

No. 34340-1-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL P. PRICE,

Appellant,

v.

CITY OF TACOMA,

Respondent.

FILED
COURT OF APPEALS
JAN 25 PM 2:38
TACOMA
BY [Signature]

BRIEF OF APPELLANT

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

A. Trial Court Error

1. The trial court erred in ruling that the Respondent City can pay one civil service employee nine months of longevity pay and vacation leave and another civil service employee performing the same functions twelve months of longevity pay and vacation leave without justification.

2. The trial court's ruling is erroneous as it contradicts the plain language of the Respondent City's contract with Appellant Mr. Michael Price.

3. The trial court erroneously deferred to the City's interpretation of its ordinance when the proper deference standard favors Mr. Price, the City employee who did not draft the employment contract.

B. Issues on Appeal

1. Whether the Appellee City's past practices of compensating similarly situated civil service employees less than the full twelve months of longevity pay and vacation leave violates Appellant Mr. Price's constitutional right to equal protection in his employment?

2. Whether the plain language of the Appellee City's contract with Appellant Mr. Price obligates the City to compensate him for all twelve months of his accrued longevity pay and vacation leave?

3. Whether any ambiguity in Appellant Price's employment contract, which the City codified in the City's ordinance, should be interpreted in favor of Appellee City, the municipal government, or Appellant Price, the employee who did not have representation at the bargaining table and did not draft the contract?

II. STATEMENT OF THE CASE

A. Procedural History

On December 27, 2004, the Appellee City of Tacoma sued Appellant Mr. Price, an individual city employee. CP 1-5. The City requested a Court order approving the City's compensation practices with respect to longevity pay and vacation leave. CP 4-5. The City questioned its procedures after Mr. Price pointed out the plain language of City ordinance promised him compensation for each month of his accumulated service, which he had never been paid or credited. CP 711-757. In response to his inquiry, the City Human Resources Director advised the City Manager that based upon the advice of the City Attorney, "our 25-30 year practice on this might not be right." CP 8. The City elected to sue Mr. Price, rather than compensate him or any other employee the benefits promised. CP 1-19, 31-103, 569, 572-573. The City also responded by amending several times its ordinances regarding longevity and vacation leave. CP 32-145. The purpose of the amendments was to "provide

clarification on how the section has historically been administered.”

CP 296.

Mr. Price defended the City’s lawsuit filed against him at his own personal expense. Following discovery, he moved for summary judgment. The City counter moved for summary judgment. The Trial Court granted summary judgment in favor of the City after oral argument on December 16, 2005. Mr. Price moved for reconsideration based upon the specific case from this Court: *Washington Public Employees Association v. State*, 127 Wn. App. 254, 110 P.3d 1154 (2005), which held in favor of civil service employees on equal protection grounds. The Trial Court denied Appellant Price’s motion for reconsideration on January 6, 2006. VRP 20-21. Mr. Price appealed.

Appellant Price’s contention on appeal is that the Trial Court’s opinion has the practical effect of adopting a higher standard than the rational basis standard for an equal protection violation against a public employer in contravention of the ruling of this Court in *WPEA v. State*. In that case, this Court concluded that a historical practice of disparity in pay for civil service employees without further justification violates the constitution. Here, the Trial Court has ruled that a historical practice of disparity in pay for civil service employees without further justification does not violate the constitution. The Court’s decision was apparently

based upon a desire to protect the City from the financial impact associated with a constitutional violation. VRP Jan. 6 at 5-6 & 9. Such a conclusion compromises the rights of Mr. Price, a long term public servant.

Appellant Price also contends that the City's method of compensation violates the plain language of his employment contract. Nothing in the contract indicates that longevity and vacation leave accrue **after** the fifth year has been completed. The time begins to accrue on the employee's anniversary date and should be paid beginning the first of the calendar year of the year the employee completes his or her fifth year of service. The same is true for each subsequent increase in later years. The City does not pay for the full twelve months of benefits, instead only the portion of the employee's fifth year, and subsequent years, worked after January 1st is paid.

Finally, Appellant Price contends any ambiguity in the contract should be interpreted in his favor because he did not draft the employment contract. In addition, as an unrepresented city employee, he was on an uneven playing field with the employer who was at the bargaining table with legal counsel and union representatives bargaining for the represented employees. The Trial Court chose to apply the deference standard applicable to statutory interpretation, rather than contract

interpretations. Such deference in favor of the bureaucracy in the context of employment substantially prejudices the rights and interests of the unrepresented employees.

