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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICHOLAS KROLL, Plaintiff Below, Appellant, v. CITY OF WILMINGTON, CITY OF WILMINGTON POLICE DEPARTMENT, and MICHAEL PURZYCKI, in his official capacity as Mayor of the City of Wilmington, Defendants Below, Appellees.	)	No.: 266, 021 Court Below: Court of Chancery C.A. No. 2019-0969-KSJM

APPELLEES CITY OF WILMINGTON, CITY OF WILMINGTON POLICE DEPARTMENT, AND MICHAEL PURZYCKI'S ANSWERING BRIEF

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Dated: November 8, 2021

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NATURE OF PROCEEDINGS

On April 11, 2018, following separate hearings before the Wilmington Police Department's Disciplinary Complaint Hearing Board and Appeal Board, the City of Wilmington (the "City") terminated Appellant Nicholas Kroll's ("Kroll") employment as a police officer.

On December 4, 2019, Kroll filed his *Verified Complaint for Declaratory Judgement* (sic) *and Injunctive Relief* ("Complaint") against the City and the City of Wilmington Police Department ("WPD") in the Court of Chancery. In his Complaint, Kroll sought to have the Court of Chancery overturn the conclusions of WPD's administrative disciplinary boards and compel the City to reinstate Kroll, with back pay, to his former position as a police officer.

On January 27, 2020, Kroll filed his *Amended Verified Complaint for Declaratory Judgement* (sic) *and Injunctive Relief* ("Amended Complaint") which asserted the same claims as the Complaint, but added the City's mayor, Michael S. Purzycki, as a defendant.

On February 20, 2020, the City, inclusive of its police department,[1] and Mayor Michael Purzycki (collectively, the "Appellees") filed their *Motion to Dismiss*

[1] Kroll named as a defendant the Wilmington Police Department. The Wilmington Police Department, however, is not a separate entity apart from the City of Wilmington that is capable of being sued. *Thomas v. Wilm. Police Dep't*, C.A. No. 92C-03-244, 1994 Del. Super. LEXIS 266, at *6 (Del. Super. June 3, 1994).

Plaintiff's Amended Complaint (the "Motion to Dismiss") under Court of Chancery Rules 12(b)(1) and 12(b)(6).

On August 16, 2021, the Court of Chancery entered an order granting the Motion Dismiss for lack of subject-matter jurisdiction.

This appeal followed.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery committed harmless error when, in dismissing the Amended Complaint for lack of subject-matter jurisdiction, it misinterpreted the CBA as requiring Kroll to arbitrate his claims where, in any event, Kroll did not otherwise sufficiently plead a claim for equitable relief and had an adequate remedy at law in the Superior Court.

STATEMENT OF FACTS[2]

I. BACKGROUND.

A. The Parties and Other Relevant Entities.

The City is a municipal corporation of the State of Delaware and includes, as a part thereof, WPD which provides law enforcement services to Delaware's largest city.[3] The City is a "public employer" as defined in the Police Officers' and Firefighters' Employment Relations Act ("POFERA").[4]

Michael S. Purzycki is the Mayor of the City.[5]

Fraternal Order of Police Lodge No. 1, Inc. (the "Police Union") is an "employee organization" and the "exclusive bargaining agent" for the purposes of

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[2] Unless otherwise noted in footnotes contained herein by citation to a document other than the Amended Complaint, Appellees accept the allegations of the Amended Complaint as true for purposes of this appeal. In assessing subject-matter jurisdiction, however, this Court is not confined to the allegations in the Amended Complaint. *See De Adler v. Upper N.Y. Inv. Co. LLC*, No. 6896-VCN, 2013 Del. Ch. LEXIS 267, at *21-22 (Ch. Oct. 31, 2013). "Although the Court may look beyond the complaint, the inquiry should be as of the time of filing; subsequent events are generally irrelevant." *Id.* (internal quotations omitted).

[3] *Appellant's Appendix to the Opening* Brief ("Kroll App."), at A29-A30 (Am. Compl. ¶¶ 3-4.

[4] *Id.* at A30 (Am. Compl. ¶ 10); 19 *Del.* § 1602(l).

[5] Kroll App. at A29 (Am. Compl. ¶5). The Amended Complaint alleged that Michael S. Purzycki exists and is the Mayor of the City (both facts that the Appellees do not dispute), but does not otherwise discuss the mayor.

"collective bargaining" as those terms are defined in POFERA.[6] The Police Union did not participate in the proceedings below and has not, to date, participated in this appeal.

