



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

NICHOLAS KROLL, :  
: C.A. No.: 266, 2021  
Appellant/Plaintiff Below, :  
: The Court of Chancery of the  
: State of Delaware  
v. : CA No.: 2019-0969-KSJM  
:  
CITY OF WILMINGTON, :  
CITY OF WILMINGTON POLICE :  
DEPARTMENT and MICHAEL :  
PURZYCKI, Mayor of the City of :  
Wilmington, :  
:  
Appellee/Defendants Below. :

**APPELLANT’S AMENDED OPENING BRIEF**

Nicholas Kroll v. City of Wilmington  
The Court of Chancery of the State of Delaware  
CA No.: 2019-0969-KSJM  
Chancellor Kathaleen St. J. McCormick

**SILVERMAN McDONALD & FRIEDMAN**

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Dated: October 20, 2021

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## NATURE OF THE PROCEEDINGS

This is an appeal from a Court of Chancery decision dated August 16, 2021. (A-19).<sup>1</sup> On December 4, 2019 Appellant Nicholas Kroll (hereinafter “Appellant”) filed a declaratory action in the Court of Chancery against Appellees, the City of Wilmington, and the City of Wilmington Police Department (Collectively known as “Appellees”). (A-28 ). Appellant, a member of the Fraternal Order of Police Lodge No. 1 (hereinafter “FOP”), sought a declaration that the Appellees were in breach of the Collective Bargaining Agreement (hereinafter “CBA”) by unilaterally amending the definition of the term “residence” as it applied to Appellees’ residency requirements, without giving the FOP an opportunity to bargain on behalf of its members. (A-36).

On February 20, 2020, Appellees filed their Motion to Dismiss, pursuant to Court of Chancery Rules 12(b)(1), and 12(b)(6). (A-7). The parties fully briefed the matter. (A-40 - A-96).

After examining the briefs and considering oral arguments, The Court of Chancery held that the Court lacked subject matter jurisdiction, and dismissed his claim. (A-19). This appeal follows.

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<sup>1</sup> References to the Appendix will be cited as follows: (A\_\_). The appendix is Bates stamped in the lower right corner.

## STATEMENT OF FACTS

1. Appellant, Nicholas Kroll, for all times relevant, was a full time police officer with Wilmington Police Department (hereinafter “WPD”). His date of hire was March 18, 2013. (A-19).

2. As a condition of ongoing employment, within six months of employment, Appellant was required to establish and maintain a residence within the City of Wilmington (hereinafter “City”) for a period of at least sixty months. (A-19).

3. In order to comply with the residency requirement of his employment, in August, 2013, Appellant and his wife purchased a home within the City of Wilmington, located at 3203 W. 2<sup>nd</sup> Street, Wilmington, DE. Appellant’s wife and children remained in their original home in Delaware City, Delaware. (A-187(\*91<sup>2</sup>)).

4. More than a year later, Appellant and his wife sold the Delaware City house and purchased a second home in Middletown, DE. (A-187 (\*92)). Appellant continued to reside in the Wilmington home. (A-203 (\*153)).

5. The property purchased in Middletown, Delaware was to be the

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<sup>2</sup> Specific page number within transcripts are identified as \* followed by the page number.

residence of his wife and children. (A-203). The specific purpose of that house was to allow Appellant to comply with his custody arrangement, and allow his autistic child to remain in a specialized educational program in the Appoquinimink School District. (A-20; A-188(\*95); A-268 (\*55)).

6. The Appellant maintained the Wilmington home as his main residence. (A-203 (\*153)). In support of the City's residency requirement, Appellant produced multiple documents, including his driver's license, vehicle registration, voter registration card, property tax records, family court documents, loan documents, and his mariner captain's license, all demonstrating that his place of residence was the Wilmington home. (A-204).

7. The Wilmington house was subdivided into three apartments which Appellant rented, with the exception of the apartment in which he maintained his residence. (A-170; A-257 (\*10)). The other two apartments were rented by a tenant who was in place when Appellant purchased the building, and another WPD officer. (A-186 (\*87-88)). The second WPD officer was investigated for the exact same issue as Appellant, but was not disciplined by the Disciplinary Board. (A-170 (\*23); A-260 (\*24-25)).

8. The Appellant's apartment was furnished, and contained his furnishings, food and personal items. (A-225 (\*244)). Appellant's Wilmington

home was squarely within the 2017 Residence Affidavit definition of “residence”:  
“This will ordinarily be the place where one normally eats, sleeps, and keeps his or  
her personal or household effects.” (A-326).

