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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001045-MR

JOE MORRISON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 15-CI-01733

CITY OF COVINGTON, KENTUCKY; SHERRY
CARRAN IN HER OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF COVINGTON, KENTUCKY;
CHUCK EILERMAN IN HIS OFFICIAL CAPACITY
AS COMMISSIONER OF THE CITY OF COVINGTON,
KENTUCKY; STEVE FRANK IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF THE CITY OF
COVINGTON, KENTUCKY; JORDAN HUIZENGA
IN HIS OFFICIAL CAPACITY AS COMMISSIONER
OF THE CITY OF COVINGTON, KENTUCKY; AND
BILL WELLS IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE CITY OF COVINGTON,
KENTUCKY

APPELLEES

AND NO. 2018-CA-001065-MR

CITY OF COVINGTON, KENTUCKY

CROSS-APPELLANT

v. CROSS-APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 15-CI-01733

JOE MORRISON

CROSS-APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

GOODWINE, JUDGE: Joe Morrison (“Morrison”), a civil service employee, filed suit against the City of Covington, Kentucky, Sherry Carran in her official capacity as Mayor of the City of Covington, Chuck Eilerman in his official capacity as Commissioner of the City of Covington, Steve Frank in his official capacity as Commissioner of the City of Covington, Jordan Huizenga in his official capacity as Commissioner of the City of Covington, and Bill Wells in his official capacity as Commissioner of the City of Covington (collectively “the City”), alleging the City abolished his position in violation of KRS¹ 90.360 and KRS 90.380. Morrison appeals a summary judgment of the Kenton Circuit Court finding the elimination of Morrison’s position was permissible based on an economic necessity. The City cross-appeals, arguing the trial court erred in concluding that Morrison was a civil

¹ Kentucky Revised Statutes.

service employee when he was terminated due to the elimination of his position. After careful review, finding no error, we affirm.

BACKGROUND

On September 17, 2015, Morrison filed a complaint alleging (1) the City violated KRS 90.380 by abolishing his position and terminating his employment; and (2) official misconduct under KRS 522.020. The City filed a motion to dismiss the mayor and city commissioners in their individual capacities and, thereafter, filed its answer to the complaint. The trial court dismissed the mayor and city commissioners in their individual capacities.

On August 30, 2016, the parties agreed to the following factual stipulations: On “April 23, 2001, the City hired Morrison as an Urban Housing Specialist in the Urban Development Department[.]” R. at 35. When Morrison was hired, “the City had a non-uniformed civil service system in effect [under] KRS 90.310 to 90.410.” *Id.* Between 2002 and 2004, Morrison received three step-in-grade increases and was appointed to the position of Code Enforcement Officer II-B in the Code Enforcement Department. *Id.* at 35-36.

The City withdrew from the non-uniformed civil service system by ordinance in 2005. *Id.* at 36. Morrison was appointed to Code Enforcement Officer/Specialist V in 2008 and was appointed to Building Inspector in 2010. *Id.*

In 2012, the City eliminated the Building Inspector position and transferred Morrison to a Code Enforcement Officer position. *Id.*

“On June 23, 2015, the City eliminated the position of Code Enforcement Officer.” *Id.* As a result, Morrison’s employment was terminated on June 30, 2015. *Id.* On “July 7, 2015, the City adopted a job description for the position of Part-Time Fire/Rental Inspector[.]” *Id.* at 37. The City offered Morrison this position, but he declined. *Id.* The City hired “four Part-Time Fire/Rental Inspectors.” *Id.* The economic benefit of switching from two full-time Code Enforcement Officers to four Part-Time Fire/Rental Inspectors was a realization of \$70,712.00 in annual savings. *Id.* Additionally, the four part-time employees worked a combined total of 88 hours per week whereas the two full-time employees worked a combined total of 75 hours per week. *Id.* Also of note, the City achieved a carryover of \$2,190,608.00 in the 2014-2015 fiscal year. *Id.*

Thereafter the parties filed cross-motions for summary judgment. After briefing, the trial court took the matter under advisement and issued a written order granting summary judgment in favor of the City on May 11, 2017 and amended its judgment *sua sponte* by order entered May 17, 2017.