Kroll is a former police officer in WPD who was employed with the City between March 18, 2013 and April 11, 2018.[7] At all times relevant, Kroll was a member of the Police Union.[8]

B. The City and Police Union's Collective Bargaining Agreement; Contractual Disciplinary Grievance Procedure.

On February 1, 2018, the City and the Police Union entered into a collective bargaining agreement made effective July 1, 2016 and which continued until June 30, 2020 (the "CBA").[9] The City and the Police Union are the only parties to the CBA.[10]

Police officers of the City are required to comply with the rules, regulations, and directives contained within the Wilmington Police Officer's Manual, including

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6 Kroll App. at A30 (Am. Compl.) & A289 (CBA § 3.1); 19 *Del.* § 1602.

7 *Id*. at A29 & A31 (Am. Compl. ¶¶ 2 &15).

8 *Id*. at A30 (Am. Compl. ¶10).

9 *See generally id.* at A285 (CBA).

10 *Id.*

directives related to the City's residency requirement (*see infra*) and police officer integrity.[11]

In the event that a police officer in WPD is accused of a violation of established work rules or regulations, disciplinary proceedings are to be conducted consistent with a combination of provisions contained within the Law-Enforcement Officers' Bill of Rights ("LEOBOR"),[12] Article 13 of the CBA, and the Wilmington Police Officer's Manual.[13] Article 13 of the CBA and the disciplinary procedures set forth in the Wilmington Police Officer's Manual "constitute[s] the contractual disciplinary grievance procedure."[14] Kroll's Amended Complaint does not allege a violation of any provision of LEOBOR or Article 13 of the CBA.

C. The City Charter's Residency Requirement; Changes to the Annual Residency Declaration; and the Arbitration Award.

The City's Charter requires its employees to be residents of the municipality within six months of the time of their employment (the "Residency Requirement").[15]

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11 Kroll App. at A31 & A34 (Am. Compl. ¶¶ 11 & 30).

12 11 *Del. C.* ch. 92.

13 Kroll App. at A301 (CBA Art. 13).

14 *Id.* at 288 (CBA § 2.1).

15 City of Wilmington Charter § 3-304, *available at* https://library.municode.com/de/wilmington/codes/code_of_ordinances.

The *Delaware Code*, however, provides that the City may not "require that, as a condition of continued employment, an employee with at least [five] years of service for the municipality be, become or remain a resident of the municipality during their employment."[16] The City Charter does not define the term "resident" or "residence."

To assist in the administration and enforcement of the Residency Requirement, the City Code requires employees to annually file a declaration of residency (the "Annual Residency Declaration").[17] On the Annual Residency Declaration, and in the Wilmington Police Officer's Manual, the City provides definitional guidance to employees of the City related to the Residency Requirement.[18] For all relevant years except 2018, the City's Annual Residency Declarations and the Wilmington Police Officer's Manual contained the following statement related to residency:

> A person's residence is that dwelling or abode, where one actually lives. It refers to one's home, the place that is the center of the person's non-working hours. This will ordinarily be the place where one normally eats, sleeps, and keeps his or her personal and/or household effects.[19]

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16 22 *Del. C.* § 841; *see also* Kroll App. at A31 (Am. Compl. ¶16).

17 *Wilm. C.* § 2-151, *available at* https://library.municode.com/de/wilmington/codes/code_of_ordinances.

18 Kroll App. at A33 (Am. Compl. ¶ 25).

19 *Id.*

Every Annual Residency Declaration completed by Kroll during his employment with the City contained this definition.[20]

On October 12, 2017, the City revised portions of the Annual Residency Declaration for 2018 to read:

> For the purposes of the City's residency requirement, an employee's residence is his/her domicile, *i.e.*, that place where the employee has his/her true, fixed, and permanent home. It is also the dwelling where the employee actually lives. It is the place where the employee eats, sleeps, and keeps his/her personal belongings. It is the center of the employee's non-working hours. In the absence of a marital separation, it is the dwelling at which an employee's spouse and children, if any, reside.[21]

This brief refers to the language contained in the 2018 Annual Residency Declaration as the "Modified Residency Definition" and the language contained in all other Annual Residency Declarations as the "Unmodified Residency Declaration."

The Police Union challenged the Modified Residency Definition, and the dispute was submitted to binding arbitration.[22] As part of the arbitration, the Police

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20 Kroll App. at A33-A35 (Am. Compl. ¶¶ 29 &36).

21 *Id*. at A33 (Am. Compl. ¶ 26).

22 *Id*. at A35 (Am. Compl. ¶¶ 39-41).

