UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2158

September Term, 2013

RODRICK JACKSON

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND

Wright,
Leahy,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: February 5, 2015

Rodrick Jackson ("Jackson") was a member of the Baltimore City Fire Department ("the Fire Department") between October 7, 2002 and February 19, 2013. The Fire Department is an agency of the Mayor and City Council of Baltimore ("the City").

On July 24, 2013, Jackson, by counsel, filed a five-count complaint in the Circuit Court for Baltimore City in which he sued: 1) the Fire Department, 2) James Clack, who was the chief of the Fire Department at the time suit was filed; and 3) the City. The counts were captioned: wrongful discharge (Count I); constructive fraud (Count II); negligence (Count III); civil conspiracy (Count IV); and, "violation of Article 24 (of the) Maryland Declaration of Rights (Count V). James Clack was never served. The Fire Department was later voluntarily dismissed because it is not an entity that can be sued. The City filed a motion to dismiss the original complaint for failure to state a cause of action upon which relief could be granted. Jackson filed an amended complaint on September 27, 2013, in which he added a sixth count, which he captioned "breach of contract." The City filed a motion to dismiss count VI to which Jackson filed an opposition. Jackson also filed an opposition to the motion to dismiss the original complaint.

After a hearing, a Baltimore City motions judge dismissed all six counts. In this appeal, Jackson takes issue only with the court's dismissal of the breach of contract count. Jackson phrases the questions presented as follows:

> 1) Did the [c]ircuit [c]ourt err by prematurely dismissing Appellant's Complaint on the grounds that Appellant failed to allege a contractual breach by the City of Baltimore under the Memorandum of Understanding?

2) Did the [c]ircuit [c]ourt abuse its discretion in deciding that the Appellant did not have grounds to pursue a breach of contract claim, per [the] Memorandum of Understanding?

I.

BACKGROUND FACTS[1]

Starting on June 25, 2012, Jackson was on paid medical leave from the Fire Department because he had been diagnosed by his private physician, Dr. Patricia Newton, as suffering from "acute traumatic stress reaction." According to Dr. Newton, this condition was caused by job related stress, including the fact that he was facing disciplinary action by his employer.

In November of 2012, the Fire Department sent Jackson a notice, by certified mail, advising him that he was to be terminated effective February 19, 2013. The reason for the termination was said to be "expiration of medical leave." According to Jackson, he never received a copy of the notification.

Next, the Fire Department sent Jackson notification that a pre-termination conference would be held on December 12, 2012. At the request of Jackson's counsel, that pre-hearing conference was rescheduled. The reason that Jackson's counsel gave for requesting a postponement was that Dr. Newton had ordered Jackson not to participate in any work related activities. On December 24, 2012, the medical director for the Fire Department, Dr.

[1] The facts set forth in part I are based on allegations set forth in Jackson's original and amended complaints - and the exhibits attached thereto.

James D. Levy, said in a memorandum that in his opinion there was no medical reason why Jackson could not participate in a pre-termination hearing. Accordingly, the pre-termination hearing was re-scheduled for February 1, 2013.

On January 3, 2013, Jackson was notified by the Fire Department that he was suspended without pay because his emergency medical training (EMT) certificate had expired on January 1, 2013. According to the notice, the reason the certificate expired was because Jackson had "failed to complete a certification course" as mandated by the State of Maryland.

Jackson's counsel, on January 27, 2013, wrote the Fire Department a letter in which counsel protested the re-scheduling of the pre-hearing conference for February 1, 2013. The grounds for the objection was that Dr. Newton, Jackson's treating doctor, had advised Jackson not to participate in any "work related activities." Nevertheless, the pre-termination hearing was held as scheduled. Neither appellant nor his counsel attended the hearing.

On February 19, 2013, which coincidentally was the same date as the effective date of Jackson's termination, Dr. Newton cleared Jackson to return to work.

On April 3, 2013, Jackson filed an appeal with the Baltimore City Civil Service Commission objecting to his suspension and termination. In regard to that appeal, the Civil Service Commission, by its president, sent Jackson's counsel a letter dated June 28, 2013, which, in effect, dismissed the appeal because the rules of the Civil Service Commission required that an appeal request must be received in the office of the Civil Service

Commission "within 5 business days of receipt of a termination letter." The letter from the Civil Service Commission president also noted that U.S. Postal Service records showed that a certified letter notifying Jackson of his impending separation had been sent to Jackson at his "address of record" on November 15, 2012 but was unclaimed.

