

FILED
COURT OF APPEALS

2017 JUN 25

BY: *[Signature]*

NO. 34340-1-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

MICHAEL P. PRICE

Appellant,

v.

CITY OF TACOMA

Respondent.

CITY OF TACOMA'S RESPONSE BRIEF

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I. COUNTER STATEMENT OF THE CASE

A. Procedural History

On October 27, 2004, Appellant filed a claim for damages, claiming in relevant part to this action, that the City of Tacoma ("City") should have credited or paid him with increased vacation accruals and longevity increases one year earlier than the City actually credited or paid them. CP 7, 10-12 (Excerpt of Claim for Damages). The City's ordinances authorizing payment of longevity and crediting of vacation accruals had been unchanged for over a generation in terms of when the City commenced payment of longevity compensation or began crediting vacation at higher rates. The City commenced a declaratory action as it provides the legal means for resolving the statutory interpretation legal question presented by Appellant's claim.

Appellant desired to conduct discovery in the declaratory action. The City cooperated in permitting the same, making witnesses available to Appellant for depositions. Thereafter, the parties filed cross motions for summary judgment which were heard

and decided by the Pierce County Superior Court on December 16, 2005, with the court granting the City's motion and denying the relief sought by Appellant. CP 1046-1048. Appellant timely filed a motion for reconsideration of the trial court's decision. The trial court denied the motion for reconsideration on January 6, 2006. Appellant timely filed this appeal.

B. Factual History

The Tacoma City Council ("Council") has authorized paid vacation leave for its employees for longer than it has authorized paying its employees the tenure-based, special compensation known as "longevity pay." CP 998-1009 (summary of Longevity and Vacation Ordinances, Exhibit 1 to Karen Short Declaration).

The City's legislative history for paid vacation leave under the City's current Code originates with Ordinance No. 16670, passed by the Council on December 13, 1960. CP 771-778. The Council authorized employees to accrue paid vacation leave time based on tenure, with eligibility for earning paid vacation leave time

at increased accruals rates being determined and credited on the basis of completed years of aggregate city service. Id.

Changes authorized by the Council to the vacation leave provision of Tacoma's Pay and Compensation Plan, TMC 1.12.220, have predominately been to the accrual rates and to address workplace changes unrelated to the when crediting of increased tenure-based accruals commence. See, CP 1003-1009. The paid vacation leave ordinances have consistently provided that the crediting of vacation accrual at increased rates be based on an employee's tenure, with increased rate of accrual starting effective the first of the calendar year (i.e. January 1) in which an employee will complete a specified number of years of aggregate city service. See, for example, CP 771-778 (Ordinance No. 16670), CP 788 (Ordinance No. 17727), CP 793 (Ordinance No. 18697 which added new rate for 23 years or more of service, leaving unchanged timing for crediting of increased accruals), CP 815 (Ordinance No. 19854), CP 819 (Ordinance No. 19729 restating accruals on per pay period basis instead of annual basis, but

leaving substantially unchanged the language providing that accruals be credited "at the first of the calendar year" in which a stipulated period of service "will be completed.") More recently, by Ordinance No. 23111, passed February 7, 1984, the table setting forth the accrual increases has also included a header reading "Completed Years of Service" CP 890-891.

Longevity Pay, authorized as a form of special or additional compensation, was first authorized by the Council in December, 1969, when it passed Ordinance No. 19000, codified at TMC 1.12.133. From the effective date of Ordinance No. 19000 through 1976, only public safety employees received this form of compensation. See, CP 849-851, Ordinance No. 20938. The Council authorized paying longevity to implement compensation terms agreed to in collective bargaining. CP 764 (Michels Deposition at pp. 7-8.). In its initial authorization of longevity pay, the Council's legislation included a schedule similar to its authorization of paid vacation leave accruals. The Council also

included eligibility language that mirrored the vacation leave provision.

Longevity will be paid an employee at the first of the calendar year in which any of the above periods of continuous service will be completed.

CP 796-797, Ordinance No. 19000, Section 2.