Union did not contend that any officer was disciplined as a result of the contested changes present in the Modified Residency Definition.[23]

On May 26, 2019, an arbitrator issued an opinion and award (the "Arbitration Award"). The Arbitration Award concluded that the Modified Residency Definition "materially altered [the meaning] . . . rather than simply clarifying [it]" and that the revision, thus, constituted a unilateral alteration to the conditions of employment in violation of the CBA.[24] The arbitrator directed the City, which had already reverted to using the Unmodified Residency Definition, to continue using the same.[25]

Thereafter, the City filed suit in the Court of Chancery seeking to vacate the Arbitration Award (the "Arbitration Litigation"). On January 22, 2020, the Court of Chancery concluded that there was no basis to vacate the Arbitration Award.[26]

II. WPD'S OFFICE OF PROFESSIONAL STANDARDS INVESTIGATES KROLL.

In April 2017, WPD's Office of Professional Standards ("OPS") (*i.e.*, internal affairs) began investigating Kroll on disciplinary charges related to a violation of

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23 Kroll App. at A143 & A149 (Arb. Award).

24 *Id*. at A148 & A151-A152 (Arb. Award).

25 *Id*. at A153 (Arb. Award).

26 *See generally id*. at A98-A129 (Memorandum Opinion dated January 22, 2020).

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directives related to the Residency Requirement contained within the Wilmington Police Officer's Manual (the "Residency Charge").[27] The Residency Charge investigation began after the City discovered inconsistencies between Kroll's 2015 and 2017 Annual Residency Declarations.[28] At all times, Kroll has maintained that, while his wife and children live in Middletown, he, in fact, resides in Wilmington.[29]

Later, in November 2017, Kroll was notified that OPS was investigating him on charges related to a violation of the Wilmington Police Officer's Manual as a result of false representations Kroll made during the investigation into the Residency Charge (the "Dishonesty Charge").[30]

III. WPD'S DISCIPLINARY COMPLAINT HEARING BOARD UNANIMOUSLY CONCLUDES THAT KROLL WAS GUILTY OF THE RESIDENCY CHARGE AND THE DISHONESTY CHARGE.

On January 11, 2018, WPD's Disciplinary Complaint Hearing Board[31] conducted a hearing on the Residency Charge and the Dishonesty Charge (the

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27 Kroll App. at A32 (Am. Compl. ¶ 22).

28 *Id.* (Am Compl. ¶¶22-23).

29 *Id.* (Am. Compl. ¶¶17-19).

30 *Id.* at A34 (Am. Compl. ¶30).

31 Under the CBA, the Disciplinary Complaint Hearing Board consists of three police officers randomly selected from a pool of all police officers with the rank of Captains or Inspector. Kroll App. at A302 (CBA §13.5). Consistent with the CBA,

"Disciplinary Hearing").[32] At the Disciplinary Hearing, the Disciplinary Complaint Hearing Board heard testimony from eight witnesses, including Kroll, and received documents from both Kroll and OPS.[33]

The Disciplinary Complaint Hearing Board "found that based on the totality of the facts and circumstances presented that no one, from neighbors to co-workers, could provide testimony that they witnessed Kroll staying at [his Wilmington] residence over the course of [a] four and a half year period," which combined with power usage records for that property that were inconsistent with even half-time occupancy thereof, supported a finding that Kroll was guilty of the Residency Charge.[34]

While Kroll alleges that the City's Director of Human Resources testified that the applicable definition of "residence" was the Modified Residency Definition,[35] the Disciplinary Complaint Hearing Board summarized that testimony as defining

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the Disciplinary Complaint Hearing Board consisted of Inspector Cecelia Ashe, Captain Stephen Misetic, and Captain Sherri Tull. *Id.* at A155 (Complaint Hearing Board Findings and Results).

32 Kroll App. at A34 (Am. Compl. ¶32).

33 *See id.* at A158-A161 (Complaint Hearing Board Findings and Results).

34 *Id.* at A161-A162 (Complaint Hearing Board Findings and Results).

35 *Id.* at A34 (Amp Compl. ¶ 33).

"residence" as "the center of [one's] non-working hours"[36] which is consistent with the Unmodified Residency Definition.

With respect the Dishonesty Charge, the Disciplinary Complaint Hearing Board found that Kroll falsely stated in an interview with OPS that he stayed in Wilmington during certain work shifts when, in fact, surveillance of Kroll demonstrated that he was at his Middletown property.[37] Additionally, the Disciplinary Complaint Hearing Board found that Kroll provided "a false or inaccurate address" on residency declaration forms submitted to the City.[38]

As the only penalty available for both the Residency Charge and the Dishonesty Charge was dismissal, and the Disciplinary Complaint Hearing Board having found him guilty of both charges, the board dismissed Kroll from his position as an officer of WPD.[39]

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36 Kroll App. at A158 (Complaint Hearing Board Findings and Results).

37 *Id.* at A162 (Complaint Hearing Board Findings and Results).