The trial court found Morrison maintained his status as a non-uniformed civil service employee until his termination. The City withdrew from

the non-uniformed civil service system under the Commissioners' Ordinance No. 0-46-05, which provides in pertinent part:

Section 1

That the City of Covington, Kentucky hereby immediately abolishes the Non-uniformed Civil Service System previously adopted under KRS Chapter 90, et seq. for all employees not presently covered under the Non-Uniformed Civil Service System and for all future non-uniformed employees.

All non-uniformed civil service system employees hired by the city after the effective date of this ordinance shall not be classified as a participant in the Non-Uniformed Civil Service System.

Section 2

Current employees of the City classified as Non-Uniformed Civil Service System employees, as of the effective date of this ordinance, shall continue to maintain their status and protection as Non-uniformed Civil Service employees.

R. at 124. The trial court opined “that the plain language and premise” of the ordinance “determines that individuals would maintain their employee status. The [ordinance] made no determination as to the status of job descriptions being civil service vs. non-civil service.” *Id.*

After finding Morrison maintained his status as a non-uniformed civil service employee, the trial court considered whether the City eliminated

Morrison's position out of economic necessity under KRS 90.380(2), which provides:

Whenever in the exercise of a reasonable discretion, it shall be the judgment of the legislative body of the city that economic necessity requires it, or that there is no longer a need for a particular office or position to exist, the board of commissioners may abolish said office or position and any officer or employee occupying said office or position may be laid-off or suspended until and if such office or position is re-created or reestablished. The abolition of any office or position must not be a subterfuge to effect another purpose, but must be actual and bona fide and must not amount to the mere alteration, modification, or abolition of title only.

The trial court found the City's elimination of Morrison's position was an economic necessity as it was one of numerous actions taken to balance its budget. Furthermore, the trial court found the "fact that there was a surplus after all the [C]ity's numerous budgetary reducing actions is not sufficient to controvert the City of Covington's arguments regarding its budget and responsibilities." R. at 125. As such, the trial court granted summary judgment in favor of the city. Following an unsuccessful CR² 59 motion, Morrison appealed.

On appeal, Morrison argues (1) the City did not have an economic necessity required to eliminate his position and; (2) it merely altered, modified, or

² Kentucky Rules of Civil Procedure.

abolished the title of his position. On cross-appeal, the City argues Morrison was no longer a civil service employee at the time he was terminated.

STANDARD OF REVIEW

Because the parties stipulated to the facts at hand, the matter before us is purely a question of law. When interpreting statutes and local ordinances, our review is *de novo*. *Marshall v. Marshall*, 559 S.W.3d 381, 383 (Ky. App. 2018); *Louisville Metro Health Dep't v. Highview Manor Ass'n, LLC*, 319 S.W.3d 380, 382 (Ky. 2010).

ANALYSIS

First, we address the City's argument on cross-appeal. The City argues Morrison was no longer a civil service employee when he was terminated because Morrison was appointed to, and accepted without objection, a Code Enforcement Officer/Specialist V position created after the City withdrew from the non-uniformed civil service. Additionally, Morrison was later transferred to the position of Building Inspector without objection. He was then transferred to the position of Code Enforcement Officer in 2012, which was different than the other code enforcement positions he previously held because it did not include a step-in-grade designation and because the job description stated it was not a civil service position.

Morrison argues although his final position of Code Enforcement Officer was designated as a non-civil service position, because he gained non-uniformed civil service status before the City adopted an ordinance withdrawing from it and because he was merely transferred, appointed, or had his job title changed, he never lost his non-uniformed civil service status. The trial court found Morrison retained his civil service status as “the plain language and premise of Commissioners’ Ordinance No. 0-46-05 determines that individuals would maintain their employee status. The Commissioners’ [sic] made no determination as to the status of job descriptions being civil service vs. non-civil service.” R. at 124. We agree Morrison maintained his status as a civil service employee under the plain language of the ordinance. The stipulated facts indicate he began his employment with the City before it withdrew from the civil service system, the ordinance withdrawing from the system contained a grandfather clause, and Morrison was continuously employed by the City until his position was eliminated. Therefore, we hold Morrison was a civil service employee when his position was eliminated.