9. Appellant spent much of his time at the Wilmington home, even going so far as to initiate a program to clean up excessive litter in his neighborhood, and arrest illegal dumping offenders.<sup>3</sup> He was lauded by the Mayor for his outstanding efforts(A-331). Appellant also attended block meetings and participated in clean-up programs on his block. (A-195 (\*122)).

10. The Appellant resided in his Wilmington home, and submitted his Residency Affidavits yearly, as required by the terms of his employment. (A-31; A-181-A-182).

11. In April, 2017, administrators in the City’s Human Resources Department discovered inconsistencies between Appellant’s 2015 and 2017 affidavits. (A-20).

12. The inconsistencies related to a transposed house number on the 2015 affidavit, and a newly identified apartment number in the 2017 affidavit. Appellant had recently assigned apartment numbers onto the mailboxes to eliminate mail

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<sup>3</sup><https://www.delawareonline.com/story/news/local/2017/06/01/wilmington-delaware-police-officer-cleaning-up-city/340822001/>; A-331.

confusion among the apartments. (A-20; A-186 (\*88)),

13. Appellee's undertook an internal investigation into the status of Appellant's residency. (A-21).

14. At all times that Appellant was employed by WPD, the definition of "residence" was identified in The Wilmington Police Officer's Manual<sup>4</sup>, and within the Residency Affidavit forms that Appellant submitted yearly as:

"A person's residence is that dwelling or abode, where one actually lives. It refers to one's home, the place which 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 or household effects." (A-20; A-280).

15. However, on October 12, 2017, at a Residency Review Board Hearing, the City unilaterally modified the definition of "residence" to:

" For 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 place that is the center of the employee's non-working hours. In the absence of a martial separation, it is the dwelling at which an employee's spouse and children, if any, reside." (A-20).

16. In breach Section 22.2 of the CBA, the FOP was neither included in discussions related to the amendment of the term "residence", nor invited to attend

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<sup>4</sup> Wilmington Police Department, Policies and Procedures Manual, Directive 6.56; A-280.

the Board meeting when the modified definition of “residence” was adopted.

(A-104).

17. In November, 2017, more than four years into his required five year City residency, Appellant was notified by WPD that information contained within his 2017 residency affidavit was in violation of WPD’s rules and regulations. A disciplinary hearing was scheduled. (A-20). The “residence” definition printed on Appellant’s 2017 Residency Affidavit was the pre-modification definition.

(A-326).

18. On January 11, 2018, at the Internal Affairs hearing, Charlotte Barnes, the City’s Director of Human Resources, was the only witness to testify for Appellees. She testified that her understanding of the applicable definition of the term “residence” was based on information she received in an internal memo. (A-21; A-177 (\*51-52)). Ms. Barnes testified that the definition of “residence” referred to where the employee’s family lived, in addition to subjective factors such as the aesthetics and comfort of the home. (A-177 (\*52); A-179 (\*59-60)).

19. The definition of “residence” that was applied to Appellant in his disciplinary hearing was the modified 2018 definition, despite that fact that his 2017 Residency Affidavit contained the prior definition of “residence”. (A-21).

20. Based on Ms. Barnes’ testimony, Appellee’s sole witness, the

Hearing Panel found that the Appellant did not satisfy the requirements of “residence”. Appellant was found guilty of dishonesty and violating the residency requirement, and the matter was sent to an Appeal Board for final resolution. (A-21).

21. Separate from Appellant’s case, on January 16, 2018, the FOP filed a grievance on behalf of its members against the City for the impermissible, unilateral modification of the residency definition (hereinafter “FOP Case”). The FOP utilized the grievance procedures provided for in Article 4 of the CBA. (A-107).

22. On April 11, 2018, in Appellant’s case, an internal appeal hearing was conducted to review the Decision from the Disciplinary Hearing Panel. The decision was affirmed. Appellant was terminated from his position as a police officer with WPD (A-250).

23. On December 12, 2018, Appellant appealed the administrative decision to Superior Court. The case was voluntarily dismissed, via a Stipulation of Dismissal, on October 24, 2019 based on jurisdictional issues. (A-12). There was no legal remedy available to Appellant in Superior Court. (A-12).

24. In February 2019, in the FOP case, an arbitration hearing was held to determine whether the City’s unilateral modification of the definition of

“residence” violated the CBA. (A-131).