38 *Id.* (Complaint Hearing Board Findings and Results).

39 *Id.* (Complaint Hearing Board Findings and Results).

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IV. WPD'S APPEAL BOARD AFFIRMS THE FINDINGS OF THE DISCIPLINARY COMPLAINT HEARING BOARD; KROLL'S EMPLOYMENT WITH THE CITY IS TERMINATED.

On April 11, 2018, WPD's Appeal Board[40] held a hearing on Kroll's internal appeal from the Disciplinary Complaint Hearing Board.[41] WPD's Appeal Board affirmed the Disciplinary Complaint Hearing Board's findings related to the Residency Charge and the Dishonesty Charge, and further affirmed Kroll's dismissal from his position as an officer of WPD.[42]

V. KROLL FILES, BUT THEN ABANDONS, AN "APPEAL" IN THE SUPERIOR COURT.

On December 18, 2018, some 76 days after receiving the written decision of the Appeal Board, Kroll filed his *Notice of Appeal* in the Superior Court, which was captioned as *Kroll v. City of Wilmington, et al.* and assigned C.A. No. N18A-12-005

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40 Under the CBA, the Appeal Board consists of the Chief or police (or a designee), the Human Resources Director (or a designee), and the Police Union President (or a designee). Kroll App. at A303 (CBA §13.10). Consistent with the CBA, the Appeal Board consisted of Inspector Charles Emory (as designee of the Chief of Police), Martha Gimbel (as designee of the Human Resources Director), and Lieutenant Harold Bozeman (on behalf of the Police Union). *Id.* at A250 (Appeal Board Findings).

41 *Id.* at A35 (Am. Compl. ¶ 38).

42 *Id.*; *see also id.* at A250-252 (Appeal Board Findings).

RRC.[43] The *Notice of Appeal* asserted several alleged errors (similar in nature to those alleged in the Amended Complaint) which Kroll believed warranted the vacation of the decision of Disciplinary Complaint Hearing Board and the Appeal Board.[44] Among the stated bases for Kroll's appeal to the Superior Court, were Kroll's belief that the disciplinary boards "committed error when applying the Residency Requirement."[45]

Following an agreed-upon stay to the Superior Court proceedings to allow for the parties to attempt to negotiate a resolution, the City moved to dismiss Kroll's *Notice of Appeal* as untimely on July 30, 2019.[46]

On October 24, 2019, Kroll, without responding to the City's motion to dismiss, voluntarily dismissed his *Notice of Appeal*, and, thus, abandoned his request for judicial review by the Superior Court of the decisions of the Disciplinary Complaint Hearing Board and the Appeal Board.[47] Kroll asserts that the voluntary

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43 *Appendix to Appellees' Answering Brief* ("City App."), at B1 (Notice of Appeal).

44 *See* generally Kroll App. at B1 (Notice of Appeal).

45 City App. at B3 (Notice of Appeal).

46 *See id.* at B7-B8 (Motion to Dismiss Notice of Appeal) (arguing that Kroll's appeal should have been filed as a writ of *certiorari* and was filed 46 days too late).

47 *See id.* at B9 (Stipulation of Dismissal).

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dismissal was "based on jurisdictional issues,"[48] but the City never argued that the Superior Court lacked jurisdiction[49] and Kroll never identifies what jurisdictional issues he purports existed.

VI. KROLL SEEKS TO RESSURECT HIS CHALLENGES TO THE ADMINISTRATIVE BOARDS' FINDINGS RELATED TO THE RESIDENCY CHARGE AND THE DISHONESTY CHARGE UNDER THE GUISE OF A CBA-RELATED DECLARATORY JUDGMENT ACTION.

A. Kroll's Amended Complaint.

On December 4, 2019, Kroll filed his Complaint against the City and WPD in the Court of Chancery, and later filed his Amended Complaint. Kroll's lawsuit was assigned to the same Vice Chancellor (now Chancellor) as the Arbitration Litigation which was still pending at the time Kroll filed his Complaint. In his Amended Complaint, Kroll sought to, among other things, have the Court of Chancery:

1. Declare that Appellees breached the CBA when they applied the Modified Residency Definition before the Disciplinary Complaint Hearing Board;

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48 Op. Br. at 7.

