



# DELAWARE

## EMPLOYMENT LAW LETTER

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### TERMINATION

## ***Ultra vires: For one employee, power was both the means and the end***

by Michael P. Stafford

*The author George Orwell once wrote that "power is not a means; it is an end." Sometimes, however, the changing tides of political power can be both the means and the end. So it was for Joseph Freebery, whose career rose along with that of his more well-known sister, Sherry Freebery, only to end at the hands of her political nemesis, Chris Coons.*

### ***Facts***

Joseph began working for New Castle County in 1984 as its superintendent of parks. The superintendent position was classified under the merit system. In a nutshell, the merit system protects public employees from termination absent "delinquency, misconduct, inefficiency or inability to perform the work of the position satisfactorily." It also provides administrative protections and rights to public employees.

In 1996, Sherry became New Castle County's chief administrative officer. As part of a restructuring of county

government, the number of departments was slashed and a new general manager position was created to oversee each of them. An amendment was passed bringing the new positions under the merit system. In 1997, Joseph became the general manager of the county's Department of Special Services.

All good things must end, however, and for Joseph, the downward spiral commenced in 2003, when Coons (at the time, president of the New Castle County Council) began lobbying in favor of an amendment that would remove general managers from the protections of the merit system. Under the amendment, the county executive would have the authority to appoint general managers, and they would serve at her pleasure. Despite Joseph's opposition to the proposed amendment, the bill ultimately passed in 2005.

In the meantime, Coons and Sherry were locked in a heated political battle for the county executive position. Like any good sibling, Joseph campaigned for his sister. However, Coons emerged victorious from the Democratic primary and prevailed in the general election in 2004.

Having won the election and secured the legislation necessary to remove the general managers from the merit system, Coons began a comprehensive review of county government. Not surprisingly, on April 6, 2005, Joseph was offered the choice of retiring, resigning, or being terminated. He chose termination.

Joseph sued, alleging violations of his rights under the First and Fourteenth Amendments to the U.S. Constitution, breach of contract, and breach of the covenant of good faith and fair dealing. In essence, his case rested on the claim that he relied on promises that the general manager position would always remain within the merit system at the time he took it. The U.S. District Court for the District of Delaware ruled against him, and he appealed to the Third U.S. Circuit Court of Appeals (the federal appeals court with jurisdiction over Delaware).

### ***Court's decision***

On appeal, the Third Circuit also rejected Joseph's claims. First, it determined that he didn't have a property interest in continued public employment after the general manager position was

removed from the protections of the merit system.

The court also found no merit to Joseph's contention that he had a contract with the county that entitled him to continued protection under the merit system despite the amended law. Any such contract, the court noted, would be *ultra vires* — a Latin phrase that means "beyond the powers." In this case, even if former county executive Thomas P. Gordon and Sherry had promised that the general manager position would always remain under the merit system, it was beyond their authority to do so. Public employees can't secure employment contracts that violate state law.

The court also rejected Joseph's claims for freedom of association and freedom of *family* association. Nor did the fact that he supported a political candidate who happened to be his sister transform a political retaliation claim into a familial association retaliation claim.

Finally, the court also disposed of Joseph's claim for breach of the covenant of good faith and fair dealing, noting that he "failed to present evidence tending to show that Coons or his Chief Administrative Officer falsified or manipulated [his] employment record to create grounds to terminate him." Rather, "the record shows that Freebery's employers were dissatisfied with his management style and became convinced that he did not fit well within the Coons administration. Although Freebery may disagree with these assessments, this disagreement does not establish a breach of the covenant of good faith and fair dealing." *Freebery v. Coons*, No. 08-4771 (3d Cir., Dec. 10, 2009).

### ***Bottom line***

Losing your job because of your support for a political candidate who just happens to be your sister may not state a claim for political or familial association retaliation, but it sure makes an interesting story! In the end, though, the key takeaway from this case is that the powers of local government are limited and, in some instances, can't be used to bind future administrations. Similarly, public employees can't secure greater protection of job security by way of contract than they obtain under state law.

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