

STATE OF MICHIGAN
COURT OF APPEALS

MICHELE ECONOMOU URESTE and STEVEN
KAPLAN,

UNPUBLISHED
June 21, 2012

Plaintiffs-Appellants,

v

WEST BLOOMFIELD TOWNSHIP, HOWARD
ROSENBERG, GENE FARBER, LAWRENCE
BROWN, and CATHERINE SHAUGHNESSY,

No. 303976
Oakland Circuit Court
LC No. 2010-113695-AW

Defendants-Appellees.

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

I. OVERVIEW

This case arises out of a dispute among the trustees of the West Bloomfield Board of Trustees regarding the scope of the board's authority. West Bloomfield is a municipality organized and operating as a Charter Township under the Charter Township Act.¹ Three of the board's trustees, Michele Economou Ureste (the supervisor), Teri Weingarden (the treasurer),² and Steven Kaplan (a trustee), filed this lawsuit. Plaintiffs named the township, the remaining three trustees (Howard Rosenberg, Gene Farber, Lawrence Brown), and the board's clerk, Catherine Shaughnessy, as defendants.³ This appeal now consists of two claims: (1) whether, under MCL 42.12, only the board supervisor may appoint (subject to the board's approval) the police chief, and (2) whether, under MCL 42.6, a trustee is required to accept compensation. The trial court granted summary disposition in defendants' favor as to both these issues, finding that both MCL 42.12 and MCL 42.6 were discretionary provisions. We affirm.

¹ MCL 42.1 *et seq.*

² By stipulation of the parties, Weingarden was dismissed from the suit without prejudice and without costs.

³ In this opinion, the board members who are defendants will be referred to collectively as "defendant-trustees." The term "defendants" will be used when referring to all defendants, including the township.

II. FACTS

A. APPOINTMENT POWER

On August 23, 2010, the board voted to modify the township's employee manual. Before the board's changes, the manual allowed only the supervisor to recommend the removal of a department head. After the board's changes, *any* board member could recommend the removal of a department head, including the power to recommend terminating the police chief. The measure passed, with defendant-trustees voting for the modification of the employee manual.

After the employee manual was modified, the police chief accepted a retirement incentive and retired to avoid being fired. Plaintiffs were opposed to the termination of the police chief, and on September 13, 2010, Kaplan moved the board to rescind its changes to the handbook. The motion failed.

On September 15, 2010, the board began interviewing police chief candidates. Before the board appointed a new chief, Ureste moved the board to acknowledge that only the supervisor could make a recommendation for the new police chief and that the recommendation would then be subject to board approval. The motion failed, with defendant-trustees all voting against the motion and asserting that any board member could recommend a police chief. On October 22, 2010, a majority of the board appointed a new police chief.

B. AUTHORITY TO REDIRECT COMPENSATION

The board sets the trustees' compensation. From November 2008, when defendants were elected, until the filing of the complaint, the trustees earned \$125 a meeting, and the board approved payment to defendant-trustees.

However, since his election in 2009, Brown declined to accept compensation. Brown redirected his payments to an unofficial Township Water Benevolent Fund. The fund provided payment of water bills for residents facing potential shut-off. The board did not issue tax documents to Brown reflecting compensation for the meetings he attended.

On September 20, 2010, Kaplan moved the board to have the township provide Brown with retroactive tax documentation for the year 2009, reflecting payment for the meetings. The motion failed.

On January 10, 2011, the board passed a resolution stating that the redirection of Brown's compensation was proper and that Brown received \$0 compensation during the 2009 tax year. The resolution also altered the township's budget to reflect allocation of funds to the water benevolent fund in lieu of payments to Brown. Additional resolutions were passed reducing the compensation of Brown, Farber, and Rosenberg for the 2010 and 2011 calendar years and allowing board members to request reductions in compensation in future years.

