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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001801-MR

DAVID DEARBORN; DAN MCCOY;
AND JERALD CRAWFORD — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00263

CITY OF FRANKFORT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: David Dearborn, Dan McCoy and Jerald Crawford (collectively the officers) are retired police officers formerly employed by the City of Frankfort. They appeal from the Franklin Circuit Court's opinion and order granting the City summary judgment on the officers' breach of contract, negligent

misrepresentation and violation of wage and hour claims on the basis that they had no entitlement to education incentive back pay.

The officers were hired as police officers for the City in 1991 and 1992. As part of their recruitment process, Dearborn and Crawford were provided with a form entitled "Application Information for Position of Patrol Officer Recruit" that offered, among other things, an education incentive of up to $800 per year above their annual starting salary of $17,170. McCoy received a different informational form entitled "Salary and Fringe Benefits for Patrol Officer Recruit," which also provided for an education incentive up to $800 after one year. Each form provided information on a variety of other benefits in addition to the education incentive, including health, dental and life insurance. The officers allege they received all the benefits specified in these forms other than the education incentive pay.

The officers testified in their depositions that Stephanie Bowman, who worked in the City's personnel department, advised them that based on their having obtained their bachelor degrees and having 120 hours of study they would be eligible for the maximum education incentive of $800 annually. They testified this incentive was part of their consideration in deciding to accept employment with the City instead of other police departments. Bowman testified that she did not recall meeting with any of the officers to discuss these issues.

After being offered employment and accepting, each officer received a "Conditions of Employment" form from the City. This form stated in part:

> In consideration for being employed as a police officer for the City of Frankfort's Police Department, and for the training, equipment, salary, and other unspecified benefits received through the Frankfort Police Department, I understand and agree to the following conditions of employment . . .

Below that statement, the form included many provisions clarifying the officers' obligations to the City, including provisions requiring them to repay the cost of training under certain circumstances. Each provision contained space for it to be initialed by the officers. The form further specified:

> I understand and agree that all terms and conditions of employment remain in full effect and unchanged and that I am in no way guaranteed any right to continued employment. All civil service, City of Frankfort Policies and Procedures, and Frankfort Police Department Rules & Regulations and General Orders relating to police officers are in full effect during my employment with the City of Frankfort. I further understand that these conditions of employment have no effect on the authority of the Chief of Police or citizens of Frankfort to invoke disciplinary actions against me in accordance with the Police Department and City of Frankfort Policies, City of Frankfort legislation, and state statutes.

Each officer signed and properly initialed his form. McCoy signed his form on January 24, 1991 and began work on January 29, 1991; Dearborn signed his form on April 6, 1992 and began work on April 27, 1992; and Crawford signed his form on April 14, 1992 and began work on April 27, 1992.

On May 22, 1991, the Frankfort City Commission passed Ordinance No. 13, amending the Frankfort Code of Ordinances (Frankfort Code) § 2.36.150 which stated as follows:

> Each fulltime, regular, confirmed city employee . . . shall be compensated as follows in addition to their regular salary, for completion of semester hours of study at an accredited college or university as follows:
>
> . . .
> 120 and over hours $800 annually or $30.77 per pay period[.]

Ordinance No. 13 retained the above language but limited the education incentive to "city personnel employed prior to November 1, 1990." Ordinance No. 13 became effective when it was published on May 28, 1991. Kentucky Revised Statutes (KRS) 83A.060(9).

After Ordinance No. 13 took effect, employees employed on or after November 1, 1990, were entitled to an alternative education incentive that rewarded them for completing additional education, rather than for the education they already had. Frankfort Code § 2.36.150(2). Employees hired before that time could opt into the new incentive program but would then be barred from receiving education incentive pay under the old program. Frankfort Code § 2.36.150(3).

The officers allege they never received any education incentive pay. The officers learned the incentive amount was not included in their paychecks in 1991 or 1992. The officers allege they complained to their supervisors and others, but only Dearborn's deposition testimony is provided to support this allegation. The officers never filed any formal action to address this issue until after they retired in 2012 and filed the instant complaint.

In the officers' complaint, they alleged breach of contract, negligent misrepresentation and violation of Kentucky's wage and hour law. In the City's answers to the complaint and answers to interrogatories, it admitted each officer entered into a written contract for employment as a police officer with the City, but did not admit the contracts included the education incentive benefits.

The parties filed competing motions for summary judgment. The circuit court granted summary judgment to the City on the following grounds: (1) Ordinance No. 13 precluded the officers from receiving the education incentive because they were all hired after November 1, 1990; (2) the conditions of employment agreement is void because it lacks the mayor's signature; and (3) the education incentive is not a wage for purposes of the wage and hours law. The circuit court did not decide whether the officers' claims were also barred by the statute of limitations.

