

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

GOVERNMENT OF THE VIRGIN ISLANDS,
DEPARTMENT OF JUSTICE,

Plaintiff.

v.

UNITED INDUSTRIAL, SERVICE,
TRANSPORTATION, PROFESSIONAL AND
GOVERNMENT WORKERS OF NORTH
AMERICA SEAFARERS INTERNATIONAL
UNION,

Defendant.

CASE NO. ST-11-CV-308

ACTION FOR DECLARATORY
JUDGMENT AND TO VACATE
ARBITRATOR'S AWARD

UNITED INDUSTRIAL, SERVICE,
TRANSPORTATION, PROFESSIONAL AND
GOVERNMENT WORKERS OF NORTH
AMERICA SEAFARERS INTERNATIONAL
UNION **on behalf of Ernest Bason, Esq.,**

Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
DEPARTMENT OF JUSTICE,

Defendant.

CASE NO. ST-11-CV-364

ACTION TO CONFIRM AN
ARBITRATOR'S AWARD

PEDRO K. WILLIAMS, ESQ.

Law Offices of Pedro K. Williams
5212 Wimmelskafts Gade
St. Thomas, VI 00802

Attorney for United Industrial, Service,
Transportation, Professional and
Government Workers of North America
Seafarers International Union **on behalf
of Ernest Bason, Esq.**

ROBERT A. MOLLOY, ESQ.

Assistant Attorney General - Labor
Office of Collective Bargaining
5001 Chandler's Wharf, Suite No. 5
Gallows Bay, Christiansted
St. Croix, VI 00820

Attorney for Government of the Virgin
Islands, Department of Justice

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: August 1, 2011)

Presently before this Court in the above-captioned civil actions¹ are the motions of the United Industrial, Service, Transportation, Professional and Government Workers of North America Seafarers International Union (the "Union") for partial summary judgment, filed in both cases, and its motion for expedited and emergency hearing, which was filed only in Case No. ST-11-CV-364. The Court held a hearing on these motions on July 28, 2011.² Because the Court determines that the Union has not established a sufficient factual basis to support the requested interim relief, the Court will deny all of these motions.

I. Factual background.

The facts were acquired through the testimony of Ernest Bason, Esquire at the July 28, 2011 hearing and the exhibits introduced into evidence at said hearing.³ Ernest Bason, Esquire was discharged from the Office of the Attorney General, which is within the Virgin Islands Department of Justice ("VIDOJ"), by letter dated July 23, 2010 from the Honorable John P. deJongh, Jr., Governor of the Virgin Islands.⁴ Prior to his termination, Attorney Bason had worked in the Office of the Attorney General for thirteen years, with the exception of a brief period wherein he worked as the Legal Counsel in the Virgin Islands Police Department, as an assistant attorney general.⁵ He exercised his legal duties pursuant to a special admission to the Virgin Islands Bar Association ("VIBA"), based on his membership in the New York State Bar.⁶ In his capacity as an assistant attorney general, Attorney Bason represented the People of the Virgin Islands in all types of criminal cases, ranging from traffic violations to murder cases.⁷ He asserts that he was discharged because: 1) the VIDOJ incorrectly asserted that he was unprepared to prosecute certain criminal cases; and 2) he filed a complaint against his supervisor for practicing law in the Virgin Islands without legal authorization.⁸

¹ This Court consolidated the above-captioned cases via separate orders of even date pursuant to SUPER. CT. R. 7 and FED. R. CIV. P. 42(a).

² The United Industrial, Service, Transportation, Professional and Government Workers of North America Seafarers International Union appeared through Mr. Eugene Irish, and Attorney Ernest Bason was present. Both were represented by Pedro Williams, Esquire. The Government of the Virgin Islands, Department of Justice appeared through Wayne Anderson, Esquire, Special Counsel to the Attorney General, and was represented by Robert A. Molloy, Esquire, of the Office of Collective Bargaining.

³ The exhibits consist of: 1) the arbitration award of George R. Shea, Jr., dated April 29, 2011, which includes and incorporates his interim decision dated January 2, 2011; 2) the collective bargaining agreement of the parties, which is effective from October 1, 2007 through September 30, 2011; and 3) the July 13, 2011 letter from FirstBank Virgin Islands to Ernest Bason.

