CIVIL SERVICE COMMISSION OF THE CITY OF NEW ORLEANS	*	**NO. 2001-CA-0635**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
THE CITY OF NEW ORLEANS	*	**STATE OF LOUISIANA**
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LOVE, J., DISSENTING WITH REASONS

This appeal involves a significant issue of first impression in the State of Louisiana: the delineation of powers between two constitutionally-sanctioned public entities; namely, the City of New Orleans, a pre-1974 Constitution home rule charter governing authority, and the Civil Service Commission of the City of New Orleans. Although related issues have been decided previously that lend guidance to the instant matter, the precise question presented to the Court by this appeal has not been squarely addressed heretofore, but is a matter of great importance in these days of economic uncertainty and the attendant need for public bodies to govern efficiently and cost-effectively.

The majority opinion reasons that because the Commission has the power, under the State Constitution and interpretive jurisprudence, to regulate the City's classified service, the instant Rule III must be upheld as a valid

exercise of the Commission's rulemaking power. The majority fails, however, to analyze thoroughly the issue of conflicting, constitutional powers of the Commission and the City. Although the majority correctly reasons that both entities' authority emanates from the State Constitution, the opinion falls short of analyzing the constitutional aspect of the conflict between the City's powers as a pre-existing (*i.e.,* pre- 1974 Constitution) home rule charter governing authority and the Commission's powers to regulate the classified service within the City of New Orleans.

The broadest power for self-government is constitutionally guaranteed to home rule charter cities and jurisprudence abounds holding that undue interference with that power is prohibited by the state and other entities. Although the Commission has been granted "broad and general rulemaking" powers under the Constitution as well, the Constitution specifically enumerates the *types* of employment functions the Commission is empowered to govern with its rules, and the instant case presents a situation where the Commission has overstepped its jurisdiction, as the Louisiana Supreme Court has held in a number of other instances over the past two decades.

The critical issue that the majority failed to address is whether the Commission, by enacting Rule III that requires the advance review and approval of all City privatization contracts, has regulated beyond its jurisdiction. If that constitutional analysis is conducted, I believe the correct answer is that Rule III is unconstitutional because it improperly breaches the separation of powers doctrine enunciated in the Constitution, art. II, § 2 by regulating an area that is reserved to the City under it broad, home rule charter authority. Therefore, for reasons more fully explained below, I respectfully dissent from the majority opinion.

The City appeals the district court's judgment in favor of the Commission enjoining the City and SMG Crystal, L.L.C. ("SMG") from the continued performance of a management agreement entered into by those two parties for SMG to provide management, operations, and marketing services at the New

Orleans Cultural Center.

Prior to the agreement, the center employed 19 city employees all of whom were offered transfers within the Department of Property Management when the contract for private management services was considered. Ten employees of the 19 chose to resign and become employees in the private sector with SMG, still working at the Cultural Center. The nine remaining

employees remained in the City's Department of Property Management, although they began working in other facilities.

Also prior to the agreement with SMG, the Cultural Center ran an annual deficit of approximately $915,000.00, while the agreement with SMG was entered for $175,000.00 per year plus an incentive fee based on the annual reduction it accomplishes in operating deficit. Additionally, the agreement requires SMG to spend $25,000.00 per year to market the facilities.

The Civil Service Commission sought a permanent injunction declaring the agreement void *ab initio* and prohibiting the implementation of the contract until it had been submitted and approved by the Commission pursuant to Rule III, Section 6.1-6.4 of the Rules of the Civil Service Commission of the City of New Orleans, which requires approval of the Commission of any privatization contract.

Civil Service Rule III, §§ 6.1 through 6.3 address contracts for personal or professional services. Section 6.4 concerns the privatization of units of city government. These rules provide as follows:

> 6.1 All contracts for personal and professional services, and amendments thereto, 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. When so approved, they may thereafter continue for a period not to exceed one (1) year from the effective date of the contract.
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> 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 . . .
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> 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 or newly established 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 unit approved by the City Civil Service Commission, subject to the following conditions: . . . .

In response to the Commission's action, the City challenged the constitutionality of the rules at issue, asserting that they were beyond the scope of the Commission's constitutional powers and that they infringed on the City's constitutionally-granted powers, especially because the City of New Orleans is a pre-1974 Louisiana Constitution Home Rule Charter entity, which gives it the broadest powers of self-government under the 1974 Constitution.

The district court heard evidence at the Commission's preliminary injunction hearing and rendered judgment (1) enjoining SMG from discharging any employee formerly employed by the City without approval of the Civil Service Commission until the Commission approves the contract between the City and SMG;

(2) enjoining the City from transferring any employee employed at the

center absent Commission approval, and (3) enjoining the City during the pendency of this action from executing any other contracts for services at the center without approval of the Commission. It is from this judgment, issued December 8, 2000, that the City now appeals.