II.

As previously noted, appellant filed an amended complaint on September 27, 2013 that added a breach of contract count (Count VI). Count VI read, in material part, as follows:

> 57. Plaintiff adopts and incorporates each and every allegation contained in the preceding paragraphs as if fully set forth herein.
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> 58. The Memorandum of Understanding is an agreement entered into between the Baltimore City Fire Department and the Union that covers many of the essential components of work life for a Baltimore City fire fighter.
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> 59. The Memorandum of Understanding, Article 31: (Other Leave) distinguishes between Line of Duty Injury and Non[-]Line of Duty Injury with the principal distinction being that Line of Duty Injuries (Article 31(B)) allows employees such as Plaintiff to receive his salary and remain an active member of the Department for 1 year as opposed to 6 months for Non-Line of Duty injuries. (See Exhibit 16, Article 31 of MOU.)
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> 60. Plaintiff's treating doctor, Dr. Patricia Newton, made a determination that his injuries were Line of Duty in nature and as such he was entitled to up to 1 year of receiving his salary and remaining a member of the Department.
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> 61. There is a procedure that is detailed in the Joint Addendum to Memorandum of Understanding that if there is a disagreement between the employee's Physician and the Physician employed by the Fire Department that the matter will be referred to an independent third party Physician to resolve. This procedure was never used. (See Exhibit 17. Joint Addendum to MOU.)
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> 62. Article 15 (Safety and Health) of the Memorandum of Understanding (K)(2) Management of Injuries and Illnesses was breached when the Baltimore

> City Fire Department held on January 27, 2013, a Pre-Termination hearing, after Plaintiff's doctor stated that he was not to participate in any work related activities. Article 15(K)(2) states "should an employee consult with his/her own physician in connection with an occupational injury, and should that physician conclude that due to an occupational injury the employee should be placed off from work or that the employee's duties at work must be limited, that physician's recommendations shall be honored by the Employer unless it is unreasonable." (See Exhibit 18, Article 15(K)(2).)
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> 63. Defendant, Mayor and City Council of Baltimore, Inc. breach of the following [sic] provisions of the Memorandum of Understanding has caused Plaintiff damages both financial and emotional caused solely by the breach of Defendant.

At the hearing on the motion to dismiss, counsel for the City argued in regard to count VI that even if the City had violated the terms of the Memorandum of Understanding ("MOU"), Jackson still could not prevail on the breach of contract count because he failed to allege that he had availed himself of the administrative remedies set forth in the MOU. That administrative remedy was to file a grievance.

The provisions of the MOU relied upon by the City are contained in Article 6 of the MOU. Article 6 provides, with exceptions not here relevant, that any grievance involving "a dispute concerning the application or interpretation of the terms of this Memorandum of Understanding or a claimed violation, misinterpretation or misapplication of the rules or regulations of the Employer affecting the terms and conditions of employment, may be settled in the following manner[.]" The MOU then sets forth a five-step procedure that must be followed after an employee files a grievance. Step five of that procedure allows the union,

on behalf of the employee, to demand binding arbitration of the grievance, if non-binding mediation (step four) is not successful.

In regard to count VI, the motions judge said, in her oral opinion:

> The Plaintiff has failed to allege some contractual breach by the City under the Memorandum of Understanding that enures to Mr. Jackson's benefit without need to pursue the grievance or arbitration mechanisms under the agreement. I believe that Mr. Jackson, especially looking at the amended count VI, fails to allege terms of contract said to have been breached, while he nevertheless satisfied his own performance responsibilities and obligations.

III.

STANDARD OF REVIEW

If an appeal is filed from a trial court's grant of a motion to dismiss, an appellate court must determine whether the decision was legally correct. Md. Rule 2-322(b)(2); *Porterfield v. Mascari, II, Inc.*, 142 Md. App. 134, *cert. granted*, 369 Md. 179 (2002), *aff'd*, 374 Md. 402 (2003). Dismissal for failure to state a claim is proper if the alleged facts and permissible inferences would, if proven, nonetheless fail to afford relief to the plaintiff. *Ricketts v. Ricketts*, 393 Md. 479 (2006).