⁴ Testimony of Ernest Bason and Plaintiff's Exhibit 1 at p. 6.

⁵ Plaintiff's Exhibit 1 at p. 3.

⁶ Testimony of Ernest Bason.

⁷ Testimony of Ernest Bason.

⁸ *Ibid.* The issue of whether the supervisor in question, Wilson Campbell, Esquire, is authorized to practice law in the Virgin Islands is presently pending before the Supreme Court of the Virgin Islands. See, *In re Application of Campbell*, S.Ct. BA. No. 2009-0230, 2011 WL 1304483 (V.I. Mar. 3, 2011).

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Assistant Attorneys General are members of the Union, and there is an existing collective bargaining agreement between it and the VIDOJ.⁹ The Union received notice of Governor deJongh's action against Attorney Bason on August 16, 2010, and filed a grievance against the VIDOJ on this matter on August 25, 2010.¹⁰ The VIDOJ contested the timeliness of the grievance, and the arbitrator denied their request to dismiss the matter on January 2, 2011. The arbitration on the substantive issues was held in February of 2011, and, by an award dated April 29, 2011, the arbitrator found in favor of Attorney Bason.¹¹ The arbitrator directed that the VIDOJ immediately reinstate Attorney Bason and restore all of his benefits, retroactive to July 1, 2010, and also awarded him back pay going back to June 7, 2010, when he was initially suspended.

In early May, 2011, when Attorney Bason attempted to return to work, in reliance upon the arbitrator's award, he was rebuffed by Wayne Anderson, Esquire. Attorney Anderson advised him that the Attorney General would not speak to him about the issue, and he would not be allowed into the office.¹² He eventually left the building, but only after notifying Attorney Anderson that the building housing the office was a public facility and that he had an arbitrator's award reinstating him to the position of Assistant Attorney General.¹³ On cross-examination, Attorney Bason testified that he did not know when the Attorney General or Attorney Anderson received the arbitrator's award.¹⁴ Although Attorney Anderson appeared for the VIDOJ at the hearing, the Union did not attempt to call him as a witness at the hearing, and the VIDOJ did not call any witnesses. Therefore, the record does not establish whether the refusal to allow Attorney Bason's return was done with or without knowledge of the arbitration award.

Attorney Bason testified that he has suffered greatly as a result of the conduct of the VIDOJ. He was unable to attend funerals for certain family members, and forced to borrow funds from friends to bury his own mother.¹⁵ Moreover, he now is in arrears on his mortgage payments to FirstBank Virgin Islands, and owes various contractors for work they have performed on his real property.¹⁶ He was able to earn approximately Fifteen Thousand Dollars (\$15,000.00) as a consultant for an entity which was seeking benefits before the Economic Development Commission, and also borrowed some monies from friends and family.¹⁷ He also claims that he was unable to sit for the Virgin Islands Bar Examination ("VIBE") because he could not afford the fees associated with taking the exam and related background investigation.¹⁸ He stated that he looked into taking the exam, and would have sat for the VIBE if he had the

⁹ Plaintiff's Exhibit 2.
¹⁰ Plaintiff's Exhibit 1 at p. 6.
¹¹ Testimony of Ernest Bason and Plaintiff's Exhibit 1.
¹² Testimony of Ernest Bason.
¹³ Ibid.
¹⁴ Ibid.
¹⁵ Ibid.
¹⁶ Ibid and Plaintiff's Exhibit 3.
¹⁷ Testimony of Ernest Bason.
¹⁸ Ibid.

funds to pay the required fees.¹⁹ As of the date of the hearing, Attorney Bason had not heard from the Office of the Attorney General with respect to either his reinstatement or his back pay.

II. Legal discussion.

a. The legal standards applicable to preliminary injunctive relief govern the Union's three motions.

At the hearing, counsel for the Union acknowledged that both motions for partial summary judgment and the single motion for expedited and emergency motion, seek the same relief. Specifically, the Union seeks the immediate reinstatement of Attorney Bason and the enforcement of Article X, Section 15 of the collective bargaining agreement, which provides,

Reinstatement of Discharged Grievant

If a discharge grievance is filed and upheld by an arbitration award providing for reinstatement and back pay, the grievant shall be promptly reinstated with back pay pending the final disposition of any appeal that the Employer may file.

