

12CA0887 Hansen v. School Dist. No. 1 02-14-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA0887
Office of Administrative Courts
Case No. TA 2011-0027

Scott Hansen,

Petitioner-Appellant,

v.

School District No. 1, City and County of Denver, Colorado,

Respondent-Appellee,

and

Office of Administrative Courts,

Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE CASEBOLT
Miller and Navarro, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced February 14, 2013

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Semple, Farrington & Everall, P.C., M. Brent Case, Holly Ortiz, Denver,
Colorado, for Respondent-Appellee

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In this administrative review proceeding, petitioner, Scott Hansen, a public school teacher, seeks review of the order of the Board of Education of Denver School District No. 1 (Board), dismissing him from employment following the filing of administrative termination proceedings by respondent, School District No. 1, City and County of Denver (District), pursuant to the Teacher Employment, Compensation, and Dismissal Act of 1990 (TECDA), §§ 22-63-101 to -403, C.R.S. 2012. We reverse the Board's order dismissing Hansen and remand to the Office of Administrative Courts (OAC) for further proceedings.

I. Background

Hansen, a non-probationary teacher in the District for fifteen years, was placed on administrative leave by the District in August 2010. In March 2011, the District superintendent submitted to the Board a recommendation to dismiss Hansen (March recommendation) pursuant to TECDA. The March recommendation alleged various statutory grounds for dismissal, including neglect of duty, insubordination, immorality, and other good and just cause, and set forth numerous factual assertions to support the

recommendation. As required by TECDA, the District sent a copy of the March recommendation to Hansen, who requested a hearing on the allegations. The hearing was scheduled in the OAC, and an administrative law judge (ALJ) was assigned to conduct the hearing.

Following several continuances, the hearing on the recommendation was set to begin on October 24, 2011. On the morning of the hearing, the District sought to amend the March recommendation to include additional grounds and evidence supporting Hansen's dismissal, asserting that it had newly discovered evidence to present. The ALJ denied the motion, ruling that the District had not yet submitted those charges to the Board, and that Hansen had not received adequate notice of them.

The District then moved to dismiss and withdraw the March recommendation without prejudice. The ALJ denied that motion, ruling that the District could proceed and present evidence to support the March recommendation, but if it did not, he would enter an initial decision recommending Hansen's retention. The District declined to present any evidence, and shortly thereafter, the ALJ issued a decision (October decision), recommending that

Hansen be retained because the District had failed to present any evidence to support its allegations.

Under section 22-63-302(9), C.R.S. 2012, the Board was required to enter a final order based on the ALJ's October decision within twenty days. However, the District never presented the order to the Board to do so, contending that it had withdrawn the March recommendation.

In November 2011, the District filed another dismissal recommendation against Hansen (November recommendation), asserting neglect of duty, insubordination, immorality, incompetency, and other good and just cause. It asserted facts to support its recommendation and incorporated the March recommendation and its underlying factual allegations.

Following receipt of the November recommendation, Hansen filed an action in district court seeking mandamus relief. The court (mandamus court) ruled sua sponte that Hansen was required to exhaust his administrative remedies through the OAC proceedings before it would address his claim.

The same ALJ who had issued the October decision was assigned to hear the November recommendation. The ALJ rejected Hansen's motion to hold that recommendation in abeyance until the final disposition of the October decision, but ruled that the District could not argue or present any evidence to support the March recommendation.

A hearing on the November recommendation was scheduled for March 2012. Relying on principles of administrative claim preclusion, Hansen moved to dismiss the charges. After the District responded, the ALJ ruled that because the Board had not entered a final order on the October decision, a final judgment had not been entered, and claim preclusion was therefore unavailable.

Following the hearing, the ALJ issued an initial decision recommending Hansen's dismissal. The Board adopted the recommendation and dismissed him.

Hansen commenced this appeal from the Board's order dismissing him. In light of this appeal, the mandamus court concluded that it lacked subject matter jurisdiction to consider Hansen's C.R.C.P. 106(a)(2) claim, later dismissed that proceeding,

and entered judgment under C.R.C.P. 58. In our opinion in *Hansen v. School District No.1*, (Colo. App. No. 12CA1630, Feb. 14, 2013) (not published pursuant to C.A.R. 35(f)) (*Hansen I*), issued concurrently with this opinion, we reverse the judgment and remand the case to the mandamus court with directions to address the merits of Hansen's mandamus claim.

