

**CIVIL SERVICE
COMMISSION OF THE CITY
OF NEW ORLEANS**

*

NO. 2001-CA-0635

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

THE CITY OF NEW ORLEANS

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-16933, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

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Judge Miriam G. Waltzer

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and
Judge Terri F. Love)

LOVE, J., DISSENTING WITH REASONS

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AFFIRMED.

STATEMENT OF THE CASE

The Civil Service Commission for the City of New Orleans (Commission) sued the City of New Orleans (City) seeking to enjoin the effect of a management agreement entered into between the City and SMG Crystal, L.L.C. (SMG). The agreement privatized operation of the New Orleans Cultural Center, a city-owned entity comprised of the Municipal Auditorium and the Theater of the Performing Arts.

The trial court issued an order on 6 November 2000 setting the preliminary injunction for trial, which order was served on the City.

The City filed an exception of failure to join SMG as a party defendant and alleged the City had not been cited and served at least two days before hearing as required by LSA-C.C.P. arts. 1265 and 3602. On 21 November 2000, the trial court entered judgment granting the non-joinder

exception and ordering the Commission to add SMG as a party defendant.

The Commission added SMG by first supplemental and amending petition, requesting service on the City and on SMG. The City answered on 28 November 2000, generally denying the Commission's allegations and asserting in defense the alleged unconstitutionality of Rule III, Sections 6.1 through 6.4 of the Commission's rules. The City Attorney certified that he sent a copy of the City's answer to the Attorney General for the State of Louisiana. On 29 November 2000, the City filed an exception of insufficient service to the supplemental and amending petition.

The trial court ordered the matter to be submitted upon verified pleadings, affidavits and oral arguments only. However, testimony was taken at the trial on 30 November 2000.

The trial court rendered judgment in favor of the Commission on 8 December 2000 enjoining the City, its Property Management Department and SMG (1) from discharging any SMG employee formerly employed by the City without approval of the Commission until the Commission has approved the SMG contract; (2) from transferring any employee employed at the Cultural Center absent Commission approval until the Commission has

approved the SMG contract; and (3) from executing any other contracts for services to be performed at or for the Cultural Center absent Commission approval during pendency of this action. From that judgment the City and SMG appeal. We affirm.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Both the Civil Service System and the New Orleans Home Rule government system are creatures of the Louisiana Constitution.

The city civil service is established and includes all persons holding offices and positions of trust or employment in the employ of each city having over four hundred thousand population and in every instrumentality thereof. . . . La.Const. Art. 10, §1.(B).

Each commission is vested with broad and general rulemaking . . . powers for the administration and regulation of the classified service, including the power to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, compensation and disbursements to employees, and other personnel matters and transactions; to adopt a uniform pay and classification plan; to require an appointing authority to institute an employee training and safety program; and generally to accomplish the objectives and purposes of the merit system of civil service as herein established. . . . La.Const.

Art. 10, § 10 (A)(1).

Section 8 of the Home Rule Charter provides for the Civil Service Commission and reaffirms the constitutional grant of authority. Section 8-103 (2)(i) provides in pertinent part that the Commission shall:

Be vested with broad and general rule-making . . . powers for the administration and regulation of the classified service, including the power to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, layoffs, compensation and disbursements to employees and other personnel matters and transactions; . . . and generally to accomplish the objectives and purposes of the merit system of civil service as herein established. . . .

Section 8-104 (10) gives the Director of Civil Service the right to examine each department's payroll to ascertain if its employees have been appointed and are being compensated in accordance with the provisions of the Charter.

Acting pursuant to its authority under the state constitution and the New Orleans Home Rule Charter, the Commission enacted Rule III, Section 6 CONTRACTS, which provides in pertinent part:

6.1 All contracts for personal or professional services, . . . shall be reviewed and approved by the Director well in advance of their effective dates, to insure compliance with the Civil Service Law and to determine whether such services

should be provided within the classified service. Such contracts shall become effective only when approved by the Director. . . .

6.2 Contracts for personal or professional services . . . shall be approved only when such services require unique or specialized skills not presently required of positions in the classified service. . . .

6.3 All contracts for personal or professional services . . . first shall be transmitted to the Civil Service Department for initial consideration and review, and again for final approval after all other aspects of contractual review have been completed. . . .