Because the Union asserts, and the Court agrees, that all of the motions seek the same relief, the same legal standards should be applied to all of these motions.

A motion for summary judgment, whether on some or all of the asserted claims, can be granted only when "...the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."²⁰ However, courts are required to consider and decide motions based on their substance and not on the basis of the form in which they are presented.²¹ A review of the relief sought in all three motions and applicable case law indicates that, by requesting that this Court direct the Office of the Attorney General to immediately reinstate him, Attorney Bason is requesting mandatory injunctive relief.²² Moreover, his request is in the nature of a preliminary injunction, given the timing of his request and the fact that his reinstatement would continue until a final disposition on the merits of these

¹⁹ Ibid.

²⁰ FED. R. CIV. P. 56(c). This federal rule is applicable to proceedings in this Court pursuant to SUPER. CT. R. 7. E.g., *Bookworm, Inc. v. Tirado*, 44 V.I. 300, 301 (Terr. Ct. 2002).

²¹ *In re Seven Fields Dev. Corp.*, 505 F.3d 237, 247 (3rd Cir. 2007); *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 887 F.2d 460, 463 (3rd Cir. 1989) ("We agree with Amgen that we must determine from its substance and not from its form whether we should treat Ortho's motion as a motion for reconsideration under Fed.R.Civ.P. 59(c) or a motion to modify a preliminary injunction..."); *Cromwell v. Int'l Union*, Civil No. 2007-141, 2010 WL 5175038 * 1 n. 1 (D.V.I. Dec. 6, 2010).

²² *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Amer.*, 909 F.2d 248 (7th Cir. 1990) (holding that confirmation of an arbitration award and directing reinstatement of employee was an appealable injunctive order); *Beale v. Blount*, 461 F.2d 1133, 1137 (5th Cir. 1972) ("Traditionally, the procedural avenue to reinstatement for an ex-employee of the federal government claiming to be the victim of improper discharge has been a petition for mandatory injunction or writ of mandamus directed to the head of the agency concerned commanding the re-employment of the petitioner.").

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consolidated actions. Requests for preliminary injunctive relief are governed by different rules than motions for summary judgment. The Court will apply the pertinent legal standards for preliminary injunctive relief as described below.

b. Attorney Bason has not presented sufficient facts to satisfy the injury requirements under local law or the federal rules to justify interim injunctive relief.

The standard for the issuance of a preliminary injunction under the rules adopted by this Court²³ is undisputed. Generally, in order to successfully move for preliminary injunctive relief, the movant must demonstrate: "1) the threat of irreparable harm to the [plaintiff] if the injunction is denied, 2) the balance of the harm between the parties if granted, 3) the probability of the [plaintiff's] success on the merits, and 4) the public interest."²⁴ Further, the movant "...must establish all four of these factors to obtain a preliminary injunction; a preliminary injunction will not issue if even one of these factors is not shown."²⁵ At the hearing, both parties made several arguments regarding why this standard had, or had not, been met based on the evidence currently in the record.

Interestingly, however, precedent indicates that there is a division among courts on what injunctive standard is to be applied to a motion for an injunction in the context of actions to enforce arbitration awards. One line of authority²⁶ holds that when the union seeks a temporary restraining order and preliminary injunction in the course of seeking enforcement of an arbitration award, a federal district court must apply the anti-injunction provision of the Norris-LaGuardia Act, 29 U.S.C. § 107, and not the standard required under FED. R. CIV. P. 65(b).²⁷ Of course, the Superior Court is not "a court of the United States", and this provision does not strictly apply to arbitration award enforcement proceedings in this tribunal. However, the

²³ Motions for preliminary injunctive relief are governed by Rule 65(b) of the Federal Rules of Civil Procedure because it does not conflict with any applicable provision of the Rules of the Superior Court. SUPER. CT. R. 7.

²⁴ *Dennie v. Abramson Enters., Inc.*, 124 F. Supp. 2d 928, 930 (D.V.I. App. Div. 2008).

²⁵ *Id.*

²⁶ *See, District 17, United Mine Workers of Amer. v. Apogee Coal Co.*, 13 F.3d 134 (4th Cir. 1993).