B. Factual History

Appellant's summary judgment brief sets forth a more comprehensive statement of the pertinent factual details of this matter. CP 699-706. This brief focuses narrowly on the critical question of whether the City's ordinances promise an employee compensation for each month of civil service. Two ordinances are at issue: 1.12.133 Longevity pay and 1.12.220 Vacation allowance with pay. Appellant excerpts only the longevity pay because the analysis is the same for vacation and it is unnecessary to duplicate it here. CP 30.

The applicable TMC 1.12.13 on longevity pay reads as follows:

1.12.133 Longevity pay.

C. Other City Personnel, Regular, probationary and appointive employees who through union agreement have elected the option of longevity pay or unrepresented employees who have been authorized to receive longevity pay by City Council action, shall receive additional compensation based on a percentage of their base rate of pay received for the class in which they are currently being paid. No application of rate may be used, in computing longevity pay.

Eligible employees shall receive longevity pay in accordance with the following schedule:

From 5 through 9 years aggregate service--1% per month
From 10 through 14 years aggregate service--2% per month
From 15 through 19 years aggregate service--3% per month
20 years or more aggregate service--4% per month

Eligibility for longevity pay shall be determined by the length of aggregate City service and will be paid an employee at the first of the calendar year in which any of the above stipulated periods of aggregate service will be completed.

CP 28.

The City never paid Mr. Price the promised 1% per month increase in pay for September, October, November or December of his fifth year of service. When he started his tenth year of service, the City never paid him his 2% per month increase in pay for September, October, November, or December. The City made the same mistake when he reached his fifteenth year, 3% for those four months, and his twentieth year, 4% for those four months.

Apparently someone at sometime in payroll decided to ignore an employee's start date, assuring that every employee would be shortchanged. CP 161-163, 582. The City never offered any evidence other than its long standing practice of doing it that way to justify its practices. CP 162-164, 171-172, 605, 607-608, 625-628. There were no meeting minutes, no handwritten notes, memos, or e-mails to evidence any

discussion by anyone, much less a policy maker, which would explain the City's methods.

The City's practice is to add the applicable percentage to an employee's paycheck each pay period beginning in January. No credit is added for the months of the aggregate period worked in the previous calendar year. This means the only employee who receives an increase in pay at 1%, 2%, 3% or 4% for each month worked is an employee hired on January 1st. January 1st happens to be a holiday when City employees are not hired. So in reality, no city employee receives the full value of the benefit. An employee hired in September, such as Mike Price, receives only eight months longevity, when he was promised a specific percent per month "From 5 through 9"; "From 10 through 14"; and "From 15 through 19", meaning all twelve months of the year served. The ordinance does not indicate the employee should receive less than a full year of credit. In fact the definition of "aggregate service" means the "total of all employment" TMC 1.12.075. CP 640. The definition makes no reference to a calendar year. The true measure begins with the date of hire. Mike Price's co-worker performing precisely the same job function who is hired in December receives eleven months of the increase. CP 147- 154. Others hired in January receive only a month of the increase.

The City argues that the ordinance requires payment at the first of the year. Mr. Price agrees. However, the City believes that it has no obligation to add in the value attributable to the efforts of the first months of the applicable year of service served in the prior calendar year because the benefit accrues only after “completion” of the applicable year of service, which is in the next calendar year. CP 25, 569-570, 582, 705. This is the point of contention. The City’s rationale is inconsistent with its actual practice of paying for months of service that precede completion of the applicable year of service. Meaning the City pays the full benefit in January through August even though those are months that proceed the completed year of service, which does not occur until after September. CP 25,146-154, 704, 711, 724-757. The only coherent interpretation is that the ordinance contemplates a distinction between accrual of the benefit and payment of the benefit. The ordinance does not have any statement that the employee does not accrue the benefit until after completion of the period of service.

The City refuses to acknowledge this fact despite its ability to comply. The testimony was unequivocal that the City can pay employees in the manner Mr. Price demonstrates is consistent with the ordinance. CP 580, 622, 625, 628-629. The City could begin paying the benefit at the first of the year in an amount that recognizes the percentage for each

month of service for the twelve months that make up the fifth year, sixth year, seventh year, etc. Instead the City elects to compensate only for those months that land in the same calendar year as the year of aggregate service completed. So for some employees that is five months. For others it is six months, or seven months, or eight months depending upon the employee's date of hire. The inequity of the City's approach is apparent.

