

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jatinder S. Khokhar, :
Appellant :
v. : No. 1398 C.D. 2009
The Charter Board of the City of : Submitted: December 11, 2009
Reading :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: February 8, 2010

Jatinder S. Khokhar (Khokhar) appeals from the June 15, 2009, order of the Court of Common Pleas of Berks County (trial court), which affirmed the decision of the Charter Board of the City of Reading (Charter Board) to impose various fines and penalties against Khokhar for violating the Home Rule Charter (Charter) of the City of Reading (City). We affirm in part and reverse in part.

On May 2, 2005, Khokhar was hired as Codes Manager for the City, and, in that capacity, Khokhar serves as head of the Property Improvement Division of the Office of the City's Managing Director. On November 8, 2007, and December 7, 2007, respectively, two City taxpayers filed complaints with the Charter Board, alleging that, because of his position, Khokhar was obligated to comply with the residency requirement set forth in section 706 of the Charter, and he was violating

that Charter section by residing outside the City.¹ (Charter Board’s Findings of Fact, Nos. 1-7, 16.) Pursuant to section 706 of the Charter, “heads of departments, offices and agencies need not be residents of the City at the time of appointment, but after appointment shall reside in the City. City residency shall be required within twelve (12) months of being appointed.” (R.R. at 284a.) Formerly, section 1-207 of the Personnel Code in the City’s Administrative Code applied this same residency requirement to all City employees. However, on June 15, 2006, the Mayor signed into law Bill No. 47-2006, which amended section 1-207 by deleting the City residency requirement for all non department directors and managing director employees; the Bill retained the residency requirement only for the City’s department directors, under Charter section 706, and the City’s Managing Director, under Charter section 401. (R.R. at 224a; Khokhar’s brief, Appendix 2.)

Following an investigation, Khokhar requested a full evidentiary hearing before the Charter Board and agreed to have the two complaints consolidated for that purpose. (Charter Board’s Findings of Fact, Nos. 8-10.) Based on evidence adduced at the hearing, the Charter Board found: Khokhar oversees a “department” with three supervisors, who, in turn, manage approximately thirty-seven employees; Khokhar runs the Codes Division and bears the ultimate responsibility for outcomes and decisions;² Khokhar, like all other “department” heads throughout the City, reports

¹ There is no dispute that neither Khokhar nor his family lives in the City. On weekdays, Khokhar resides at 68 Christine Drive in Exeter Township, and, on weekends, he travels to Leesburg, Virginia, where his wife and children reside. (Charter Board’s Findings of Fact, Nos. 11-15, 17.)

² When asked if he shared that responsibility with any other person, Khokhar replied, “No. The buck stops with me.” (R.R. at 94a-95a.)

directly to the City’s Managing Director without any intervening level of supervision or accountability; and the Managing Director is the only person who delegates responsibilities to Khokhar. (Charter Board’s Findings of Fact, Nos. 18-21.)

Based on these facts, the Charter Board found that the term “division” is just another classification for an organizational component of the City’s administration and, in the context of the City’s Codes Division, is synonymous with the terms “office,” “department” or “agency” as used in section 706 of the Charter. Similarly, the Charter Board found that the term “manager” is nothing other than a descriptive term for the leadership of such an organizational component of the City’s administration and, therefore, is merely a synonym for the term “head” as used in section 706 of the Charter. (Charter Board’s Findings of Fact, Nos. 22-23.) Thus, the Charter Board concluded that, notwithstanding Khokhar’s formal title as Codes *Manager* of the Property Improvement *Division*, Khokhar effectively served as the head of a department, office or agency and, therefore, was subject to the residency requirement of section 706 of the Charter. (Charter Board’s Conclusions of Law, Nos. 1-3, 9-13.) Holding that Khokhar failed to adhere to the Charter’s residency requirement and, thus, violated the terms of his employment from May 2, 2006, ongoing, the Charter Board, by order dated July 21, 2008, imposed various penalties on Khokhar, including public censure, a thirty-day suspension without pay, a \$1,000 administrative fine and a separate \$1,000 fine for violation of the Charter.³ The

³ Section V(B)(2)(a)(ii)(b) of the Charter Board Ordinance permits the Charter Board to publicly censure a City employee for a Charter violation. (R.R. at 324a.) Section V(B)(2)(a)(ii)(c) of the Charter Board Ordinance permits the Charter Board to impose a suspension without compensation for a period not to exceed thirty days. (R.R. at 324a.) Section V(B)(2)(a)(ii)(g) of the Charter Board Ordinance states that the Charter Board may impose an administrative fine of not more than \$1,000 to defray the actual cost and expense of investigating any violation. (R.R. at **(Footnote continued on next page...)**)

Charter Board further stated that “[e]very pay period in which Khokhar remains employed by the City while maintaining residency in violation of Charter Section 706 shall constitute a separate and ongoing violation of the Charter as found herein.” (R.R. at 246a.) Therefore, the Charter Board order also imposed a continuing fine of \$300 per pay period on Khokhar, to last from the date of the final order until Khokhar satisfied the Charter Board’s directive to comply with Charter section 706 within specified timeframes or face termination of his employment.⁴ (R.R. at 246a-51a.)

