In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00304-CV

IN RE CITY OF BEAUMONT, TEXAS

Original Proceeding
60th District Court of Jefferson County, Texas
Trial Cause No. A-192,887

MEMORANDUM OPINION

This original proceeding concerns the trial court's role in reviewing the decision made by an independent hearing examiner in an employment dispute between the City of Beaumont and one of its firefighters. At the firefighter's request, the trial court entered an order allowing the firefighter to change the election that he made first, which was to litigate the City's decision before an independent hearing examiner, and to re-litigate the dispute in another forum, before the City's Civil Service Commission. In this mandamus proceeding, the City argues the trial court abused its discretion and failed to follow the law by rendering an order allowing the firefighter "the opportunity to render or change his election." After carefully

reviewing the evidence before the trial court when it rendered the order that is challenged in this original proceeding, we conclude that the firefighter waived any claim that he might have had to seek a change in forums. We conditionally grant the City's petition, and we direct the trial court to vacate its July 2017 order.

Background

James Mathews worked as a firefighter for the City of Beaumont until 2008 when he was indefinitely suspended from his duties by the Department's Fire Chief. When firefighters or police officers are involuntary suspended from their duties, they have the right to appeal such decisions to either the Civil Service Commission or to an independent third-party hearing examiner. *See* Tex. Loc. Gov't Code Ann. §§ 143.053(a), (b), 143.057(a) (West 2008). Shortly after Mathews was suspended in October 2008 from his duties with the City, he elected[1] to litigate the City's decision

[1]On October 10, 2008, after being suspended on October 8, 2008, Mathews sent a letter to the Civil Service Commission of the City of Beaumont notifying the City of his decision to request "a hearing before an independent third party hearing examiner" concerning Fire Chief Ann Huff's decision suspending him. The provisions in the collective bargaining agreement that existed at that time between the City and its firefighters gave Mathews the right to arbitrate a grievance arising from the City's decision suspending him before an examiner selected from a list of examiners (arbitrators) provided to the parties by either the Federal Mediation and Conciliation Service or the American Arbitration Association. In his letter, Mathews referred to sections 143.010 and 143.053 of the Local Government Code, and subsections that are in these two sections allowed Mathews to appeal the City's decision to the Civil Service Commission. *See* Tex. Loc. Gov't Code Ann. §§ 143.010(a), 143.053(b) (West 2008). Mathews' letter also cites section 143.057 of the Local Government Code. In addition to the rights provided by the other sections

before an independent hearing examiner. In 2011, we overturned the first hearing examiner's decision after the City appealed from the trial court's ruling confirming the first hearing examiner's decision. *See City of Beaumont v. Mathews*, 09-10-00198-CV, 2011 WL 3847338, at *2 (Tex. App.—Beaumont Aug. 31, 2011, no pet.).[2] After we remanded that case to the district court for further proceedings, the

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referred to by Mathews in his letter, section 143.057 allows a firefighter the right to "elect to appeal to an independent third party hearing examiner instead of to the commission." Tex. Loc. Gov't Code Ann. § 143.057(a) (West 2008). Based on the decision made by the hearing examiner who decided Mathews' initial appeal, the first examiner was chosen from a list provided to Mathews and the City by the American Arbitration Association. The American Arbitration Association is a not-for-profit organization that resolves disputes between individuals and organizations who desire to resolve their conflicts out of court. *See* American Arbitration Association, Employment Arbitration Rules and Mediation Procedures, https:// ww.adr.org/sites/default/files/Labor%20Rules.pdf (last visited October 25, 2017).

