

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO, EX REL. :
JOHNNY HOLLOWAY, JR.

Plaintiff-Appellant : C.A. CASE NO. 23836

vs. : T.C. CASE NO. 09CV01568

PERSONNEL APPEALS BOARD, : (Civil Appeal From
CITY OF HUBER HEIGHTS : Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 1st day of October, 2010.

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Henry A. Arnett, Atty. Reg. No.0011379, 135 Dublin Road, Suite
108-B, Columbus, OH 43215
Attorney for Plaintiff-Appellant

Matthew D. Stokely, Atty. Reg. No. 0062611; Julie C. Hammond,
Atty. Reg. No. 0072965, 2700 Kettering Tower, Dayton, OH 45423
Attorneys for Defendants-Appellees

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GRADY, J.:

{¶ 1} This is an appeal from a summary judgment for the
respondent in an action on a petition for a writ of mandamus.

{¶ 2} Johnny Holloway, Jr., was employed by the City of Huber

Heights in the position of Battalion Chief in the City's Fire Division. On November 23, 2008, Holloway was terminated from his position. He filed an appeal of his termination to the Personnel Appeals Board of the City of Huber Heights (the "Board").

The Board refused to hear the appeal.

{¶ 3} Holloway filed a petition for a writ of mandamus in the common pleas court, asking that the Board be ordered to hear his appeal of his termination. Both Holloway and the Board filed motions for summary judgment. The court denied Holloway's motion and granted summary judgment for the Board. Holloway appeals.

ASSIGNMENT OF ERROR

{¶ 4} "THE COURT OF COMMON PLEAS ERRED IN NOT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, IN OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND IN SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT."

{¶ 5} "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station."

R.C. 2731.01. A writ of mandamus may be allowed by the court of common pleas. R.C. 2731.02. "The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of law." R.C. 2731.05.

{¶ 6} A summary judgment must be issued on the motion of a party on any claim or defense in an action when the record demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). The essential facts of this matter are not in dispute. The only issue is whether the Board was entitled to judgment as a matter of law on the Board's defense to Holloway's claim for relief in his petition.

{¶ 7} A municipality is empowered by Section 7, Article XVIII of the Ohio Constitution to frame and adopt or amend a charter for its government under which it may exercise, subject to all of the provisions of Section 3, Article XVIII of the Ohio Constitution, all powers of local self-government. The provisions of a home rule charter therefore derive their authority from the Ohio Constitution itself. A municipal home rule charter confers power, and one of its functions is the distribution of powers and the establishing of a framework within which substantive powers may be exercised. Baldwin's Local Government, §§ 4.33, 4:34, 4:39.

{¶ 8} Huber Heights is a charter city. Section 4.01 of the Charter of the City of Huber Heights creates the City Council and confers on it "all legislative and other powers of the City. . .," "including the distribution or allocation of authority and

responsibility to exercise powers and carry out municipal functions among; (i) the City administrative department, divisions and offices, or subunits thereof, (ii) the City's boards and commissions; and (iii) the City's officers and employees."

Section 7.02 of the Charter states:

{¶ 9} "The Council may, by ordinance or resolution, create, change or abolish any office, department, division, or subunit of any department or division, or agency, or other than those established by the Charter. Council may assign additional duties to any department established by this Charter, but may not discontinue or assign to any other office, department, or agency, any function assigned by this Charter to a particular office, department, or agency."

{¶ 10} Section 8.04 of the Charter of the City of Huber Heights establishes a Personnel Appeals Board to "hear appeals when an officer or employee of the City in the nonexempt service is aggrieved by an action of the Director of Personnel, the City Manager, or any department, under rules or regulations promulgated pursuant to Division (B) (1) of Section 8.03 of this Charter, and (the officer or employee) requests such a hearing." (Emphasis supplied).

{¶ 11} Section 8.02 of the Charter, which is captioned "Exempt Service," states, in its entirety:

{¶ 12} "All positions in the administrative service of the City shall be filled pursuant to open competitive examinations except the following, which shall constitute the 'exempt service' of the City:

- (1) City Manager;
- (2) Clerk of Council;
- (3) Directors of Departments and their assistants, Division Heads, and the Director of Personnel;
- (4) Assistant City Managers and assistants to the City Manager;
- (5) Secretary to the Manager and personal secretaries to all heads of departments and division, or subunits thereof, and secretaries of boards and commission;
- (6) City Attorney, assistant or Acting City Attorneys and the City's prosecutor and assistant prosecutors;
- (7) Any office or position requiring professional or scientific skills or knowledge;
- (8) Unskilled laborers, as determined by the Manager;
- (9) Seasonal or part-time employees, as determined by the Manager;
- (10) All officers and employees appointed or whose appointment is approved by the Council under its charter authority;
- (11) Volunteer members of any fire department and members of any police auxiliary unit of the City; and

(12) Members of board, commissions and other agencies and all elected officials of the City.” (Emphasis supplied.)

Section 8.03(B)(1) of the Charter provides that the City Manager of Huber Heights may propose to the City Council “rules and regulations . . . for the following matters with respect to officers and employees who are not exempt from the City’s merit system (the ‘nonexempt service of the City’), including (e) ‘causes and procedures for dismissal’ . . .and (f) [p]rocedures for appeal to the Personnel Appeals Board with respect to matters within its jurisdictions.”