C. PLAINTIFFS' COMPLAINT

Plaintiffs' complaint challenged the interference with the supervisor's ability to perform her duties as defined in MCL 42.1 *et seq.*, and Brown's failure to accept compensation pursuant

to MCL 42.6. Plaintiffs asserted that, under MCL 42.12, only the supervisor could recommend a police chief. Plaintiffs also asserted that the trustees' responsibilities and duties had not changed enough to warrant alteration of the established salary under MCL 42.6a(6) and that the township was required to issue Brown retroactive tax documentation reflecting payment for meetings attended.

D. MOTIONS FOR SUMMARY DISPOSITION

In response to plaintiffs' lawsuit, defendants moved for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10). Defendants argued that MCL 42.12 was a discretionary provision, under which the board *may* authorize the supervisor to appoint policemen subject to the board's approval. However, according to defendants, nothing in the language of MCL 42.12 required the board to give the supervisor the authority to appoint the police chief. Moreover, defendants argued that sections of the West Bloomfield Ordinance Code provided that the police chief "shall be appointed by the township board" and that the supervisor's authority to change titles and create positions "shall not extend to the office of police chief." Defendants also argued that the trial court should grant summary disposition as to plaintiffs' tax withholding claim because the trial court lacked jurisdiction over federal tax law.

Plaintiffs opposed the motion and countered with a motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Generally, plaintiffs argued there had been an impermissible intrusion upon the authority of the supervisor in contravention of the Charter Township Act. In particular, plaintiffs argued that the township had discretion to establish a police force under MCL 42.12. However, according to plaintiffs, that discretion did not allow the creation of a police force beyond what was envisioned by the Charter Township Act. Plaintiffs contended that the general grants of power to the board should not be construed to trump the specific provisions in MCL 42.12. Plaintiffs asserted that appointing a police chief was an administrative process, not a legislative act, and the board's legislative power was not unlimited. Plaintiffs also argued that Brown could not refuse to receive payment for attending board meetings and that no authority allowed him to divert payment of his salary elsewhere. Plaintiffs argued that, as a matter of law, the salary of a public employee, once established, could not be rejected by an employee.

E. THE TRIAL COURT'S DECISION

The trial court determined that MCL 42.12 was discretionary and did not require that only the supervisor be allowed to appoint the police chief. The trial court concluded that § 18-20 of the West Bloomfield Ordinance Code was evidence that the township had already determined that the supervisor did not have sole authority to appoint the police chief. The trial court also determined that no authority cited by plaintiffs conferred upon the supervisor the sole authority to terminate a department head or negotiate collective bargaining agreements.

The trial court rejected defendants' argument that it lacked jurisdiction to decide the matter of Brown's refusal of compensation because the question was not one of federal tax law but Michigan statutory and case law regarding a public employee's receipt of compensation. The trial court opined that a public employee cannot accept less than a statutory salary and found

diversion of township funds was not proper. Accordingly, as to the compensation issue, the trial court found that plaintiffs' complaint stated a claim upon which relief may be granted.

After consideration of the parties' further motions, the trial court provided the parties with the opportunity to submit additional arguments on the propriety of summary disposition on the issue of Brown's compensation. After considering such additional argument, the trial court determined that MCL 42.6 was discretionary and did not require a trustee to accept compensation for attending meetings. According to the trial court, funds not accepted by a trustee would lapse into the general fund. The trial court also determined that MCL 42.6a was an alternative means of setting compensation and did not apply. Accordingly, the trial court granted summary disposition to defendants.

Plaintiffs now appeal the trial court's order declaring that (1) MCL 42.12 was discretionary and finding that the supervisor did not have to recommend termination of department heads and (2) that MCL 42.6(A)(6) permitted a trustee to reject compensation and that the township was not required to retroactively issue tax documentations reflecting payment for meetings a trustee attended but rejected compensation.

III. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

At various points in the proceedings below, the parties brought motions under MCR 2.116(C)(4), (C)(8), and (C)(10). The trial court did not specify under what subrule of MCR 2.116(C) summary disposition was appropriate. However, it is clear from the record that the trial court rejected defendants' argument under MCR 2.116(C)(4) that the trial court lacked jurisdiction. Further, review under MCR 2.116(C)(8) is also inappropriate because the trial court considered materials beyond the pleadings.⁴ Accordingly, we review summary disposition under the MCR 2.116(C)(10) standard.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and the trial court should grant such a motion, as a matter of law, where no genuine issue of material fact exists to warrant a trial.⁵ In considering a motion under MCR 2.116(C)(10), the Court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party.⁶

This Court reviews de novo a trial court's decision on a motion for summary disposition.⁷ This case also presents questions of statutory interpretation that this Court reviews de novo.⁸

⁴ *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

⁵ *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

⁶ *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁷ *Spiek*, 456 Mich at 337.

B. APPOINTMENT POWER

1. LEGAL STANDARDS

Townships, including charter townships, exist under Michigan's Constitution, which provides that "[e]ach organized township shall be a body corporate with powers and immunities provided by law."⁹ "[T]he powers granted to townships by the Constitution and by law must include only those fairly implied and not prohibited by the Constitution."¹⁰ Thus, "local governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the state constitution or state statutes or which are necessarily implied therefrom."¹¹ It is well recognized that the Constitution and laws concerning townships, including charter townships, "shall be liberally construed in their favor."¹²

This Court employs the usual rules of statutory construction to evaluate statutes governing municipal bodies.¹³ The goal of statutory interpretation is to discern the Legislature's intent.¹⁴ We look first to the language of the statute, and where the language is "clear and unambiguous the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted."¹⁵ In analyzing statutory language, we give words their "ordinary and generally accepted meaning."¹⁶ We avoid constructions that would "render any part of the statute surplusage or nugatory."¹⁷ Moreover, we "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute,"¹⁸ nor may we add language to the statute that the Legislature did not include.¹⁹

2. APPLYING THE STANDARDS

We begin by rejecting defendants' argument that we lack jurisdiction over the issue relating to the appointment of the police chief. Defendants argue that under MCR 7.204(C)(1) plaintiffs were required to submit a copy of the January 5, 2011 trial court order, in which the

⁸ *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

⁹ Const 1963, art 7, § 17.

¹⁰ *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005); Const 1963, art 7, § 34.

¹¹ *Conlin v Scio Twp*, 262 Mich App 379, 385; 686 NW2d 16 (2004) (citation omitted).

¹² Const 1963, art 7, § 34; *Hess*, 265 Mich App at 590.

¹³ *Conlin*, 262 Mich App at 386.

¹⁴ *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003).

¹⁵ *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003).

¹⁶ *Tryc v Mich Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996).

¹⁷ *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

¹⁸ *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003).

¹⁹ *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997).

trial court disposed of the police chief claim. MCR 7.204(C)(1) provides that “[w]ith the claim of appeal, the appellant shall file the following documents with the clerk: (1) a copy of the judgment or order appealed from . . .” However, it is well recognized that “[a]n appeal of right is available only from a final order.”²⁰ And, here, the January 5, 2011 order was not a final order because it did not dispose of all claims in the case.²¹ Instead, the final order was entered April 13, 2011. And plaintiffs properly appealed the April order and provided a copy to the clerk. Thereafter, plaintiffs were free to raise issues relating to other orders in the case because they claimed their appeal from a final order and complied with MCR 7.204(C)(1).²²

Analysis of the authority to appoint a police chief begins with MCL 42.12, which states, in pertinent part:

The township board in each charter township may provide for and establish a police force and authorize the supervisor, or the township superintendent if one has been appointed, to appoint, subject to the approval of the said board, a township marshal and such other policemen and watchmen as may be required to protect property and preserve the public welfare and safety in that portion of the township not included within the corporate limits of any village or villages located wholly or in part within the township. . . .

