STATE OF MINNESOTA
IN COURT OF APPEALS
A11-350

Allen M. Nelson,
Relator,

vs.

City of Eden Prairie,
Respondent.

Filed December 27, 2011
Writ of certiorari discharged
Worke, Judge

City of Eden Prairie City Council

William E. Sjoholm, Natalie Rose Walz, Thomsen & Nybeck, P.A., Bloomington, Minnesota (for relator)

Patricia Y. Beety, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Relator challenges respondent's decision to eliminate his position within the city's fire department, arguing that his employment was improperly terminated without cause or a hearing. We conclude that the decision of respondent's city manager to eliminate relator's position constituted the final decision triggering the 60-day period for relator to

petition for a writ of certiorari. Because relator failed to petition during the applicable timeframe, we discharge the writ as untimely.

D E C I S I O N

Relator Allen M. Nelson challenges the termination of his employment by respondent City of Eden Prairie. "[A] petition for a writ of certiorari provides the exclusive means by which an employee can secure judicial review of the [municipality's] employment termination decision." *Dietz v. Dodge County*, 487 N.W.2d 237, 237 (Minn. 1992) Certiorari review is limited to questions of jurisdiction, the regularity of proceedings, and, consistent with rules of administrative deference, the merits of the decision. *Id.* at 239.

Relator was employed as respondent's fire marshal until respondent's city manager decided to eliminate the position as part of a restructuring of the fire department. The city manager provided relator with final notice of this determination on March 29, 2010. Relator requested reconsideration of the decision in April, and respondent informed relator that the decision was final. After months of negotiating with respondent without resolution, relator attended a city-council meeting in December and requested a formal hearing on the elimination of his position. On January 4, 2011, respondent denied relator's request, explaining that there was no procedure in place that entitled relator to challenge the elimination of his position before the city council. Relator petitioned for a writ of certiorari on February 22, this court issued a writ, and respondent has moved to discharge the writ as untimely.

A writ of certiorari is properly issued by this court if sought within 60 days of when a relator received notice of the decision to be reviewed. Minn. Stat. § 606.01 (2010). Respondent argues that the final decision eliminating relator's position occurred on March 29, 2010, when the city manager informed relator that his employment was ending due to department restructuring. Because relator failed to petition within 60 days of March 29, respondent asserts that the writ must be discharged as untimely. Relator, on the other hand, contends that the March 29 decision was not final because the city manager is not empowered to unilaterally eliminate the fire-marshal position. Instead, relator argues that the 60-day period began when the city council denied his hearing request in January 2011. Accordingly, whether the respondent's city manager is empowered to eliminate the fire-marshal position is dispositive of the timeliness of relator's petition.

The statutory scheme pertaining to the governance of Minnesota cities is structured by four population classifications. *See* Minn. Stat. § 410.01 (2010). Within each population classification, a city is empowered to elect operating as a "statutory city," meaning the city governance conforms to Minnesota Statute Chapter 412, or a "home rule charter city," meaning the city is governed under a local code. Minn. Stat. § 410.015 (2010). Cities that elect to operate as a statutory city have the additional option of three forms of organization: (1) the Standard Plan; (2) Optional Plan A; (3) Optional Plan B. Minn. Stat. § 412.541 (2010).

With a population between 20,001 and 100,000, respondent is classified as a "second class" city under the statutory structure. *See* Minn. Stat. § 410.01. Respondent

has elected to operate as a statutory city, organizing under the Optional Plan B format of Minn. Stat. § 412.541, also known as the "council-manager plan." As an Optional Plan B city, respondent's governance is broadly divided as follows:

> The [city] council shall exercise the legislative power of the city and determine all matters of policy. The city manager shall be the head of the administrative branch of the government and shall be responsible to the council for the proper administration of all affairs relating to the city.

Minn. Stat. § 412.611 (2010).

Relator argues that the final authority to eliminate the fire-marshal position under an Optional Plan B organization rests with the city council, not the city manager. Relator asserts that the city council is empowered to create "departments, divisions, and bureaus for the administration of the affairs of the city as may seem necessary, and from time to time may alter their powers and organization." Minn. Stat. § 412.671 (2010). Additionally, relator cites to Minn. Stat. § 412.681 (2010), which provides: "The council may by ordinance abolish offices which have been created by ordinance and it may combine the duties of various offices as it may deem fit." Relator correctly points out that respondent's city council created the fire-marshal position by ordinance. *See* Eden Prairie, Minn. Legislative Code § 9.05, subd. 2 (2010). Because the position was created by the city council, relator claims that the position may only be eliminated by an additional ordinance adopted by the council pursuant to section 412.681.

