COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1136-FT **Cir. Ct. No. 2009CV5354**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMES HEBEL,

PLAINTIFF-APPELLANT,

V.

DEPARTMENT OF CORRECTIONS, STATE OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. James Hebel appeals from a summary judgment order[1] dismissing a declaratory judgment action in which he sought to enforce a settlement agreement with the Wisconsin Department of Corrections relating to a disciplinary proceeding.[2] We affirm for the reasons discussed below.

¶2 For purposes of summary judgment, we accept the allegations in the complaint as true. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. Hebel alleged that his employer, the Department of Corrections, suspended him without pay in connection with the death of an inmate purportedly under his care as a nursing supervisor in the prison system. Hebel challenged the disciplinary action in an administrative proceeding. During a telephone hearing, the parties orally agreed to a settlement under which the Department would reduce Hebel's period of suspension and repay him $4,500 in lost wages and Hebel would admit no wrongdoing. However, shortly thereafter the Department rescinded its agreement to settle.

¶3 Hebel then filed the action that is the subject of this appeal, seeking declarations that the Department's refusal to follow through on the alleged settlement agreement constituted a breach of contract and that Hebel was entitled to enforcement of the agreement, including the payment of his lost wages, without any further administrative proceedings. The circuit court dismissed the action on

[1] Hebel asserts that the circuit court acted only on the Department's motion to dismiss and did not address his cross-motion for summary judgment. However, because determining whether a complaint states a claim upon which relief could be granted is the first step in summary judgment methodology, the court's decision effectively decided both parties' motions.

[2] Hebel has also filed a motion asking this court to "endors[e] the Petition for Bypass to the Supreme Court on the specific grounds set forth in the Petition for Bypass." The motion is moot because the Supreme Court has denied the bypass petition. *See* SUPREME COURT ORDER, 2010AP1136-FT (Dec. 7, 2010).

the related grounds that the question was not ripe for adjudication and the Department was entitled to sovereign immunity because Hebel had failed to satisfy several statutory prerequisites for filing a suit for damages against a government agency.

¶4 We review the circuit court's summary judgment determination de novo. ***Lambrecht***, 241 Wis. 2d 804, ¶21. The first step in summary judgment methodology is to determine whether the complaint states a claim upon which relief can be granted. ***Id.*** In this case, that raises the question whether declaratory relief is available under WIS. STAT. § 806.04 (2007-08)[3] to resolve a claim for the enforcement by a state agency of a settlement agreement during a still pending administrative proceeding.

¶5 The Uniform Declaratory Judgments Act accords courts the "power to declare rights, status, and other legal relations" among certain parties. WIS. STAT. § 806.04(1). Specifically, the statute provides that "[a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." WIS. STAT. § 806.04(2). In addition, in order to be a proper subject for declaratory relief, a claim must involve the assertion of a legally protectable right against an adverse party with an interest in contesting that right, and must

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

also be ripe for judicial determination. ***Lister v. Board of Regents***, 72 Wis. 2d 282, 306, 240 N.W.2d 610 (1976). However, the declaratory judgment statute may not be used "to fix the state's responsibility to respond to a monetary claim" or to otherwise "obtain a declaration of the state's duty to … pay money" in violation of immunity principles. ***Id.*** at 308-09 (citation omitted). Nor may the declaratory judgment mechanism be used to bypass an exclusive means of administrative review provided by the legislature. ***Turkow v. DNR***, 216 Wis. 2d 273, 281, 576 N.W.2d 288 (Ct. App. 1998). When a litigant attempts to raise a declaratory judgment claim against a state agency while related administrative proceedings are pending, we consider the question of exhaustion of remedies before addressing other principles of sovereign immunity or jurisdiction. ***Metz v. Veterinary Examining Bd.***, 2007 WI App 220, ¶12, 305 Wis. 2d 788, 741 N.W.2d 244. We may conduct our own independent analysis as to the application of the exhaustion doctrine if the circuit court has not considered the matter. ***Id.***, ¶18.

¶6 The general rule is that a party must complete all steps in an available administrative process before seeking judicial relief. ***Id.***, ¶13. However, a party may be excused from the exhaustion doctrine if: the administrative body does not have the authority to provide the relief sought; the party who failed to complete the administrative process would have no judicial review in circumstances that would be harsh or unfair; or the agency has already informed the party of its position on a question of law when the facts are not in dispute. ***Id.***, ¶15.

¶7 Here, Hebel asserts—without any citation to authority—that the Wisconsin Employment Relations Commission hearing examiner lacked jurisdiction to determine whether the parties' oral settlement agreement was

enforceable. We find that assertion difficult to evaluate because Hebel has not adequately explained the procedural posture of the administrative proceeding or the source of the hearing examiner's authority, and the record does not contain any materials from the administrative proceeding aside from the hearing examiner's letter refusing to address the question of the enforceability of the settlement agreement. We cannot even tell from the materials before us whether the proceeding was a disciplinary action initiated by the Department or a grievance filed by Hebel pursuant to a union contract. In either case, it is not apparent why a hearing examiner would have the authority to enter an order adopting a settlement agreement by the parties, but not the authority to determine whether there was an enforceable settlement agreement in the first place.

¶8 In any event, assuming for the sake of argument that the hearing examiner lacked authority to determine the validity of the settlement agreement, that does not mean that Hebel could not still obtain administrative relief on other grounds. In particular, we do not see why the hearing examiner would need to find that the settlement agreement was enforceable in order to grant Hebel the ultimate relief he seeks—namely, a determination that his conduct did not warrant discipline and that he is entitled to payment of his lost wages. *Cf.* ***Metz***, 305 Wis. 2d 788, ¶23 (board did not need to rule on disputed constitutional challenge to statute in order to rule in party's favor in underlying disciplinary proceeding). Therefore, Hebel has failed to convince us that he should be excused from the exhaustion doctrine based on the unavailability of administrative relief.

¶9 Hebel also appears to argue that the question of the enforceability of the settlement agreement either could not be considered during judicial review of a completed administrative proceeding, or that it would present an unfair and overwhelming financial burden to require him to follow standard procedures for

judicial review. Again, Hebel cites no authority for the proposition that a court would be unable to consider the enforceability of the settlement agreement within the context of reviewing the administrative proceeding, and we will not address such an undeveloped assertion. Furthermore, we do not see how seeking judicial review of a completed administrative proceeding would have presented a significantly greater financial burden than the declaratory judgment action, appeal, and bypass petition that Hebel instead filed.

¶10 Finally, the question whether the settlement agreement was enforceable requires factual as well as legal determinations. The legal determinations will involve defining the standard for enforceability of an oral stipulation of a settlement agreement made over the telephone during a proceeding in an action before an administrative agency. The factual determinations will depend upon the standard adopted and may involve, for example, what representations the Department made and in what context.[4] Therefore, this is not a situation where the facts are undisputed and only a legal determination needs to be made. *See* ***Metz***, 305 Wis. 2d 788, ¶15.

¶11 In sum, we conclude that Hebel has failed to provide facts or arguments that would warrant excusing him from completing the interrupted administrative proceeding before seeking judicial relief. Because we conclude that Hebel failed to exhaust his administrative remedies, we do not address whether his claim was also barred based upon other sovereign immunity principles

[4] The fact that the Department accepted Hebel's allegations regarding the existence and breach of a settlement agreement for the purposes of summary judgment does not mean that it conceded all alleged facts or would have no other facts of its own to offer if the matter were to proceed to trial on the declaratory judgment action.

or the requirement that a declaratory judgment action present an issue ripe for adjudication.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.