

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001416-MR

JAMES PHILLIP GRIES, LAWRENCE GLASER,
PETER D. MCNARTNEY, GLENN MINOR,
DION D. DODSON, GINGER MARX, ROBERT
BRIAN BERNARDI, AND JERRY NIEVES

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 06-CI-006441

LOUISVILLE-JEFFERSON COUNTY
METROPOLITAN GOVERNMENT,
LOUISVILLE METRO POLICE MERIT
BOARD, YVETTE GENTRY, ANDREW
AMHREIN, ROBERT SCHROEDER, AND
DAVID GRAY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND MOORE, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

BUCKINGHAM, SENIOR JUDGE: This appeal concerns the interpretation of a statute that governed the promotion of police officers within the Louisville Metro Police Department (LMPD) after the merger of the governments of Jefferson County and the City of Louisville. Nine officers (James Phillip Gries, Lawrence Glaser, Peter D. McNartney, Glenn Minor, Dion D. Dodson, Ginger Marx, Robert Brian Bernardi, Jerry Nieves, and Harold Miller²) brought an action against the Louisville-Jefferson County Metropolitan Government and the Louisville Metro Police Merit Board, challenging the Board's interpretation of Kentucky Revised Statutes (KRS) 67C.319(6) as it applied to the calculation of seniority for promotion purposes. Four other officers (Yvette Gentry, Andrew Amhrein, Robert Schroeder, and David Gray), who received their promotions in July 2006, intervened in the lawsuit in support of the Board's position. The Jefferson Circuit Court entered a declaration of rights judgment in favor of the defendants. We affirm.

The appellants are sergeants in the LMPD. In 2006, they all sought promotion to the rank of lieutenant. The promotion process within the LMPD is governed by KRS Chapter 67C, which was passed after the governments of

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Harold Miller was not listed as an appellant in the notice of appeal.

Jefferson County and the City of Louisville merged into a consolidated local government, Louisville-Jefferson County Metro Government, on January 6, 2003.

Under KRS 67C.319, aspiring candidates for promotion receive a rating based upon their scores on various examinations. An applicant's years of service are also a component of the final rating. At the time the appellants sought promotion, KRS 67C.319(6) provided in pertinent part as follows:

Promotional tests shall be graded, as determined by the board, to include written, oral, and other examination scores. **In addition, seniority in grade, not to exceed ten percent (10%), shall be awarded for each year of service after five (5) full years of service.** The results of the written, oral and other examinations shall be combined with seniority to determine the applicant's final evaluated rating.

(Emphasis supplied.)

The appellants construe the highlighted sentence of the statute to mean that seniority credit for purposes of promotion should be given only to applicants who have completed five full years of service in a particular rank or grade. Under their interpretation of the statute, an applicant for a promotion to lieutenant who had served less than five years as a sergeant would receive no seniority credit. By contrast, the Board construed and applied the statute to mean that any years in excess of five years served in any grade would be credited towards promotion.

After their scores are computed, the names of applicants for promotion are placed on a list. Whenever a vacancy becomes available, the names

of the five highest ranking candidates on the list are sent to the Chief of Police, who is free to choose an individual from any of the five to fill the vacancy. The names of the appellants were placed on a list which will expire on June 20, 2008. According to the Board's Chief Examiner, Anne Russo, recalculation of the appellants' scores using their interpretation of the statute would bring the highest-ranking appellant up from number 27 to number 22 on the list. That means that this individual will be eligible for the Chief's consideration (his name will be one of the five submitted) when (and if) the 18th vacancy for lieutenant appears during the lifetime of the list. According to Russo, on the prior lieutenants' promotion list, 19 promotions were made.

After unsuccessfully requesting the Board to limit seniority credit to those candidates with five full years of service "in grade," the appellants filed a complaint in Jefferson Circuit Court on July 21, 2006, seeking immediate injunctive relief as to the rankings on the promotional list and seeking a declaration of rights under the Kentucky Declaratory Judgments Act (KRS Chapter 418). The intervening defendants filed an answer and petition for declaration of rights and were allowed to become parties in the action without objection. On July 19, 2006, the Chief of Police announced the promotion of five individuals to the rank of lieutenant. These included all four intervening defendants and none of the appellants. The appellants' motion for a restraining order was heard on August 8, 2006, at which time the court denied the motion on the ground that the appellants would not suffer immediate harm. After briefing and argument, the court agreed

with the appellants that they had standing to bring this action. It entered a declaratory judgment, ruling that the statute provides that an officer will be given seniority within his grade based on the number of years he has served on the force in any capacity. This appeal followed.

The interpretation of a statute is a matter of law. However, while we ultimately review issues of law de novo, we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing. *Commonwealth., ex rel. Stumbo v. Kentucky Public Service Com'n*, 243 S.W.3d 374, 380 (Ky.App. 2007).