Relator's argument overlooks several key statutory provisions related to the authority of the city manager in an Optional Plan B organization. The powers and duties of the city manager are provided in Minn. Stat. § 412.651, subd. 3 (2010):

> The city manager shall appoint upon the basis of merit and fitness and subject to any applicable civil service provisions and, except as herein provided, remove the clerk, all heads of departments, and all subordinate officers and employees; but the appointment and removal of the attorney shall be subject to the approval of the council.

Thus, from a plain reading of the statute, the city manager "*shall* . . . remove . . . all heads of departments, and all subordinate officers and employees." *Id.* (emphasis added). The only exception to this authority contained in section 412.651 pertains to the city attorney. *See id.* The city manager is also empowered to control all municipal departments, including those created by city-council ordinances: "The city manager *shall* exercise control over all departments and divisions of the administration created under Optional Plan B or which may be created by [the city] council." *Id.*, subd. 4 (2010) (emphasis added).

Neither provision expressly addresses the city manager's authority to eliminate a position or, as worded in section 412.681, "abolish offices" as the city council is authorized to do. And, ordinarily, preference is given to the more specific statute when the two positions are irreconcilable. Minn. Stat. § 645.26, subd. 1 (2010). But the use of "shall" and "may" in these provisions conferring power to the city manager and city council is instructive and allows the seemingly conflicting authorities to be reconciled. *Compare* Minn. Stat. § 645.44, subd. 16 (2010) ("'Shall' is mandatory.") *with* Minn. Stat. § 645.44, subd. 15 (2010) ("'May' is permissive."); *see also Minnwest Bank, M.V. v. Arends*, 802 N.W.2d 412, 417 (Minn. App. 2011) (noting that, absent a clear directive from the legislature to the contrary, courts are to give weight to the statutory definitions

of "shall" and "may"). Here, the permissive language allowing the city council to abolish an office created by ordinance is trumped by the compulsory language empowering the city manager to "remove . . . all heads of departments, and all subordinate . . . employees," and otherwise "exercise control over all departments and divisions of the administration." *Compare* Minn. Stat. § 412.681 *with* Minn. Stat. § 412.651, subds. 3 and 4. The city council may still abolish an office created by an ordinance, perhaps over the objection of the city manager, but the broader authority vested within the city manager precludes such an action from being an absolute prerequisite to eliminating a position. Based on a plain reading of the statutes governing Operation Plan B cities, the city manager is allowed to reorganize positions, such as the fire marshal, without seeking a city-council ordinance.

This reading of the statutes appears to be consistent with the expansive powers bestowed upon the city manager by respondent's city council. Eden Prairie, Minn. Legislative Code § 2.30, subd. 1 (2010) states that: "The Manager shall be the chief administrative officer of the City and all Departments of the City shall be under the overall control of the City Manager." The city code also provides "general duties and responsibilities" in addition to this overarching authority, which include the obligation to "[p]lan the organization of City staff and [to] assign appropriate responsibility and authority for the efficient and effective delivery of City services." *Id.* Consistent with the outline of the city manager's personnel authority in Minn. Stat. § 412.651, subd. 3, the only personnel decision of the city manager expressly requiring consent of the city council under the Eden Prairie Code is the appointment of the city attorney. *See id.* ("The

City Manager, with the consent of the Council, shall appoint a City Attorney, who shall serve at the pleasure of the Council."). Thus, the city manager was authorized to eliminate relator's position under respondent's city code.

Alternatively, relator contends that the city manager could not eliminate the fire-marshal position because respondent's fire marshal was effectively the city's fire-code official. Relator correctly notes that the International Fire Code (IFC) has been incorporated by reference in the Minnesota Fire Code. *See* Minn. R. 7511.0090 (2011) ("The IFC is incorporated by reference and made a part of Minnesota Rules pursuant to statutory authority, subject to the alterations and amendments in this chapter."). Relator points out that, under the IFC, "the fire code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority." IFC § 103.2 (2006). But while relator correctly contends that a fire-code official may not be terminated without cause and a hearing under the IFC and Minnesota Fire Code, the Eden Prairie fire marshal is not the Eden Prairie fire-code official. Indeed, we conclude that this designation belongs to the Eden Prairie fire chief: the IFC notes that "[t]he department of fire prevention is established within [a] jurisdiction under the direction of the fire code official," IFC § 103.1 (2006), and the Eden Prairie City Code provides that "[t]he head of [the fire] department is the Fire Chief." Eden Prairie, Minn. Legislative Code § 2.30, subd. 4 (2010). Relator's argument is, therefore, unconvincing.

Accordingly, the city manager possessed authority to eliminate relator's position, and the final decision occurred on March 29, 2010. Because relator failed to petition for

a writ of certiorari within 60 days of receiving notice of this final decision, we discharge the writ as untimely under Minn. Stat. § 606.01. *See In re Ultraflex Enters.*, 494 N.W.2d 89, 90-91 (Minn. App. 1992) (stating that a writ must be discharged for lack of jurisdiction if it is not timely issued or served).

Writ of certiorari discharged.