[2] With respect to the City's appeal from the order that was at issue in that proceeding, we concluded that the first examiner who heard Mathews' appeal acted outside the authority that he possessed when he, without conducting an evidentiary hearing, reinstated Mathews to his position with the City. *See City of Beaumont v. Mathews*, 09-10-00198-CV, 2011 WL 3847338, at *2 (Tex. App.—Beaumont Aug. 31, 2011, no pet.). S*ee generally* Tex. Loc. Gov't Code Ann. § 143.057(b) (West 2008). We held that the hearing examiner's decision from Mathews' first appeal was void, vacated the decision, and remanded the matter to the district court for further proceedings consistent with the opinion. *Mathews*, at *3. Upon remand, the attorney representing Mathews filed a motion in which he asked the district court to return the case to the American Arbitration Association for further proceedings. In May 2012, a second hearing examiner was selected, he subsequently conducted an evidentiary hearing regarding Mathews' appeal, and in August 2012, the second hearing examiner issued a written decision. Approximately one week later, Mathews challenged the validity of the second hearing examiner's decision by suing the City in district court. The proceeding that is now before us arose after the trial court ordered the proceedings to be abated to allow Mathews the opportunity to re-litigate

attorney representing Mathews filed a motion asking the parties to appear before the American Arbitration Association.

In August 2012, following an evidentiary hearing before the second hearing examiner, the second independent hearing examiner dismissed the challenge Mathews presented in his appeal of the City's decision suspending him from his duties. Shortly thereafter, Mathews sued the City in district court, challenging the validity of the second decision on several grounds. The record of the proceedings from the trial court does not show the trial court ever conducted an evidentiary hearing on the merits of the complaints Mathews raised in district court challenging the second hearing examiner's decision. In July 2017, nearly five years after Mathews appealed the second hearing examiner's decision to the district court, Mathews asked the trial court to allow him to litigate the Fire Chief's decision in a new forum before the Civil Service Commission.

The trial court rendered the order that is at issue in this proceeding without reducing any of its findings or conclusions to writing. And, the parties did not ask the trial court to provide them with any written findings. In Mathews' motion to abate, which is the motion he filed asking the trial court to allow him to start over in another forum, Mathews explained why he thought he should be allowed to re-

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the dispute that he had with the City for suspending him in a new forum before the Beaumont Civil Service Commission.

litigate the Fire Chief's decision before the Civil Service Commission. According to Mathews' motion, when the City suspended him in 2008, the City failed to fully inform him of his right to appeal the City's decision to the Civil Service Commission or to fully inform him of the limitations that the Legislature placed on courts to review the merits of decisions made in cases decided by independent hearing examiners.[3] In its response to Mathews' motion, the City pointed out that Mathews was asking the court to allow him to change the election that he made approximately nine years earlier, and after having litigated the matter and obtained decisions from two hearing examiners. The City claimed that "[b]y failing to ask to change his election . . . before July 28, 2017 and waiting until he lost on the merits, Mathews waived any complaint or right to switch his election." Nevertheless, the trial court apparently concluded that Mathews retained the right to change the forum in which he wanted to litigate the City's decision suspending him based on alleged defects in the notice the City provided to Mathews in 2008, which explained the reasons the

[3] For instance, Mathews' motion to abate states that "the City's letter of disciplinary action, initially, failed to inform Mathews of his options - to appeal to the civil service commission with de novo review by the district court, or alternatively, if he elected to appeal to a hearing examiner, his rights of review by a district court were waived, except under limited circumstances." Mathews also argued that the City's notice of discipline did not mention the Local Government Code, and that it did not notify him that he had the right to elect between proceeding before an independent hearing examiner or proceeding before the Civil Service Commission.

City suspended Mathews and advised Mathews that he could appeal the decision under the collective bargaining agreement the City has with the firefighters.

The City advances the same arguments in its petition for mandamus that it advanced in district court in opposing Mathews' motion to abate. In its petition, the City argues that the trial court incorrectly applied the law by allowing Mathews another opportunity to change the election that he first made in 2008 when he elected to challenge the firefighter's decision in a hearing before an independent hearing examiner. The City also argues that a regular appeal following a final decision before the Civil Service Commission would be insufficient to remedy the trial court's alleged error.