Khokhar appealed to the trial court, arguing that the Charter Board lacked jurisdiction to address the residency issue and, even if the Charter Board had jurisdiction, it lacked authority to impose an additional, continuing fine of \$300 per pay period because this amount exceeded the \$1,000 maximum permitted under the City’s Charter Board Ordinance. The trial court rejected both of Khokhar’s arguments and affirmed the Charter Board in its entirety. In doing so, the trial court analogized the case to *Mukerji v. City of Reading Charter Review Board*, 941 A.2d 102 (Pa. Cmwlth.), *appeal denied*, 598 Pa. 752, 954 A.2d 579 (2008), wherein this court determined that the City could not circumvent the Charter’s residency requirement merely by changing the job title of a City employee from department

(continued...)

325a.) Section V(B)(2)(a)(ii)(f) of the Charter Board Ordinance states that the Charter Board may impose a fine not to exceed \$1,000 per violation. (R.R. at 324a.)

⁴ Khokhar was given thirty days to submit an affidavit affirming his intent to comply with section 706 of the Charter within 120 days of the Charter Board’s order. Failure to timely submit the affidavit would result in Khokhar’s immediate termination on the thirty-first day following the order, and if Khokhar submitted the affidavit but failed to establish residency within the 120-day period, Khokhar’s employment with the City would end on the 121st day. (R.R. at 250a-51a.)

director to office manager. Khokhar now appeals to this court, repeating the arguments he raised below.⁵

Jurisdiction

Khokhar first argues that the issue of his residency is a personnel matter beyond the jurisdiction of the Charter Board. Amendment I, section 2(b) of the Charter sets forth the Charter Board’s jurisdiction,⁶ stating, in relevant part, “The Charter Board shall hear and decide all cases alleging violations of the Charter or Administrative Code, except that *its jurisdiction shall not extend to any case arising under the Ethics Code or the Personnel Code.*” (R.R. at 260a, emphasis added); *see also* (Charter Board Ordinance, section III(A)(1), R.R. at 314a, and Section V(B)(1), R.R. at 323a.) Khokhar maintains that, because the 2006 amendment to the Personnel Code removed the residency requirement for non department directors and managing director employees, of which he was one, the Charter Board incorrectly

⁵ Where, as here, the local agency developed a full and complete record and the trial court took no additional evidence, our scope of review is limited to determining whether the local agency violated constitutional rights or committed an error of law or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. §754(b); *Siteman v. City of Allentown*, 695 A.2d 888 (Pa.Cmwlth.), *appeal denied*, 550 Pa. 674, 703 A.2d 469 (1997).

⁶ Through Amendment I, entitled Enforcement of Charter, the City’s Charter was amended in 2003 to include a Charter Board. (R.R. at 260a-62a.) Section 2(a) of Amendment I calls for City Council, by ordinance, to establish the Charter Board within three months of the Amendment’s effective date. Section 2(b) of Amendment I sets forth the Charter Board’s jurisdiction, and section 2(c) of Amendment I states that, within twelve months of the Amendment’s effective date, City Council shall, by ordinance, adopt regulations implementing the section, including the provision of penalties and other enforcement mechanisms. (R.R. at 260a-61a.) Amendment I of the Charter was implemented by virtue of the Charter Board Ordinance. (R.R. at 311a.)

determined that his residency obligation was covered by section 706 of the Charter rather than by the City's Personnel Code. We disagree.

Like the Charter Board and the trial court, we believe that this case is governed by this court's opinion in *Mukerji*. That case involved a City employee, Adam Mukerji, who was hired as Director of the Department of Community Development but never complied with the Charter's residency requirement. Subsequently, the City's Administrative Code was amended to delete references to the Department of Community Development and to create the position of Economic Development Manager as head of the Office of Community Development; Mukerji was then hired to fill the newly created position. Thereafter, a City resident filed a complaint alleging that Mukerji was violating section 706 of the Charter. The Charter Board conducted an evidentiary hearing and found: the City hired Mukerji as Economic Development Manager, not as a demotion, but merely as a change in title in order to make him compliant with the Charter's residency requirement; Mukerji, as the Economic Development Manager, was head of the Office of Community Development, on a level with other department heads; and Mukerji still reported directly to the City's Managing Director and retained the duties, salary, responsibilities, office location and staff he had as a department director. Based on these facts, the Charter Board determined that, despite his new title, Mukerji was obligated to reside within the City, and the Charter Board imposed various penalties on Mukerji for failing to do so. This court upheld the Charter Board's determination, noting that the City could not help Mukerji avoid the Charter's residency requirement simply by changing his title.