Analysis

The Commission argues that the rules in question, which require the Commission's review and approval of any contracts for personal or professional services or privatizations of governmental functions entered into by the City of New Orleans, are legitimate exercises of its Constitutional duty, as granted in the above article. The Commission states that this power is exercised "in order to determine the effect of such contracts upon the classified civil service workforce and in order to preserve [the] system of civil service for which the Commission has charge."

In support of its position, the Commission relies upon a First Circuit case, *Jack A. Parker & Assoc., Inc. v. State through Dep't of Civil Service,* 454 So.2d 162 (La. App. 1st Cir. 1984), where a contractor for the provision of professional services to organize and maintain the state group insurance program brought a breach of contract action against the State after the State Civil Service Commission refused to approve its contract with the State. The lack of approval was based upon State Civil Service Rule 3.1(o), which

provided that the director of civil service shall:

> Review and approve or disapprove, in advance of their effective dates, contracts for personal services between the State, or any instrumentality thereof, and any person in order to insure that such agreements do not provide for the performance of such services for the State of Louisiana which could and should be performed by classified employees.

In declaring the contract void, the First Circuit determined that Parker's "failure to comply with Rule 3.1(o) defeats the purpose of the civil service laws." The court reasoned that the requirement of advance approval by the director was necessary for the protection of classified employees and "[i]f approval of such contracts between the state and proposed independent contractors was not required, state officials could easily circumvent the reasons for establishing the Civil Service Commission . . . ." *Id.* at 167.

On the other hand, the City asserts that the civil service rules at issue in the instant case are unconstitutional because they are beyond the scope of the Commission's jurisdiction as set forth by the Louisiana Constitution. Although Article X, § 10(A)(1) of the Constitution grants the Commission exclusive constitutional power to *regulate the classified service*, the Commission power does not include a right to limit the City's power to contract pursuant to its authority under the Constitution and the City's Home Rule Charter. Therefore, the Commission may not infringe upon the City's

constitutional right to enter into contracts that the City's executive branch deems fiscally imperative.

Additionally, the City posits that a home rule charter government possesses, relative to local affairs, powers that are as broad as those of the State, except when limited by the Constitution, laws permitted by the Constitution, or its own home rule charter. La. Const., art. VI, §§ 4, 5. Moreover, the Constitution itself specifically prohibits interference with home rule charter governmental powers:

> 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.

La. Const., art. VI, § 6.

The City argues additionally that the First Circuit case, *Jack A. Parker & Assoc., Inc. v. State through Dep't of Civil Service*, 454 So.2d 162 (La. App. 1st Cir. 1984), is inapposite to the analysis of the instant case, as well as not being mandatory authority. In *Parker*, the State and the Commission were aligned in opposing Parker's contract. Thus, the issue of the conflicting balance of power between the (State) civil service commission and the State was never briefed or addressed by the court. That issue, albeit as regards to the City of New Orleans *vis à vis* the Civil Service Commission

of the City of New Orleans, is presented squarely by the instant case and must be analyzed where both entities' powers and functions flow directly from the state constitution, but are in conflict.

The Louisiana Supreme Court articulated the broad powers of a home rule charter government in *Francis v. Morial*, 455 So.2d 1168 (La. 1984), where then Justice Dennis, writing for the majority, stated the issue in that review as:

> We are called upon to decide whether an act of the legislature altering the procedure for selecting members of a home rule municipality's administrative board should be upheld as necessary to prevent abridgement of a reasonable exercise of the state's police power or stricken as an interference with local deployment of home rule charter powers and functions prohibited by the state constitution.

Upon motion of the New Orleans Aviation Board, the trial court had declared the statute affecting New Orleans unconstitutional and enjoined its enforcement. The supreme court affirmed, explaining that:

> Section 6 [of La. Const. art. VI] was added to the local government article to protect home rule charter governments from unwarrantable interference in their internal affairs by state government. It is clear from the convention proceedings and the words of Section 6 that it was intended to prevent the legislature from substituting its judgment for that of the home rule government with respect to the arrangement of the various offices, departments, agencies and elements of the local government, and as to the

> assignment, allocation or distribution of purposes, work, authority and capacities among them. Unless the constitution elsewhere provides justification for such an intrusion, any state law which changes or affects, i.e., produces an alteration in or material influence upon, the local government's structure and organization or the distribution or redistribution of its powers is prohibited.

Francis, 455 So.2d at 1171-72 (citing VII Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1341, 1361; other citations omitted).