Analysis

Abuse of Discretion

In his response to the City's petition, Mathews argues the trial court properly granted his motion and gave him the right to change his election so that he could proceed before the Civil Service Commission. According to Mathews, the City's notice failed to notify him that he could appeal to the Civil Service Commission, and the notice failed to sufficiently inform him that only a limited right of review existed in the courts to review decisions made by independent hearing examiners.

We need not actually decide whether the City's notice was deficient to decide the proceeding before us. The City's argument relies on actions taken by Mathews

and his attorneys in 2011, by which time Mathews was aware that he could have argued that he should have been given an opportunity to change the election he made in 2008 so that he could pursue an appeal to the Civil Service Commission. There is some evidence that Mathews was fully aware of his options to appeal even before he elected, in 2008, to appeal to an independent hearing examiner. For example, we note that Mathews responded to the Fire Chief's decision of October 8 in writing, notifying the City that he was acting in accordance with the provisions of sections "143.010, 143.053, 143.056, and 143.057" in requesting a hearing before an independent third-party hearing examiner. Section 143.057(a) provides that a firefighter may appeal to an independent third-party hearing examiner "instead of to the commission." Tex. Loc. Gov't Code Ann. § 143.057(a). Section 143.057(c) provides that a firefighter appealing "to an independent hearing examiner waives all right to appeal to a district court except as provided by Subjection [j]." *Id*. § 143.057(c) (West 2008). Subsection (j) provides that the district court may hear an appeal of a hearing examiner's award "only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means." *Id*. § 143.057(j) (West 2008). Thus, although the City's notice failed to reference the controlling statutory provisions relevant to Mathews' appeal, Mathews' response to the City's notice references the very statutory provisions that authorize an appeal to the Civil Service Commission.

His 2008 response also references the statute that gives courts only a limited right to review decisions made by independent hearing examiners.

The Local Government Code does not provide a remedy if a city issues a notice that does not contain the information that is required to be in such notices under section 143.057(a). Additionally, regardless of the information to be gleaned from the City's notice advising Mathews that he had been suspended and the information in his response, the law presumes that individuals are fully aware of the rights that have been granted to them by the Legislature. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, n.3. (Tex. 1990) ("In Texas, the law recognizes that there is no duty to inform others of the requirements of the law because all persons are presumed to know the law."). In large part, the City relies on the statements Mathews made in the brief he filed in response to the City's appeal in 2011 to support its argument that the evidence conclusively shows that by 2011 Mathews was fully aware of his statutory rights and of the consequences of choosing an independent hearing examiner to hear his appeal. Additionally, the City relies on Mathews' actions following our remand, which show that Mathews asked the district court on remand to order the parties to appear before the American Arbitration Association for further proceedings.[4]

[4] For example, the exhibits the City filed in the response to Mathews' motion seeking to change his election included pages from the brief that Mathews filed in

While waiver is ordinarily a question of fact, the exhibits that were before the district court when it heard Mathews' motion to abate show that by at least 2011, Mathews was actually aware that the Local Government Code allowed firefighters to elect to proceed in a forum before the Civil Service Commission to litigate decisions suspending firefighters from their duties. The brief Mathews filed in the 2011 appeal reflects that he was aware the City's notice suspending him failed to contain all of the information the Legislature required to be included in notices informing a firefighter of a suspension. *See* Tex. Loc. Gov't Code Ann. §§ 143.052(d) (West 2008), 143.057(a).