{¶ 13} On February 14, 2006, on the recommendation of the City Manager, the Huber Heights City Council adopted Ordinance No. 2006-0-1617, which amended Section 137.03 of the Huber Heights Code. After acknowledging that the Huber Heights Charter provides for a Department of Public Safety headed by the Director of Public Safety, who administers the functions of the Police and Fire Departments, and that the job description for Battalion Chiefs allows them to act in the place of the Fire Chief when that officer is unavailable, the Ordinance provides, at Section 1: “The Fire Chief and Battalion chief(s) shall both serve, in addition to their other duties, as assistants to the Director of Public Safety with respect to all fire-related affairs.”

{¶ 14} By classifying Battalion Chiefs of the Fire Division

as assistants to the Director of Public Safety, Ordinance 2006-0-1617 establishes the position of Battalion Chief from which Holloway was terminated as an assistant to the Director of a Department, one of the classifications which Section 8.03(3) of the Charter places in the exempt service of the City. Because Sections 8.03 and 8.04 of the Charter limit appeals to the Personnel Appeals Board to those filed by "employees who are not exempt" or those in the "nonexempt service," the Ordinance operates to exclude Holloway from the class of non-exempt employees who have a right of appeal. The Board refused to hear Holloway's appeal for that reason.

{¶ 15} Huber Heights relies on the broad authority conferred on the City Council by Sections 4.01 and 7.02 of the charter, claiming they authorize the City Council to designate Battalion Chiefs of the Fire Division as assistants to the Director of Public Safety. Holloway contends that the City Council exceeded its authority because Battalion Chiefs are not among those specific provisions identified in Section 8.02 of the Charter as "the 'exempt service of the City,'" for which civil service appeals authorized by Section 8.04 for the "nonexempt service" are unavailable.

{¶ 16} The trial court found that Holloway is not entitled to a writ of mandamus requiring the Board to review his appeal

because the Ordinance, by placing Battalion Chiefs in the exempt service, denies Battalion Chiefs a right of appeal. The court rejected Holloway's argument that the Ordinance conflicts with the Charter provision identifying those other positions which are exempt. The court reasoned that Battalion Chiefs may act in the absence of the Fire Chief, who is an assistant to a Director of a Department, and that Battalion Chiefs exercise judgment and discretion typical of exempt employees. The court concluded that the Ordinance merely "labeled" Battalion chiefs for what they in fact are: assistants to a Departmental Director.

{¶ 17} The issue is not whether Ordinance No. 2006-0-1617 is sensible or correct. The issue is whether the Ordinance conflicts with the Charter with respect to Holloway's right of appeal and the Board's duty to hear his requested appeal. In that event, the Charter provision controls, for the reason that the City Council that enacted the Ordinance is but a creature of the Charter, and its authority to promulgate ordinances will not be construed to vitiate or qualify other duly enacted charter provisions. *State ex rel. Hattery v. Columbus* (1938), 28 Ohio Law Abs. 523.

{¶ 18} Section 8.02 of the Charter, identifying those positions that are "the 'exempt service' of the City," establishes a framework within which the City Council may exercise the powers

conferred on it by Sections 4.01 and 7.02, with respect to appeals to the Personnel Appeals Board authorized by Section 8.04 for those in the nonexempt service and the authority conferred on the City Council by Section 8.03(B)(1) to establish procedures for appeals to the Personnel Appeals Board by a nonexempt employee who has been dismissed. The City Council may not use the powers conferred on it to arbitrarily deny a person in the nonexempt service the right of appeal that Section 8.04 confers.

{¶ 19} Section 8.02(3) identifies "Directors of Departments and their assistants (and) Division Heads" as positions in the nonexempt service. Battalion Chiefs serve under the direction of the Fire Chief, who is a Division Head, but Section 8.02(3) does not include assistants to Division Heads in the nonexempt service. Ordinance No. 2006-0-1617 nullifies that distinction by making both the Fire Chief and his Battalion Chiefs assistants to the Director of Public Safety, on the rationale that Battalion Chiefs can act in the place of the Fire Chief. However, the ordinance confers no additional duties on Battalion Chiefs in relation to those of the Director of Public Safety. Huber Heights conceded at oral argument that neither are Battalion Chiefs paid any additional salary or granted any additional authority on that account.

{¶ 20} The foregoing analysis strongly suggests that

designating Battalion Chiefs as assistants to the Director of Public Safety is nothing other than a pretext to remove them from the nonexempt service to which Section 8.04 of the Charter grants a right of appeal to the Personnel Appeals Board. Section 8.02 of the Charter identifies those positions which "constitute the 'exempt service' of the City." The position of Battalion Chief of the Fire Division is not among them. Applying the canon of construction "expressio unius," meaning expression of one thing suggests the exclusion of others, compels the conclusion that the position of Battalion Chief is not in the exempt service. Therefore, per Section 8.04(B) of the Charter, the Personnel Appeals Board is charged by law to hear Holloway's appeal, and the City Council may not deprive Holloway of that right of appeal by adopting an ordinance that places Holloway in the exempt service, vitiating Section 8.04. *State ex rel. Hattery.*

{¶ 21} Because the Board is not entitled to judgment as a matter of law on the petition that Holloway filed, the trial court erred when it granted summary judgment for the Board. The assignment of error is sustained and the case will be remanded to the trial court for further proceedings, consistent with this opinion.

FAIN, J. And FROELICH, J., concur.

Copies mailed to:

Henry A. Arnett, Esq.
Matthew D. Stokely, Esq.
Julie C. Hammond, Esq.
Hon. Michael T. Hall