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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002031-MR

CAROL CAMPBELL; PATRICK NICHOLS;
SHAWN D. PECK; LEANN SHAUGHNESSY;
CARL E. WEAVER; LYLE E. YEAGER;
(INDIVIDUALLY AND IN THEIR OFFICIAL
CAPACITY AS MEMBERS OF THE LYNNVIEW
CITY COUNCIL) APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 07-CI-002949

ROBERT BRYANT, MAYOR,
CITY OF LYNNVIEW APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Members of the Lynnview City Council appeal from an Opinion and Order of the Jefferson Circuit Court determining that an Ordinance

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

passed by the Council seeking to establish a civil service system for the City Police Department was invalid upon its first passage, and, though later properly passed, was not retroactively applicable to Mayor Robert L. Bryant's firing of the city Police Chief upon its second passage.

FACTUAL AND PROCEDURAL BACKGROUND

The City of Lynnview is a Fifth Class city pursuant to Kentucky Revised Statutes (KRS) 81.010(5). The City operates pursuant to the mayor-council plan as described in KRS 83A.130. KRS 83A.130(3) provides, in part, that "[t]he executive authority of the city shall be vested in and exercised by the mayor. . . . He shall supervise all departments of city government and the conduct of all city officers and employees under his jurisdiction[.]" KRS 83A.130(9) provides that "[t]he mayor shall be the appointing authority with power to appoint and remove all city employees, including police officers, except as tenure and terms of employment are protected by statute, ordinance or contract and except for employees of the council." Moreover, a Chief of Police is defined in KRS 83A.080(2)(d) as a nonelected city officer. KRS 83A.080(3) provides as follows:

> All nonelected city officers shall be appointed by the executive authority of the city and, except in cities of the first class, all these appointments shall be with approval of the city legislative body if separate from the executive authority. The officers may be removed by the executive authority at will unless otherwise provided by statute or ordinance. Upon removal of a nonelected officer at will, the executive authority shall give the officer a written statement setting forth the reason or reasons for the removal. However, this requirement shall not be

> construed as limiting in any way the at-will dismissal power of the executive authority.

In the November 2006 General Election appellant Robert Bryant was elected mayor of the City of Lynnview. Prior to his inauguration, on November 27, 2006, the City Council purported to enact Ordinance No. 7, Series 2006-2007, by application of the emergency ordinance enactment provisions contained in KRS 83A.060(7). The emergency provisions of the statute allow that an ordinance may be enacted and immediately become effective without a second reading and the normal publication requirements.

Following his inauguration, on February 20, 2007, Bryant sent Lynnview Police Chief Joseph M. Cunningham a correspondence in which he requested that the Chief bring the KRS statute books and personnel records from the police station to City Hall, and to provide him with a key and the security code to the police station. Cunningham responded, objecting to the requests.

Following Cunningham's failure to timely comply with his requests, on March 21, 2007, Bryant issued a letter purporting to immediately terminate Cunningham from his position as Police Chief. The letter further notified Cunningham that a hearing would be held within 60 days regarding the termination. Cunningham, in his response, asserted that his employment was covered by the civil service provisions alleged to have been enacted by Ordinance 7, and requested that his discharge be governed by the corresponding procedural protections.

On March 23, 2007, Bryant filed a Petition for Declaration of Rights, the present action, seeking to have the November 27, 2006, passage of Ordinance 7 declared invalid.

While the present action was being litigated, on May 9, 2007, a termination hearing, presided over by Mayor Bryant, was held on Cunningham's discharge. At the conclusion of the hearing Bryant upheld the termination.

On September 8, 2007, the circuit court entered an Opinion and Order determining that the City Council's November 27, 2006, passage of Ordinance 7 was invalid because it did not comply with the emergency provisions contained in KRS 83A.060(7), and that the subsequent amended passage of the Ordinance on April 23, 2007, was not retroactive so as to apply to the mayor's termination of Cunningham. This appeal followed.

VALIDITY OF EMERGENCY PASSAGE OF ORDINANCE 7

The City Council contends that the circuit court erroneously determined that the November 27, 2006, emergency passage of Ordinance 7 was invalid. It argues that it properly invoked the emergency provisions of KRS 83A.060(7). KRS 83A.060(7) provides, in relevant part, as follows:

> (4) Except as provided in subsection (7) of this section, no ordinance shall be enacted until it has been read on two (2) separate days. The reading of an ordinance may be satisfied by stating the title and reading a summary rather than the full text.
>
> . . . .

> (7) In an emergency, upon the affirmative vote of two-thirds (2/3) of the membership, a city legislative body may suspend the requirements of second reading and publication to provide for an ordinance to become effective by naming and describing the emergency in the ordinance. Publication requirements of subsection (9) of this section shall be complied with within ten (10) days of the enactment of the emergency ordinance.