With the enactment of Ordinance No. 20938 in late 1976, the Council authorized paying all other eligible city employees, whether represented by a labor union or not (i.e. “unrepresented”), longevity pay effective for services performed on and after January 1, 1977. See, CP 849-851, Ordinance No. 20938. The language used by the Council in authorizing longevity pay for all eligible employees mirrored the then existing and historical language as to when payment of the same was to commence.

The only material change over the years to longevity pay authorizations has been to either increase the monthly dollar amount authorized, or to convert from a monthly dollar amount to a percentage of base compensation.

From 1969 to the present, the Council has authorized longevity pay be paid effective January 1 of the calendar year in which an employee will complete a threshold number of years of service, with the minimum threshold for eligibility being five years (with increases following in like five year increments). CP 796. Changes in the authorization to pay longevity pay have been a result of collective bargaining negotiations, with the Council implementing the negotiated agreements by Ordinance, as required by the City Charter Section 6.9. The one exception to this history is the Council's authorizing longevity pay for unrepresented employees on the same basis as represented employees. CP 849-851, Ordinance No. 20938.

The City has consistently maintained a practice of paying longevity pay or crediting vacation accruals at higher than the base accrual rate only as of January 1 of the year in which an employee will have completed a milestone period (anniversary) of City employment, regardless of the actual day in the year that an employee will have an employment anniversary. The only actual

dispute that has arisen over the decades has been where the City sought a refund of overpayment of longevity to a public safety employee. CP 766, (Michels Deposition at p.36-37).

II. ISSUES

1. Whether the trial court correctly held that the City's long standing administrative practice implementing the special compensation ordinances for longevity and paid vacation accrual is consistent with the ordinance language and legislative intent?

2. Whether a special compensation ordinance authorizing and directing that longevity pay and increases in the accrual rate of paid vacation leave time occur on a calendar year basis violates Equal Protection?

III. ARGUMENT

A. Standard of Review

Where the issues before the court involve questions of statutory interpretation, review is *de novo* under the question of law standard. Pasco v. Public Employment Relations Commission, 119 Wn. 2d 504, 833 P.2d 381, (1992). When reviewing an order of summary judgment, the court engages in the same inquiry as the trial court

The burden of proving a constitutional violation of a statute or ordinance is on the challenger. Washington Education Association v. Smith, 96 Wn. 2d 601, 609, 638 P.2d 77 (1981). A classification must be purely arbitrary to overcome a strong presumption that it is constitutional. Id.

B. Statutory Interpretation

1. It is a question of statutory interpretation what special compensation has the City Council authorized be paid to employees under TMC 1.12.133 and 1.12.220, not one of implied contract.

Municipal employees are entitled to compensation only where a valid bargaining agreement or law authorizes it. State ex. Re. Beck v. Carter, 2 Wn. App. 974, 980, 471 P.2d 127 (1970).

- a. The Council is the sole authority for authorizing compensation for city employees.

Article XI, Section 10 of the Washington State Constitution grants Tacoma, as a first class city, the authority to adopt its own charter. Tacoma's current charter was adopted by special election held November 4, 1952, and was last amended by the election held November 2, 2004.

Tacoma's charter grants the City Council broad legislative powers. The specific Charter provision relating to employee compensation is found at Section 6.9. That section provides as follows:

Compensation of Officers and Employees

Section 6.9 – Except as otherwise provided in this charter or by state law, the **compensation of all officers and employees of the city shall be fixed in accordance with the pay plan and salary ordinance adopted by the Council and within the limits of budget appropriations.**

No officer or employee shall receive any compensation from any sources whatsoever for his service to the city other than his salary. (emphasis added.)

Pursuant to Charter Section 6.9, the Council has, in the exercise of its discretion, enacted ordinances authorizing the special compensation. The ordinances are codified at TMC 1.12.133 and TMC 1.12.220, commonly referred to as longevity pay and paid vacation leave provisions of the City's Pay and Compensation Plan, respectively.

In deciding the question in this case, it is noteworthy that, as a general rule, retroactive compensation of public officers and

employees is prohibited under Washington's Constitution. Article II § 25, of the Washington State Constitution states:

Extra Compensation, Prohibited. The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office.

