

STATE OF MICHIGAN
COURT OF APPEALS

ARITA MAGEE,

Plaintiff-Appellee,

v

RETIREMENT COMMISSION OF THE
GENESEE COUNTY EMPLOYEES'
RETIREMENT SYSTEM,

Defendant-Appellant.

UNPUBLISHED

March 16, 2001

No. 218292

Genesee Circuit Court

LC No. 96-051716-CK

Before: K. F. Kelly, P.J., and Smolenski, Meter, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court order resolving plaintiff's petition for writ of superintending control. We reverse the circuit court's decision and dismiss plaintiff's petition.

I. Factual and Procedural Background

On January 22, 1981, plaintiff entered into a contract with the Genesee County Clerk. Under that contract, plaintiff agreed to perform specific services for the Genesee County Road Commission. In general, plaintiff's duties involved keeping the minutes for the road commission's board meetings. For approximately twelve years, plaintiff performed the duties set forth in her contract with the county. During that time period, she did not work a full-time schedule, but worked an average of approximately 5 to 6 hours per week.

The county clerk provided all the office space, equipment and supplies used by plaintiff in performance of her contractual duties. The county clerk provided plaintiff with computer training and also provided a replacement employee to perform plaintiff's duties when she was unavailable. Plaintiff's contract with the county specified a flat hourly rate for her services and stated that plaintiff would be considered as an independent contractor, not as an employee of either the county or the road commission. Finally, the contract specified that plaintiff was not "entitled to receive any benefits" as a county or road commission employee.

On October 7, 1993, plaintiff requested permission to purchase service credits in the Genesee County Employees' Retirement System for the twelve years during which she kept the

road commission minutes. Defendant denied plaintiff's request for service credits, finding that plaintiff's services were not rendered as a member of the retirement system. Rather, defendant found that plaintiff was a person "engaged for special services on a contract or fee basis" under an exception defined in § 16(b)(1) of the retirement system ordinance.

Plaintiff filed a complaint for superintending control pursuant to MCR 3.302(E), requesting that the circuit court compel defendant to provide her with the requested service credits. The circuit court stated on the record that it would not issue an order of superintending control. Instead, the circuit court issued an order stating that plaintiff "was not a person who was engaged for special services on a contract or fee basis as that term is used in section 16(b) of the Genesee County Employees' Retirement System Ordinance." The circuit court then remanded the case to defendant with instructions to conduct a rehearing consistent with the circuit court's ruling. The record reveals that the circuit court retained jurisdiction over the matter, scheduling another hearing in order to ensure that defendant resolved plaintiff's request for retirement service credits. Defendant appeals as of right. We reverse.

II. Petitions for Writs of Superintending Control

MCR 3.302(E) governs the procedure that a circuit court must follow when a party files a petition for writ of superintending control. The rule provides, in pertinent part:

(3) *Issuance of Order; Dismissal.*

(a) After the filing of a complaint and answer or, if no answer is filed, after expiration of the time for filing an answer, the court may

(i) issue an order to show cause why the order requested should not be issued,

(ii) issue the order requested, or

(iii) dismiss the complaint.

(b) If a need for immediate action is shown, the court may enter an order before an answer is filed.

(c) The court may require in an order to show cause that additional records and papers be filed.

(d) An order to show cause must specify the date for hearing the complaint.

"Superintending control is an extraordinary power that may be invoked when the plaintiff demonstrates the defendant's failure to perform a clear legal duty and the absence of an adequate legal remedy." *In re Gosnell*, 234 Mich App 326, 341; 594 NW2d 90 (1999). An order of superintending control has traditionally been used only to determine if the inferior tribunal had jurisdiction, whether it exceeded that jurisdiction, and whether it proceeded according to law. *Id.* Furthermore, the circuit court's review of the inferior tribunal's decision is limited to questions

of law. *Id.* The circuit court may not substitute its judgment of the facts for that of the inferior tribunal, but must accept those findings of fact that are supported by substantial evidence on the whole record. *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994).

III. Standard of Review

As an initial matter, we note that the circuit court lacked authority to issue the remand order in the present case. MCR 3.302(E)(3)(a) permits a circuit court only three options when ruling on a party's petition for a writ of superintending control: (1) issue an order to show cause why the order requested should not be issued, (2) issue the order requested, or (3) dismiss the complaint. The court rule does permit the circuit court to issue a show cause order requiring a party to file additional records and papers in the circuit court. MCR 3.302(E)(3)(c). However, the court rule does not explicitly permit a circuit court to retain jurisdiction over a plaintiff's petition while remanding to the inferior tribunal with instructions to conduct further hearings. Because the circuit court chose not to issue an order to show cause, it was required to either issue the requested order or dismiss plaintiff's complaint.