The officers filed a motion to vacate, which the circuit court denied. The circuit court acknowledged that the officers were contract employees of the City, but noted that their contract did not incorporate the education incentive and, thus, it had to look to Ordinance 13 to determine the City's obligations.[1] The circuit court also ruled that the negligent misrepresentation claim was barred by the statute of limitations.

[1] While the circuit court stated the officers were contract employees of the City in accordance with the City's previous admissions, without any specific contractual language obligating the City to pay them an education incentive any gaps in the contract must be supplied by the City's ordinances, so the result is the same as if there were no contract.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

On appeal the officers argue: (1) the $800 education incentive should be implied as a term of the contract because the contract is silent or ambiguous and the benefits documents and oral representations provide the needed terms; (2) if the written contract incorporated the Frankfort Code, McCoy should still receive the education incentive pay because the previous ordinance was in effect when he was hired and shows the City's intent; (3) the officers should recover under the doctrine of equitable estoppel and negligent misrepresentation even if the written contracts were invalid; (4) the officers' claims are not barred by the relevant statute of limitations because the City's conduct chilled their ability to initiate a formal action and the officers are entitled to damages for each pay period that occurred within the past fifteen years from the filing of their complaint; and (5) the education incentive pay constituted wages under Kentucky's wage and hours law.

"To prove a breach of a contract, the complainant must establish three things: 1) existence of a contract; 2) breach of that contract; and 3) damages flowing from the breach of contract." *Metro Louisville/Jefferson Cty. Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky.App. 2009). We affirm because the officers have failed to prove the existence of a contract entitling them to education incentive pay.[2]

The reasoning of the circuit court in its order granting summary judgment to the City is both persuasive and an accurate recitation of the law:

> Frankfort follows a city manager form of Government. Still, the Mayor must sign certain documents and instruments. Any delegation of the city manager's duties or responsibilities to subordinate officers and employees shall be made by municipal order except that all bonds, notes, contracts, and written obligations of the city according to the KRS 83A.150(9). None of the [officers'] contracts were signed by the Mayor. Indeed, the "contracts" were signed by only one party—each [officer] himself. . . . Rights to wages and benefits for city and state workers do not arise from common law contract; rather they arise from statutory law. Thus, a city employee is not entitled to a benefit by virtue of its mention in an agreement. Rather, the city employee is entitled to a benefit because it was enacted by a

[2] We note that in *Waters v. City of Pioneer Vill.*, 299 S.W.3d 278, 281 (Ky.App. 2009), what appears to be a similar form was determined to be an employment contract that bound a police officer to reimburse a city for the cost of training him. However, the case involved whether the statute requiring one law enforcement agency to reimburse another for the training costs when an employee left the first agency and began working for the second, obligated the first agency to seek reimbursement that way instead of seeking reimbursement from its former employee and did not contain any discussion about whether the form was a valid contract. *Id.* at 280-81. *Compare with Rhode Island Bhd. Of Corr. Officers v. Rhode Island*, 357 F.3d 42, 49 (1st Cir. 2004) (*Rhode Island II*) (holding that written forms police officers signed acknowledging what they needed to do to qualify for an education incentive pay program did not create any contractual right for them to receive such pay; the forms were not contracts because they only clarified the officers' obligations rather than creating any obligations on the part of the state).

> legislative body. Consequently, that legislative body may amend or repeal the law.

Pursuant to KRS 82.082(1) "[a] city may exercise any power and perform any function within its boundaries . . . that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute." Therefore, a city may properly enter into contracts, but is constrained in the method by which it may do so according to the statutes that govern it.

According to the Kentucky League of Cities, the City of Frankfort is managed in accordance with the city manager form of government. KRS 83A.150 explains how the city manager form of government is to be conducted and provides in relevant part:

> Any delegation of the city manager's duties or responsibilities to subordinate officers and employees shall be made by municipal order except that *all* bonds, notes, *contracts, and written obligations of the city* according to ordinance or resolution *shall be made and executed by the mayor on behalf of the city*.

KRS 83A.150(9) (emphasis added).

KRS 83A.070 has at all relevant times provided that "[t]he legislative body of each city shall fix the compensation of city employees . . . in accordance with a personnel and pay classification plan which shall be adopted by ordinance."[3] The Frankfort Code contains civil service ordinances relating to city employees including police officers which include pay grades and their corresponding

[3] This language from KRS 83A.070 was in effect when the officers were hired as originally enacted in KRS 83A.070(3) (1980) and is currently codified under KRS 83A.070(2).

salaries, and the availability of education incentive pay. The pay newly hired police officers are entitled to receive can be determined through such ordinances.