The collective bargaining context is recognized as a limited instance of when payment of retroactive compensation by a municipality will not be contrary to the Washington State Constitution. See RCW 41.56.950. See also Christie v. Port of Olympia, 27 Wn. 2d 534, 179 P.2s 294 (1947). The City's ordinance language authorizing when employees will be paid or credited longevity pay or vacation leave accruals reflects this general prohibition.

- b. Municipal Ordinances are interpreted under the same rules as govern statutory construction.

Municipal ordinances are local statutes that are to be construed according to the rules of statutory construction. McTavish v. Bellevue, 89 Wn. App. 561, 565, 949 P.2d 837 (1998);

Neighbors v. King County, 88 Wn. App. 733, 778, 946 P.2d 1188 (1997). Statutory interpretation is a question of law which an appellate court reviews *de novo* under the error of law standard. Homeowners Assoc, v. Ltd. Partnership, 156 Wn. 2d 696, 698-699, 131 P.3d 905 (2006). McTavish, *supra*.

The primary duty of the court in interpreting any statute is to discern and implement the intent of the legislature. Homeowners Association, *supra*; HJS Development, Inc. v. Pierce County, 148 Wn.2d 451, 472, 61 P.2d 1141 (2003); Perkins Coie v. Williams, 84 Wn. App. 733, 736-737, 929 P.2d 1215, rev. denied, 132 Wn.2d 1013 (1997); McQuillin, Municipal Corporations, §§ 20.42, 20.43 3rd Ed. Rev., citing Schear v. Ludwig, 143 F.2d 20 (1944). The starting point of analysis for interpreting any statute must always be the statute's plain language and ordinary meaning. Homeowners Assoc, *supra*. Courts must interpret and construe statutes so that all the language used is given effect, with no portion rendered meaningless or superfluous. Homeowners Association, *supra*,

citing State v. J.P., 149 Wn. 2d 444, 450, 69 P.3d 318 (2003); State v. Beaver, 148 Wn.2d 338, 344, 60 P.2d 586 (2002);

2. TMC 1.12.133 and TMC 1.12.220, when read in their entirety, are unambiguous as to when the Council has authorized paying an employee special compensation consisting of longevity pay or increased accrual of paid vacation leave.

The City believes that the provisions of its compensation ordinances, when read in their entirety and with consideration of the prohibition on retroactive compensation, are clear as to when the City Council has authorized employees to receive longevity pay and/or the crediting of vacation leave accrual at an increased rate for work performed. These elements of the administration of these compensation authorizations has been unchanged for decades, save for changes in the dollar amount, percentage, or leave accrual rate(s) when appearing in ordinances. See, CP 764, Michels deposition¹ at p. 7; CP 765, Michels deposition at p. 32-33; CP 766, Michels deposition at pp. 35-36; CP 768, Michels deposition

¹ Of the deposition testimony in the record and before the trial court, only Mr. Michels' provided testimony based on personal knowledge of and participation in bargain history. Unlike Msrs. Walton and Jones, whose testimony Appellant cites to, Mr. Michels and Ms. Short had responsibilities that included implementing the Council's authorized compensation.

at p. 51. See also, CP 770-973 (excerpts of ordinances); CP 596-614 (deposition of Karen Short) and CP 998-1009 (Exhibit 1 to Karen Short Declaration). This is because at all times the City Council's legislative direction has provided that employees are not eligible to be "paid" or "credited" the particular form of compensation until January 1 of the particular year in which they will **complete** a stated threshold period of city service.

Appellant parses the language of the City's special compensation ordinances at issue. This parsing consists of focusing on, or emphasizing, the table portion of the ordinance section and the word "from", and not integrating or harmonizing the language following the table that prescribes when payment or accrual of the particular form of compensation commences. Appellant also argues, based on this reading, in favor of a retroactive effect (tied to the 365th date of the year of aggregate service) that he asserts is required based on what he believes would be a fair or more precise compensation practice. As referenced above, Washington law recognizes only limited

instances where retroactively paid compensation is lawful. Nothing in the language of the ordinances at issue evidences any legislative intent to have the types of special compensation retroactively computed and paid each January 1 of a milestone year.