6.4 The prior provisions of this Rule notwithstanding, if due to fiscal restraints or some other cause it becomes necessary to privatize either a traditional governmental function or one unique to the City which has been performed by classified employees, or to privatize an existing . . . organization unit of city government which is or could be staffed by classified city employees, no action or decision toward this end by any agency of the City, State, or parish of Orleans shall become binding and effective until approved by the City Civil Service Commission, subject to the following conditions:

(a) Any contract for privatization of a governmental service shall contain a provision that thoroughly explains the effects of privatization on the status of current employees, as well as any specific contractual commitments entered into by the parties, which affect the interests of the displaced employees.

(b) Any contract for privatization of a governmental service shall contain an additional provision which has the effect of prohibiting unlawful discriminatory treatment of employees.

(c) Any contract for privatization of a governmental service shall contain an additional provision which affords regular employees an opportunity for a full and fair hearing prior to any disciplinary action.

(d) Employees who choose to remain in the classified service of the City may request the City Civil Service Commission to invoke the application of Rule XII, Layoffs, in order to preserve their classified status.

* * *

(f) A copy of the proposed contract, and such other evidence to be presented to the Commission to justify the necessity for privatization, shall be reviewed with the Commission at a public meeting. The Commission shall not approve the contract prior to a subsequent meeting, with due notice given to the public of the proposed provisions of the privatization contract. Due notice shall include individual notification to affected employees.

The City and SMG contend that these rules violate Article 6, §6 of the

Louisiana Constitution which provides:

The legislature shall enact no law the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions of any local governmental subdivision which operates under a home rule charter.

Section 9 (B) of the same Article 6 provides:

Notwithstanding any provision of this Article, the police power of the state shall never be abridged.

The Home Rule Charter provides:

Section 2-101. Powers

(1) The City shall retain, to the same extent as if herein repeated, all rights, powers, privileges and authority that it has or could claim under the law of this State at the time of the adoption hereof, except as herein expressly modified.

(2) In addition to the foregoing, the City shall have all rights, powers, privileges and authority herein conferred or herein enlarged and all rights, powers, privileges and authority whether expressed or implied that may hereafter be granted to a similar corporation by any general law of the State or that may be necessary or useful to enjoy a home rule charter.

* * *

The City, in addition to the rights, powers, privileges and authority expressly conferred upon it by this Charter, shall have the right, power, privilege and authority to . . . do and perform all of the acts pertaining to its . . . property . . . which are

necessary or proper in the legitimate exercise of its corporate powers and municipal functions.

* * *

(6) The rights, powers, privileges and authority of the City of New Orleans under this Charter shall be construed liberally in order to establish the broadest measure of local self-government in any and all matters not prohibited or reserved to the state by the Louisiana Constitution.

Section 3-118. Adoption of Pay Plans

All persons employed by the City . . . and paid either in part or in whole from appropriations made by the Council, . . . shall be compensated only in accordance with pay plans adopted by the Council. The pay plan for those persons in the classified service shall be in accordance with the prevailing provisions of the civil service law and the rules and regulations adopted thereunder. . . .

Section 4-102 Organization [of Executive Branch]

The Executive Branch shall consist of the Office of Mayor, of which the Mayor shall be the head; the Administrative Office, of which the Chief Administrative Officer shall be the head; the department heads; . . .; and the following departments and boards; all of which are hereby created and established or continued and recognized:

(1) Departments

* * *

Department of Property Management

Section 4-302 mandates that the Chief Administrative Officer shall supervise and appoint, with the Mayor's approval, the heads of all departments except the Law Department and City Civil Service.

Section 4-1401. Functions [of Department of Property Management]

The Department of Property management, . . . shall:

(1) Maintain all buildings owned or operated by the City for a public purpose and perform all custodial functions in connection therewith; . . .

* * *

(5) Award all concessions on City property subject to requirements which may be imposed by ordinance.

* * *

The Home Rule Charter does not address specifically the issue of privatization of otherwise traditional governmental functions.

FIRST AND SECOND ASSIGNMENTS OF ERROR: Rule III, Sections 6.1 through 6.4 of the Rules of the Civil Service Commission of the City of New Orleans are unconstitutional as said rules are beyond the scope of the Commission's jurisdiction as established by the Louisiana Constitution of 1974; Rule III, Sections 6/1 through 6.4 of the Rules of

the Civil Service Commission of the City of New Orleans are unconstitutional as said rules abrogate the powers and duties granted to unclassified officials of the City of New Orleans pursuant to the City's Home Rule Charter.