II. Standard of Review

We review the record before the hearing officer to determine whether the action of the board was arbitrary, capricious, or legally impermissible. § 22-63-302(10)(c), C.R.S. 2012; *Adams Cnty. School Dist. No. 50 v. Heimer*, 919 P.2d 786, 792 (Colo. 1996). If we find a substantial irregularity during the hearing or error by the ALJ, we may remand for further proceedings. § 22-63-302(10)(d), C.R.S. 2012.

III. Claim Preclusion

Hansen contends that the October decision should have barred the District's prosecution of the November recommendation based on principles of claim preclusion. We first review the applicable provisions of TECDA. We then review principles of claim

preclusion and apply those principles to this case. Upon doing so, we conclude that further proceedings before the ALJ are required.

A. TECDA

Under TECDA, a teacher may be dismissed for any of various grounds enumerated in the statute, including incompetency, neglect of duty, immorality, insubordination, or other good and just cause. § 22-63-301, C.R.S. 2012. To dismiss a teacher, a school district's chief administrative officer must file a written recommendation for dismissal with the school board, based on one or more of the grounds specified in section 22-63-301. § 22-63-302(2), C.R.S. 2012. If the teacher objects to the dismissal, he or she may request a hearing before an impartial hearing officer. § 22-63-302(3), C.R.S. 2012.

At the hearing, the chief administrative officer, that is, the school district, has “the burden of proving that the recommendation for the dismissal of the teacher was for the reasons given in the notice of dismissal and that the dismissal was made in accordance with the provisions” of TECDA. § 22-63-302(8), C.R.S. 2012. The hearing officer is required to “review the evidence and testimony

and make written findings of fact thereon,” and recommend that “[t]he teacher be dismissed or the teacher be retained.” *Id.* The hearing officer then is required to forward the findings of fact and the proposed action to the teacher and the school board. *Id.*

“The board shall review the hearing officer’s findings of fact and recommendation, and it shall enter its written order within twenty days after the date of the hearing officer’s findings and recommendation.” § 22-63-302(9). The board is permitted to take only one of three actions: dismiss the teacher, retain the teacher, or place the teacher on one-year probation. *Id.* The board is bound by the hearing officer’s findings of fact if they are supported by competent evidence in the record, but it is not bound by the hearing officer’s recommendation. *Blair v. Lovett*, 196 Colo. 118, 125, 582 P.2d 668, 673 (1978). However, “if the board dismisses the teacher over the hearing officer’s recommendation of retention, the board shall make a conclusion, giving its reasons therefor, which must be supported by the hearing officer’s findings of fact, and such conclusion and reasons shall be included in its written order.” § 22-62-302(9). In other words, where there are no evidentiary facts

found by the hearing officer that would justify the dismissal of the teacher, the board cannot dismiss the teacher. *Cordova v. Lara*, 42 Colo. App. 483, 485, 600 P.2d 105, 107 (1979).

If the teacher is dissatisfied with the board's decision, he or she may appeal to this court pursuant to section 22-63-302(10), C.R.S. 2012; *see also Snyder v. Jefferson Cnty. Sch. Dist. No. 1*, 707 P.2d 1049, 1050 (Colo. App. 1985) ("Absent an order by the board, there is not a final order, and this court lacks jurisdiction to review any administrative actions which have occurred.").

However, if the board refuses to issue an order, a teacher can seek relief in the nature of mandamus from the district court under C.R.C.P. 106(a)(2) to compel the board to issue a decision. *See Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 523 n.8 (Colo. 2004); *Julesburg Sch. Dist. v. Ebke No. RE-1*, 193 Colo. 40, 42, 562 P.2d 419, 420-21 (1977).