Appellant ignores important legislative history that the trial court considered in reaching its decisions. Significantly, the trial court had before it evidence that, as originally enacted, longevity pay was only authorized for public safety employees. From the outset, eligibility to receive (for the City to pay out) longevity pay did not arise until "the first of the calendar year in which any of the above stipulated periods of continuous services will be completed." Ordinance No. 19000, Section 1. (CP 796) Specifically as regards longevity, the initial authorization for its payment to public safety employees commenced January 1970, at the beginning of a calendar year. (See, CP 796, Ordinance title noting emergency provision.). Also significant is the fact that the language used in Ordinance No. 19000 was substantially the same as the language contained in the City's vacation allowance ordinance. (See, CP

775, excerpt of Ordinance No, 16670, and CP 788, excerpt of Ordinance 17727).

Looking at the legislative history for vacation leave under Tacoma's code, the trial court had before it Ordinance 16670. At Section 6, subpart A of that ordinance, it is seen that the City Council acted to authorize the earning of paid vacation leave time as part of employee compensation. Significant to the Council authorization was that a new employee would not be eligible to earn any more than a minimum amount of vacation leave "until the first of the calendar year in which he will have **completed** four years aggregate City service" The earning of additional tenure-based increased was authorized in Subpart C of Section 6 of Ordinance 16670. Again, the eligibility to accrue paid vacation leave at an increased rate arises for work performed on and after January 1 of the year in which an employee will complete a certain period of service.

3. If an ordinance is found to be ambiguous, the court must give deference to the construction of the ordinances given by the officials charged with its implementation and administration.

Underlying Appellant's assertion that the trial court erred are based on: (1) Appellant's belief that a legislative authorization and direction for paying longevity or crediting a greater vacation accrual as of January 1, regardless of an employee's actual anniversary date, is flawed because it lacks precision, (2) Appellant's placing greater weight on the language immediately preceding the "schedule" and not applying (reading out) the language regarding **completed** years of service to the schedule, and (3) Appellant's argument that words are missing from the ordinance or would need to be changed. Appellant's first assertion is not relevant as the only City Council possesses the authority to authorize when and how City employees will be compensated. Appellant's second and third assertions would support an argument that the City's ordinance is ambiguous.

Well settled law mandates that the court accord deference to the City's interpretation if it finds the compensation ordinances

ambiguous. Neighbors v. King County, supra. This is particularly so where “the construction has been accompanied by acquiescence of the legislative body over a long period of time.” Ball v. Smith, 87 Wn.2d 717, 723, 556 P.2d 936 (1976).

The trial court had before it significant evidence that officials charged with administering the longevity and vacation leave compensation authorized by the City Council have, for more than a generation and throughout Appellant’s employment with the City², applied, interpreted, and construed them in a manner that has been consistent. The City’s administration implemented the City Council’s authorization of these forms of compensation. In authorizing the payment, the Council enacted legislation necessary to implement terms of collective bargaining agreements. Had City officials not implemented and administered consistent with collective bargaining, the City would have had labor representatives

² Appellant commenced employment in September 1974, and retired effective May 1, 2006. Mr. Michels, per his deposition, commenced employment with the City in 1975. Per Mr. Michels’ deposition, the City’s administration of the longevity and vacation special compensation ordinances was unchanged from before he commenced employment. Per Karen Short’s deposition, the administration remains unchanged.

filing grievances, unfair labor practice complaints, or other claims in an effort to assure its members were compensated as promised. Appellant's argument fails to acknowledge this. Instead, Appellant asserts a fair labor standards argument for which he provides no substantive analysis, particular where he is not a represented employee.

4. Compensation ordinances are present, not deferred compensation. Case law relating to pensions are inapplicable.

Appellant invites the Court to import legal principles governing pensions to a question involving whether a municipal legislative body has authorized payment of compensation. Nowhere, however, does Appellant analyze how the distinct body of pension law relates to a question concerning whether and when compensation is authorized to be paid. The compensation involved herein is not compensation that is in the "nature of deferred compensation." Bakenhus v. Seattle, 48 Wn. 2d 695, 296 P.2d 536 (1956). The ordinances in question do not involve a promise of a future payment conditioned on continued services. The

compensation in question herein is earned and paid upon performance of personal services through the regular payroll processes. The question herein is simply one of when an employee is eligible to be paid the particular type of compensation authorized; i.e. when it must be included in the paycheck.