49 City App. at B7-B8 (Motion to Dismiss Notice of Appeal).

2. Declare that Appellees violated Kroll's due process rights when they applied the Modified Residency Definition before the Disciplinary Complaint Hearing Board;

3. Enjoin Appellees from applying the Modified Residency Definition to Kroll;

4. Compel Appellees to reinstate Kroll as a police officer in WPD; and

5. Award monetary damages for back pay, lost pension allotments, and lost benefits, etc.[50]

B. Appellees Move to Dismiss Kroll's Amended Complaint for Lack of Subject-Matter Jurisdiction.

On February 20, 2020, Appellees filed their Motion to Dismiss under Court of Chancery Rules 12(b)(1) and 12(b)(6). In their briefing on the Motion to Dismiss, Appellees argued that Kroll's claims did not state a colorable claim for equitable relief because: 1) the requested injunction would not require the City to reinstate Kroll; 2) the requested injunction would merely require the City to follow the law which the Court presumes the City would do; and 3) the true substance of Kroll's claims was that of an appeal claiming that the Disciplinary Complaint Hearing Board and Appeal Board committed legal error for which a writ of *certiorari* in the Superior

[50] Kroll App. at A36-A37 (Am. Compl.).

Court was an adequate legal remedy.[51] After Kroll admitted that he was not a party to the CBA,[52] Appellees noted that individual employees, such as Kroll, do not have standing to sue for breaches of collective bargaining agreements.[53]

C. The Court of Chancery Dismisses Kroll's Amended Complaint.

On August 16, 2021, the Court of Chancery entered an order granting the Motion Dismiss for lack of subject-matter jurisdiction.[54] In dismissing the Amended Complaint, the Court of Chancery, apparently relying on its experience in the Arbitration Litigation and without the parties having submitted briefing on the specific issue, relied on the language of the CBA to conclude that Kroll had an adequate remedy at law in a grievance and arbitration process required therein.[55]

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51 Kroll App. at A52-A56 (Opening Brief on Motion to Dismiss).

52 Kroll's Amended Complaint refers to himself as a party to the CBA. *See id.* at A30-A31 (Am. Compl. ¶ 10) & A36 (Am. Compl. Amended Complaint at ¶ (a) of the *ad damnum* clause). In response to the Motion to Dismiss, however, Kroll admitted that "the CBA is a contract between the FOP and [the City]." *Id.* at A77 (Ans. Br. on Motion to Dismiss).

53 *Id.* at A94-A95 (Reply Br. on Motion to Dismiss).

54 *Id.* at A19 (Order Granting Motion to Dismiss).

55 *Id.* at A24-A25 (Order Granting Motion to Dismiss). The Court of Chancery stated that its facts were taken from the Amended Complaint and documents that it incorporates by reference. *Id.* at A19. Kroll's Amended Complaint, however, does not attach the CBA to the Complaint, quote any language of the CBA, or specifically incorporate the CBA by reference to it. Additionally, neither party attached the CBA

Specifically, the Court of Chancery concluded that Kroll's claims were controlled by the grievance procedure in the CBA and, therefore, subject to mandatory arbitration.[56]

as part of the briefing on the Motion to Dismiss. Thus, it would appear then, that the Court of Chancery relied on its prior interpretation of the CBA in the Arbitration Litigation, consulted the CBA which was part of the record in the Arbitration Litigation, or both. For example, in support of its interpretation of the CBA, the Court of Chancery quotes its prior opinion in the Arbitration Litigation (*id.* at A24) which in turn cites to the CBA (*id.* at A106-A107).

[56] Kroll App. at A25 (Order Granting Motion to Dismiss).

ARGUMENT

I. THE COURT OF CHANCERY COMMITTED HARMLESS ERROR WHEN, IN DISMISSING THE AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION, IT MISINTERPRETED THE CBA AS REQUIRING KROLL TO ARBITRATE HIS CLAIMS WHERE, IN ANY EVENT, KROLL DID NOT OTHERWISE SUFFICIENTLY PLEAD A CLAIM FOR EQUITABLE RELIEF AND HAD AN ADEQUATE REMEDY AT LAW IN THE SUPERIOR COURT.

A. Question Presented.

Whether the Court of Chancery committed harmless error when, in dismissing the Amended Complaint for lack of subject-matter jurisdiction, it misinterpreted the CBA as requiring Kroll to arbitrate his claims where, in any event, Kroll did not otherwise sufficiently plead a claim for equitable relief and had an adequate remedy at law in the Superior Court. The issues presented by this question were fairly presented by Appellees in their briefing below on the Motion to Dismiss or raised *sua sponte* by the Court of Chancery in the Order.[57]

B. Scope of Review.

"On questions of subject matter jurisdiction, the applicable standard of review by this Court is whether the trial court correctly formulated and applied legal

[57] Kroll App. at A17-A21 (Order Granting Motion to Dismiss) & A51-56 (Op. Br. on Motion to Dismiss).

principles[,]" and the scope of this Court's review is *de novo*.[58] Likewise, this Court reviews questions of contract interpretation *de novo*.[59]