IV.

ANALYSIS

A. First Question Presented

The main assertion in count VI is that the City breached Articles 15 and 31 of the MOU. We therefore turn our attention to those two Articles, copies of which Jackson

attached to his amended complaint. As appellant points out, accurately, Article 15(K)(2) provides that "should an employee consult with his/her own physician in connection with an occupational injury, and should that physician conclude that due to an occupational injury the employee should be placed off from work or that the employee's duties must be limited, that physician's recommendations shall be honored by the Employer unless it is unreasonable." According to count VI, the Fire Department violated Article 15 when it held a pre-termination hearing[2] despite the fact that appellant's physician had recommended that Jackson not participate in any "work related activities." If, as appellant alleges, the City violated Article 15(K)(2) by not honoring Dr. Newton's recommendation, even though the recommendation was "reasonable," appellant had a remedy under the MOU. That remedy was to file a grievance. He did not, however, file a grievance. Under the MOU, that type of breach is not one that the Baltimore City Civil Service Commission has jurisdiction to resolve.

Count VI of the complaint also alleges that Article 31 of the MOU was breached because the Fire Department did not utilize a procedure for resolving disagreements between the Fire Department's physician (Dr. Levy) and appellant's personal physician about whether an injury occurred in the line of duty. Once again, assuming the City was guilty of a breach,

[2]In count VI, appellant alleges that the pre-termination hearing was held on January 27, 2013; but, earlier in his complaint, he states that the pre-termination hearing was held on February 1, 2013. The latter date appears to be correct, based on documents that appellant attached as exhibits to his complaint. The exact date, however, is immaterial to the outcome of this case.

appellant could have, but did not, file a grievance pursuant to the MOU. The exclusive remedy for such a breach under the MOU is to file a grievance.

In *Pope v. Board of School Commissioners of Baltimore City*, 106 Md. App. 578, 597-98 (1995) we said:

> It is well recognized that before an individual employee may sue his employer in court, he must show that he exhausted contractual remedies. . . . Exhaustion of contractual remedies applies equally to cases where the procedures are provided by a collective bargaining agreement[.]

Id. (citing *Dearden v. Liberty Medical Center*, 75 Md. App. 528, 531-32 (1988)).

In *Dearden*, *supra*, Chief Judge Wilner, speaking for this Court, explained the reason for the rule just quoted. In *Dearden*, the employee (Linda Dearden) ignored a multi-step grievance procedure provided for in her employment contract. This Court ruled in favor of her employer. Judge Wilner explained:

> Ms. Dearden never invoked this [grievance] procedure. She defends that failure on the basis that, as her complaint is with Mr. Jews, himself, and with Mr. Kelly, it would be fruitless to seek a resolution with either of them or with any subordinate official. We do not agree.
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> In *Jenkins v. Schluderberg, Etc. Co.*, 217 Md. 556, 561, 144 A.2d 88 (1958), the Court laid down the general rule that "before an individual employee can maintain a suit [against his employer], he must show that he has exhausted his contractual remedies. . . ." Quoting from *Cone v. Union Oil Co.*, 277 P.2d 464, 468 (Cal.1954), the Court observed:
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> > "'This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to courts * * * is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and

> inexpensive procedure, and by persons who, generally, are intimately familiar therewith. * * * The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations.'"
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> In furtherance of that policy, which, we think pertains whether the contractual remedy is part of a collective bargaining agreement or simply available as part of the company's personnel rules, the Court held, 217 Md. at 561-62, 144 A.2d 88, that "if the employee refuses to take even the initial step of requesting the processing of the grievance, he will not be granted relief in the courts."

Id. at 531-32.

In his brief, appellant makes the following assertions in support of his contention that the motions judge erred in dismissing the breach of contract count:

> Appellee contends that Appellant failed to exhaust contractual remedies prior to filing a lawsuit. However, Appellant made several attempts to request an appeal of the Impending Termination but was deprived of his contractual right to utilize this remedy. Appellant tried to pursue an appeal with the Civil Service Commission but was informed that he was to file an appeal within five days of his notice of termination, which was recorded as sent to Appellant on November 15, 2012. Appellant never received the notice of termination, which was confirmed as unclaimed by Appellee's representative, Mr. Devin Do[d]son.
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> Article 6 (F) of Memorandum of Understanding states "the rights of any employee who is discharged . . . shall be prescribed in Article 12." Article 12 (A) outlines an employee's two options of contesting a discharge, which is requesting an appeal with the Civil Service Commission or filing a grievance. The employee's choice of which procedure to use to contest the discharge is binding, and prohibited from choosing to follow an alternate procedure. Appellant made a binding selection when he elected an appeal with the Civil Service Commission regarding his Impending Termination, but was denied. As such, Appellant was denied his contractual right to file a grievance.