The Louisiana Supreme Court has made clear that the Commission's rules have the effect of law. Sanders v. Department of Health and Human Resources, 388 So.2d 768, 770 (La. 1980); La.Const. art. 10, §10(A)(4). See also, Bannister v. Department of Streets, 95-0404 p. 5(La. 1/16/96), 666 So.2d 641, 645; Paul v. New Orleans Police Department, 96-1441 p. 6 (La.App. 4 Cir. 1/15/97), 687 So.2d 589, 592. Furthermore, the provisions of the constitution involving civil service and the Commission's rules are designed to secure adequate protection to public career employees from political discrimination. They embrace the merit system. Their intent is to preclude favoritism and their purpose is to guarantee the security and welfare of public service. Sanders, 388 So.2d at 771.

The constitutional grant of rule-making power to the Commission precludes the legislature from enacting a statute that would nullify a Commission rule. See, Smith v. Department of Health and Human

Resources, 416 So.2d 94, 96 (La. 1982), where the Louisiana Supreme Court held that the Administrative Procedure Act could not supersede Civil Service Rule 13.33(b).

While Commission rules have the force of law, they may not violate established, basic constitutional rights. For example, the rules may not abrogate an employee's constitutional right to due process or to appeal. See, Guillory v. State Dept. of Institutions, La. State Penitentiary, 219 So.2d 282, 286 (La.App. 1 Cir. 1969); Marullo v. New Orleans Police Department, 183 So.2d 431 (La.App. 4 Cir. 1966). The City makes no allegation of denial of due process in the instant case.

This case is not the first in which a conflict arose between the city administration and the Commission. In Civil Service Commission of City of New Orleans v. Rochon, 374 So.2d 164 (La.App. 4 Cir. 1979), the city's chief administrative officer sought to alter methods of compensation and disbursements to classified city civil service employees by changing the method of computing overtime pay. The city argued that the chief administrative officer could make these modifications pursuant to Section 4-302(5) of the New Orleans Home Rule Charter which conferred on him the

authority to "prescribe accepted standards of administrative practice to be followed by all offices, departments and boards." This Court summarily dismissed the city's argument, holding that "[T]he Chief Administrative Officer of the City of New Orleans has no authority under law to independently alter methods of compensation and disbursements to civil service employees of the city as set by the Commission." Rochon, 374 So.2d at 166. Citing La.Const. Art. 10, §10(A)(1), the Court rejected the city's charter-based argument.

The scope of the Commission's rule-making authority and the standard by which we as a reviewing court should interpret those rules were set forth cogently in New Orleans Firefighters Ass'n Local 632, AFL-CIO v. City of New Orleans, 590 So.2d 1172, 1174-75 (La. 1991):

The Louisiana Constitution has contained detailed provisions for the state and city civil service systems since 1952. The principal objectives of the civil service system are to select and promote public employees competitively on the basis of merit, fitness and qualifications, to secure the tenure of public employees, and to protect public employees against discrimination, intimidation or dismissal because of political or religious beliefs, sex, race or other unjustified reasons. The *Projet* [of a state constitution, ed. 1954] noted that the primary function of the state and city civil service commissions in Louisiana is

to "see to it that the rank and file of state and city employees are selected competitively on the basis of merit, free from political influence" and to "see that these employees are protected from dismissal or discriminatory treatment because of religious or political reasons."

In order to achieve these objectives, La. Const. art. X, § 10(A)(1) grants broad and general rulemaking powers to the state and city civil service commissions to regulate the classified service,

The rules adopted by a civil service commission pursuant to this authority "have the effect of law," . . .

Thus, a city civil service commission has the exclusive power to adopt rules regulating the classified service in the areas specifically enumerated in Section 10(A)(1), and the city governing authority cannot constitutionally infringe on the commission's exercise of this power. Moreover, the convention debates surrounding the adoption of Section 10(A)(1) **indicated an intent that this provision should be construed liberally in favor of fulfilling the goals of civil service.** [Emphasis added; citations omitted.]

The rule of liberal construction favoring the objectives and goals of civil service's merit system was repeated in Paul, *supra*, and in Reimer v. Medical Center of Louisiana at New Orleans, 95-2799 (La.App. 4 Cir. 1/29/97), 688 So.2d 165, 168.

In the Firefighters case, the court held that the power to impose

residency requirements did not fall within the Commission's constitutional authority. The court employed the following analysis:

Of the specific areas of power enumerated in Section 10(A)(1), "employment" refers in context to the selection and hiring of employees, and "promotion" and "demotion" refer to the raising or lowering in position of employees after employment. The power to adopt a residency requirement does not fall within the commission's express powers to adopt rules regulating the selection, hiring, promotion or demotion of public employees on the basis of merit. Moreover, as to the objectives of civil service, a residency requirement is unrelated to the competitive selection and promotion of public employees on the basis of merit, fitness and qualifications. Firefighters, 590 So.2d at 1176.