The term “may” is discretionary or permissive, as opposed to the use of “shall” which is mandatory.²³ Accordingly, the portion of MCL 42.12 allowing for the establishment of a police force is discretionary. However, the dispute here is whether the board is required to authorize the supervisor to appoint the police chief.

We agree with the trial court that the board has discretion to establish a police force, and having established a police force, the board has discretion to authorize the supervisor to appoint policemen. We note that this interpretation provides the township with the greatest degree of control over the functioning of its police force, and it is the type of liberal construction required by our Constitution.²⁴

The plain language of MCL 42.12 clearly provides that the board “may . . . authorize the supervisor.”²⁵ In this phrase, the Legislature gave the board the discretionary power to “authorize” the supervisor to appoint policemen. If the Legislature intended to create a mandatory power of appointment for the supervisor, then it could have done so by simply saying

²⁰ *Dean v Tucker*, 182 Mich App 27, 30; 451 NW2d 571 (1990).

²¹ MCR 7.202(6)(a).

²² *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

²³ *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008); *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 318; 596 NW2d 591 (1999).

²⁴ Const 1963, art 7, § 34.

²⁵ MCL 42.12.

“the supervisor shall appoint policemen subject to board approval.” We will not add mandatory language the Legislature did not include.²⁶

This reading of the statute is harmonious with the rest of MCL 42.12, which provides that “[t]he township board *shall* make *all* necessary rules for the government of the township police force and its members” “[T]here is no broader classification than the word ‘all.’ In its ordinary and natural meaning, the word ‘all’ leaves no room for exceptions.”²⁷ The statute, taken as a whole, does not indicate that the Legislature intended to temper this broad grant of mandatory legislative authority by requiring the board to authorize the supervisor to appoint policemen.

Although not necessary to resolve plaintiffs’ claim, we also note that MCL 41.806(1)(c) specifies that township boards have the power to appoint police chiefs. While MCL 41.806 governs general townships, and is not part of the Charter Township Act, MCL 42.5(2) provides that: “[t]he elected township board described in subsection (1) shall be the successor to the prior township board of the township and shall possess the powers and perform the duties of township boards in townships in addition to the powers granted by law to charter townships.” Accordingly, the charter township board is vested with those powers not conflicting with the Charter Township Act, including the power to appoint the police chief.²⁸

In reaching our decision, we also reject plaintiffs’ contention that the power to appoint the police chief properly rests with the supervisor because appointment is an administrative rather than a legislative act. Admittedly, MCL 42.5(2) provides that “the supervisor shall be . . . executive officer of the board.” However, this Court has previously held that the term “executive officer” only denotes a leadership role within the board itself, not an executive role in the township.²⁹ A charter township includes *only* a “legislative branch,” and there is no separation of powers argument to be made as to the appointment of the police chief.³⁰

In keeping with their powers under MCL 42.12, the West Bloomfield township board established an ordinance specifying that the board shall appoint the police chief.³¹ Because the board had the authority to make this ordinance, and indeed followed the ordinance, it was lawful for someone other than the supervisor to recommend a police chief. Thus, there is no material question of fact warranting a trial and summary disposition was appropriate under MCR 2.116(C)(10).

²⁶ *Empire Iron Mining Partnership*, 455 Mich at 421.

²⁷ *Skotak v Vic Tanny Int’l, Inc.*, 203 Mich App 616, 619; 513 NW2d 428 (1994).

²⁸ MCL 42.5(2); MCL 41.806(1)(c) (appointment power).

²⁹ *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 588; 640 NW2d 321 (2001).

³⁰ *Id.* at 587-588.

³¹ West Bloomfield Ordinance, § 18-20.

C. TRUSTEE COMPENSATION

1. LEGAL STANDARDS

We first note that MCL 42.6a(6) does not apply because it is a subpart of MCL 42.6a, which establishes alternative means for setting compensation through a commission. Because West Bloomfield does not employ a commission to set compensation, MCL 42.6a is inapplicable, and we review plaintiffs' claims in light of MCL 42.6.