25. During the arbitration, Ms. Barnes testified that she was unaware of any disciplinary action taken against any FOP member in connection with the 2018 residency affidavits. (A-138). However, that was not accurate. There was one solitary city employee who did receive discipline, specifically termination, in connection with the application of the 2018 residence modification - Officer Nicholas Kroll. Appellant’s issue centered on his 2017 Residency Affidavit, but the standard applied during his disciplinary hearing was the modified 2018 definition of residence. (A-21).

26. On March 4, 2019, an arbitrator returned a lengthy decision finding that the City’s unilateral modification of the definition of “residence” was in violation of the CBA. (A-153).

27. The Arbitration Award specifically precluded Appellees from utilizing the 2018 Residency Affidavit forms with the amended “residence” definition for any purpose, including discipline. (A-153).

27. On June 28, 2019, the City of Wilmington appealed the Arbitration Award to The Court of Chancery seeking to vacate the Arbitration Award arguing

that the Award is in contravention with Delaware law<sup>5</sup> (A-110)

29. In light of the Arbitration Award precluding Appellees' from applying the modified 2018 definition of "residence" for disciplinary matters, Appellant filed a declaratory action with the Court of Chancery on December 4, 2019. (A-28). Appellant sought a declaration that the Appellees were in breach of the Collective Bargaining Agreement when they applied the prohibited 2018 definition of "residency" during his disciplinary hearing, and sought reinstatement of his job. (A-36).

30. Given the impact the Arbitration Award would have on the outcome of Appellant's case, the Appellant's proceeding was stayed until the Court of Chancery decided the matter related to the FOP case. (A-22).

31. In the FOP case, the Court of Chancery considered briefs and heard oral arguments to determine whether the Arbitration Award was contrary to Delaware law. On January 22, 2020, in a Memorandum Opinion, the Court ruled in favor of the Fraternal Order of Police. The terms of the Arbitration Award were found to be within the bounds of the law and enforceable. (A-129).

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<sup>5</sup> City of Wilmington v. Wilmington Fraternal Order of Police Lodge No.1, Inc. 2020 WL 8257386 (Del. Ch. Jan 22, 2020); A-98. \*Note: The Memorandum Opinion was issued on January 22, 2021 but it was erroneously dated and reported January 22, 2020.

32. Following the resolution of the FOP case, the Stay was lifted on the Appellant's case. After a full briefing of the issue, and oral arguments, the Court found in favor of the Appellees and dismissed Appellant's case. (A-19).

33. The Court held that it lacked subject matter jurisdiction, finding that Appellant had an adequate remedy at law through the arbitration clause in the CBA. (A-25).

34. The Appellant disagrees with the Court of Chancery's interpretation of the CBA, relevant facts, and the availability of an individual grievance right.

35. The Appellant was denied due process during his disciplinary hearing, and discharged from his position as a WPD officer based on a standard of residency that was found to be impermissible in the FOP arbitration. The City was barred from using the definition in any disciplinary actions. That Arbitration Award was upheld by the Court of Chancery. Appellant now has the distinction of being the *only* City employee unfairly terminated based on the outlawed definition. Appellant has suffered a great injustice; he was labeled dishonest, fired from his position as a police officer and engaged in years of mentally and financially taxing litigation to clear his name. Appellant is also facing a de-certification hearing, which will terminate his career as a police officer, based on the erroneous findings of the Disciplinary Board. Yet, as it stands, he has no right

to a grievance under the CBA, but also has no avenue of justice in the Court of Chancery. This Appeal follows.

## **SUMMARY OF THE ARGUMENT**

- I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY DISMISSING APPELLANT'S CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION, HOLDING THAT APPELLANT HAD AN ADEQUATE REMEDY AT LAW THROUGH A GRIEVANCE PROCEDURE PROVIDED FOR IN THE COLLECTIVE BARGAINING AGREEMENT.

## ARGUMENT

### **I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY DISMISSING APPELLANT’S CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION.**

#### **A. Question Presented**

Whether the Court of Chancery erred as a matter of law when it dismissed Appellant’s Complaint based on lack of subject matter jurisdiction, holding that Appellant had an adequate remedy at law under the Collective Bargaining Agreement.<sup>6</sup>

#### **B. Standard of Review**

The Delaware Supreme Court examines de novo questions of law decided by a lower court and thus exercises plenary review.<sup>7</sup> This Honorable Court reviews rulings on motions under the abuse of discretion standard.<sup>8</sup> Further, this Court has held that “[t]he essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the

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<sup>6</sup>Nicholas Kroll v. City of Wilmington, C.A. No.:2019-0969-KSJM, Memorandum Opinion, McCormick, V. (Del. Ch. Aug. 16, 2021); A-19.