C. Equal Protection

1. Appellant's equal protection challenge is based on his belief that it is improper for the Council to authorize payment of special compensation based on the year an employee instead of an individualized date of hire.

Appellant alleges the City's special compensation ordinances at issue violate equal protection violation because employees hired in the same calendar all receive the same longevity and increased vacation accruals each pay period regardless of an individual's actual date of hire³.

The Equal Protection Doctrine provides that similarly situated persons are to receive like treatment under the law. Moore v. Dept. of Retirement Systems, 2006 Wash. App. LEXIS 1292

³ The phrase "date of hire" is used for ease of argument as calculation of an individual employees "aggregate service" under the definition found at TMC 1.12.075 requires exclusion of certain time and subtraction of days of length disciplinary suspensions or layoffs.

(decided June 20, 2006). At the outset of an equal protection analysis, it is critical to define the class at issue and the applicable standard of review. Id.; Washington Public Employees Assoc. v. State, 127 Wn. App. 254, 110 P.2d 1154 (2005).

a. Defining the Class

The ordinances at issue treat all employees of the City the same.⁴ Appellant, in his brief, failed to engage in any discussion to assist the court in understanding what he believes is the classification at issue. What Appellant does make clear, however, is his disagreement with the City's ordinances, and administrative implementation of the ordinances, authorizing special compensation as lacking in mathematical precision based on the an individual employee's actual date of hire. Appellant, is understood to assert that he believes that equal protection requires the City to time the actual payment of longevity and vacation in an individually particularized basis, or grant a lump sum amount retroactively each

⁴ The differences in eligibility for authorized percentage of longevity pay is slightly different under paragraphs A and B of TMC 1.12.133 for commissioned police and fire employees, but the timing authorization for the special longevity compensation at issue in this case is the same for all employees.

January 1, which sum should be based on the individual employee's date of hire. Thus, a classification, if one exists, would appear to be a class of one. Willoughby v. Dept of Labor & Industries, 147 Wn. 2d 725, 57 P.3d 611 (2002). The question, then, is whether the legislative line drawn by the Council for timing of payment of the special compensation is an appropriate one.

- b. The rational basis test is the appropriate standard of review to be applied.

The legislative decision of the Council for timing the commencement of payment or accrual of longevity and vacation forms of compensation does not implicate a fundamental right or suspect class. Rather it involves finite municipal resources. Thus, the rational basis test applies. Moore, supra; Washington Public Employees Assoc, supra.

A statute will fail to survive a rational basis review "only in the rarest of cases." Moore, supra, citing DeYoung v. Providence Med. Ctr, 136 Wn. 2d 136, 144, 960 P.2d 919 (1998).

Rational basis review is extraordinarily deferential and enacted statutes carry a heavy presumption of constitutionality. ... A statute will survive rational basis

review if there is a conceivable legitimate objective for the classification; the objective need not have motivated the [City Council] or be supported by evidence or by empirical data. A conceivable rational speculation is sufficient to uphold the classification.

Moore, supra (internal citations omitted).

2. An ordinance that provides a convenient means for determining eligibility and time for payment of special compensation to commence does not violate Equal Protection.

Appellant asserts that the City's ordinances authorizing that the special compensation be paid alike to employees based on the year in which they were hired ordinances is not reasonable.

Appellant objects that the testimony provided by City employees largely consisted of responses to the effect of "that's the way it's always been done," or "that's what was agreed to in bargaining."

This is insufficient for Appellant to meet his burden.

The City has no obligation under equal protection jurisprudence to produce evidence to sustain the rationality of the City Council's classification.

[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.

Heller v. Doe, 509 U.S. 312 at 320, 113 S. Ct. 2637; 125 L. Ed. 2d 257, (1993) quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 133 S. Ct. 2096, 124 L. Ed 2d 211 (1993). Moreover, equal protection does not require a perfect fit between the objective and means employed, only a conceivable rational basis. Heller, supra; Moore, supra.