Next, we address Morrison’s argument that the City did not have an economic necessity requiring his position to be eliminated because the City had a carryover of over \$2 million. The City argues KRS 90.380(1) provides its legislative body broad discretion in abolishing civil service positions for economic

necessity. “The judiciary should not second-guess the judgment of local government officials. And, substantial deference is afforded local officials in their assessments and inferences of solutions to problems within their city.”

Commonwealth v. Jameson, 215 S.W.3d 9, 35 (Ky. 2006) (citations omitted).

Based on the stipulated facts, the trial court found: “The mere fact that there was a surplus after all the city’s numerous budgetary reducing actions is not sufficient to controvert the City of Covington’s arguments regarding its budget and responsibilities. The Court finds the City acted upon economic necessity within the meaning of KRS 90.380.” R. at 125. We agree.

Morrison directs our attention to *Glass v. Board of Common Council of City of Frankfort*, 262 Ky. 471, 90 S.W.2d 700 (1936). There, the city eliminated three police officer positions by resolution, alleging financial conditions necessitated a reduction in the police force. *Id.* at 701. The same resolution allowed the mayor to appoint special policemen in emergency situations. *Id.* However, “three special or extra policemen were appointed by the mayor who have served continuously since that date, drawing the salary and performing the duties of regular policemen.” *Id.* The Court held the mayor’s act of appointing special policemen in non-emergent situations was an abuse of discretion. *Id.* at 703-04.

The facts at hand are clearly distinguishable. The City submitted the affidavit of its Director of Finance and Operations as proof the City made “across-

the-board budget cuts [which] were necessary for the City to maintain a balanced budget.” R. at 82. Part of that effort included eliminating both full-time Code Enforcement Officer positions and creating four new part-time Fire/Rental Inspector positions in the fire department, which resulted in an annual savings of \$70,712.00. In *Glass*, the city clearly did not recognize any savings when it appointed special policemen and paid them the same salary as regular officers. Here, the City’s decision was a reasonable exercise of its discretion under KRS 90.380 as it recognized an annual savings due to its action. “[A]gency determinations are to be upheld if the decision is supported by substantial, reliable and probative evidence found within the record as a whole.” *Hocker v. Fisher*, 590 S.W.2d 342, 344 (Ky. App. 1979). As such, we hold the City’s decision to eliminate Morrison’s position was based on an economic necessity.

Finally, we address Morrison’s argument that even if the City had an economic necessity, the City merely altered, modified, or abolished the title of his position under KRS 90.380(2). He argues the new position performs only two additional job duties: (1) inspections under the fire code and (2) annual inspections of rental properties. Further, Morrison’s full-time position was in the code enforcement division, while the new part-time positions are in the fire department. He argues the positions are nearly identical, which indicates the city attempted to subvert protections provided to civil service employees. The trial court held:

The fact that [Morrison] was a civil service employee alone cannot be used to infer that economic necessity was not present and the realignment of the code enforcement responsibilities was to terminate a non-uniformed civil servant. The additional facts regarding the budgetary actions taken by the City and the elimination of both Code Enforcement Officers and the realignment in the department to part time positions mitigates against the fact that the code enforcement realignment was executed to abolish a civil service position or to effect [sic] the termination of the plaintiff's civil service status.

R. at 126.

We agree the City eliminated Morrison's position out of economic necessity and did not attempt to subvert his protected status as a civil service employee. The City clearly realigned code enforcement duties as part of a larger effort to balance its budget. The title of Morrison's position was not merely modified, altered, or abolished. Although the new position is similar, the City used its discretion to determine that, in order to achieve a balanced budget, it needed code enforcement duties performed by part-time employees in a different department and needed those employees to perform additional duties. As such, we hold the City's decision was based on an economic necessity and amounted to more than a mere change in title.

CONCLUSION

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

ALL CONCUR.

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