<sup>7</sup> Merrill v. Crothall-American, Inc., 606 A.2d 96, 99 (Del. 1992); citing Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927 (Del. 1982).

<sup>8</sup> Pitts v. White, 1019 A.2d 786 (Del. 1954).

circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused”.<sup>9</sup> The question is not whether this Court agrees with the lower Court, but rather whether it believes that the Judge, in light of the relevant laws and facts of the case, could reasonably have reached the conclusion for which is appealed.<sup>10</sup>

**C. Merits of the Argument**

- a. The Lower Court erred as matter of fact and law because Appellant is not afforded the right to a grievance under the Collective Bargaining Agreement, therefore he had no other adequate remedy at law.

The crux of the matter in the instant case is whether the Court of Chancery has subject matter jurisdiction over Appellant’s cause of action. The Court of Chancery can exercise subject matter jurisdiction only when a case falls under one of three categories<sup>11</sup>: 1) “one or more of the plaintiff’s claims for relief is equitable in character.” 2) “a plaintiff requests equitable relief and there is no adequate remedy at law,” and 3) “jurisdiction exists by statute.”<sup>12</sup> “In deciding

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id. (quoting Delawareans for Educ. Opportunity v. Carney, 2018 WL 4849935, at \*5 (Del. Ch. Oct.5, 2018)); see also Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 997 (Del. 2004) (identifying the three ways the “Court of Chancery can acquire subject matter jurisdiction”).

<sup>12</sup> Id. (quoting Delawareans for Educ. Opportunity, 2018 WL 4849935, at \*5.))

whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim.”<sup>13</sup>

“The appropriate analysis requires a "realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate.”<sup>14</sup> However,

[t]he mere fact that a litigant may have a remedy at law does not divest Chancery of its jurisdiction. The basic jurisdictional fact upon which equity operates is the absence of an adequate remedy in the law courts. The question is whether the remedy available at law will afford the plaintiff full, fair and complete relief.<sup>15</sup>

“A remedy at law must be as practical to the ends of justice and to its prompt administration as the remedy in equity.”<sup>16</sup> This Court, therefore, may “exercise jurisdiction over an action in which an injunction is sought to prevent a threatened injury where the remedy at law, if there should be one, would undoubtedly be less complete and less effective than in a court of equity.”<sup>17</sup>

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<sup>13</sup> Candlewood Timber Grp., LLC, 859 A.2d at 997.

<sup>14</sup> Id.

<sup>15</sup> Hughes ToolCo. v. Fawcett Publ’ns, Inc., 315 A.2d 577, 579 (Del.1974).

<sup>16</sup> El Paso Natural Gas Co. v. TransAm.Natural Gas Corp., 669 A.2d 36, 39 (Del. 1995).

<sup>17</sup> Id.

In the instant case, the Appellant falls within the second category; He requested equitable relief from the termination of employment which result from Appellees' breach of the CBA. There is no adequate remedy at law to afford him full, fair and complete relief, as held by the lower Court. Arguendo, even if Appellant's grievance pre-dated the FOP case, and he had a right to grieve his matter through the provisions of the CBA, he would not be afforded full and complete relief. By the terms of the CBA and this Court's prior holdings,<sup>18</sup> the Appellant is barred from grieving and arbitrating a disciplinary matter. Based on this Court's holding in Wilmington v. Fraternal Order of Police,<sup>19</sup> Appellant would only be permitted to grieve the impermissible modification of the 2018 residence definition, but not the termination itself.<sup>20</sup> Any award would simply be form over matter, and would not address the reinstatement of his position as a WPD officer. Appellant does not have a right to grieve his case under the provisions of the CBA, and is left with no legal remedy, complete or otherwise, other than the Court of Chancery.

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<sup>18</sup> Wilmington v. Fraternal Order of Police, 510 A.2d 1028, 1029 (Del. 1986).

<sup>19</sup> Id.

<sup>20</sup> *See* Wilmington v. Fraternal Order of Police, 510 A.2d 1028, 1029 (Del. 1986).