Waiver is defined as "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). "Waiver is largely a matter of intent, and

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2011 in *Mathews*, 2011 WL 3847338. In the brief Mathews filed in the 2011 appeal, Mathews discussed the consequences that result from a firefighters' election to appeal a city's decision to an independent hearing examiner, arguing:

> As the Court knows, traditionally, civil service discipline cases were decided by a city's own Civil Service Commission. That meant that the appeal was always going to be decided by representatives of the same entity (and of the same taxpayers) that had imposed the discipline in the first place. The Legislature thus decided that it would be a little more fair (or fair-looking) to allow a true-neutral to decide discipline cases. But, of course, it imposed a trade-off on the employee: . . . If you select a true-neutral and lose, you are stuck with the decision unless you can show fraud, collusion, or a truly jurisdictional error.

for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances." *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). As shown by the pleadings and evidence before the trial court on Mathews' motion to abate, the surrounding circumstances in Mathews' case demonstrate that by at least 2011, Mathews was fully aware that he could have chosen to litigate the City's decision before the Civil Service Commission, and that he was aware that the courts have only a limited right to review the merits of an independent hearing examiner's decision if an appeal of such decisions is pursued in a district court.

In Mathews' case, the circumstances show that Mathews was fully aware of his rights when we remanded the case to the district court in 2011 for further proceedings. Nevertheless, the evidence shows that Mathews' attorneys consequently filed a motion asking the district court to remand the case for further proceedings before the American Arbitration Association. Following our remand, Mathews did not ask the trial court to allow him to change his election. Mathews also did not ask the second hearing examiner to allow him to change the forum so that he could litigate the Fire Chief's decision before the Civil Service Commission.

Although the motion Mathews filed asking the trial court to remand the case for further proceedings before the American Arbitration Association is a motion

filed by the attorneys who were representing him at that time,[5] Mathews is bound by the acts of the lawyer-agents who acted on his behalf. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1880))); *see also Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968) (noting "that as long as the attorney-client relationship endures, with its corresponding legal effect of principal and agent, the acts of one must necessarily bind the other as a general rule" (quoting *Dow Chem. Co. v. Benton*, 357 S.W.2d 565, 567-68 (1962))). Mathews is also considered to be on notice of all of the matters known to his attorneys. *See id*.

In the trial court and in this proceeding, Mathews relies heavily on *City of DeSoto v. White*, 288 S.W.3d 389 (Tex. 2009) to support his argument that the trial court had the right to allow him the opportunity to change his election and to litigate the City's decision before the Civil Service Commission. The City disputes that *White* authorizes trial courts to allow parties to change their earlier decisions about the forum where they have chosen to litigate their suspension under the circumstances presented in Mathews' case.

In *White*, the Texas Supreme Court explained the importance of the officer electing his remedy after having full knowledge of his rights and the consequences

[5] Mathews' current attorneys are not the attorneys who were representing him in 2011 when we decided *Mathews*, 2011 WL 3847338, at *1.

of his election. *Id*. at 398. That purpose is not at issue here, given that Mathews was fully aware of his rights and the consequences of electing a hearing examiner to hear his appeal. Additionally, Mathews has not claimed that he mistakenly relied on the strict enforcement of the ten-day appeal deadline in making his election, the rule the Court explained the police officer mistakenly relied on in *White* when the officer turned down the opportunity he was given by the hearing examiner to change his election. *Id*. at 401.

In contrast to the circumstances in *White*, Mathews cannot claim that he mistakenly relied on Texas Supreme Court precedent when he asked the district court in 2011 to remand his case for further proceedings before the American Arbitration Association. He was fully aware in 2011 of the Texas Supreme Court decision in *White*, which was decided in 2009. *Id*. Therefore, because the circumstances involving the election discussed in *White* differ substantially from the circumstances in this case, we agree with the City's argument that *White* is distinguishable. We further agree the district court erred by applying *White* as controlling authority to the circumstances shown by the evidence that was before the court when it granted Mathews' motion.

In Mathews' case, the substantial delays that have occurred between 2011 and 2017 regarding whether Mathews should be allowed to change his 2008 election are directly attributable to Mathews. *See id.* at 400 (holding that the ten-day rule still

applies when the officer's failure to meet the deadline is attributable to the officer). In Mathews' case, the circumstances show that Mathews never asked the hearing examiners before whom he litigated the City's decision suspending him to allow him to elect to proceed before the Civil Service Commission. Instead, Mathews allowed both hearing examiners to issue decisions without ever requesting a change in forum. By 2017, the evidence conclusively shows that Mathews had been fully aware of all of his statutory rights since 2011, if not before.