Thus an essential requirement to invoke the provisions of 83A.060(7) is that the applicable emergency be described and named. The description and naming of the existing emergency in Ordinance 7 was limited to the following. In the preamble, the following was stated:

> **WHEREAS**, the City Council has determined that an emergency exists with respect to the administration of the LPD [Lynnview Police Department].

Section 6 of the ordinance states as follows:

> Section 6: For the reasons set forth above, an emergency is hereby declared to exist and the provisions of this Ordinance shall become effective immediately upon its adoption by a vote of two-thirds (2/3) or more of this City Council.

The above provisions are the only sections of the Ordinance addressing the issue of an emergency. A naked declaration that an emergency exists which does not describe the emergency, standing by itself, does not meet the requirements of KRS 83A.060 (7). *United Dry Forces v. Citizens for a Progressive Community*, 635 S.W.2d 478, 482 (Ky. 1982). An examination of the foregoing provisions of the ordinance which purport to invoke the provisions of KRS 83A.060 (7) discloses that, at best, the provisions are naked declarations that an

emergency exists and do not describe the emergency. As such, we are constrained to agree with the circuit court that the original passage of Ordinance 7 was invalid.

RETROACTIVITY OF APRIL PASSAGE

Appellants also argue that the April 23, 2007, passage of the Ordinance should be deemed retroactive to November 27, 2006, the date of the original attempt to pass the Ordinance.

The second passage of the ordinance in April 2007 was characterized as an amending of the original Ordinance 7 pursuant to the provisions of KRS 83A.060. The above quoted emergency provisions of the original Ordinance are indicated as being deleted by lines being drawn through the applicable language. The first reading is disclosed to have been on April 17, 2007, and the second reading, and final passage, on April 23, 2007.

We agree with the circuit court that the April passage of the Ordinance cannot be deemed retroactive to November 2006. As previously noted, the original passage did not comply with the emergency provisions contained in KRS 83A.060 (7), and thus the passage was invalid and void. We are unaware of any authority, nor do the appellants cite any, under which a City Council may retroactively breathe life into an Ordinance which was originally invalidly enacted.

Further, Section 7 of the April Ordinance provides that "[t]his Ordinance shall be published according to law and shall take effect upon publication." (Emphasis added). Thus by its own terms the April passage of the

Ordinance was not contemplated to be retroactive and, moreover, this provision is inconsistent with a retroactive application of the Ordinance.

Moreover, KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Additionally, "[a]s a general rule statutes operate prospectively rather than retrospectively, and they will not be given a retroactive effect even where the Legislature has power to enact them, unless such an intention clearly and unmistakably appears from the statute itself." *Snyder v. City of Owensboro*, 555 S.W.2d 246, 249 (Ky. 1977). It follows that the same rationale extends to a municipality's enactment of an ordinance pursuant to KRS 83A.060. Again, no such retroactivity provision is included in the April Ordinance, and thus the general rule that there is no retroactive effect is applicable.

In summary, the circuit court properly determined that the April 2007 passage of the ordinance was not retroactive to November 2006.

CORRECTION OF DEFECT

The City Council also contends that because the final hearing on Cunningham's termination was not held until May 9, 2007, following the passage of the April version of the Ordinance, the civil service system enacted by the ordinance was in effect in time to apply the termination.

As previously noted, Bryant terminated Cunningham by letter dated March 21, 2007. As discussed in the previous section, the April 2007 passage was not retroactive to November 2006. Because the civil service system ordinance

was not in effect at the time of Cunningham's March 21, 2007, termination, we are unpersuaded that it is nevertheless effective as a result of a new Ordinance having been passed during the administrative delay period between the termination and the final hearing on the matter.

VESTED PROPERTY INTEREST

The City Council next argues that at the time of the hearing Cunningham had a vested property interest in his position and thus the May 9, 2007, "non-civil service termination hearing violated the Chief's vested due process rights and was entirely improper and void." It further states that "the date of the hearing itself is the date that is controlling in this case, it is not the date of the Mayor's 'complaint' as the Appellee argued to the Circuit Court and as the Circuit Court's Order stated."

We first note that the City Council has not cited us to its preservation of this issue (Cunningham's alleged vested property interest) as required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Nor are we able to locate in the record the presentation of any argument by the City Council to the circuit court premised upon Cunningham's alleged vested property interest in his job; nor did the circuit court address this argument.[2] Accordingly, this issue is not properly preserved for our review.

[2] Further, whether Cunningham had a vested property interest in his position corresponds with a wrongful termination action, and is not relevant to the present issue of whether Ordinance 7 was properly enacted.

In any event, this argument is, in substance, simply a reframing of the retroactivity arguments previously discussed. Again, we are persuaded that the law in effect on the date of the termination letter is controlling, and, further, we conclude that the passing of the April 2007 Ordinance initiating a civil service system was not effective retroactively to November 2006, and thus is not applicable to Cunningham's termination.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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