²⁷ 29 U.S.C. § 107 states, in pertinent part:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect--

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

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Legislature of the Virgin Islands has adopted its own anti-injunction act which applies in local labor disputes.²⁸ Thus, if the Court were to follow the *Apogee Coal Co.* reasoning, this matter should be decided using the standard set forth in 24 V.I.C. § 345 because “The clear intent of Superior Court Rule 7 is for locally promulgated rules to govern in the Superior Court, regardless of whether adopted by the Legislature or the Superior Court.”²⁹

Conversely, other courts³⁰ have held that reinstatement of an employee over the objection of the employer in an action to enforce an arbitration award is not a “labor dispute,” which is the trigger for the anti-injunction acts under both federal and local law.³¹ If the Court were to decide that *Detroit Typographical Union* expresses the appropriate policy, then the general standard for preliminary injunctive relief expressed in *Abramson Enters., Inc.* would govern. Because of the factual record before the Court, however, it is not necessary to select which is the precedent to be followed as a general proposition. The Union failed to adequately establish a factor common to both standards.

As with the usual injunctive standard, the requirements expressed in 24 V.I.C. § 345 are written in the conjunctive using the word “and.”³² Therefore, a movant for injunctive relief must make a sufficient showing on all of the listed factors in the statute. Under Rule 65(b), a movant must show that he will suffer irreparable injury, and under the local anti-injunction statute, the complainant must show that his injury would be greater than the opponent’s, if the requested injunctive relief is not granted. Based on his own testimony and Virgin Islands law, the Union

²⁸ See, V.I. CODE ANN. tit. 24, § 345, which provides, in relevant part:

“No court of the Virgin Islands shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect:

(a) that acts of fraud or violence have been threatened and will be committed unless restrained, or said acts have been and will continue to be committed unless restrained; but no injunction or temporary restraining order shall be issued on account of any threat or act of fraud or violence, except against the person or persons or association or organization making the threat of committing the act of fraud or violence or actually authorizing the same after actual knowledge thereof;

(b) that substantial and irreparable injury to complainant's physical property will result;

(c) that as to each item of relief sought on each allegation greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon the defendants by the granting of relief;

(d) that complainant has no other adequate remedy at law; and

(e) that the public officers charged with the duty to protect the property of the complainant are unable or unwilling to furnish adequate protection.”

²⁹ *Phillips v. People*, 51 V.I. 258, 275 (V.I. 2009).

³⁰ See, *Detroit Typographical Union v. Detroit Newspaper Agency*, 283 F.3d 779 (6th Cir. 2002).

³¹ See, 29 U.S.C. § 113(c); 24 V.I.C. § 349(c).

³² *Reese Bros., Inc. v. United States*, 447 F.3d 229, 235–236 (3rd Cir. 2006) (“The usual meaning of the word ‘and,’ however, is conjunctive, and ‘unless the context dictates otherwise, the ‘and’ is presumed to be used in its ordinary sense...” (citations omitted); *In re Philadelphia Newspapers, LLC*, 433 B.R. 164, 271 (Bankr.E.D.Pa.2010) (“Statutory phrases separated by the word “and” are usually to be interpreted in the conjunctive.”) (citations omitted).

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failed to show the necessary injury to Attorney Bason required under both standards, and, consequently must fail under either paradigm.

According to Attorney Bason, he has not passed the VIBE, and previously served as an assistant attorney general solely by virtue of his special admission to the Virgin Islands Bar Association ("VIBA"). Special admissions to VIBA are governed by Rule 202 of the Rules of the Supreme Court of the Virgin Islands.³³ Under Rule 202, a person who is licensed to practice law in another American jurisdiction, may, without being regularly admitted to VIBA, serve as an attorney for the Government of the Virgin Islands under certain conditions.³⁴ When the Supreme Court promulgated this rule, it overruled the previous custom under which persons practiced law in the territory as attorneys within the Government of Virgin Islands for several years without ever taking and passing the VIBE. However, the Supreme Court also recognized a need for a grace period to allow those persons who served as Government attorneys under the previous system to come into compliance with the new rule. Therefore, Rule 202 provides that Government attorneys who were serving under a special admission on the effective date of the rule, may continue to practice under those circumstances for a period of four (4) years from the Rule's effective date, which is September 1, 2007, without taking and passing the VIBE.³⁵