Here too, the Charter Board determined that a City employee's obligation to comply with the Charter's residency requirement was not necessarily dictated by his or her job title. Similar to the facts in *Mukerji*, the Charter Board concluded that, although Khokhar holds the title of *Manager* of the Property Improvement *Division*, he effectively serves as head of a City "department" or "office" because, like all department heads, his responsibilities are those of a person at the top of his organizational component who must report directly to the City's Managing Director. Based on these facts, which are fully supported by the record, we are satisfied that the Charter Board correctly determined that Khokhar works at a department head level and, thus, is subject to the City's residency requirement.

Moreover, this result is supported by section 702 of the Charter, which provides, in relevant part, as follows.

Each elected official, officer, and employee of the City shall be a member of either the career or exempt service.

(a) *The exempt service shall consist of:*

- (i) All elected officials;
- (ii) The Managing Director and the City Solicitor;
- (iii) *The heads of departments, offices, and agencies immediately under the direction and supervision of the Managing Director;*
- (iv) one clerk or secretary for each of the full-time elected City officials and the heads of each City department;
- (v) The City Clerk;
- (vi) The members of authorities, boards, and commissions;
- (vii) Temporary, part-time, or seasonal employees;

(b) All other officers and employees shall be members of the career service.

(R.R. at 282a-83a) (emphasis added).

As expressly indicated in this Charter section, every City employee must be a member either of the exempt or career service and, therefore, any City employee excluded from the list of exempt service employees set forth in section 702(a) of the Charter is, necessarily, a member of the career service. Charter §702(b). The parties here do not dispute that, as Codes Manager, Khokhar is a member of the exempt service, (R.R. at 118a, 171a); thus, Khokhar's position *must* fit into one of the seven enumerated categories in section 702(a). There can be no doubt that the only such possibility is section 702(a)(iii), referring to “[t]he heads of departments, offices, and agencies immediately under the direction and supervision of the Managing Director.”

Because the issue of Khokhar's residency is governed by section 706 of the Charter, rather than the Personnel Code, we conclude that Khokhar's failure to reside in the City constitutes a violation under the jurisdiction of the Charter Board. Accordingly, Khokhar's first argument fails.

Penalties

Khokhar next argues that, even assuming the Charter Board has jurisdiction, it lacked authority to impose a continuing fine against Khokhar of \$300 per pay period for separate, ongoing violations of Charter §706. Khokhar contends that the Charter Board's action violates section V(B)(2)(a)(ii)(f) of the Charter Board

Ordinance,⁷ which limits the imposition of fines by the Charter Board to an amount “not to exceed \$1,000 per violation,” (R.R. at 324a), and does not state that a continuing violation may be viewed as a series of separate violations occurring each day (or, as in this case, each pay period). The Charter Board counters that it has broad discretion with regard to the imposition of penalties and acted within that grant of discretion in finding that every pay period during which Khokhar remains employed by the City while residing outside the City constitutes a separate Charter violation. We agree with Khokhar that, absent language in the Charter Board Ordinance stating that each day of a continuing violation constitutes a separate offense, the Charter Board was required to view Khokhar’s violation of Charter §706 as a single, continuous offense subject to the \$1,000 limit.

In *Commonwealth v. Garris*, 672 A.2d 343 (Pa. Super. 1996), the court dealt with a similar situation. In that case, a criminal complaint was filed against Roger Garris for failing to obtain a sewage permit under the applicable statute, and he was ordered to correct the violation by a certain date. When it was later determined that the violation had not been timely rectified, a \$300 fine was imposed on Garris for each subsequent day during which the problem remained uncorrected. Garris appealed, arguing that his fine was impermissible because it exceeded the \$300 maximum penalty permitted for a violation of the statute. The court agreed with Garris, reasoning as follows.

⁷ Where the Charter Board has jurisdiction, it may impose penalties for Charter violations *as set forth in the Charter Board Ordinance*. (Section V(B)(2) of the Charter Board Ordinance, R.R. at 322a-25a.)

The rules of statutory construction state that “[w]henver a penalty or forfeiture is provided for the violation of a statute, such penalty or forfeiture shall be construed to be for each such violation.” 1 Pa.C.S.A. § 1930. Thus, we must determine whether Garris’s inactivity constituted more than one violation of [the statute]. After careful consideration, we find that Garris’s failure to obtain a sewage permit equalled a single continuing violation, rather than a series of identical violations.