MCL 42.6 provides:

A trustee may receive, in addition to other emoluments provided by law for his service to the township, a sum per meeting of the board actually attended by him, as established by the township board to be paid upon authorization of the township board. The supervisor, the township clerk, and the township treasurer shall receive no additional compensation for attending meetings of the board. Reasonable expenses may be allowed to members of the township board when actually incurred on behalf of the township.

Unlike the trial court, we conclude that MCL 42.6 does not empower a trustee to decline compensation. Instead, the trustee's receipt of "a sum per meeting" is "as established by the township board." In other words, MCL 42.6 authorizes the board, not the trustee, to pay the trustee and set the terms of his or her compensation. Moreover, a trustee may not decline compensation after it has been set.³²

2. APPLYING THE STANDARDS

Here, it is undisputed that each trustee was set to receive \$125 a meeting. The board of trustees did not have the authority to reject their compensation.³³ Moreover, we are unaware of any authority that would allow a trustee to refuse compensation and then direct it into a general township fund. However, the board's retroactive resolutions appear to resolve this problem. In particular, the board retroactively stated that the trustee in question was entitled to \$0 for 2009, 2010, and 2011. The board also ratified the use of his compensation for the water benevolent board fund and established a process that will allow future trustees to decline the compensation.

³² *Brown v State Dep't of Military Affairs*, 386 Mich 194, 200; 191 NW2d 347 (1971) ("Salaries of public officers which are established by law are not determined by contract or agreement between the parties. . . . The public employee cannot accept less."). See also *Lee v Macomb Co*, 288 Mich 233, 237; 284 NW 892 (1939):

The salary of an officer, when once fixed in the manner prescribed by law, can be changed only by a like compliance with the statutory conditions; and by accepting a smaller amount than that to which he is entitled, the officer does not waive his right to recover the full salary.

³³ *Brown*, 386 Mich at 200.

MCL 42.6 does not place specific limits on how the board may “establish” per-meeting compensation. Thus, it appears that the board has the authority to legislate whether trustees may refuse compensation.³⁴ Moreover, this Court has recognized retroactive modifications of compensations, stating in particular that the township board is “empowered to obviate mistakes and irregularities in its prior proceedings through retroactive resolutions, so long as they do not impair the rights of third persons.”³⁵ Retroactively setting the trustee’s compensation to \$0 resolves any irregularities between what Brown accepted and what he was entitled to; there is also no reason to suppose such a change would impact the rights of third persons.³⁶ We therefore affirm the trial court’s grant of summary disposition because, as a result of the resolutions, Brown received the sum he was required to accept as a matter of law.³⁷ And although our reasoning differs from that of the trial court, we will affirm a grant of summary disposition where the right result is reached for the wrong reason.³⁸

Additionally, like the trial court, we decline to consider the legality of the water benevolent fund established by the board because the issue was not raised in plaintiffs’ complaint. A plaintiff may not litigate claims not raised in his pleadings.³⁹ Moreover, plaintiffs have not sought the leave of this Court or the trial court to amend their complaint.⁴⁰ Because the matter was not properly pleaded, we decline to review it on appeal.⁴¹

We affirm.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan

³⁴ MCL 42.6.

³⁵ *Deshler v Grigg*, 90 Mich App 49, 55; 282 NW2d 237 (1979).

³⁶ *Id.*

³⁷ *Brown*, 386 Mich at 200.

³⁸ *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

³⁹ *Belobradich v Sarnsethsiri*, 131 Mich App 241, 246; 346 NW2d 83 (1983).

⁴⁰ MCR 2.116(I)(5); MCR 2.118(A)(2); MCR 7.216(A)(1).

⁴¹ *Dolan v OM Scott & Sons*, 23 Mich App 13, 14; 178 NW2d 108 (1970).