B. Standard of Review

Claim preclusion is either a strict question of law or a mixed question of law and fact. *Camp Bird Colo., Inc. v. Bd. of Cnty. Comm'rs*, 215 P.3d 1277, 1281 (Colo. App. 2009). If the facts in the

case are undisputed and the question of preclusion can be answered by review of the judgment or solely by reviewing the record, it is strictly a question of law and thus our review is de novo. *Id.* If, however, there are disputed facts, then we review any factual determination for clear error and review application of the law de novo. *Id.*

C. Applicable Law

The doctrine of claim preclusion “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.” *City & Cnty. of Denver v. Block 173 Assocs.*, 814 P.2d 824, 830 (Colo. 1991) (quoting *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160, 1163 (Colo. 1987)); accord *Loveland Essential Grp., LLC v. Grommon Farms, Inc.*, 2012 COA 22, ¶ 27 (“[A] main purpose of the general rule [that claim preclusion bars a later action on claims arising out of the same transaction as the original action] is to protect the defendant from being harassed by repetitive actions based on the same claim.” (quoting Restatement (Second) of Judgments § 26 cmt. a (1982) (alterations in the original))).

“Claim preclusion works to preclude the relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not.” *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). For a claim in a second judicial proceeding to be precluded by a previous judgment, there must exist (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; and (4) identity of or privity between parties to the actions. *Id.*

Whether the claims or causes of action are the same is determined by the injury for which relief is demanded, not the legal theory on which the person asserting the claim relies. *Camp Bird Colo., Inc.*, 215 P.3d at 1282 (citing *Argus Real Estate*, 109 P.3d at 608). Claim preclusion bars litigation of claims that previously were or might have been decided only “if the claims are tied by the same injury.” *Argus Real Estate*, 109 P.3d at 609.

Claims are tied to the same injury where they concern “all or any part of the transaction, or series of connected transactions, out of which the [first] action arose.” *Id.* (quoting Restatement (Second)

of Judgments § 24). Whether a claim arises from the same transaction is determined pragmatically, and we consider “whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations.” *Salazar v. State Farm Mut. Auto. Ins. Co.*, 148 P.3d 278, 281 (Colo. App. 2006) (quoting Restatement (Second) of Judgments § 24).

Claim preclusion may be applied to administrative proceedings where, as here, the parties were afforded a full adversary hearing before an administrative judge acting in a judicial capacity. See *Umberfield v. Sch. Dist. No. 11*, 185 Colo. 165, 169, 522 P.2d 730, 732 (1974), *overruled as stated in City of Colorado Springs v. Indus. Comm’n*, 749 P.2d 412, 416 n.4 (Colo. 1988); *Steamboat Springs Rental & Leasing, Inc. v. City & Cnty. of Denver*, 22 P.3d 543, 545 (Colo. App. 2000).

D. Application

Here, the ALJ determined that, because the Board had not entered an order on the October decision, there was not a “final judgment” for claim preclusion purposes. The ALJ did not address

the remaining three prongs of claim preclusion, nor did he need to do so, having found no final judgment. However, in light of our decision in *Hansen I* to remand the proceeding to the district court to address the merits of Hansen’s mandamus claim, we conclude that the ALJ must revisit that determination if the mandamus court directs the Board to issue an order and, if appropriate, apply the remaining three prongs of claim preclusion principles.

We decline, for several reasons, to address Hansen’s assertion that we should apply principles of “practical finality” under *Carpenter v. Young*, 773 P.2d 561, 568 (Colo. 1989), to the ALJ’s October decision. First, it is highly likely that the district court in *Hansen I* will order mandamus relief on remand. Such an outcome will produce a “final judgment,” inasmuch as the Board will be forced to act and issue an order that will constitute its final determination under section 22-63-302(9), obviating any need to apply practical finality principles.

Second, the *Carpenter* court applied the practical finality test in a case involving issue preclusion and not, as here, claim preclusion, and there is some doubt whether practical finality can

apply in claim preclusion cases. See Restatement (Second) of Judgments § 13 (limiting a practical finality approach to matters of issue preclusion); see also 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4434 (2d ed. 2002) (“However far traditional views of finality may be relaxed in dealing with issue preclusion, the question remains whether any comparable developments will occur with respect to claim preclusion. It is often assumed that traditional views will persist as to claim preclusion.”).

We need not decide the issue, however, as such a determination would likely be dictum or an advisory opinion in light of our remand order. See *Indus. Claim Appeals Office v. Ray*, 145 P.3d 661, 667 (Colo. 2006) (dictum is that which is unnecessary to the court’s holding); *City & Cnty. of Denver v. Consol. Ditches Co.*, 807 P.2d 23, 28 (Colo. 1991) (a court should avoid providing an advisory opinion on an abstract proposition of law).