The Collective Bargaining Agreement (“CBA”)<sup>21</sup> establishes standards of wages, working conditions, and other conditions of employment for employees of the City in its Police Department with the rank of Patrolperson to Lieutenant.<sup>22</sup> Its terms are negotiated between the City of Wilmington (“City”) and the Fraternal Order of Police, Lodge 1 (“FOP”) on behalf of its members.<sup>23</sup> Appellant is a member of the FOP, and therefore bound by the provisions of the CBA.

In its Decision, the lower Court cited its holding in City of Wilmington v. Wilmington Fraternal Order of Police Lodge No.1, Inc.<sup>24</sup> finding that the CBA “provides a process by which the FOP or employees may file grievances,” and “if that process is followed and the grievance is not satisfactorily resolved, the Agreement permits the FOP to appeal to an impartial arbitrator.”<sup>25</sup> The cited holding refers to Sections 4.1-4.6 of the CBA, which outline the process by which

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<sup>21</sup> City of Wilmington & FOP Lodge 1, Collective Bargaining Agreement, 07/01/16 - 06/30/20; A-285.

<sup>22</sup> Id.

<sup>23</sup> Wilmington v. Fraternal Order of Police, 510 A.2d 1028, 1029 (Del. 1986).

<sup>24</sup> City of Wilmington v. Wilmington Fraternal Order of Police Lodge No.1, Inc. 2020 WL 8257386 (Del. Ch. Jan 22, 2020); A-98.

<sup>25</sup> Nicholas Kroll v. City of Wilmington, C.A. No.:2019-0969-KSJM, Memorandum Opinion, McCormick, V., at \*6-7 (Del. Ch. Aug. 16, 2021); A-24.

a matter may be aggrieved and ultimately arbitrated.<sup>26</sup> The lower court is incorrect, however, in holding that the CBA grievance procedure is an avenue of full and complete relief from Appellant’s disciplinary matter. Once the FOP aggrieved the 2018 “residence” modification, Appellant Kroll was prohibited by Section 4.13 of the CBA from bringing an individual grievance. Section 4.13 states:

Where the alleged grievance involves a matter of general application impacting on a significantly large number of employees, the Lodge may initiate a grievance on behalf of the entire group involved. . . All individuals in the group that will be affected by the grievance and its resolution shall be bound to any resolution which is accepted by the Lodge Committee and shall not thereafter again raise the issue individually.<sup>27</sup>

Further, Appellant is barred by Section 4.7 of the CBA from arbitrating a grievance that arises from a disciplinary proceeding.<sup>28</sup> Section 4.7 provides direction on the arbitration process but explicitly bars disciplinary matters from being arbitrated. Section 4.7 states, in part: “The arbitrator will have no

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<sup>26</sup> City of Wilmington v. Wilmington Fraternal Order of Police Lodge No.1, Inc. 2020 WL 8257386 at \*8-9 (Del. Ch. Jan 22, 2020); A-106-107.

<sup>27</sup> City of Wilmington & FOP Lodge 1, Collective Bargaining Agreement, 07/01/16 - 06/30/20 § 4.13 (emphasis added); A-291.

<sup>28</sup>City of Wilmington & FOP Lodge 1, Collective Bargaining Agreement, 07/01/16 - 06/30/20 §§ 4.7; A-291.

jurisdiction over disciplinary matters.”<sup>29</sup> The clear provisions of the CBA precluded Appellant from aggrieving the application of the modified 2018 residence requirement during his disciplinary hearing, and subsequent termination that was caused by it. The Court of Chancery erred in fact and law in finding that Appellant had an alternate avenue for full and complete relief, whereby denying subject matter jurisdiction.

The time line is significant in analyzing Appellant’s right to the CBA grievance process, whereby denying the lower Court’s subject matter jurisdiction. Appellant’s Disciplinary Hearing occurred on January 11, 2018. Until that time, Appellant has submitted, and the City accepted, Residency Affidavits for 2014, 2015, and 2016 listing his Wilmington address as his residence. Appellant was in compliance with the definition of “residence” contained in the Affidavit, as well as WPD Directive 6.56, until the City made a last minute modification to the definition. Going into the Hearing, Appellant was operating under the understanding that the standard by which he would be judged was the definition of “residence” that was identified on his 2017 Residency Affidavit and in WPD

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<sup>29</sup> Id. (emphasis added).

