

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

FRATERNAL ORDER OF POLICE LODGE 89)	
et al.,)	
Appellees,)	Case No. 09-1949
v.)	
PRINCE GEORGE'S COUNTY, MARYLAND)	
Appellant.)	
)	

MOTION TO DISMISS APPEAL
FOR LACK OF FINAL DECISION UNDER 28 U.S.C. § 1291

Pursuant to Fed. Rule App. Pro. 27, this Motion to Dismiss Appeal is filed on behalf of the five labor organizations and five individuals who are appellees before this Court representing all public-safety employees of Prince George's County, Maryland ("County").¹ For the reasons more fully explained below, this

¹ The public-safety appellees include the Fraternal Order of Police Lodge No. 89, Inc., the exclusive bargaining representative of all sworn employees of the Prince George's County Police Department at the rank of Lieutenant and below; the Professional Fire Fighters Association, Prince George's County Local No. 1619, Inc., the bargaining representative of all sworn uniformed employees of the Prince George's County Fire/EMS Department up to and including the rank of Battalion Chief, and for various civilian employees of the Fire/EMS Department; the Deputy Sheriff's Association of Prince George's County, Inc., the bargaining representative of all sworn employees of the Office of the Sheriff of Prince George's County at the rank of Lieutenant and below, and all civilian employees of said office in certified bargaining units; the Prince George's

Court should dismiss the appeal filed by the County because the Order issued by the District Court on August 18, 2009 is not a “final decision” under 28 U.S.C. § 1291, and any appeal filed from that Order is premature.

The District Court issued both a Memorandum Opinion and an Order on August 18, 2009. Copies of these documents are attached to this Motion as Exhibit 1. In its Opinion, the District Court concluded that, under the Contract Clause of the U.S. Constitution, an Employee Furlough Plan (“EFP”) adopted by the County for Fiscal Year 2009 (running from July 1, 2008 through June 30, 2009) was an unconstitutional impairment of the parties’ collective bargaining agreements in effect during that year. In its simultaneously issued Order, the Court granted summary judgment on the Contract Clause claim on behalf of the plaintiffs, denied the County’s cross-motion on that same claim, and directed the parties to “consult and discuss the means and manner of refunding any monies owed to Union employees as a result of having complied with the EFP, and, if necessary, submit a joint proposal for the Court’s approval within ten (10) days of the entry of this Order.” No final assessment of monetary damages was included in the Order.

County Correctional Officers Association, Inc., the bargaining representative of all sworn employees of the Prince George’s County Department of Corrections at the rank of Lieutenant and below, and all civilian employees of said office in certified bargaining units; and the Police Civilian Employees Association, the bargaining representative of all civilian employees of the Prince George’s County Police Department, as well as certain employees in the Office of Homeland Security and the Department of Environment.

In reaction to the Court's ruling, the County filed its Notice of Appeal on August 21, 2009, and simultaneously filed a Motion for a Stay Pending Appeal under Rule 62(d) of the Federal Rules of Civil Procedure. Neither of these filings was timely or proper because, under 28 U.S.C. § 1291, there is no final judgment or order from which an appeal may be taken.²

This conclusion is dictated by binding authority from the Supreme Court and the unanimous decisions of the Courts of Appeals, including this Court. In Carolina Power & Light Co. v. Dynegy Marketing & Trade, 415 F.3d 354 (4th Cir. 2005), for example, this Court concluded that a judgment leaving open the amount of legal costs based on a contractual provision (as compared to a separate petition for attorneys' fees) was not final for purposes of appeal. Quoting the Supreme Court's decision in Catlin v. United States, 324 U.S. 229, 233 (1945), this Court held that a District Court order is a final and therefore appealable judgment only if it is "a decision that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Carolina Power, 415 F.3d at 358. More specifically, the Court concluded that "a judgment on liability that does not fix damages is not a final judgment because the assessment of damages is part of the merits of the claim that must be determined." Id. (citing Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742 (1976), and Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948)).

² The public-safety appellees already have filed an Opposition to the Motion for Stay Pending Appeal before the District Court. That motion is still pending.

This has been the governing rule since at least Republic Natural Gas. Although the Supreme Court noted in that case that “[n]o self-enforcing formula defining when a judgment is 'final' can be devised,” it also made clear that “the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up – for example, where liability has been determined and all that needs to be adjudicated is the amount of damages.” 334 U.S. at 68. See The Forscher Group, Inc. v. Arrow Trading Co., 124 F.3d 402, 410 (2d Cir. 1997); Cleveland Hair Clinic, Inc. v. Puig, 104 F.3d 123, 125 (7th Cir. 1997) (“An order that neither ends the litigation nor quantifies the sum due for misconduct is a considerable distance from the paradigm of a final decision.”); Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931, 934-37 (3d Cir. 1994) (citing and collecting additional cases).

The Order issued by the District Court on August 18, 2009 falls squarely within this category of non-final and therefore non-appealable decisions. The District Court understood that its judgment was not final, as it directed the parties to meet and to report back to the Court within ten days to finalize the assessment of damages.³ (Despite the exhaustion of this ten-day period, the parties still have not met in person to discuss the monetary remedy; at this

³ The District Court’s Order of August 18, 2009 also directed that “the Clerk of the [District] Court CLOSE this case,” but it is our understanding that this aspect of the Order was an administrative instruction related to internal recordkeeping maintained by that Clerk’s Office, and was not intended to reflect on the finality of the Order for purposes of appeal.

point, the County continues to contend that the Court's Order of August 18, 2009 was final and appealable, although it has taken a few preliminary steps toward developing a final remedial order.) Nor could this case fall within a possible exception to the normal rule for finality, for it certainly is not one in which "the controversy ha[s] proceeded to a point where a losing party would be irreparably injured if review were unavailing." Republic Natural Gas Co., 334 U.S. at 68. The Memorandum Opinion issued by the District Court specifically noted that the Employee Furlough Plan challenged in this case ended on June 30, 2009, and that the only remedy at issue, other than allowable costs and reasonable attorneys' fees, is back pay to the employees harmed by the County's unconstitutional actions. Unless and until the amount of those damages is fixed by the District Court, therefore, that Court's order is neither final nor appealable under 28 U.S.C. § 1291.

Conclusion

For the foregoing reasons, the public-safety appellees request that the Notice of Appeal be dismissed as premature.

Respectfully submitted,

_____/s/_____
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Dated: September 2, 2009

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CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of September, 2009, a true and correct copy of the foregoing Motion to Dismiss Appeal For Lack of Final Decision Under 28 U.S.C. § 1291 was filed electronically and/or sent via first-class, postage prepaid mail, on the following:

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