In this case, the trial court's role was limited to reviewing the hearing examiner's decision based on the limited rights of review assigned to the courts under section 143.057(j) of the Local Government Code. Tex. Loc. Gov't Code Ann. § 143.057(j). Hearing examiners have discretion under appropriate circumstances to allow a firefighter to change his election before conducting a hearing based on a claim that a notice of suspension did not include sufficient instruction to allow the firefighter to make an informed decision in choosing how to exercise his rights. *See id*. § 143.010(g) (West 2008) (providing that "[t]he commission shall conduct the hearing fairly and impartially as prescribed by this chapter and shall render a just and fair decision"), § 143.057(f) (West 2008) (providing that "the hearing examiner has the same duties and powers as the commission"). Given that Mathews failed to first present his request to change forums to a hearing examiner, we further conclude that the remedy Mathews requested for the first time in district court concerned a

matter that fell outside the scope of the issues the trial court was called on to review. *Id*. § 143.057(j).

In conclusion, even after considering all reasonable extensions that Mathews might arguably have been entitled to have received due to the alleged deficiencies in the City's notice of suspension, the evidence before the trial court conclusively demonstrated that Mathews was not entitled to wait until 2017 to change forums after having litigated the dispute to a final decision before an independent hearing examiner. We conclude the trial court misapplied *White* to Mathews' case, and we hold the trial court abused its discretion by failing to properly apply the law.

Adequate Remedy by Appeal

The City contends that if it is required to engage in further proceedings as contemplated by the trial court's July 2017 order, a regular appeal will be inadequate to remedy the harm created by allowing Mathews to proceed in a new forum. According to the City, the trial court's July 2017 order subjects "the City to a third-bite-at-the-apple" after the City prevailed based on the decision of the second hearing examiner.

"An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits to reviewing the issues in a mandamus proceeding outweigh the detriments of doing so, appellate courts must consider whether the appellate remedy is adequate. *In re Prudential Ins. Co. of Am.*,

148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). In evaluating the benefits and detriments of mandamus relief, we consider whether extending relief by granting the writ will preserve the relator's substantive and procedural rights from being impaired or lost. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding).

In Mathews' case, the district court's order deprives the City of the immediate benefits of the statutory procedure created to resolve disputes over the suspension of firefighters. *See id.*; *see also Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992) (orig. proceeding). The order also deprives the City of the benefits of its collective bargaining agreement with the City's firefighters. Because Mathews waived his right to proceed before the Civil Service Commission when he knowingly elected to proceed and litigated the dispute to conclusion before an independent hearing examiner, the trial court's order, if allowed to stand, would subject the City to the expense of a third proceeding in a forum whose decision, regardless of whether it favored Mathews or the City, would eventually be reversed. *See In re Team Rocket*, 256 S.W.3d at 262.

Under the circumstances, we conclude that the benefits of issuing the writ outweigh its detriment. *See In re Prudential*, 148 S.W.3d at 136. We further conclude the City lacks an adequate remedy by appeal. *See id*. at 135-36. We conditionally grant the City's petition for a writ of mandamus. We are confident that the trial court will vacate its order of July 14, 2017, that it will deny Mathews'

motion to abate, and that it will then review the hearing examiner's decision based on the parties' arguments on the issues that district courts are allowed to review pursuant to section 143.057(j) of the Local Government Code. *See* Tex. Loc. Gov't Code Ann. § 143.057(j). The writ shall issue only if the trial court fails to comply.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on August 21, 2017
Opinion Delivered November 9, 2017

Before McKeithen, C.J., Kreger and Horton, JJ.