A jurisdiction's governing body's only obligation to its employees regarding pay and benefits is to follow enacted law as it currently exists; once the enacted law is amended, it must be followed as amended. In *Beckham v. City of Bowling Green*, 743 S.W.2d 858 (Ky.App. 1987), the Court explained that cities lack any obligation to maintain current salaries for their police officers. In 1986, by ordinance, the City of Bowling Green increased the pay grade of police sergeants and captains by four levels, substantially increasing their salaries. Later that year, after the City received complaints from members of the fire department who previously had parity of pay with those police positions that increasing the salary of only police officers was unfair, by ordinance the City reduced the pay grades of police sergeants and captains by two levels and raised the respective fire fighters' pay grades by two levels. The affected police officers then filed suit challenging the ordinance, arguing that KRS 95.450 prohibits the reduction of their salary unless justified for disciplinary reasons and "the members of the police department have a property interest in their employment and rate of compensation which cannot be taken away without due process of law[.]" *Beckham*, 743 S.W.2d at 859.

The Court rejected the officers' reasoning based upon its interpretation of the relevant statutes authorizing the City's actions and its determination that the limitations contained in KRS 95.450 did not apply to these

circumstances. The Court explained that under KRS 82.082(1) the City was authorized to exercise any power in furtherance of the public purpose of the City that was not in conflict with a constitutional provision or statute, and under KRS 83A.070 cities are required to fix the compensation of city employees. *Beckham*, 743 S.W.2d at 859. The Court noted that "[g]enerally, unless prohibited or restrained by law the salary or compensation of an employee of a municipal corporation may be increased or diminished during the term or period of employment." *Id.* at 860 (quoting *Campbell v. Meredith*, 239 S.W.2d 979, 980 (Ky. 1951)). The Court held this general rule applied to the City because under KRS 83A.070 the City had the authority to fix the compensation for its officers and employees and KRS 95.450 did not prohibit a non-discriminatory reduction in pay or grade. *Beckham*, 743 S.W.2d at 861. Therefore, "[t]he decision to raise and then lower the salaries . . . was certainly lawful and within the power of the [City]." *Id*.

In *City of Lexington v. Rennick*, 105 Ky. 779, 49 S.W. 787, 788 (1899), police officers, whose ongoing salary was reduced by a new ordinance of the City, argued they were entitled to keep receiving their original salary while they continued to be employed by the City under Section 161 of the Kentucky Constitution which prohibits the alteration in the compensation of any city officer during his term in office. The Court determined the officers were not protected by Section 161 because they had no term of office and by statute they were removable

at the pleasure of the board of police commissioners, thus allowing an adjustment of their salaries at any time. *Rennick*, 49 S.W. at 788-89.

In *Keeling v. City of Grand Junction*, 689 P.2d 679, 680 (Colo.App. 1984), our sister court applied the same reasoning as in *Beckham* in ruling that the City was not contractually bound to maintain a prior education incentive program for police officers because the City had the legislative power to fix the salaries of city employees:

> Because the fixing of salaries is subject to change and the receipt of a salary is contingent upon continued employment with the City, plaintiffs do not have a vested contractual right in the continuance of a particular rate or method of compensation.

Similarly, in *Rhode Island Bhd. Of Corr. Officers v. Rhode Island*, 357 F.3d 42, 45-46 (1st Cir. 2004) (*Rhode Island II*), the Court held that the state government could lawfully reduce an education incentive program for correctional officers by amending the statute creating the program because the original statute lacked an unmistakable intent to create contractual rights.

The officers have failed to establish any contractual right to be paid education incentive pay over the course of their careers with the City. The City properly exercised its authority to fix the officers' compensation. Therefore, the officers were only entitled to be paid what the Frankfort Code specified under the version then in effect.

It is undisputed that Dearborn and Crawford were paid in accordance with the Frankfort Code § 2.36.150 in effect at the time they became employed in

1992 as previously amended by Ordinance No. 13. While Ordinance No. 13 did not take effect until after McCoy was employed by the City, this did not prevent the City from changing his pay in a prospective manner[4] because the accurate pre-employment information McCoy received about the education incentive did not entitle him to ongoing education incentive pay after the Frankfort Code was changed. Accordingly, as concerns the period from May 28, 1991, until McCoy's retirement, McCoy could not suffer any deprivation from being paid in accordance with the Frankfort Code.

