

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, LOCAL 2125 and)
LOCAL 2832,)
)
Plaintiffs/Appellants,) D.C. Civ. App. No. 2003-172
)
v.)
) Re: Super. Ct. Civ. No. 97/2003
GOVERNMENT OF THE VIRGIN)
ISLANDS, VIRGIN ISLANDS FIRE)
SERVICE, GOVERNOR CHARLES W.)
TURNBULL and IAN WILLIAMS,)
DIRECTOR,)
)
Defendants/Appellees.)
_____)

On Appeal from the Superior Court of the Virgin Islands

Considered: December 16, 2005

Filed: August 13, 2007

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **CURTIS V. GÓMEZ**, Judge of the District Court of the Virgin Islands; and **EDGAR ROSS**, Judge of the Superior Court of the Virgin Islands, sitting by designation.¹

ATTORNEYS: Archie Jennings, Esq.
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For the Appellants,

Richard S. Davis, AAG
St. Thomas, U.S.V.I.
For the Appellees.

¹Between the date of consideration and the date of filing, District Judge Curtis V. Gómez became Chief Judge of the District of the Virgin Islands, and Judge Edgar Ross retired from the Superior Court. Judge Ross participated in the hearing, but played no part in the drafting of this opinion.

MEMORANDUM OPINION

The Appellants, International Association of Firefighters, Local 2125 and Local 2832 (the "IAF") ask this Court to overturn a Superior Court ruling barring it from bringing suit against the Appellees, Government of the Virgin Islands, the Virgin Islands Fire Service ("VIFS"), Governor Charles W. Turnbull (the "Governor"), and Ian Williams ("Williams") (collectively, the "GVI" or "Appellees"). The IAF filed a suit against the GVI in the Superior Court, which the Superior Court dismissed for failure to exhaust administrative remedies. This Court will affirm the Superior Court's order.

I. FACTS

On October 17, 2002, the IAF, which is the exclusive bargaining agent for the Firefighters of the Virgin Islands, and the Appellees entered into a negotiated wage increase agreement (the "Agreement"). Eight days later, the Governor transmitted an appropriation measure to the Virgin Islands Legislature (the "Legislature") to fund the pay increase. On December 31, 2002, the Legislature passed Bill No. 24-037, which appropriated funds to pay for the firefighters' pay increase. In a letter dated

January 10, 2003, the Governor signed the bill into law, Act 6571 ("Act 6571"), and used his authority pursuant to section 1575(d) of Title 48 of the U.S. Code to veto some of its spending provisions. He did not express any objections to Section 8 of Act 6571, wherein the Legislature appropriated funds specifically for the Agreement. Nevertheless, the Governor has not yet disbursed the funds appropriated for the pay increase.

On February 26, 2003, the IAF filed a petition with the Superior Court seeking injunctive relief to require the release of funds allocated under the Agreement. The GVI filed a motion opposing IAF's petition, and seeking dismissal of the IAF's suit. The Superior Court granted dismissal of the IAF's petition in a March 6, 2003, order after finding that the IAF failed to exhaust its administrative remedies.

On March 11, 2003, the IAF filed an unfair labor practice charge (the "Charge") with the Public Employees Relation Board ("PERB"), an administrative agency. The Charge alleges that the Office of Collective Bargaining violated section 378(a)(8) of Title 24 of the Virgin Islands Code² by refusing to "honor the collective bargaining agreement between the parties." The PERB

² This section prohibits "any public employer or agent of a public employer" from failing to "comply with any of the terms of a valid collective bargaining agreement to which it is a party." V.I. CODE ANN., tit. 24, § 378(a)(8).

has not acted on this matter.

On March 19, 2003, the IAF filed a motion for reconsideration with the Superior Court, asking it to reconsider its March 6, 2003, order. On September 5, 2003, the Superior Court denied the IAF's motion to reconsider. IAF appeals that decision.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review final judgments and orders of the Superior Court of the Virgin Islands. See the Revised Organic Act of 1954 § 23A; 48 U.S.C. § 1613a.

"The standard of review for a denial of a motion for reconsideration varies with the nature of the underlying judicial decision." *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986). In the instant case, the Superior Court granted GVI's motion to dismiss the IAF's complaint due to failure to exhaust administrative remedies. Grants or denials of motions to dismiss are legal determinations, and are reviewed *de novo*. *Julien v. Gov't of the V.I.*, 961 F. Supp. 852, 854 (D.V.I. App. Div. 1997).

III. DISCUSSION

A. Administrative Remedies and Exhaustion

The IAF argues that the Superior Court erroneously determined its claim was a labor dispute under Virgin Islands Law. In the alternative, the IAF argues that its claim fits into an exception to the exhaustion doctrine because any attempt to obtain relief from the PERB would be futile. (Appellant's Br. 12-14.) Moreover, the IAF argues, once the Legislature signed Act 6571 and appropriated the funds to cover the pay increase, the Governor was under a legal obligation to release the funds.