Directive 6.56.<sup>30</sup> During the Hearing, Ms. Barnes misapplied the 2018 modified definition of “residence” which unfairly measured Appellant by an incorrect standard. Based on that application, the Disciplinary Board found against Appellant. Several months later, on March 3, 2018, the Appeal Board upheld the findings of the Disciplinary Board, including the misapplication of the 2018 “residence” definition. Appellant was terminated as a result. Appellant’s grievance was not ripe until the final resolution of his case, in March 2018. That is to say, until he had a final disposition from the Appeal Board, Appellant could not demonstrate that he had suffered unfairly in connection with the 2018 residence modification, whereby necessitating initiation of the grievance process.<sup>31</sup>

Notably, on January 16, 2018, several months *prior* to the final disposition of Appellant’s case, the FOP filed its grievance on behalf of its members. When the FOP filed its grievance, as a member of the FOP, Appellant was part of the aggrieved party. He was barred from individually aggrieving the same issue by the language in Section 4.13, specifically “All individuals in the group that will be

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<sup>30</sup> Wilmington Police Department, Policies and Procedures Manual, Directive 6.56; A-280 (A person’s residence is that dwelling or abode, where one actually lives. It refers to one’s home, the place which 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 or household effects).

<sup>31</sup> City of Wilmington & FOP Lodge 1, Collective Bargaining Agreement, 07/01/16 - 06/30/20 §§ 4.1; A-290.

affected by the grievance and its resolution shall be bound to any resolution which is accepted by the Lodge Committee and shall not thereafter again raise the issue individually.”<sup>32</sup>

Appellant was also barred by Section 4.7 of the CBA which prohibits aggrieving disciplinary matters.<sup>33</sup> The plain language of the CBA states that “The arbitrator will have no jurisdiction over disciplinary matters”.<sup>34</sup> This Court has examined similar cases, and held that the Section 4.7 exclusion applies to “disputes over the discipline and punishment of certain individual patrolmen, and not to general issues of disciplinary procedure which potentially affect all the patrolmen represented by the Union. . .”<sup>35</sup> In Wilmington v. Fraternal Order of Police, this Court held that the FOP had a right to the grievance and arbitration provisions of the CBA to grieve a method of punishment utilized during an officer’s disciplinary hearing, but the provisions were not applicable to specific punishments imposed on officers.<sup>36</sup> The Appellee’s case arose from a disciplinary

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<sup>32</sup> Id. (emphasis added).

<sup>33</sup> City of Wilmington & FOP Lodge 1, Collective Bargaining Agreement, 07/01/16 - 06/30/20 §§ 4.7; A-291.

<sup>34</sup> Id. (emphasis added).

<sup>35</sup> Wilmington v. Fraternal Order of Police, 510 A.2d 1028, 1030 (Del. 1986).

<sup>36</sup> Id. at pg 1031.

practice employed during a disciplinary hearing involving a change in salary steps as disciplinary measure.<sup>37</sup> Important to note, it was not focused on the discipline of one single officer, but rather it sought to grieve a general disciplinary practice.

This Court held that:

The union has made no demands with respect to the punishment imposed in Green's case, and challenges only the use of a reduction in step as a future disciplinary measure. Under the circumstances, we agree that this dispute is subject to grievance and arbitration proceedings, and does not constitute an attempt by the union to arbitrate a disciplinary case.<sup>38</sup>

The Wilmington case is distinguishable from the instant case in that the FOP did not seek to overturn punishment given to an individual officer in a disciplinary hearing. It sought to aggrieve a certain disciplinary practice that affected a large number of its members. In the instant case, Appellant is seeking a judgment from the Court declaring that the use of the 2018 residence definition in his disciplinary hearing was impermissible, and an Order reinstating him to his position as a WPD police officer. It is not simply a claim to declare the 2018 modified residence definition impermissible; Appellant is seeking to rescind the termination and reinstate him to his position as a WPD officer, along with back

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<sup>37</sup> Id. at pg. 1029.

<sup>38</sup> Id. at pg. 1030.

pay and related compensation. Appellant’s claim is clearly barred from the grievance and arbitration process by Section 4.7, as well as this Court’s prior holdings.<sup>39</sup>

Appellant did not have a “complete remedy” in the form of the grievance process provided for in the CBA. In fact, his only available remedy was a declaratory action in the Court of Chancery, as Section 4.7 barred his grievance, and the residency matter was already in the process of being aggrieved, arbitrated, appealed, and ultimately affirmed. The Court of Chancery erred in fact and law when it held that “a complete remedy otherwise existed”<sup>40</sup> under the grievance procedure. Appellant was barred from doing so by the terms set forth in Sections 4.7 and 4.13 of the CBA, and the prior holdings of this Court. In light of the foregoing, the Court of Chancery’s Order should be reversed and remanded.