As can be seen, appellant argues, in essence, that if an employee is discharged, that employee has the option of filing an appeal with the Civil Service Commission or by filing a grievance. This is true. *See* Baltimore City Charter section 100(a). But, except as discussed *infra*, count VI alleges only a breach of Article 15 and Article 31 and neither Articles 15 or 31 have anything to do with discharge. Under the MOU, if a breach of those Articles occurs, the only option an employee has is to file a grievance.

Although not mentioned by appellant in his brief, we note that count VI of the amended complaint incorporated by reference all other paragraphs in the complaint. In count III, in the portion of the complaint captioned "negligence," appellant alleged:

> 44. Defendant had a duty as his employer and pursuant to Memorandum of Understanding and other policies and procedures to notify Plaintiff that he was being terminated and although Defendants claim that they mailed Plaintiff a termination letter, Plaintiff never received same.
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> 45. Defendant breached its duty to Plaintiff by failing to ensure that Plaintiff received a termination notice either by hand-delivering the notice to Plaintiff, mailing the notice to Plaintiff's counsel or other means reasonably calculated to ensure Plaintiff was notified of his termination.
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> 46. As a result of Defendant's breach of its duty, Plaintiff has sustained emotional and monetary damages.

Count VI of appellant's amended complaint, deals exclusively with the alleged breach of the MOU and not with "other policies and procedures." Therefore, taking the allegations in the complaint in the light most favorable to appellant, we will assume that the MOU

contained a duty to notify of termination.[3] Appellant's complaint does allege a dispute as to whether the City fulfilled its duty under the MOU to notify him of his termination. Nevertheless, under the clear provisions of Article 6 of the MOU, disputes of that nature must be resolved by filing a grievance. Article 6, which sets forth the grievance procedure, provides that grievances must be filed within "fifteen calendar days of the date of the grievance or knowledge by the affected employee of the occurrence giving rise to the grievance . . . ." Assuming, *arguendo*, that an employee who is sent notification of termination by a certified mail letter, which the employee did not pick up at the post office, has not received proper service under the MOU, appellant knew of this "improper" notice, at the latest, in May 2013, when he received a letter from the president of the Civil Service Commission. But thereafter he failed to avail himself of the grievance procedure.[4] Article 6 does not allow disputes as to proper notification to be resolved by filing a complaint with the Baltimore City Civil Service Commission.

In summary, if an employee contends that the MOU was breached by failing to give proper notice of termination, and, as here, the City disputes that contention, the only option is to file a grievance, which appellant has never done. If a timely grievance had been filed

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[3]Neither the amended complaint nor the original complaint has attacked the portion of the MOU that provides for a duty to notify.

[4]Appellant does not say in his complaint when he received actual notice that he was being terminated. Given the fact that appellant's lawyer was given notification that a pre-termination conference had been scheduled for February 1, 2013, it would appear likely that by that date both appellant and his counsel knew that appellant was about to be fired.

regarding the notification issue, and if it were determined that the proper notification procedure was not followed, appellant would have been entitled as a remedy to file a belated appeal of his discharge to the Civil Service Commission.

B. Second Question Presented

In regard to the second question presented, appellant argues "[t]he [c]ircuit [c]ourt abused [its] discretion in deciding that the Appellant did not have grounds to pursue a breach of contract claim, per [the] Memorandum of Understanding." In support of this argument appellant asserts that he had "sufficient standing to bring a claim to enforce contractual provisions stated in the Memorandum of Understanding[.]" There is no doubt that the appellant did have "standing" to enforce a claim based on the contents of the MOU. But the motion to dismiss was granted on the grounds that appellant had failed to exhaust administrative remedies. The court's ruling had nothing to do with standing. Therefore, the argument that appellant provides in regard to his second question presented is unavailing.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.