Appellees respond that the filing of a claim with the PERB was an acknowledgment that the IAF is alleging unfair labor practices. The GVI also argues that the IAF appeal is premature, as the PERB must first rule on the complaint.

1. Labor Dispute Under Virgin Islands Law

Under Virgin Islands law, a "labor dispute," is defined as "any controversy concerning terms or conditions of employment." V.I. Code Ann. tit 24, § 349(c). Virgin Islands courts have regarded allegations of unfair labor practice as labor disputes. See *McBean v. Gov't of the V.I.*, 32 V.I. 120 (Terr. Ct. 1995) (holding that a union's complaint against the governor for violating a collective bargaining agreement constituted a labor dispute).

The IAF argues that the Governor committed an "unfair labor

practice" by failing to comply with the terms of a valid collective bargaining agreement. Because this controversy concerns terms and conditions of employment, it falls within the definition of a labor dispute. *Cf. McBean*, 32 V.I. 120.

2. The Exhaustion of Administrative Remedies

Because this matter constitutes a labor dispute, ordinarily the IAF must first submit its claim to the PERB for administrative review before seeking judicial review. *See Gen. Offshore Corp. V. Farrelly*, 743 F. Supp. 1177, 1190 (D.V.I. 1990)(noting courts should not interfere with legislatively-intended administrative remedies); V.I. CODE ANN, tit. 24, § 345.

However, exhaustion is not required for the filing of a complaint: (1) when the agency action has been a clear violation or statutory or constitutional rights, (2) when reliance on administrative procedures is clearly and demonstrably inadequate to prevent irreparable injury, and (3) when exhaustion is futile. *Gen. Offshore Corp.*, 743 F. Supp at 1190 (citing *LaVallee Northside Civic Ass'n v. V.I. Coastal Zone Mgmt.*, 866 F.2d 616, 620-21 (3d Cir. 1989)). Exhaustion is futile where an administrative agency is without the authority to address the controversy, or is incapable of producing the type of relief requested. *See Lester H. v. Gilhool*, 916 F.2d 865, 869-870 (3d

Cir. 1990); *Gen. Offshore Corp.*, 743 F. Supp at 1191.

The IAF argues that the PERB may only fine those who violate the Virgin Islands labor laws, and thus cannot order executive action and provide the IAF adequate relief.³ (Appellant's Br., at 12.)

However, by statute, the PERB has the authority to hear labor disputes and "take such actions with respect thereto as it deems necessary and proper." V.I. CODE ANN, tit. 24, § 365(i). Indeed the statute expressly provides that PERB may "take such action as may be warranted to remedy [a] complaint" including issuing cease and desist orders. *Id.* at tit. 24, § 379(a)(4). Thus contrary to the IAF's assertions, the PERB is not limited to merely imposing fines for violations. The agency could require that the GVI disburse funds under the Agreement to resolve its labor dispute with the IAF.

B. Act 6571 Does Not Create a Legal Duty to Act

³The IAF relies in large part on the novel argument that administrative agencies cannot compel executive action, because it would interfere with the separation of powers doctrine. It did not raise this argument before the Superior Court. Of course, the erroneous argument overlooks the structure of administrative agencies, which are located in the executive branch. *But see Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952)(observing the multifarious nature of the modern administrative agency and commenting "The mere retreat to the qualifying 'quasi' is implicit with confusion that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.")

The IAF also argues that Act 6571 created a legal requirement that the Governor disburse the allocated funds.

Appropriation measures can make spending by the executive branch either mandatory or discretionary, depending on the measure's language. See *Train v. New York*, 420 U.S. 35, 44-47 (1975). In *Train*, the Supreme Court found Congressional language that allocated funds "shall be allotted" to require the President to disburse those funds. *Id.* The executive branch is not, however, precluded from withholding allocated funds. See *Clinton v. City of New York*, 524 U.S. 417, 446-7 (1998) (citing examples of language in appropriation measures giving the President wide discretion in both the allocation and amounts spent). Instead, statutory language determines whether an expenditure is mandatory or permissive. *Id.*

In the instant case, the Legislature appropriated sums to fund negotiated union contracts. Act 6571, § 6. These monies were to "remain available until expended." *Id.* Unlike the language of the statute at issue in *Train*, which required the President to disburse allocated funds, Act 6571's language gives the Governor discretion to decide on which union contract to spend the appropriated sums, as well as on when to expend funds. Act 6571 does not, as the IAF argues, require the Governor to disburse the allocated funds for the IAF's benefit. Nor does it

require expenditure within a time certain.

III. CONCLUSION

Accordingly, this Court will **AFFIRM** the order of the Superior Court dismissing the IAF's petition.

Courtesy Copy:

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