Applying that analysis, it is clear that in the instant case, the Commission's rules on privatization contracts relate immediately to the selection, hiring, promotion and demotion of public employees. The employees covered by the rules were classified civil service employees, working for the city's Department of Property Management. The rules protect these classified employees from an administration that would use privatization as a means of eliminating civil service protection of the employees and defeating the objectives of providing for selection, hiring, promotion and demotion on the basis of merit.

"Suspension" refers to the temporary removal of a public employee from service, and "removal" refers to the permanent separation from

employment. The power to adopt a residency requirement does not fall within a commission's express power to adopt rules regulating the suspension and removal of public employees. . . .A residency requirement is not pertinent to the prohibition against subjecting a permanent employee to disciplinary action except for cause. Id.

Again, the Commission's privatization rules fall within the Commission's express power to adopt rules regulating suspension and removal of public employees. Rule 6.4 particularly addresses the interests of employees displaced by privatization and is consistent with the Commission's authority and with the objectives of the civil service system. These rules are related clearly to the selection and promotion of public employees on the basis of merit, fitness and qualifications, to the security of tenure of public employees, and to the protection of the employees against political, religious, racial, gender or similar discrimination or intimidation. See, Firefighters, 590 So.2d at 1177.

For the foregoing reasons, it is evident that the privatization rules are squarely within the constitutional authority granted to the Commission and to the authority granted to the Commission by the New Orleans Home Rule Charter. The interpretation of the Charter suggested by the City unnecessarily creates a conflict between the Commission's authority and that of the Mayor. We do not read the Charter's provisions concerning mayoral

authority to be as broad as the City would suggest. The power of the Mayor's Office under the Home Rule Charter must not be extended to circumvent the merit system for public employees by executing management contracts "privatizing" governmental functions. The Commission's Rules at issue herein are clearly and unequivocally within the scope of the Commission's constitutional and Chartered authority and serve to achieve the goals and objectives of the merit system of public employment. Therefore, these assignments of error have no merit.

THIRD ASSIGNMENT OF ERROR: In the event these rules are constitutional, they are inapplicable to the management services contract entered into by and between the City and SMG Crystal, L.L.C.

The City's alternative argument that the SMG contract is not for personal or professional services and is not a privatization agreement is disingenuous. The Department of Property Management's operation of the "Cultural Center" requires rendition of personal and, it may be argued, professional services, by SMG as manager and by the classified employees in their respective positions. The trial court was not persuaded by the testimony of SMG's regional general manager, Doug Thornton, or the City's

chief administrative officer, Cedric Grant, and its Director of Property Management, Kerry DeCay, that the management agreement somehow does not rise to the level of privatization because the City retained ownership of the property in question. This begs the question of whether the management of the center is or is not "privatized." While the term "privatize" is not defined specifically, it is clear from the rule that when a formerly traditional governmental function (for example, management of government property) is contracted to a non-governmental or "private" entity, the Rules become effective.

We do not accept the City's invitation to put classified employees at risk merely in order to subscribe to a tortured interpretation of the term "privatize."

This assignment of error is without merit.

FOURTH ASSIGNMENT OF ERROR: The preliminary injunction entered by the trial court enjoining SMG from terminating certain of its employees absent Civil Service Commission approval must be vacated because the Commission is not entitled to this relief.

SMG in brief spills much ink extolling its outstanding record of

performance in other cities, calling attention to the City's alleged budgetary crisis and promising alleviation of the "crisis" by its superior management skills. However, none of these allegations, even if true, are relevant to the issue of the propriety of the Commission's rules concerning protection of classified city workers impacted by privatization. Whether or not SMG can or will solve the City's alleged budgetary crisis is an issue for another day and another forum.

SMG argues that the preliminary injunction enjoining SMG from discharging any former city employees without Commission approval must be vacated because the Commission did not show that it was entitled to this injunctive relief. SMG contends that since some former city employees resigned their city positions to work for SMG, they are no longer under the Commission's jurisdiction. This argument ignores the fact that, in reality, these employees had no real choice if they intended to continue to do the work they had been doing on behalf of the "Cultural Center." Acceptance of SMG's argument effectively would eviscerate the Commission's rules, designed to achieve the objectives of the merit system and to protect the center's classified employees in the event of privatization.

This assignment of error is without merit.

CONCLUSION AND DECREE

For the foregoing reasons, we affirm the judgment of the trial court.

Costs of this appeal are assessed against the appellants.

AFFIRMED.