

12CA1630 Hansen v. School Dist. No. 1 02-14-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA1630
City and County of Denver District Court No. 11CV8135
Honorable Michael A. Martinez, Judge

Scott Hansen,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

JUDGMENT 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

Charles F. Kaiser, Denver, Colorado, for Plaintiff-Appellant

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

This is an action seeking relief in the nature of mandamus under C.R.C.P. 106(a)(2). Plaintiff, Scott Hansen, a public school teacher, appeals the district court's judgment entered after the court required him to exhaust his administrative remedies under the Teacher Employment, Compensation, and Dismissal Act of 1990 (TECDA), §§ 22-63-101 to -403, C.R.S. 2012, before the court would entertain his request for mandamus relief. Hansen sought to compel defendant, the Board of Education of School District No. 1 in the City and County of Denver (Board), to act upon a retention recommendation made by an administrative law judge (ALJ), in conjunction with dismissal proceedings brought by the superintendent of School District No. 1 (District). The district court also determined that it lacked subject matter jurisdiction to consider his claims because his appeal in a second dismissal proceeding divested it of jurisdiction in this case. We reverse the judgment dismissing the mandamus action and remand.

I. Background

Hansen, a non-probationary teacher 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 Colorado Office of Administrative Courts (OAC), and an 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 this mandamus action. The 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 an appeal from the Board's order dismissing him, which is the subject of our opinion in *Hansen v. School District No.1*, (Colo. App. No.

12CA0887, Feb. 14, 2013) (not published pursuant to C.A.R. 35(f)) (*Hansen II*).

Meanwhile, in this mandamus action the district court concluded that it lacked subject matter jurisdiction to consider Hansen's C.R.C.P. 106(a)(2) claim in light of the *Hansen II* appeal, and it later dismissed this action and entered judgment under C.R.C.P. 58.

II. Exhaustion of Administrative Remedies

Hansen asserts that the district court erred when it ruled that he was required to exhaust his administrative remedies under TECDA before it would address the merits of his claim for mandamus relief under C.R.C.P. 106(a)(2). We first examine the applicable provisions of TECDA and then turn to Hansen's contentions.

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."). In such an administrative review, this court reviews 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 the court finds a substantial irregularity during the hearing or error by the ALJ, it may remand for further proceedings. § 22-63-302(10)(d), C.R.S. 2012.

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. No. RE-1 v. Ebke*, 193 Colo. 40, 42, 562 P.2d 419, 420-21 (1977).

B. Standard of Review and Applicable Law

The doctrine of administrative exhaustion requires a party to pursue available statutory remedies before obtaining judicial review of a claim. *Thomas v. F.D.I.C.*, 255 P.3d 1073, 1077 (Colo. 2011). Where a party fails to exhaust these remedies, a trial court is without jurisdiction to hear the action. *Id.* The doctrine promotes important policy interests, including judicial economy, by ensuring

that courts intervene only if the administrative process fails to provide adequate remedies. *Id.*

When administrative remedies are provided by statute or ordinance, those procedures must be followed if the contested matter is within the jurisdiction of the administrative authority, *Moss v. Members of Colo. Wildlife Comm'n*, 250 P.3d 739, 742 (Colo. App. 2010), unless the administrative remedy would not be meaningful. *See Bazemore v. Colorado State Lottery Div.*, 64 P.3d 876, 880 (Colo. App. 2002). Further, exhaustion is unnecessary “when the matter in controversy raises questions of law rather than issues committed to administrative discretion and expertise.” *State v. Golden’s Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998) (quoting *Collopy v. Wildlife Comm’n*, 625 P.2d 994, 1006 (Colo. 1981)).

The exhaustion requirement, however, is subject to exceptions where its application would not further its underlying policy interests. Exhaustion is not necessary, for example, when it is “clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested.” *City & Cnty. of Denver v. United Air Lines, Inc.*,

8 P.3d 1206, 1213 (Colo. 2000) (quoting *Golden's Concrete Co.*, 625 P.2d at 923).

C. Application

For several reasons, the court erred in requiring Hansen to exhaust his administrative remedies.

