

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE, DEPARTMENT :
OF TRANSPORTATION (“DELDOT”) : C.A. No. 09A-09-003 WLW
:
Employer-Below/Appellant, :
:
v. :
:
BONNIE KEELER, :
:
Grievant-Below/Appellee, :
and :
THE MERIT EMPLOYEE RELATIONS :
BOARD, :
:
Appellee. :

Submitted: January 15, 2010

Decided: January 28, 2010

ORDER

Upon State of Delaware Department of
Transportation’s Motion to Stay. *Denied.*

Frederick H. Schranck, Esquire, Department of Justice; Dover, Delaware; attorneys
for Appellant Delaware Department of Transportation.

Roy S. Shields, Esquire of Brown Shields & O’Brien, LLC, Dover, Delaware; attorneys
for Appellee Bonnie Keeler.

WITHAM, R.J.

The State of Delaware Department of Transportation (“DelDOT”) filed this Motion to Stay on November 3, 2009. Bonnie Keeler (“Keeler”) filed a response on November 12, 2009. Based upon the reasons set forth below, DelDOT’s motion must be denied.

FACTS

On July 22, 2009, the Merit Employee Relations Board (“MERB” or “the Board”) ordered DelDOT to reinstate Keeler to her position at the Department of Transportation. She was terminated in July 2008 after three instances of tardiness. Keeler allegedly violated her signed Last-Chance Memorandum of Understanding (“MOU”). Keeler, however, maintains that the MOU applied only to absences and not to tardiness.

The Board concluded that Keeler did not violate the MOU and that her termination was improper. Consequently, the Board ordered DelDOT to reinstate Keeler to her former position. DelDOT appealed the Board’s decision to this Court on September 11, 2009.

DelDOT’s Arguments

DelDOT contends that this Court should stay the Board’s decision to reinstate Keeler pending the outcome of the appeal. DelDOT maintains that a stay is appropriate because substantial issues and facts have been submitted for review. DelDOT also asserts that a stay is required to avoid irreparable harm. In doing so, DelDOT contends that a stay is required in almost all, if not all, cases resulting in an employee’s termination.

Defendant Keeler's Arguments

Keeler avers that this case concerns the Board's interpretation of the MOU. Keeler contends that, although her reinstatement may cause a few DelDOT employees to question the validity of DelDOT MOUs, this doubt would be erased if DelDOT exercised more care in drafting future MOUs. Keeler further asserts that DelDOT has failed to show the presence of irreparable harm or any substantial legal or factual issue.

Standard of Review

Title 29, section 10144 of the Delaware Code provides:

When an action is brought in the Court for review of an agency regulation or decision, enforcement of such regulation or decision by the agency may be stayed by the Court only if it finds, upon a preliminary hearing, that the issues and facts presented for review are substantial and the stay is required to prevent irreparable harm.¹

A stay is therefore appropriate where: (1) the issues and facts submitted for review are substantial; and (2) the stay is required to prevent irreparable harm.

DISCUSSION

A stay is appropriate if DelDOT establishes both that the issues and facts submitted for review are substantial, *and* that the stay is required to prevent irreparable harm. DelDOT maintains that the following substantial issues of law and fact have been submitted for review: (1) the correct interpretation of the last-chance MOU; (2) whether the MERB has the authority to substitute its own interpretation of

¹ 29 Del. C. § 10144.

the MOU; and (3) whether the burden of proof was correctly apportioned.

A stay may not be granted under Section 10144 absent a reasonable probability of success on the merits.² A party must do more than simply outline the issues before the Court on appeal to establish a reasonable probability of success.³ In the case *sub judice*, DeIDOT offers little evidence to allow this Court to conclude that the Board's decision was "questionable" on its face.⁴

Nevertheless, in the case *sub judice*, the Court does not need to determine whether the substantial issue requirement is met under Section 10144. Even assuming, *arguendo*, that DeIDOT has satisfied the first requirement, DeIDOT has not shown that the stay is required to prevent irreparable harm. Speculative harm cannot serve as the basis for irreparable harm.⁵

The only harm proffered by DeIDOT is based on the opinion of Jennifer Cohan ("Cohan"), the Director of the Department of Motor Vehicles. Cohan maintains that reinstating Keeler would undermine the effectiveness of MOU agreements. DeIDOT, however, cannot support Cohan's concern. DeIDOT has failed to establish that other DeIDOT employees would even be aware of the Board's decision nor how their work might be affected. Consequently, it is unclear how Keeler's specific reinstatement

² See *Watts v. Porter Indus.*, 1990 WL 261094, at *3 (Del. Super.).

³ See *id.*

⁴ See *id.*

⁵ *Liselyn Enter. v. Brady*, 1989 WL 100399, at *2 (Del. Super.).

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would cause other DeIDOT employees to conclude that there are issues with DeIDOT MOU agreements generally.

In addition, the Court is not persuaded by DeIDOT's contention that a stay is required in almost all, if not all, cases resulting in an employee's termination. DeIDOT has cited no authority to support this assertion. The Court is therefore unwilling to arrive at such a broad conclusion. This is especially true given that the alleged harm is speculative.

CONCLUSION

For the foregoing reasons, DeIDOT's Motion to Stay is denied. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Hon. William L. Witham, Jr.

WLW/dmh
oc: Prothonotary
xc: Counsel