Furthermore, there appear to be issues of fact concerning the three prongs of claim preclusion that the ALJ did not address. Because the record does not allow us to resolve those as a matter of

law, remand for further proceedings is the appropriate remedy. See *Camp Bird Colo. Inc.*, 215 P.3d at 1281.

E. Validity of the October 2011 Hearing

The District nevertheless asserts that it permissibly abandoned the March recommendation, and therefore, the dismissal of the original proceedings could not preclude the dismissal proceedings based on the November recommendation as a matter of law. We disagree for two reasons.

First, the District did not permissibly abandon the initial dismissal proceeding. Although the District sought to withdraw the March recommendation without prejudice, the ALJ denied this request. Furthermore, the ALJ did not err in refusing to allow the District to abandon the proceedings where the District first made the request on the day of the hearing. See *Powers v. Prof'l Rodeo Cowboys Ass'n*, 832 P.2d 1099, 1102 (Colo. App. 1992) (“The right to a voluntary dismissal without prejudice is not absolute. Rather, it is within the sound discretion of the trial court.”); see also § 24-4-105(4), C.R.S. 2012 (ALJ has authority to dispose of motions to

dismiss and to take any other action in accordance with the procedure in the district courts).

Second, the cases that the District cites in support of its contention that the October decision could not have preclusive effect are distinguishable.

In *Snider v. Kit Carson School District R-1*, 166 Colo. 180, 442 P.2d 429 (1968), a teacher claimed that the school board's first attempt to dismiss her without following the necessary procedures precluded its second attempt to dismiss her where it followed the proper procedures. *Id.* at 183-84, 442 P.2d at 430-31. The court held that because the original proceedings were void for failure to give the teacher the requisite notice and hearing, the board could treat them as a nullity; thus, the original proceedings did not preclude a subsequent dismissal proceeding based on the same charges. *Id.* at 185-86, 442 P.2d at 432. Similarly, in *Dugan v. Bollman*, 31 Colo. App. 261, 502 P.2d 1131 (1972), the court held that dismissal of the original termination proceeding did not preclude later action by the school because the parties' agreement

to dismiss the original proceedings rendered them a nullity. *Id.* at 263, 502 P.2d at 1132.

Here, the proceedings based on the March recommendation were not a nullity, and thus, *Snider* and *Dugan* are inapposite to the resolution of this case. Before the October hearing, the District followed the necessary dismissal procedures. Furthermore, the proceedings based on the March recommendation were never dismissed. Instead, the ALJ issued findings of fact and a recommendation based on those allegations. Accordingly, even though the District treated the October 2011 proceedings as void, they were not.

IV. District's Remaining Contentions

The District contends that Hansen's failure to challenge the ALJ's findings of fact concerning the November recommendation, or to assert that those findings fail to serve as sufficient bases on which to dismiss him, are fatal to his appeal.

To the extent the District relies upon its purported withdrawal of the March recommendation, we have already dealt with, and have rejected, that contention.

To the extent the District asserts that Hansen's decision not to contest the ALJ's findings of fact in the decision on the November recommendation somehow precludes him from attacking the decision itself, we disagree. If claim preclusion prevents the District from bringing the second dismissal proceeding, the Board's order on that proceeding is, a fortiori, a nullity. See § 22-63-302(10)(c) (court reviews the record before the hearing officer to determine whether the action of the board was legally impermissible).

The District also asserted for the first time at oral argument that claim preclusion principles do not apply in this administrative proceeding, citing *City of Colorado Springs v. Industrial Commission*, 749 P.2d at 416 n.4. However, the District did not make that assertion before the ALJ, nor did it set forth the contention in its answer brief before us. Accordingly, we decline to address it. See *People v. Czemerynski*, 786 P.2d 1100 (Colo. 1990) (issue not properly before the court where party did not raise the argument in the trial forum or in its principal brief); *Taxpayers Against Congestion v. Regional Transp. Dist.*, 140 P.3d 343, 346 (Colo. App.

2006) (we need not consider contentions raised for the first time during oral argument).

V. Hansen's Remaining Contentions

Hansen also asserts on appeal that the ALJ lacked subject matter jurisdiction to hold the March 2012 hearing, erred by not holding the proceedings on the November recommendation in abeyance under the doctrine of priority jurisdiction, and erred in concluding that the doctrine of unclean hands was inapplicable. We address these assertions because, if correct, they would afford Hansen greater relief than our remand to the OAC.

