STATE OF MICHIGAN

COURT OF APPEALS

JACK M. MOULIK,

Plaintiff-Appellant,

v

THE STATE POLICE RETIREMENT SYSTEM and THE STATE POLICE RETIREMENT BOARD,

Defendants-Appellees.

UNPUBLISHED
June 1, 1999

No. 200087
Ingham Circuit Court
LC No. 94-0777-7 AA

JACK M. MOULIK,

Plaintiff-Appellant,

v

RITA PONTZ, MICHAEL D. ROBINSON, THOMAS A. TALIAFERRO, DIANE K. DEWITT, P. D. CHANEY, JAMES NEUBECKER, THE STATE POLICE RETIREMENT BOARD, THE STATE POLICE RETIREMENT SYSTEM, MICHIGAN STATE POLICE, DEPARTMENT OF MANAGEMENT & BUDGET, and THE STATE OF MICHIGAN,
jointly and severally,

Defendants-Appellees.

No. 204527
Ingham Circuit Court
LC No. 95-080849 CZ

JACK M. MOULIK,

Plaintiff-Appellant,

v

No. 204528

Court of Claims
LC No. 95-015812 CM

MICHAEL D. ROBINSON, THOMAS A. TALIAFERRO, DIANE K. DEWITT, P. D. CHANEY, JAMES NEUBECKER, THE STATE POLICE RETIREMENT BOARD, THE STATE POLICE RETIREMENT SYSTEM, MICHIGAN STATE POLICE, DEPARTMENT OF MANAGEMENT & BUDGET, and THE STATE OF MICHIGAN, jointly and severally.

Defendants-Appellees.

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

MARKMAN, J. *(concurring).*

I concur with the results of the majority's opinion in this case reversing the forfeiture of plaintiff's retirement benefits. I specifically join the majority in rejecting various arguments raised by defendants, including those asserting that (1) the "public interest" forbids pension benefits for plaintiff; (2) § 24(1) prohibits plaintiff from receiving benefits; (3) plaintiff was not entitled to the accrual of retirement credits during the period of his embezzlement; (4) plaintiff was not entitled to the accrual of retirement credits during his training period; and (5) plaintiff's earliest effective date of retirement must be later than the date on which he purported to retire, May 24, 1993. However, I agree with the trial court that plaintiff "does not cite and the Court cannot find any authority for the view that the appointing authority could not lawfully pursue to completion the disciplinary process put in motion" prior to plaintiff's retirement. Therefore, I write separately to further discuss this issue, although I ultimately join in the reversal of this case.

I agree with the majority that plaintiff had over twenty-five years of "credited service" when he gave notice of his retirement pursuant to § 24(1) of the retirement act on May 24, 1993. However, I disagree that this conclusion, by itself, mandates that we turn immediately and solely to the plain language of § 24(1) in order to resolve the forfeiture issue. Instead, I agree with the trial court that, since the state police had already suspended him, begun an investigation against him, and, in fact, held a disciplinary conference that resulted in a recommendation that he be discharged before he retired, plaintiff was under the jurisdiction of the state police with regard to discipline even after he gave notice of his 'retirement.' The trial court stated:

> [I]t is of no consequence that Petitioner tendered his resignation before the departmental director could formally dismiss him. Petitioner is mistaken in suggesting that resignation and termination from employment are mutually exclusive such that a civil servant's resignation automatically precludes a later discharge for cause. This Court has no difficulty accepting the factual claim that Petitioner did resign and apply for retirement on

> May 24, 1993. That does not mean, however, that the resignation short-circuited the ongoing disciplinary process begun earlier. That process was independent of any personal decision of Petitioner to resign and seek retirement. Petitioner does not cite and the Court cannot find any authority for the view that the appointing authority could not lawfully pursue to completion the disciplinary process put in motion well before this precipitous resignation under charges took place. Thus, the Trial Board's proceedings and decision and the ultimate dismissal for cause were not nullified by Petitioner's prior resignation. [Footnotes omitted.]

I fully agree that plaintiff's notice of his 'retirement' did not instantly disengage the disciplinary proceedings against him. Although the majority states that "the trial court's conclusion that plaintiff could be dismissed for breach of the public trust, even after he effectively retired, finds no support in the law and therefore is clearly erroneous," the citation that follows does not support this statement. *Schultz v Oakland Co*, 187 Mich App 96, 98; 466 NW2d 374 (1991), holds only that a public employee's resignation is effective as soon as it is submitted, regardless of formal acceptance; thus the plaintiff in *Schultz* could not automatically withdraw his resignation and complain of a "discharge" because he was not automatically reinstated. *Schultz* did not address the specific question at issue here, i.e. whether a resignation renders ineffectual a disciplinary action already in progress. Similarly, the case on which *Schultz* relies, *Stearns v Bd of Fire and Police Comm'rs of the City of Carbondale*, 59 Ill App 3d 569; 375 NE2d 877 (1978), does not address the specific issue here. Although *Stearns* is more factually similar to the instant case than *Schultz*-- the plaintiff in that case allegedly committed a crime on September 24, resigned from service on September 25, then was discharged after a hearing before the city manager on September 26-- there is no evidence showing that formal disciplinary proceedings had been initiated *before* the plaintiff resigned. Since there is no discussion or consideration in *Stearns* whether an ongoing disciplinary process would affect the plaintiff's resignation, this opinion does not offer significant guidance in the instant case.