The first argument on appeal concerns the construction of the disputed sentence: “In addition, seniority in grade, not to exceed ten percent (10%), shall be awarded for each year of service after five (5) full years of service.” The appellants argue that the phrase “in grade” is the equivalent to the phrase “in rank” and denotes the promotion ranks of police officer, sergeant, lieutenant, and captain. The appellants contend that the statutory phrase “seniority in grade” refers solely to seniority acquired by serving in a given rank.

In our view, the placement of the phrase “in grade” is dispositive. If the authors of the statute had intended seniority in a particular rank to accrue (for purposes of promotion) only after an individual had served five years in that rank, the phrase “in grade” would have been placed at the end of the sentence where it would modify “years of service.” The plain meaning of the sentence is that seniority in grade will be awarded after five years of service, not after five years of

service in a particular grade. We agree with the circuit court that any other construction would be tantamount to reading language into the statute.

The appellants next argue that the circuit court's interpretation of subsection (6) has the effect of rendering another subsection of the statute, (2)(c), redundant and meaningless, thereby contravening a fundamental principle that a statute must be construed so that no part of it is meaningless and that all parts have effect. *See Kidd v. Board of Educ. of McCreary County*, 29 S.W.3d 374, 377 (Ky.App. 2000) (“A fundamental principle of statutory interpretation is that the legislature intends the act to be effective as an entirety and that each part is entitled to significance and effect. . . . A statute must be construed so that no part of it is meaningless.”).

KRS 67C.319(2)(c) provided:

The rules in addition to other matters shall specifically provide for and cover the following:

A requirement that police officers have five (5) years of service as police officers before being eligible for promotion from lower to higher rank or classification.

The appellants point out that once an officer has served the five years that (2)(c) requires for eligibility for any promotion, section (6)'s requirement of five years' service to be entitled to seniority credit would always be automatically satisfied. According to the appellants, every promotional candidate would have five generic years of service before his or her first promotion under section (2)(c), thereby rendering the five-year requirement in section (6) redundant and without effect.

We disagree. First, subsection (2)(c) governs eligibility for promotion by setting a baseline for such eligibility. Subsection (6) serves the different purpose of setting forth how seniority will be factored into the promotion process. It harmonizes with the earlier subsection, stating that after the first five years are served, subsequent years may form up to 10 percent of a candidate's rating for promotion purposes. These sections of the statute serve distinct purposes, and we see no redundancy or meaninglessness here.

The appellants further contend that the portion of the circuit court's opinion which discusses this issue is confusing or missing a word. It states:

There is no way of knowing how long an officer will serve as a sergeant before he or she is promoted to lieutenant; however long that is, after the initial five years, will be counted toward the officer's seniority as a lieutenant.

We believe the court was merely distinguishing between the five-year minimum required to become eligible for promotion to sergeant and the fact that an individual could serve as a sergeant for any number of years ("however long that is") after that before applying for promotion to lieutenant.

Furthermore, at the time the statute was passed, there were concerns about seniority rankings in the newly merged county and state police forces. Prior to merger, it was possible for some Jefferson County Police Department sergeants to become lieutenants with less than five years of service as a police officer. A county police officer could enter the department as a lateral transfer, or "Police Officer C." Because a Police Officer C could become eligible for promotion to

sergeant after only three years at that rank, lateral hires could become lieutenants after only three years with the department. Therefore, without the provision of KRS 67C.319(6), it would have been possible for a pre-merger Jefferson County Police Department sergeant to become a lieutenant with the post-merger Metro Police Department with less than five years of service as a police officer. Anne Russo, the Board's Chief Examiner submitted an affidavit wherein she stated

It is my belief and understanding that the requirement for five years of service in KRS 67C.319 for Sergeants competing for the Lieutenant position was to prevent individuals transferring into the Louisville Metro Police Department ("LMPD") as laterals from another department from being able to leap ahead of individuals already employed by LMPD and that they be required to serve five (5) years with LMPD before competing for a promotional position.

The record also contains a copy of an e-mail from Lieutenant Jerald Fifer who served on the negotiating group for the River City FOP Lodge 614 that states:

I disagree that the ambiguous wording of 67C.319 translates into only 5 year Sergeants getting credit for their seniority as a Sergeant or "Seniority in Grade." That was not the intent of our negotiations in amending chapter 67 in 2002 and again in 2003. Then Lodge #14 VP John Minogue and myself as the then VP of Lodge #6 handled the negotiations for the Merit Bill. Anne Russo and Jeff Prewitt represented the government's interests. The only intent on the wording of 5 years of service was to insure that only those officers with 5 years of service could compete in a promotional process for the rank of Sergeant. Even if a strict interpretation is applied it fails to translate into only those Sergeants serving for a full 5 years as Sergeant be given credit for a Lieutenant Test. If that were the case it would say that, the intent of the

wording was to insure that laterals not be allowed to sit for a promotion test until they have 5 years of service.