It is rational for a legislative body to determine to authorize special compensation for employees by tying it to payroll cycles or tax year periods instead of an anniversary date of hire. Likewise, it is rational to authorize payment of special compensation in terms that coincide with municipal budget years, particularly where other ordinances provide that “[e]ach annual budget as finally adopted by the City Council shall be the final and determining factor in the payment of said compensation during the year to which said budget is applicable” TMC 1.12.070. Budget years, tax years and payroll cycles are identifiable time periods in everyday American life and business.

Rationality also exists where special compensation authorized by a governmental employer is substantially the product of collective bargaining, and implementing any change in wages or working conditions requires the undertaking of the obligation to bargain the same. RCW Chapter 41.56. Thus, even though changes in technology would permit special compensation could be computed and processed with greater mathematical precision, the employer may rationally chose to not undertake the obligation to bargain such a change in practice.

Equally as rational as the foregoing conceivable bases for continuation of past practice is a desire to make payroll processing smoother by minimizing the number of changes occurring each payroll cycle. Paying employees involves financial transactions which must be accurate to assure proper payment. Minimizing risk of payroll errors by timing of changes in authorized employee compensation to occur simultaneously,

in large groups is a conceivable basis for the legislative line drawn.

As previously stated, the City's ordinances do not impose a fundamental, irreconcilable and perpetual disparity in basic pay as was the case in WPEA. The ordinances only draw a line as to the timing for when employees are deemed eligible to receive, and when the City will pay, certain types of special, additional compensation. Ultimately, all employees (if employment continues) will receive the special compensation. Overinclusiveness or underinclusiveness relative to date of hire is temporal only. Overinclusiveness or underinclusiveness does not make a statute violative of equal protection. Moore, supra, citing Campbell v. Dept. of Social & Health Services, 150 Wn.2d 881, 901, 83 P.3d 999 (2004). A classification does not fail equal protection simply because it is not mathematically precise. Campbell v. Dept. of Social & Health Services, 150 Wn.2d 881, 901, 83 P.3d 999 (2004). Heller, supra.

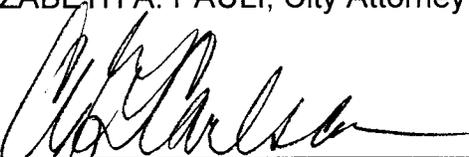
IV. CONCLUSION

Appellant's argument challenging the City's administrative implementation of the special compensation ordinances fails to consider every word appearing therein and fails to consider the intent of the Council in authorizing the forms of special compensation. His equal protection challenge fails to recognize that equal protection does not require mathematical precision in the provision of like treatment. Moreover a number of conceivable, rational reasons exist for the payment timing methodology authorized and chosen by the Council.

Appellant fails to meet his burden of proof as challenger of the legislation at issue and a decision affirming the trial court should be issued.

RESPECTFULLY SUBMITTED this 24th day of July, 2006.

ELIZABETH A. PAULI, City Attorney

By: 
CHERYL F. CARLSON
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PIERCE COUNTY COURTS

06 JUL 26 PM 6:25

1720 1st Ave. S.W.

TACOMA, WA 98402

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL P. PRICE,

Appellant,

v.

CITY OF TACOMA,

Respondent.

NO. 34340-1-II

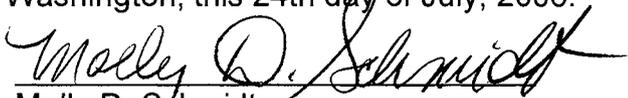
Pierce County No. 04-2-14957-1

CERTIFICATE OF SERVICE

I, Molly D. Schmidt, certify that on July 24, 2006, I caused a copy of Respondent City of Tacoma's Response Brief and this Certificate of Service to be delivered, via facsimile and followed by messenger to:

Ms. Joan K. Mell, Esq.
MILLER, QUINLAN & AUTER, P.S., INC.
1019 Regents Blvd., Suite 204
Fircrest, WA 98466

Signed at Tacoma, Washington, this 24th day of July, 2006.


Molly D. Schmidt