Instead, contrary to the majority's position, there is support in the law for the proposition that the disciplinary proceedings could continue even after plaintiff gave notice of his retirement. In *Matter of Probert*, 411 Mich 210, 222; 308 NW2d 773 (1981), the Supreme Court held that where formal disciplinary proceedings were instituted against a judge who then left his judicial office before the Court could actually discipline him, the former judge was not beyond the Court's disciplinary reach. The Court recognized that "it is difficult to conceptualize how one who does not hold judicial office could be suspended, retired, or removed from office."[1] However, it stated that discipline could still be applied through a "conditional suspension," which would disengage the disciplined party from judicial power if that party occupied another judicial office in the future, and that censure was applicable to both current and former judges. *Id.* at 224. Thus, a judicial discipline case does not become moot when the judge leaves office because effective relief can still be granted and a controversy still exists. *Id.* at 226. The Court stated:

> A judge charged with misconduct should not have the power, simply by leaving office, to short-circuit investigation of the allegations against him, leaving the proceedings incomplete and subject to the abrasion of time. [*Id.* at 226-27.]

In my judgment, the conclusions of *Probert* apply equally well to the case at hand. Obviously, the disciplinary process initiated by the Board here could not have practically forced plaintiff from his position with the police force since plaintiff had 'retired' under duress prior to this time. However, I do not believe that this Court should be so quick to transform the Board's disciplinary process into a nullity merely because *one* of the potential consequences of that process has been short-circuited by the unilateral actions of the investigated party in announcing his 'retirement' before he could be fired. In my judgment, the ancillary effects of a dismissal, as well as various other disciplinary procedures that might be afforded under the law, were still practically available and viable in the instant circumstance. I see no statutory barriers to allowing the disciplinary process to proceed to its natural closure, and imposing upon a disciplined party whatever sanctions remain applicable. Indeed, I believe that, as in *Probert*, it would be unwise to allow those police officers with the most seniority to short-circuit the disciplinary process.[2] Thus, in my judgment, the Trial Board's termination of plaintiff was fully effective, even though the most obvious effect of this discipline, the prevention of plaintiff's return to work and future payment, would not have practically affected plaintiff by the time that it was imposed. However, even if the termination itself was largely academic as a result of plaintiff's prior 'retirement,' certainly other sanctions remained viable and were effective against plaintiff. Merely because plaintiff was able to effectively deprive the Board of *one* of its sanctions-- forced dismissal-- does not mean that plaintiff should be able to deprive the Board of *all* sanctions within its statutory authority.

Unfortunately, regardless whether the Board actually terminated plaintiff or merely had the authority to impose other discipline upon plaintiff because he had already retired, it appears that the Board did not have the authority, under the circumstances of this case, to take away plaintiff's § 24 retirement benefits. I agree with the majority that § 24 is clear and unambiguous and does not contain the provision of § 23[3] and § 30[4] mandating the forfeiture of benefits where there is a "breach of the public trust." I agree with the majority that "the omission of a provision from one part of a statute, which is construed in another part, should be construed as intentional." *Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993). Since, in my judgment, plaintiff was indeed terminated for a breach of the public trust, I believe that the Board conceivably could have forfeited the benefits provided for in either § 23 or § 30. However, because plaintiff fulfilled the requirements of his 'automatic retirement' contract by completing twenty-five years and applying for benefits under § 24, he had a vested right to his § 24 pension benefits. He applied only for these § 24 benefits which did not require compliance with a public trust provision, so the Board did not have a statutory basis for denying him § 24 benefits.

The majority ends its discussion at this point, although I do not believe that the mere lack of the "breach of the public trust" language in § 24 would necessarily prohibit the Board's forfeiture action on some other basis, such as another statute or administrative rule. The absence of a forfeiture provision in § 24 merely precludes forfeiture where there is no other enabling law; it does not affirmatively preclude forfeiture in every conceivable circumstance, as evidenced by the recent enactment of the public employees retirement benefits forfeiture act, MCL 38.2701 *et seq.*; MSA 3.982(1) *et seq*. Even if a plaintiff could effectively retire while in the midst of a disciplinary proceeding, I believe that it is possible to enact a statute or administrative rule that forfeits pension benefits on the basis of the plaintiffs breach of the public trust and not merely on the basis of his 'dismissal' for such breach. However, it does not

appear that such a statute or rule had been enacted at the time that plaintiff was disciplined in this case.[5] Thus, it appears that the Board did not have the authority, statutory or otherwise, to forfeit plaintiff's § 24 pension benefits.