“‘[C]ontinuing offenses’ are proscribed activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations so as to impose separate penalties.” *Newcomer Trucking v. P.U.C.*, 109 Pa.Comm. 341, 345, 531 A.2d 85, 87 (1987) (citation omitted). Instantly, without legislative guidance, it is impossible for us to segregate Garris’s inactivity into separate violations of [the statute]. Any attempt to do so merely equates to an arbitrary judicial determination. Taken to its logical extension, the Commonwealth would have us find separate violations for every hour, minute or second that Garris had not obtained a permit. Appellee essentially requests that we re-write [the statute] to read that the maximum penalty may be imposed “per day for each violation.” While our legislature has repeatedly written such language into the laws of our state, it has failed to do so concerning [the statute]. As such, we are constrained to apply the law as it has been written and, thus, it would be improper to adjudicate Garris guilty of more than one violation of [the statute]. See *Key Savings and Loan Assn. v. Louis John, Inc.*, 379 Pa.Super. 226, 230-32, 549 A.2d 988, 991 (1988) (“this Court is without authority to insert a word into a statutory provision where the legislature has failed to supply it”).

Garris, 672 A.2d at 344 (footnote omitted). This same reasoning applies here. Because Khokhar was found to have violated only one Charter provision, and the Charter Board Ordinance does not clearly state that each day (or pay period) that the

violation continues constitutes a separate violation,⁸ the Charter Board could not fine Khokhar any more than the maximum allowable fine of \$1,000.⁹

⁸ For this reason, we conclude that the Charter Board mistakenly relies on *Newcomer Trucking Inc. v. Pennsylvania Public Utility Commission*, 531 A.2d 85 (Pa. Cmwlth. 1987), as support for its position. In *Newcomer*, a trucking company held a certificate from the Pennsylvania Public Utility Commission (PUC), under which the carrier was authorized to transport goods but prohibited from transporting the goods of more than one consignor on one truck at any one time. The carrier was found to have violated its PUC certificate by combining shipments 184 times on 128 separate days, and the PUC imposed a fine of \$18,400, or \$100 per violation for each of the 184 violations.

The carrier first challenged the fine based on section 3301(a) of the Public Utility Code (Code), 66 Pa. C.S. §3301(a), which limits to \$1,000 the amount of the penalty the PUC can impose for violation of any single Code provision. This court concluded that Code §3301(a) permits the PUC to impose a fine of \$1,000 for each discrete violation of the Code or PUC regulation, and, because there were 184 separate shipments identified as discrete violations, the penalty was proper. The court next considered the carrier's argument under section 3301(b) of the Code, which related to continuing offenses *and provided that each and every day's continuing violation was to be considered a separate and distinct offense*. Based on this provision, the carrier argued that he should have been fined only \$12,800 because the violation occurred on 128 separate days. In rejecting that argument, we again noted that this was not a single, continuing violation but, rather, a series of distinct offenses.

Newcomer is inapplicable to the present matter because Khokhar's Charter violation was a single, continuing offense rather than a series of discrete Charter violations and, more importantly, unlike the Code provision in *Newcomer*, section 706 of the Charter does *not* provide that each day's continued violation should be considered a separate offense.

⁹ The Charter Board contends that permitting Khokhar to continue his employment in violation of the Charter's residency requirement without additional per pay period fines sets an untenable precedent. According to the Charter Board, "under Khokhar's argument, employees subject to the Charter's §706 could merely pay a \$1,000.00 maximum fine and forever bypass residency," (Charter Board's brief at 23), leading to an absurd and unreasonable result. However, we note that the Charter Board's order itself, issued in conformity with the penalty provisions of the Charter Board Ordinance, precludes such an absurd result by calling for the termination of Khokhar's employment in the event that he does not comply with the Charter's residency requirement within a specified timeframe.

Accordingly, we affirm the trial court's order to the extent it declares the Charter Board had jurisdiction over the issue of Khokhar's alleged violation of the Charter's residency requirement, as well as the Charter Board's determination that the City's Codes Manager is subject to the Charter's residency requirement. We reverse to the extent the trial court's order declares the Charter Board's additional penalty of \$300 per pay period to be valid and enforceable.

ROCHELLE S. FRIEDMAN, Senior Judge

Judge Pellegrini concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jatinder S. Khokhar,	:	
Appellant	:	
	:	
v.	:	No. 1398 C.D. 2009
	:	
The Charter Board of the City of	:	
Reading	:	

ORDER

AND NOW, this 8th day of February, 2010, the order of the Court of Common Pleas of Berks County, dated June 15, 2009, is hereby affirmed in part and reversed in part in accordance with the foregoing opinion.

ROCHELLE S. FRIEDMAN, Senior Judge