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<sup>39</sup> See Wilmington v. Fraternal Order of Police, 510 A.2d 1028, 1030 (Del. 1986); City of Wilmington & FOP Lodge 1, Collective Bargaining Agreement, 07/01/16 - 06/30/20 §§ 4.7; A-291.

<sup>40</sup> Nicholas Kroll v. City of Wilmington, C.A. No.:2019-0969-KSJM, Memorandum Opinion, McCormick, V., at \*7 (Del. Ch. Aug. 16, 2021); A-25.

## CONCLUSION

Officer Nicholas Kroll diligently served the City of Wilmington as a police officer for nearly five years. His commitment to his job and the residents of the City was exemplary, so much so that his efforts were recognized by local news outlets and lauded by the Mayor. Officer Kroll did everything right; he performed his job with integrity and dedication, and he was a family man who balanced the needs of his family, specifically the educational needs of his autistic son, with the terms of his employment by maintaining his City residency.<sup>41</sup> Yet, in 2018, based on a definition of “residence” that was ultimately barred, Appellant was wrongfully labeled as dishonest and discharged from his job as a police officer. Appellant is also facing a Council on Police Training Board Hearing. An adverse decision will de-certify Appellant as a police officer, and terminate his career as an officer in any department, based on the erroneous findings of the Disciplinary Board. Appellant has been placed in a position that has proved nearly impossible to defend or find judicial relief.

In his disciplinary hearings, Officer Kroll was deprived of due process.<sup>42</sup>

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<sup>41</sup> Wilmington Department of Police, Wilmington Police Department v. Nicholas Kroll, OPS #: AD2017-031, Appeal Hearing Transcript at pg 56-57( April 11, 2018); A-268.

<sup>42</sup>U.S. Const. Amend. XIV, § 1

His due process rights were violated when he was denied a meaningful, and fair hearing, and forced to defend against a moving target.<sup>43</sup> He was measured against a standard that was not only different than the identified residence definition on his 2017 affidavit<sup>44</sup> and the definition identified in WPD Directive 6.56,<sup>45</sup> but one that was found to be in breach of the CBA. When Appellant was in a position to grieve the unlawful application of the modified residence definition, the FOP had already initiated its grievance process on behalf of its members, Officer Kroll being one. Officer Kroll was barred from lodging his grievance by the provisions of the CBA, specifically section 4.13, but also 4.7 since it was a disciplinary matter and not subject to arbitration. In the FOP case, through the grievance and arbitration process, the modification was stricken from WPD's residency affidavits. Not a single WPD employee was affected by the breach of contract, with the exception of Officer Kroll.

There is an Arbitration Award holding that the 2018 modification was

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<sup>43</sup>Adjile, Inc. v. City of Wilmington, 2005 WL 1139577, at \*7 (Del. May 12, 2005).

<sup>44</sup> Wilmington Police Department, Annual Residency Declaration - 2017; A-326

<sup>45</sup> Wilmington Police Department, Policies and Procedures Manual, Directive 6.56; A-280.

unlawful and not to be used in disciplinary matters.<sup>46</sup> That Award was affirmed on Appeal to the Court of Chancery.<sup>47</sup> Officer Kroll was a member of the party who properly aggrieved and arbitrated that matter. Yet, the Award and subsequent affirmation is nothing more than form over function if Officer Kroll - *the one person affected by the modification* - is denied subject matter jurisdiction for a declaratory action. Officer Kroll has no right to a grievance under the CBA in this particular situation, but was also unfairly denied subject matter jurisdiction by the Court of Chancery. He is simply collateral damage to the City's wrongdoings, which is an abhorrence to justice. The Court of Chancery's Order denying subject matter jurisdiction must be reversed and remanded.

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<sup>46</sup>City of Wilmington v. Wilmington Fraternal Order of Police Lodge No.1, Inc., AAA Case No.: 01-18-0001-6080 Arbitration Award, May 26, 2019 \* A-153.

<sup>47</sup> City of Wilmington v. Wilmington Fraternal Order of Police Lodge No.1, Inc. 2020 WL 8257386 (Del. Ch. Jan 22, 2020); A-129.