All of this evidence serves to support the conclusion that the circuit court's interpretation of the disputed section does not make the other section redundant.

The appellants' next argument is based on a comparison of the disputed sentence to a similar provision of the older statute which governed promotion in the Jefferson County Police Department, KRS 78.440(7). It stated:

The grading of promotional tests shall be as follows: sixty percent (60%) for written examination; thirty percent (30%) for oral examination; one percent (1%) for each year in seniority in grade, not to exceed ten percent (10%). **Seniority points shall be awarded for each year of service after five (5) full years of service.** The results of the written and oral examinations shall be added to the seniority points available to each applicant in determining the applicant's final evaluated rating.

The appellants contrast the sentence that is highlighted above in the old statute with the analogous sentence at issue here ("In addition, seniority in grade, not to exceed ten percent (10%), shall be awarded for each year of service after five (5) full years of service."). They contend that the addition of the phrase "in grade" indicates that the General Assembly intended to change the promotion policy when it drafted the merger statute and that the addition of the phrase triggers the doctrine of statutory construction known as *eiusdem generis*.

The rule of *eiusdem generis* (of the same kind) is that where, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind,

class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose. Ballentine's Law Dictionary, Second Edition, page 424; *Burke v. Oates, Commissioner of Revenue*, 293 Ky. 563, 169 S.W.2d 608; 50 Am.Jur. 244.

Steinfeld v. Jefferson County Fiscal Court, 312 Ky. 614, 617, 229 S.W.2d 319, 320 (1950).

The rule of ejusdem generis is used to determine (and usually to limit) the scope of a general term when it follows a list of specific objects. For example, in *Garcia v. Commonwealth*, 185 S.W.3d 658 (Ky.App. 2006), this court relied on the doctrine of ejusdem generis to determine whether a cracked windshield constituted a nuisance under KRS 189.020, which states as follows:

Every vehicle when on a highway shall be so equipped as to make a minimum of noise, smoke or other nuisance, to protect the rights of other traffic, and to promote the public safety.

Application of the rule of ejusdem generis meant that “other nuisance” “should be interpreted as including only those nuisances of a similar kind as noise and smoke.” *Garcia*, 185 S.W.3d at 664. On that basis, the court concluded that the term “other nuisance” did not encompass a cracked windshield.

By contrast, KRS 67C.319(6) contains no enumeration of specific terms followed by a general term; we are simply presented with two different terms with no indication that the second is in some way restricted by the first. The application of this rule of statutory construction to the statute at hand is therefore inapposite.

The appellants next argue, based on definitions found in the Merit Board rules, that the terms “seniority in grade” and “years of service” are essentially identical and that, therefore, five years of service means five years of service in grade. The appellants point to the fact that seniority is commonly defined as length of service and that it is defined in the Merit Board’s own rules as “[t]he status or priority given an employee based on length of service of the employee in grade.” They also point to the fact that all uses of the term “seniority” in the Merit Board’s rules refer to time in grade. They assert that because “seniority” is defined as length of service, and since seniority is also defined as time “in grade,” then that definition must also apply to seniority’s synonym: years of service. The fact remains, however, that the placement of the phrase “in grade” indicates that it is intended to modify the word “seniority,” not “years of service.”

The appellants next argue that the appellees erroneously relied on the prior practices of the pre-merger city and county police departments to support their interpretation of the statute. They argue that the General Assembly’s choice of language trumps any prior practices and that if the legislature had intended to continue the practices under the prior county police statute, it would have used the same language. They also contend that the circuit court in effect applied a theory of estoppel to reject their claims. The pertinent section of the circuit court’s opinion states as follows:

Though the Plaintiffs make the compelling argument that the Board’s interpretation of the old statute has no bearing on this case, in that the statute’s language has

changed, it cannot be ignored that the Board has been interpreting and enforcing the “new statute” in consonance with the “old statute’s” interpretation for the last five or six years. The Court is inclined in this instance, where the statute can possibly be read either way, to give deference to the Board’s reading of the statute, especially since this interpretation has lain unchallenged for years.

The circuit court also mentioned that the Board’s interpretation of the statute had not been challenged since the merger several years before.

We agree with the court’s analysis, which does not rely on the theory of estoppel but rather finds additional support for its interpretation of the statute in the fact that the Board had been interpreting and enforcing the new statute in consonance with the old one for several years. “[W]hile we ultimately review issues of law de novo, we afford deference to an administrative agency’s interpretation of the statutes and regulations it is charged with implementing.” *Commonwealth., ex rel. Stumbo*, 243 S.W.3d at 380.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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