C. Merits of Argument.

In reviewing the Court of Chancery's dismissal of a complaint for lack of subject-matter jurisdiction under Court of Chancery Rule 12(b)(1), the Court applies the same standard as the court below. "If a party moves to dismiss under Court of Chancery Rule 12(b)(1), the non-moving party bears the burden of establishing the Court's jurisdiction."[60] "If the court is asked to exercise its equitable jurisdiction to remedy a legal wrong, the critical jurisdictional question is whether an adequate remedy at law exists."[61] "If a litigant can seek a remedy in a law court, or other adequate venue, that would provide full, fair, and practical relief, the Court of Chancery is without subject matter jurisdiction to hear the matter."[62] "It is the

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58 *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

59 *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

60 *De Adler,* 2013 Del. Ch. LEXIS 267, at *21-22.

61 *Christiana Town Ctr. Ltd. Liab. Co. v. New Castle Cty*., No. 20215, 2003 Del. Ch. LEXIS 60, at *11-12 (Del. Ch. June 6, 2003).

62 *Id.* at 12.

practice of this Court in determining its jurisdiction, to go behind the facade of prayers to determine the true reason for which the plaintiff has brought suit."[63]

i. The Court of Chancery committed legal error when it concluded that §§ 4.1-4.6 of the CBA required Kroll to arbitrate his claims and, thus, provided him with an adequate remedy at law.

Appellees agree with Kroll that the specific provisions of the CBA relied upon by the Court of Chancery do not provide Kroll with a remedy which would deprive the court below of subject-matter jurisdiction. As best as Appellees can tell from the Order, the Court of Chancery relied on §§ 4.1 through 4.6 of the CBA to conclude that Kroll was required arbitrate his claims before seeking relief in the Court of Chancery.[64] For the reasons set forth below, §§ 4.1 through 4.6 of the CBA do not apply to disciplinary grievances of the type presented by Kroll, and, thus, do not provide Kroll with a remedy which would deprive the Court of Chancery of subject-matter jurisdiction.

Kroll's Amended Complaint claims that Appellees wrongfully terminated his employment based on what he contends was the erroneous application of the

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63 *Gladney v. City of Wilmington*, No. 5717-VCP, 2011 Del. Ch. LEXIS 182, at *14 (Del. Ch. Nov. 30, 2011) (internal quotations omitted).

64 In support of its interpretation of the CBA, the Court of Chancery quotes its prior opinion in the Arbitration Litigation (Kroll App. at A24) which in turn cites to the CBA (*id.* at A106-A107).

Residency Requirement by the City, the Disciplinary Complaint Hearing Board, and Appeal Board.[65] In other words, Kroll's claims arise out of a disciplinary matter.

Under the CBA, disciplinary matters are subject to a different process than non-disciplinary grievances. In the event that a police officer in WPD is accused of a violation of established work rules or regulations, disciplinary proceedings are to be conducted consistent a combination of provisions contained within LEOBOR,[66] Article 13 of the CBA, and the Wilmington Police Officer's Manual which "constitute[s] the contractual disciplinary grievance procedure" under the CBA.[67]

Therefore, Appellees agree with Kroll that the Court of Chancery committed legal error when it concluded that it lacked subject-matter jurisdiction for the specific reason that §§ 4.1-4.6 of the CBA required Kroll to arbitrate his claims and, thus, provided him with an adequate remedy at law.

ii. The Court of Chancery's legal error, however, was harmless because Kroll did not otherwise sufficiently plead a claim for equitable relief and had an adequate remedy at law in the Superior Court.

While the Court of Chancery committed legal error, it did not commit reversible error because this Court, as part of its *de novo* review, should conclude

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65 Kroll App. at A36 (Am. Compl. ¶43).

66 11 *Del. C.* ch. 92.

67 Kroll App. at A288 (CBA § 2.1).

that Kroll did not otherwise sufficiently plead a claim for equitable relief and had an adequate remedy at law in the Superior Court. Kroll and the Appellees agree that the standard of review is *de novo* and, thus, this Court's review is plenary.[68] As such, the Court does not end its review after the mere finding of legal error but "must decide *de novo* whether the Complaint was properly dismissed."[69]

In this case, Kroll's Amended Complaint attempted to invoke this Court's equitable jurisdiction by asking for an injunction. Specifically, Kroll asked the Court of Chancery to enter a prohibitory injunction against Appellees which would prohibit them from "taking any action, based on the [Modified Residency Definition] resulting in disciplinary action, including termination, of Plaintiff [Kroll]."[70] Additionally, Kroll sought a mandatory injunction requiring City Defendants to "[r]einstate [Kroll] to his position with WPD as a police officer . . . ."[71] Neither

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68 Op. Br. at 13.