One exception to this proviso is that a person who has been specially admitted for ten (10) years or more on the Rule's effective date, is absolved of any duty to take the VIBE as long as they continue in the service of the pertinent department, or any other department of the Government if the inter-agency change does not take in excess of ninety (90) days.³⁶ The arbitrator's award affirms that Attorney Bason served as an assistant attorney general for thirteen (13) years prior to his termination, which relates back to the year 1997.³⁷ Consistent with that determination is Attorney Bason's affidavit in support of his motion for expedited and emergency hearing which provides, in paragraph 2, that he commenced his service with the VIDOJ in 1997.

However, Attorney Bason, who bears the burden of proof on his motions, did not introduce any facts demonstrating when in 1997 he commenced his service. If he started on or prior to September 1, 1997, he is exempted from taking the VIBE. If he began after September 1, 1997, then he is not exempt. The distinction is important because, if he is not exempted under the ten-year rule, then he must sit and pass the VIBE by September 1, 2011. The Court takes judicial notice that the VIBE was conducted on July 27 and 28, 2011, and will not be offered again until February, 2012. If Attorney Bason is not exempted under Rule 202, he would be ineligible to practice law in the Virgin Islands under either a regular or special admittance. This factual scenario would make his requested reinstatement illegal under the Supreme Court rules, and this Court will not issue an injunction which may be contrary to law. Moreover, one cannot claim to be injured by being prevented from engaging in an activity that he or she is legally

³³ The Supreme Court of the Virgin Islands is charged with exclusive authority to regulate the practice of law in the United States Virgin Islands. 4 V.I.C. § 32(e).

³⁴ V.I. S.Ct. R. 202(a).

³⁵ V.I. S.Ct. R. 202(e)(1).

³⁶ V.I. S.Ct. R. 202(e)(4).

³⁷ Plaintiff's Exhibit 1 at p. 3.

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prohibited from conducting. While the unproven fact may be viewed to be *de minimis* by some, this body is not authorized to assume facts – they must be demonstrated by the party bearing the burden of proof. Consequently, since the Union has not demonstrated a sufficient injury inuring to Attorney Bason under either Rule 65 or the anti-injunction statute to warrant the emergency relief he seeks, the Court is obligated to deny his pending motions.³⁸

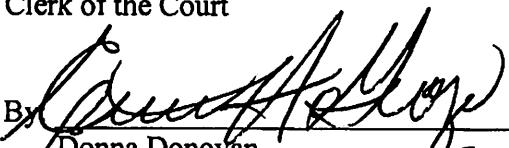
III. Conclusion.

Because Attorney Bason has not presented a factual record demonstrating a sufficient injury to support preliminary injunctive relief under local law or federal rule, his motions for partial summary judgment, in both cases, and his motion for expedited and emergency relief in Case No. 364 will all be denied. However, the Court also recognizes a duty to expedite this matter to meet the purposes of the contractually negotiated arbitration clause of the collective bargaining agreement between the parties and the Federal Arbitration Act.³⁹ Therefore, the Court's accompanying order will set an expedited schedule for the parties to file the complete arbitration record and to brief the outstanding issues in this case for final disposition.

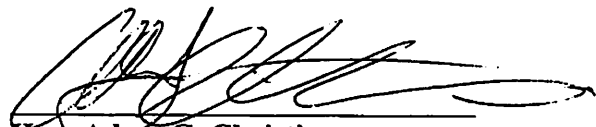
Dated: August 1, 2011

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By


Donna Donovan

Acting Court Clerk Supervisor 8/1/2011


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

³⁸ The Union also requests that Attorney Bason immediately receive his back pay. However, back pay can be addressed via an award of damages and cannot support a request for injunctive relief. *E.g., Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of Amer. v. Exide Corp.*, 688 F. Supp. 174, 188-190 (E.D. Pa. 1988), *aff'd w/o opinion*, 857 F.2d 1464 (3rd Cir. 1988).

³⁹ *E.g., Raymond James Financial Servs., Inc. v. Bishop*, 596 F.3d 183, 190 (4th Cir. 2010) (noting that the purpose of arbitration is the quick resolution of disputes), *cert. denied*, 131 S.Ct. 224 (2010).