)](#); attorney's fees may be imposed against defendants in workman's compensation cases pursuant to [19 Del. C. § 2127](#); attorney's fees may be imposed in connection

with violations of the Architectural Accessibility Act pursuant to [29 Del. C. § 7310\(d\)](#) and for violation of the Freedom of Information Act at [29 Del. C. § 10005\(d\)](#).

There is a rule of statutory construction to the effect that where a provision is expressly included in one section of a statute but is omitted from another, one must infer that the legislature was aware of the omission and intended it. See *Giuricich v. Emtrol*.^{FN4}

^{FN4}. Del.Supr., [449 A.2d 232 \(1982\)](#). Also see 2A Sutherland Statutory Construction § 47.23 (1984).

The General Assembly has demonstrated that when it desires to impose attorney's fees against someone as an element of relief, it will enact a specific statute. It did just that at one part of the Merit System statute ([§ 5943\(d\)](#)). Therefore, I do not think that it intended to empower the Board to award attorney's fees at [§ 5931](#) by the use of the phrase "otherwise make employees whole."

I regret having to reach that conclusion in this case where it appears from the Board's opinion that Mr. Brice was subjected to the most blatant discrimination on account of nepotism and favoritism employed by those involved in the selection process. I also sympathize with his argument that the State refused to recognize this situation and unreasonably litigated the matter causing him to incur unnecessary legal expenses in order to vindicate his rights. However, the statute does not empower the Board to award attorney's fees and therefore I *Affirm* its decision not to do so.

IT IS SO ORDERED.

Del.Super.,1997.

Brice v. State

Not Reported in A.2d, 1997 WL 524053 (Del.Super.)