As a matter of law, the officers' claim of equitable estoppel fails because although they have adequately alleged a material misrepresentation, they cannot establish that any reliance on their part was reasonable.

> Under Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party:
>
> > The essential elements of equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall

[4] It appears that McCoy may have adequately alleged that he failed to receive incentive pay under the previous ordinance from the time he began his employment on January 29, 1991, until the time that Ordinance No. 13 went into effect on May 28, 1991. While his informational form stated his education incentive would not be available for one year, the ordinance and Bowman's statement did not contain such a limitation. Assuming he would be entitled to such compensation immediately upon employment, his recovery during this period is barred by even the longest statute of limitations that is potentially applicable to him, the fifteen-year statute of limitations, KRS 413.090(2).

> be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Fluke Corp. v. LeMaster, 306 S.W.3d 55, 62 (Ky. 2010) (quoting *Sebastian–Voor Properties, LLC v. Lexington–Fayette Urban County Government,* 265 S.W.3d 190, 194–95 (Ky. 2008)).

Because cities have the right to change city employee salaries at any time, *Beckham*, 743 S.W.2d at 861; *Rennick*, 49 S.W. at 788-89, city employees cannot reasonably rely on the ordinance which created their pay never being altered. In *Keeling*, 689 P.2d at 681, the Court held that because the fixing of salaries is subject to change and contingent upon continued employment "plaintiffs could not have reasonably relied upon continuing payments under the [education incentive] program, and therefore, their claims based on promissory estoppel must fail." In *Rhode Island Bhd. of Corr. Officers v. Rhode Island*, 264 F.Supp.2d 87 (D.R.I. 2003) (*Rhode Island I*) (cited favorably in *Rhode Island II*, 357 F.3d at 49, for effectively explaining why the claims invoking promissory estoppel could not succeed) the district court reasoned as follows:

> [A] legislature must be free to adjust the pay schedules of state employees as warranted by changing economic

> conditions. As a result, for plaintiff and its Members to have presumed that the Rhode Island General Assembly would never revisit the issue of educational incentive pay was simply unreasonable.

Id. at 105.

The officers could not reasonably rely on information at odds with the current municipal code or erroneous information about the law or how it affected them as given by city employees, and any flawed representations could not obligate the City to act contrary to its own ordinances absent extraordinary circumstances. *See Louisville Civil Serv. Bd. v. Blair*, 711 S.W.2d 181, 184 (Ky. 1986) (holding estoppel not available against a city where city official promised that if police officer was acquitted he would be reinstated; "it does not matter whether the act or conduct of the official was the result of error, mistake, negligence, unauthorized act or dereliction of duty, a municipal corporation cannot be estopped in prosecution of public affairs. . . [while acting in] a governmental capacity."); *Stovall v. City of Scottsville*, 605 S.W.2d 767, 770 (Ky.App. 1980) (holding city employee could not come under the protections of its civil service act through a city ordinance by virtue of an assurance by city officials that he was covered by the ordinance because "[a] City cannot be estopped from asserting the invalidity of unauthorized acts by its officers"). *See also Sizemore v. Madison Cty. Fiscal Court*, 58 S.W.3d 887, 890-91 (Ky.App. 2000) (determining county could not be estopped from enforcing its applicable land ordinances based on its giving erroneous information to a land developer, noting the developer "always had

access to the statutes and regulations at issue and is chargeable with notice of the proper procedure."); *J. Branham Erecting & Steel Serv. Co. v. Kentucky Unemployment Ins. Comm'n*, 880 S.W.2d 896, 898 (Ky.App. 1994) (Kentucky Unemployment Insurance Commission could not be estopped from correcting administrative error in initial erroneous assessment of unemployment contributions due, where the correct statutory rate was clearly delineated).

The officers could not reasonably rely on Bowman's representations that they would receive education incentive pay because they should have known their compensation could be changed by the City at any time. Additionally, Dearborn and Crawford should have known that Bowman's representation was contrary to then existing law, because they were presumed to know about the ordinance then in effect that would control their access to such pay. *See Nussbaum v. Gen. Acc., Fire & Life Assur. Corp., of Perth, Scotland*, 238 Ky. 348, 38 S.W.2d 1, 2 (1931). Any erroneous information given to Dearborn and Crawford by Bowman could not obligate the City to act contrary to its own ordinances. McCoy could not reasonably rely on any representations about his ongoing compensation over the course of his employment with the City because the City could change his pay at any time through a new ordinance.

Accordingly, we affirm the Franklin Circuit Court's opinion and order granting summary judgment to the City of Frankfort.

J. LAMBERT, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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