Later in that same opinion, Justice Dennis also cautioned that:

> *Home rule abilities and immunities are bestowed by the constitution in terms too full and general to warrant narrow construction of them by the courts*. . . . This transformation in the constitutional philosophy of local government calls for a corresponding adjustment in the judicial attitude toward home rule prerogatives. . . . Hence, it is appropriate that *home rule powers, functions and immunities should be construed fairly, genuinely and reasonably and any claimed exception to them should be given careful scrutiny by the courts*.

Francis, 455 So.2d at 1173 (emphasis added).

The Louisiana Supreme Court recently considered an issue analogous to the instant case concerning conflicting powers in *Louisiana Dep't of Agriculture and Forestry v. Sumrall*, 98-1587 (La. 3/2/99), 728 So.2d 1254, where Justice Kimball, writing for the majority, analyzed a rule promulgated

by the State Civil Service Commission that afforded a classified employee the right to administrative appeal on claims of discrimination based on grounds that were not specifically listed in the Louisiana Constitution, art. X, § 8B. The First Circuit had held in favor of the Commission, finding that under its "broad and general" rule-making power, it had the authority to expand on the types of discrimination that warranted appeals. The supreme court reversed, holding that the Commission's rules in question were unconstitutional because they were in conflict with the separation of powers doctrine set forth in the Louisiana Constitution, art. II, § 2, which prohibits any branch of government or representative thereof to exercise the powers belonging to another. *See Sumrall,* 728 So.2d at 1263.

In arriving at the decision, the court utilized the two-part analysis developed in *New Orleans Firefighters Ass'n v. Civil Service Comm'n of the City of New Orleans,* 422 So.2d 402, 411 (La. 1982) ("*Firefighters I")* and *New Orleans Firefighters Ass'n Local 632, AFL-CIO v. City of New Orleans*, 590 So.2d 1172 (La. 1991) ("*Firefighters II*"*)*: (1) whether the rule in question falls within an area specifically enumerated in Article X, § 10(A)(1); and (2) whether it is necessary for the Commission to have the power to enact the rules in question to effectuate the objectives and purposes of the civil service. *Sumrall,* 728 So.2d at 1261-62.

Applying the first prong of the above two-part test to assess the constitutionality of the Commission Rule III in the instant case, we look to La. Const. art. X, § 10(A)(1) to determine whether the rule falls within the expressly enumerated powers enunciated therein. Article X, § 10 provides in pertinent part:

> (A) Rules. (1) Powers. Each commission is vested with broad and general rulemaking and subpoena 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. It may make recommendations with respect to employee training and safety.

Although the above article expressly authorizes the Commission to regulate the classified service, *e.g.*, promotions, demotions, certifications, etc., the constitution does not specifically authorize the Commission to adopt rules to regulate all employment contracts entered into by the City. The City points out that in terms of layoffs, for example, La. Const., art. X, § 10 (A)(3) demonstrates the framers' intent to give the Commission merely a

ministerial role in decision-making that results from fiscal necessities of administering the City's budget for its employees. Section 10(A)(3) sets forth that the Commission may determine the *procedures* for effecting layoffs, but the *decision* to execute the layoffs is a fiscal and business decision that belongs to the City, not to the Commission, as long as there is no discriminatory intent or political motivation associated with the layoff.

The City argues that this decision by the framers of the Constitution *not to grant* the Commission the power to prevent, affect, or even to review proposed layoffs is significant because there is no greater action that can affect the classified service employees than layoffs of classified employees. In the instant situation, for example, the City could sell or lease the Cultural Center buildings, or any of its other properties, and such action might well result in the layoffs of many classified employees. If that action were taken, the Commission would have no power whatsoever to restrict or prevent the sale or lease of such property despite the dire results to many civil servants. Jurisprudence of this State reinforces this interpretation of the pertinent constitutional article. *See, e.g., Munson v. State Parks and Recreation Comm'n,* 105 So.2d 254, 259 (La. 1958) (involving civil service employees' attempts to return to their positions that had been abolished by the Parks Commission where the court concluded that "[t]here is no evidence upon which to draw a legitimate inference that the action of the Parks Commission was activated by improper political influence or because of the political or religious views or activities of any of the appellants."); *Heno v. Department of Labor*, 171 So.2d 270 (La. App. 1st Cir. 1965) (where the court held that much discretion is given an appointing authority in determining which employees shall be affected by layoffs); *Casse v. Sumrall*, 547 So.2d 1381, 1387 (La. App. 1st Cir. 1989) ("It is significant that the layoff plan at issue was formulated on the basis of administrative decisions which were made after careful review of the needs and priorities of the department involved and not upon the performance of individual employees.").
As the supreme court explained in *Sumrall*, 728 So.2d 1254, "the Commission's authority to enact rules, though it be broad and general, is nonetheless *limited by the terms expressed in the constitution itself*." *Id*. at 1261 (emphasis added). The court decided in that case that it had extensively reviewed Article X, §10(A)(1) in *Firefighters II* and determined

that the words expressly mentioned in section 10, *e.g.*, "employment," "promotion," "demotion," etc., did not warrant "the Commission's authority to enact rules expanding its appellate jurisdiction to claims beyond that which the constitution has already bestowed." *Sumrall*, 728 So.2d at 1262. The court in *Sumrall* continued to examine the last phrase in the enumerated powers listed in Section 10: "other personnel matters and transactions." Justice Kimball clarified:

> However, when this phrase is read in the context of the article, it is clear that the language was added to allow the Commission *some flexibility* in rulemaking with respect to *administration* of personnel. This phrase pertains to personnel management rather than to the jurisdiction of the Commission. We find nothing in Section 10 which could serve as an authorization for the Commission to expand its jurisdiction.

Sumrall, 728 So.2d at 1262.

Thus, the court concluded that under the first step of the analysis for constitutionality, the state civil service rules were unsupportable and I conclude the same. The City Civil Service Rule III, §§ 6.1-6.4, which rules require the Commission's review and approval of any contracts for personal or professional services or privatization of governmental functions entered into by the City of New Orleans, are not specifically enumerated under Article X, § 10(A)(1). The Commission's power to regulate classified employees is, as the court in *Sumrall* explained, limited by the terms expressed in the Constitution itself.

Turning now to the second step of the analysis, as the court did in *Sumrall*, the inquiry is whether it is necessary for the Commission to have

the power to enact the rules in question to effectuate the objectives and purposes of the civil service. A review of the previous cases where this question was presented is helpful in determining the answer in the instant matter.

In *Firefighters I,* the supreme court concluded that "it was not necessary for the Civil Service Commission of the City of New Orleans to have power to modify statewide minimum wage levels established by the Legislature in order to adopt a uniform pay and classification plan for the City or to achieve the civil service objectives of safeguarding merit selection and promotion, protecting against discriminatory dismissal, and safeguarding public employees from political influence or reprisal." *Firefighters II,* 590 So.2d at 1176 (citing *Firefighters I, supra,* at 411). Additionally, in *Firefighters II,* the court concluded that:

> Neither is it necessary in this case for the Civil Service Commission of the City of New Orleans to have the exclusive power to adopt domiciliary or residency requirements in order to achieve generally the principal objectives of civil service. A residency requirement is unrelated to the selection and promotion of public employees on the basis of merit, fitness and qualifications, to the security of tenure of public employees, or to the protection of public employees against political, religious, racial, gender or similar discrimination or intimidation.

Firefighters II, 590 So.2d at 1177.

Finally, after reviewing the analyses in both of the *Firefighters* cases, the court in *Sumrall* concluded similarly, holding that "it is unnecessary for the Commission to have the power to enact rules expanding its jurisdiction in order to achieve the goals and principal objectives of the civil service." *Sumrall,* 728 So.2d at 1262. The court reasoned that the civil service provisions in the constitution are "designed to protect public career employees from political discrimination by eliminating the 'spoils system.'" *Id*. (citing La. Const. art. X, § 1, *et seq.)*. Further, the court found that the rules at issue in *Sumrall* were in conflict with La. Const. art. II, § 2, which provides for the separation of powers between the three branches of government.

Applying the above supreme court analysis to the instant case, the rules in question, *i.e.,* Rule III, §§ 6.1-6.4 of the Civil Service Commission of the City of New Orleans, constitute an unwarranted expansion of the Commission's jurisdiction. These rules, as the supreme court found in the above cases involving conflicts of power, are not necessary for the City Civil Service Commission to achieve its principal objectives of regulating employment of classified employees and protecting them from discriminatory employment actions. Therefore, under the second step of the analysis for constitutionality, the civil service rules in question are not

authorized where they conflict with the City's ability to contract.

The constitutionally-granted authority that flows to the City as a pre-existing home rule charter governing body (*i.e.*, pre-existing the 1974 Constitution) underlies the City's freedom to contract for the management of its property as one of the fundamental aspects of its deployment of its powers and functions. The executive branch must be free to run the City in a fiscally-responsible manner as it has done in the instant situation where thousands of dollars would be saved each year by the implementation of the current contract with SMG – dollars that could be devoted to other essential priorities of City government. This freedom to contract belongs to the executive branch, and its pertinent departments, as authorized by the Constitution under the broad governing powers of a pre-existing home rule charter entity, and such freedom must be protected from undue interference as the above jurisprudence demonstrates.

Therefore, I respectfully dissent from the majority opinion and would find that Rule III of the Civil Service Commission of the City of New Orleans is unconstitutional because it conflicts with the powers of the pre-existing home rule charter governing authority, the City of New Orleans. I would reverse the district court's judgment in favor of the Commission and dismiss the Commission's case.