A. Subject Matter Jurisdiction

Where, as here, the underlying facts are not in dispute and the issue is purely one of law, we review the issue of subject matter jurisdiction de novo. *People v. Blue*, 253 P.3d 1273, 1276 (Colo. App. 2011) (citing *Medina v. State*, 35 P.3d 443, 454 (Colo. 2001)).

Hansen essentially asserts that, once the ALJ issued the October decision, the OAC lost subject matter jurisdiction over any further proceedings because the matter passed to the Board for its decision by operation of law. While we agree that the OAC had

concluded its statutory duty to hear and decide the issues raised in the first proceeding once the ALJ issued the October decision, we reject the assertion that this precluded the OAC from hearing and acting upon the second proceeding. Once the District filed the November recommendation, it commenced a new hearing process under section 22-63-302(4), C.R.S. 2012, triggering Hansen's right to a new hearing. Furthermore, the Board only had authority to act on the October decision, which had concluded a separate, discrete proceeding; it had no authority to act on the November recommendation until after the ALJ resolved the issues presented at the hearing on that recommendation.

Accordingly, we reject this assertion.

B. Priority Jurisdiction

The exercise of concurrent jurisdiction is controlled by the principle of priority, which is sometimes referred to as the rule of exclusive concurrent jurisdiction. *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838, 844 (Colo. App. 2005); *see Martin v. Dist. Court*, 150 Colo. 577, 579, 375 P.2d 105, 106 (1962) (“[T]he court first acquiring jurisdiction of the parties and the

subject matter has exclusive jurisdiction, which perhaps more accurately should be denominated as a ‘priority of jurisdiction.’”). This rule is based on the public policies of preventing a conflict of decisions of two courts of concurrent jurisdiction and avoiding unnecessary duplication and multiplicity of suits. *Estates in Eagle Ridge*, 141 P.3d at 844.

As pertinent here, the rule of priority of jurisdiction is most often applied where one tribunal has already assumed jurisdiction over an action and there is a danger of inconsistent rulings when a second action is filed in another tribunal with concurrent jurisdiction. *Id.* In such circumstances, the second action should be suspended or stayed rather than dismissed for lack of jurisdiction. *Id.* We review such issues de novo. *See id.*

Here, the principles of priority jurisdiction are not implicated. As noted previously, the authority of the ALJ as to the March recommendation ended when he issued the October decision. Hence, there could not be concurrent jurisdiction.

Furthermore, the November recommendation proceeding was properly limited by the ALJ to factual issues that had not been

asserted in the March recommendation. Accordingly, while there was certainly an attempted duplication by the District, the ALJ's order effectively nullified that attempt. *See id.* at 845 (stating that when litigant abandoned allegedly duplicative action, policy reasons for principles of priority jurisdiction were not implicated).

We therefore reject this assertion.

C. Unclean Hands

A party requesting equitable relief from the courts must do so with "clean hands." *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) (citing 1 Dan B. Dobbs, *Law of Remedies* § 2.4(2) (2d ed.1993)). Thus, a party engaging in improper or fraudulent conduct relating in some significant way to the subject matter of the cause of action may be ineligible for equitable relief. *Salzman*, 996 P.2d at 1269 (citing *Rhine v. Terry*, 111 Colo. 506, 508, 143 P.2d 684, 684 (1943)). "The [unclean hands doctrine] is intended to protect the integrity of the court, and simply means that equity refuses to lend its aid to a party who has been guilty of unconscionable conduct in the subject matter in litigation." *Jameson v. Foster*, 646 P.2d 955, 958 (Colo. App. 1982); *see also*

Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504, 519 (Colo. App. 2006).

Here, the District did not seek equitable relief. It sought relief based on its statutory rights under TECDA. Furthermore, Hansen has pointed to no case authority granting an ALJ the power to exercise equitable powers in cases involving TECDA, and we have found none. *See* § 22-63-302(5), (7), (8), C.R.S. 2012 (outlining authority of the ALJ). Hence, we reject this contention.

The order is reversed, and the case is remanded to the OAC with directions to reconsider Hansen's claim preclusion contention following the district court's decision on his mandamus claim. On remand, the ALJ, in exercise of his discretion, may permit the parties to introduce new evidence and submit briefs on the issue.

JUDGE MILLER and JUDGE NAVARRO concur.