69 *White v. Panic*, 783 A.2d 543, 550 (Del. 2001). *See also Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) ("In our view, the formulation by the Court of Chancery here is confusing and unhelpful, but not reversible error, particularly in light of our *de novo* review."); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997) (holding that a lower court's misarticulation of the pleading standard was harmless error because "[this Court] concluded that, even under the proper pleading standard, the complaint fails to state a claim for damages").

70 Kroll App. at A37 (Am. Compl. ¶ (c) of the *ad damnum* clause).

71 *Id.* (Am. Compl. ¶ (d) of the *ad damnum* clause).

request, however, state colorable claims for equitable relief. Indeed, while the Amended Complaint requests equitable relief upon which he argues equity jurisdiction might be predicated, "that is true only if the complaint, objectively viewed, discloses a genuine need for such equitable relief."[72]

Kroll Had an Adequate Legal Remedy in the Superior Court

The gravamen of Kroll's claims was that the City wrongfully terminated his employment based on what he contends was the erroneous application of the Residency Requirement by the Disciplinary Complaint Hearing Board and Appeal Board. Indeed, Kroll's requested declaratory relief, which formed the basis for his injunctive relief, asked the Court of Chancery to declare that Appellees violated the CBA during his disciplinary hearings by applying the wrong legal definition of "residence" in adjudicating the Residency Charge[73] In short, Kroll asked the Court of Chancery for appeal-like judicial review of the findings and conclusions of two administrative boards – the Disciplinary Complaint Hearing Board and Appeal Board – after they found him guilty of the Residency Charge. In fact, Kroll's

72 *Candlewood*, 859 A.2d at 997.

73 Kroll App. at A37 (Am. Compl. ¶¶ (a) &(b) of the *ad damnum* clause).

Amended Complaint captioned the parties as "Appellant" and "Appellee"[74] and referred to himself in the body of the complaint as "Appellant."[75]

But "[t]he appropriate avenue for appealing the decision of an administrative board's decision, however, is not by an action in [the Court of Chancery], but rather by petitioning for a writ of *certiorari*."[76] Indeed, an adequate legal remedy existed for Kroll's claims in the Superior Court where that court could determine "whether the lower tribunal (1) committed errors of law, (2) exceeded its jurisdiction, or (3) proceeded irregularly."[77] Where the Superior Court finds one of these errors, it may reverse the lower tribunal.[78]

Assuming Kroll could have defeated the City's motion to dismiss his *Notice of Appeal* in the Superior Court,[79] he could have properly presented his claims of legal error to the Superior Court. Kroll certainly agrees or he would not have filed

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74 Kroll App. at A28 (Am. Compl.).

75 *Id.* at A31(Am. Comp. ¶ 15).

76 *Gladney*, 2011 Del. Ch. LEXIS 182, at *3-*7.

77 *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1213 (Del. 2008).

78 *Id.*

79 The City moved to dismiss Kroll's *Notice of Appeal* in the Superior Court - which the City argued should have been brought as a writ of *certiorari* - as untimely because it was filed 76 days after Kroll received the written decision of the Appeal Board. City App. at B7-B8 (Motion to Dismiss Notice of Appeal).

his claims in the Superior Court in the first instance. But, now, having availed himself of the contractual disciplinary grievance procedure in the CBA and having abandoned the adequate legal remedy that was judicial review in the Superior Court, Kroll cannot claim that he was without a legal remedy, and, as such, this Court should not allow him to resurrect his appeal under the guise of a request for equitable relief.

Kroll's Requested Equitable Relief Would Not Remedy the Harms Claimed in His Complaint

In any event, it is clear from the face of the Amended Complaint, that Kroll's requested injunctive relief will not remedy his alleged harm. The Court of Chancery "is empowered to provide injunctive relief *only where it will serve to remedy the specific harms complained of*" and that "[a]bsent some factual basis from which one could conclude that the requested injunctive relief *would remedy the alleged wrong*, this Court will not grant a mandatory injunction or other form of coercive relief."[80]

Regarding Kroll's request for a prohibitory injunction prohibiting Appellees from "taking any action, based on the [Modified Residency Definition] resulting in

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80 *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 16297-NC, 1999 Del. Ch. LEXIS 134, at *8 (Ch. June 15, 1999) (emphasis added); *see also Folks v. Scott*, 1998 Del. Ch. LEXIS 188, at *13 (Ch. Oct. 8, 1998) ("Absent some factual basis from which one could conclude that the requested relief would remedy the wrong, this Court cannot and will not grant a mandatory injunction or *any other equitable relief*. (emphasis added)).

disciplinary action, including termination, of [Kroll],"[81] Kroll sought to sought to enjoin that which has already occurred. The City terminated Kroll on April 11, 2018.[82] The Court of Chancery cannot enter an order preventing that from happening. As such, it is clear that Kroll's requested prohibitory injunction will not remedy the specific harms of which he complains.