First, this action sought to compel the Board to issue a final order regarding the ALJ's October decision. There were no other available administrative remedies that Hansen could have pursued. Hansen had already exhausted his administrative remedies regarding the October decision. He could obtain no further relief from the District or the Board in that administrative proceeding. *See Golden's Concrete Co.*, 962 P.2d at 923 (holding that, when the matter in controversy raises questions of law rather than issues committed to administrative discretion and expertise, exhaustion is unnecessary).

Second, requiring Hansen to exhaust his administrative remedies by participating in the second proceeding would have been futile. As required by section 22-63-302(9), the Board must review the hearing officer's decision and issue a final order dismissing, retaining, or placing the teacher on probation within twenty days

after the date of the hearing officer's decision. Thus, the Board was required to issue an order regarding the March recommendation within twenty days, which had elapsed by the time Hansen filed the mandamus action. And the order necessarily would have retained Hansen, with or without probationary terms. *See Cordova*, 42 Colo. App. at 485, 600 P.2d at 107 (concluding that where there are no evidentiary facts found by the hearing officer that would justify the dismissal of the teacher, the board has no alternative but to retain the teacher). Participating in the second proceeding could not affect the Board's obligation to issue a final order retaining Hansen. Because the Board failed to issue an order even after Hansen brought this action, we conclude that pursuing further administrative remedies would have been futile.

Third, the ALJ was powerless to compel the Board to issue a final order regarding the October decision. A hearing officer's powers and duties are limited to those conferred by statute, *Dee Enterprises v. Indus. Claim Appeals Office*, 89 P.3d 430, 437 (Colo. App 2003), and TECDA does not grant the hearing officer the power to compel a school board to issue a final decision. *See* § 22-63-302,

C.R.S. 2012. Thus, the ALJ lacked the authority to provide Hansen the relief he sought from the district court.

Accordingly, we conclude that the district court erred in requiring Hansen to exhaust administrative remedies before it would address his mandamus claim.

III. Subject Matter Jurisdiction

Hansen asserts the district court erred in concluding that his appeal of the Board's dismissal order in *Hansen II* deprived it of subject matter jurisdiction in this proceeding. We agree.

A. Standard of Review

A trial's court's determination regarding subject matter jurisdiction is a question of law that we review de novo. *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App.), *vacated and remanded to* 17 P.3d 841 (Colo. App. 2000).

B. Applicable Law

"[T]he filing of a notice of appeal divests a trial court of authority to consider matters of substance affecting directly the judgment appealed from." *Molitor v. Anderson*, 795 P.2d 266, 269 (Colo. 1990). "The doctrine of divestment is intended to serve the interests of judicial efficiency, by preventing consideration of the

same issue in different courts at the same time, and therefore it has never applied to more than trial court rulings affecting the judgment subject to appeal.” *Sanoff v. People*, 187 P.3d 576, 578 (Colo. 2008).

C. Application

Here, the District’s March recommendation and its November recommendation were separate and distinct actions, involving different factual assertions. The ALJ entertained the March recommendation and ruled against the District. He then heard the November recommendation and limited the factual presentation to those new facts and allegations contained therein. He specifically precluded the District from presenting anything concerning the March recommendation.

Moreover, deciding the mandamus issue would have had effect only upon the October decision. And while a determination on the mandamus issue could have created a final judgment that the ALJ in the November proceeding could have relied upon in addressing claim preclusion principles, that effect presents a different issue than the one before the district court. Accordingly, the filing of the

notice of appeal in *Hansen II* did not present the same issue in different courts at the same time.

Thus, we conclude that the district court erred in concluding that it lacked subject matter jurisdiction to consider Hansen's mandamus claim.

The judgment is reversed, and the case is remanded to the district court with directions to consider the merits of Hansen's mandamus claim.

JUDGE MILLER and JUDGE NAVARRO concur.