Although the circuit court stated on the record that it was not granting plaintiff's petition for superintending control, we conclude that its order effectively did so. The circuit court's order granted plaintiff the relief that she requested in the petition, i.e., ordered defendant to conclude that plaintiff "was not a person who was engaged for special services on a contract or fee basis" under § 16(b)(1) of the retirement system ordinance. Defendant's factual determination to the contrary was the sole basis on which defendant denied plaintiff's request for service credits. Accordingly, for purposes of our review, we must treat the circuit court's decision as an order granting plaintiff's petition for superintending control. This Court reviews for abuse of discretion a circuit court's decision to grant or deny an order of superintending control. *Gosnell*, *supra* at 333.

IV. Analysis

Defendant argues on appeal that the circuit court erroneously substituted its own factual determination for that of defendant when it concluded that plaintiff did not fall within the category of persons described in § 16(b)(1) of the retirement system ordinance. We agree.

The circuit court may grant a writ of superintending control only when the defendant has failed to perform a clear legal duty. *Gosnell*, *supra* at 341. When reviewing a petition for writ of superintending control, the circuit court may only determine questions of law, and may not resolve questions of fact. *Id.* If the defendant's decision is supported by substantial evidence in the record, the circuit court must accept the defendant's findings of fact. *Payne*, *supra* at 692. Further, the circuit court may not set aside the defendant's findings of fact "merely because alternative findings also could have been supported by substantial evidence on the record." *Id.*

Applying this standard in the present case, we cannot conclude that defendant's findings of fact were unsupported by substantial evidence. Defendant determined that plaintiff was not eligible for retirement service credits because she fell within an exception defined in § 16 of the retirement system ordinance, which provides:

(a) All persons who are employees of an employer, and all persons who become employees of an employer, shall become members of the retirement system, except as provided in subsection (b) of this section.

(b) The membership of the retirement system shall not include (1) *any person who is engaged for special services on a contract or fee basis . . .*

(d) In any case of doubt the Retirement Commission shall decide who is a member of the retirement system and to which general group of employees a member belongs within the meaning of the provisions of this ordinance. [Emphasis added.]

Defendant determined, as a factual matter, that plaintiff was “engaged for special services on a contract or fee basis.” Accordingly, defendant held that plaintiff was not a member of the retirement system and denied her request for retirement service credits. Plaintiff admits that she provided services for the road commission under contract with the county clerk. Accordingly, substantial evidence exists to support defendant’s conclusion that plaintiff worked for the county on a “contract basis.”¹

However, plaintiff contends that the record is devoid of substantial evidence that she was engaged for “special services.” We disagree. Plaintiff’s contract specified the services that plaintiff would perform, and plaintiff admits that she provided no services beyond those stated in the contract. Although plaintiff may have performed services similar to those services performed by employees of the county clerk, she did not perform all the tasks and duties performed by those employees. Further, plaintiff worked only on a limited basis, averaging approximately 5 to 6 hours per week. Finally, plaintiff’s contract clearly provided that she was not “entitled to receive any benefits” as a county or road commission employee.²

We believe that the record contains substantial evidence supporting defendant’s factual conclusion that plaintiff fell within the exclusion defined in § 16(b)(1). Although there may have been substantial evidence on the record to support plaintiff’s position, there was also substantial evidence on the record to support defendant’s decision. Accordingly, we conclude that the trial court abused its discretion when it set aside defendant’s factual determination. Because

¹ Plaintiff contends that she does not fall within § 16(b)(1) because the county paid her on an hourly basis, rather than a fee basis. We conclude that this distinction is irrelevant. Section 16(b)(1) excludes “any person who is engaged for special services on a contract *or* fee basis.” Because plaintiff admits that she performed services pursuant to a written contract with the county, it is clear that she performed services on a “contract basis,” and we need not decide whether she performed services on a “fee basis.”

² Plaintiff contends that she does not fall within § 16(b)(1) because she was an employee, not an independent contractor. We conclude that this distinction is irrelevant. Section 16 of the retirement system ordinance does not use the term “independent contractor,” and the ordinance clearly excludes some persons who are employees.

defendant did not fail to perform a “clear legal duty,” the circuit court’s decision to grant plaintiff relief on her petition for writ of superintending control was inappropriate. *Gosnell, supra* at 341. We reverse the circuit court’s decision and dismiss plaintiff’s petition for superintending control.

Reversed.

/s/ Kirsten Frank Kelly

/s/ Michael R. Smolenski

/s/ Patrick M. Meter