To the extent that the Amended Complaint sought to enjoin Appellees from disciplining Kroll following some future reinstatement of his employment, such relief would simply compel Appellees to follow the law in the manner urged in his declaratory judgment claims. But the City is already bound by the Arbitration Award to apply only the Unmodified Disciplinary Definition. In any event, Kroll's requested prohibitory injunction would require Appellees to comply with the law as declared by the Court. Such preemptive relief is unwarranted as "[t]he Courts of this State understandably presume that governmental agencies and actors will follow the law."[83] Indeed:

> It would be anathema to our form of government to believe, as a baseline principle, that after a court renders a declaratory judgment another governmental agency would not follow that decision. It may actually be the case that a particular agency does not follow such a

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81 Kroll App. at A37 (Am. Compl. ¶ (c) of the *ad damnum* clause).

82 *Id.* at A29 (Am. Compl. ¶ 2).

83 *Gladney*, 2011 Del. Ch. LEXIS 182, at *15.

> judgment, but a party should only seek injunctive relief if that agency actually refuses to comply with the judicial declaration.[84]

With respect to Kroll's request for mandatory injunctive relief (*i.e.*, reinstatement), the limited allegations and assertions of legal error preclude the issuance of a mandatory injunction requiring the City to reinstate Kroll. Here, the Amended Complaint only alleges that Appellees misapplied the definition of residence related to the Residency Charge.[85] Kroll ignores entirely that the Disciplinary Complaint Hearing Board found, and the Appeal Board affirmed, that Kroll falsely stated in an interview with OPS that he stayed in Wilmington during certain work shifts when, in fact, surveillance of Kroll demonstrated that he was at his Middletown property.[86] Thus, Kroll does not challenge, seek to overturn, or otherwise claim any error in the finding of his guilt on the Dishonesty Charge which was an independent and sufficient basis for his dismissal from his position as a police

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84 *Christiana Town Ctr.*, 2003 Del. Ch. LEXIS 60, at *14 n.19.

85 Kroll App. at A36-A37 (Am. Compl. ¶¶ (a) &(b) of the *ad damnum* clause).

86 *Id.* at A162 (Complaint Hearing Board Findings and Results).

officer in WPD.[87] Indeed, the only penalty for the Dishonesty Charge is dismissal.[88] So, again, Kroll's requested mandatory injunction will not remedy the specific harms of which he complains because Kroll was properly terminated after being found guilty of the Dishonesty Charge.

This case, as a factual and legal matter, closely resembles the circumstances presented in *Gladney v. City of Wilmington*.[89] In *Gladney*, an employee of the City of Wilmington sought declaratory and injunctive relief from this Court after an administrative board of the City found that the employee was in violation of the City's residency requirement.[90] In dismissing the employee's complaint, the Court concluded, as has been argued *supra*, that the employee's claims did not state a colorable claim for equitable relief because: 1) the requested injunction would not require the City to reinstate the employee;[91] 2) the requested injunction would merely require the City to follow the law which the Court presumes the City would

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87 Kroll App. at A162 (Complaint Hearing Board Decision) ("The board by unanimous decision agreed that for a violation of the [Residency Charge] and [the Dishonesty Charge] the only penalty is dismissal. Given that the board found Officer Kroll guilty of both violations, the penalty imposed was dismissal.").

88 *Id.*

89 2011 Del. Ch. LEXIS 182.

90 *Id.* at *3-*7.

91 *Id.* at *15.

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do;[92] and 3) the true substance of the employee's claims was that of an appeal claiming that the administrative board committed legal error for which a writ of *certiorari* in the Superior Court was an adequate legal remedy.[93] For the same reasons set forth in *Gladney*, the Court should conclude that the Court of Chancery lacked subject-matter jurisdiction over the claims presented in Kroll's Amended Complaint.

92 *Gladney*, 2011 Del. Ch. LEXIS 182., at *15

93 *Id.* at *18-*21.

CONCLUSION

For the foregoing reasons, the Court of Chancery committed harmless error when, in dismissing the Amended Complaint for lack of subject-matter jurisdiction, it misinterpreted the CBA as requiring Kroll to arbitrate his claims where, in any event, Kroll did not otherwise sufficiently plead a claim for equitable relief and had an adequate remedy at law under the contractual disciplinary grievance procedure provided in the CBA and in the Superior Court. Thus, the Court should affirm the dismissal of Kroll's Amended Complaint for lack of subject-matter jurisdiction.

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