This conclusion is supported first by two opinions of the attorney general. OAG, 1977-1978, No 5188, p 116 (May 5, 1977) states:

> [I]n the absence of legislation imposing a condition of faithful performance, the applicant who meets the age and credited service requirements of the Act . . . may not be denied a retirement allowance because he was discharged from state employment because of a conviction of a misdemeanor involving state property.

Although this opinion dealt with a different retirement statute than that at issue here, the reasoning applies to the statutory retirement benefits at hand because it is extrapolated from the Const 1963, art 9, sec 24 provision which states that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." OAG, 1985-1986, No 6301, at 103 (June 14, 1985) repeated the holding of OAG, No 5188, *supra*, and further stated that it was the "intent of the framers that the harsh common law rule of forfeiture of retirement benefits upon conviction of a crime committed during the course of employment was to be supplanted by a rule that the . . . benefits . . . are a contractual obligation." Thus, where there is no specific authority allowing forfeiture, a plaintiff under the state retirement system may apply for retirement either before or after a disciplinary proceeding and be entitled to full benefits. Second, the conclusion that the Board did not have the authority to forfeit § 24 benefits is supported by the Michigan State Police Department's own official order. Michigan State Police Official Order No. 30, issued October 7, 1991 to members of the department, provides, in paragraph 9(A):

> A member of the department electing to retire or take a deferred retirement after a disciplinary investigation has been initiated against him/her will not be eligible to receive or purchase a departmental retirement badge, identification card, or for enforcement officers, their departmental weapon. Such member will also not be eligible to receive or purchase any other departmental accoutrements otherwise permitted by this order without the approval of the Director. *This will not affect the monetary benefits a retiring employee is entitled to under the pension system*. [Emphasis added.]

Thus, it appears that the Department itself was either aware of the lack of authority for forfeiting an officer's 'automatic retirement' benefits or specifically determined that forfeiture was not to be part of the discipline for officers eligible for retirement benefits regardless of any authority.

Accordingly, I find that I am constrained to join the majority's reversal of the circuit court's decision and conclude that plaintiff is entitled to his § 24 retirement benefits despite his obvious breach of the public trust. I fully join in the majority's reluctance to reverse this case. However, I believe that plaintiff's strategy in retiring before he could be formally dismissed for his breach of the public trust did not work to disengage him from the disciplinary process that was ongoing before his preemptive

retirement. While there were apparently no laws or rules in place that could have been used to forfeit plaintiff's pension, I believe that any disciplinary action for which authority had been provided could have been imposed upon plaintiff regardless of his 'retirement.' The ongoing disciplinary proceedings could not be short-circuited by plaintiff's unilateral actions and the Board continued to have disciplinary jurisdiction even after he attempted to leave the department.

/s/ Stephen J. Markman

[1] The Supreme Court authority to discipline members of the state judiciary flows, in part, from Const 1963, art 6, § 30, which allows the Court to "censure, suspend with or without salary, retire or remove a judge."

[2] A `retirement', such as that which occurred in this case, would only be effective in preserving an officer's pension benefits if he had already accrued the necessary retirement time at the point of such retirement.

[3] MCL 38.1623(2); MSA 5.4002(23)(2) provides:

> A member who resigns, dies, is transferred to a position not covered by the retirement system, or is *dismissed for a reason other than his or her retirement or breach of the public trust*, upon application is entitled to receive in a lump sum, payable to him or her or his or her legal representative if the member dies or is legally disabled, 100% of the contributions made into the reserve for employee contributions. [Emphasis added.]

[4] MCL 38.1630(1); MSA 5.4002(30)(1) provides:

> A member who resigns, dies, is transferred to a position not covered by the retirement system, or is *dismissed for a reason other than his or her retirement or breach of the public trust,* and who meets the requirements of subsection (3) or who has been a member under this act or former Act No. 251 of the Public Acts of 1935, or both, for 10 or more years, is entitled to a deferred retirement allowance in lieu of a payment of a refund of his or her contributions as provided in section 23. . . . [Emphasis added.]

[5] In addition, it appears that in this case, an administrative rule may conflict with the express language of § 24 that a "member retiring under this subsection *shall* be entitled to receive a retirement allowance . . . ," MCL 38.1624(1); MSA 5.4002(24)(1). See MCL 38.1607(4); MSA 5.4002(4)(1); MCL 28.9; MSA 4.439; MCL 28.12; MSA 4.442.