III. ARGUMENT

A. Standard of Review

The standard of review of a trial court's order on summary judgment is de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The appellate court performs the same inquiry as the trial court. *Id.*

B. Equal Pay for Equal Work

The trial court erred in granting Respondent City of Tacoma's Motion for Summary Judgment because the plain language of the City's contract with Appellant Price entitles him, and other city employees, to additional benefits. The City cannot, as a matter of law, pay disparate benefits to city civil service employees who perform the same job functions. *Washington Public Employees Association v. State*, 127 Wn. App. 254, 110 P.3d 1154 (2005). The City must have a reasonable basis for any differential, and the City's past practices are an insufficient basis

to justify any disparity. *Id.* Thus, the City has violated its own contract and has denied Mr. Price his constitutional right to equal protection. This lawsuit initiated by the City against Appellant Mr. Price is not the proper procedure to justify the City's erroneous compensation practices. Mr. Price is entitled to his full benefits. The Trial Court should be reversed, and summary judgment granted in Mr. Price's favor.

C. The City's Interpretation Violates the Plain Language of the Ordinance

The legal rules on contract or ordinance interpretation are the same in the absence of any ambiguity. Contract and statutory construction are questions of law. *McTavish v. Bellevue*, 89 Wn. App. 561, 565, 949 P.2d 837 (1998). Consideration must be given to every word or part appearing in the text. *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995).

In this case, the City ignores, and after Mr. Price raises the issue, actually deletes any reference in its agreement to the term "per month." CP 25, 155-156, 169, 702. The "per month" language indicates that the benefit applies to each month of the applicable aggregate period. Obviously there are twelve months in any year, and the language makes no reference to the calendar year as opposed to a year calculated from the

employee's start date. In fact, by definition aggregate service includes all time, not just time within a calendar year:

For purposes of this chapter the following definitions shall apply:

A. Aggregate Service. Aggregate service for all purposes shall be the total of all employment, inclusive of authorized leaves of absence, in the City service as a probationary, regular, project, or appointive employee; provided, that: (1) time lost due to suspension of more than 15 working days or layoff shall not be included in the determination of aggregate service; (2) no person employed as a temporary employee shall accrue aggregate service as defined herein; (3) if an employee retires from the City and is rehired in a position under a pension system other than that from which he/she retired, such prior service shall not be credited towards aggregate service.

Ord. 1.12.075. CP 640.

The City's interpretation would alter the plain language of the contract by changing the word "From" to the word "After":

~~From~~ After 5 through 9 years aggregate service--1% per month
~~From~~ After 10 through 14 years aggregate service--2% per month
~~From~~ After 15 through 19 years aggregate service--3% per month
After 20 years or more aggregate service--4% per month

In addition, the City ignores the plain language of the phrase "and will be paid an employee at the first of the calendar year in which any of the above stipulated periods of aggregate service will be completed." and amends the meaning through its interpretation to "*and will be paid an employee at the first of the calendar year **only for those months that land in the same calendar year** in which any of the above stipulated periods of*

aggregate service have been completed. An employee's start date will not be used to calculate the benefit accrual date."

None of the bold language is contained in the agreement. "Words should be given their ordinary meaning; courts should not make another or different contract for the parties under the guise of construction."

Universal/Land Const. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). The Courts are duty bound to give meaning to every word in a contract or ordinance, and must avoid rendering any language superfluous. *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). There is no logical means to achieve the result desired by the Appellee City without amending the plain language of the agreement. The Appellee City cannot ignore the per month reference, nor can it interpret "from" to mean "after."

Amendment of the agreement is prohibited retroactively. The law does not permit the City to retroactively change its contractual obligation to city employees.

Moreover, DRS points out that retroactive application of the amendment would violate the rule established in *Bakenhus v. City of Seattle*. *Bakenhus* held that a public employee's pension rights are contractual rights based on a promise made by the State *at the time the employee enters employment*, rights that generally cannot later be changed. Normally the *Bakenhus* rule is invoked by public employees to prevent the State from modifying their rights.

Olesen v. State, 78 Wn. App. 910, 899 P.2d 837 (1995).

City firemen and policemen who were appointed before the effective date of a statutory amendment changing pension rates and terms, were held to be unaffected by that amendment ...

Pension rights, such as those here involved, are contractual in nature and they become vested at the time the employee enters the public service.

... the legislature could not thereafter constitutionally alter the provisions of his already existing contract of membership. His rights in the fund could only be changed by mutual consent. (citations omitted)

Bakenhus v. City of Seattle, 48 Wn.2d 695, 698-700, 296 P.2d 536, 538-539 (1956).

The Fair Labor Standards Act is an additional legal barrier to the City's efforts to amend its promise through interpretation and subsequent amendments by the City Council to clarify what it is doing, rather than doing what it originally promised.

The City admits the compensation ordinances at issue in this matter come from collectively bargained agreements. CP 759-769; 849-851. The Fair Labor Standards Act prohibits amendment of City ordinances without proper collective bargaining.

d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, ... That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless ...

29 USC 158 (d)(2).

The City has unilaterally amended its compensation provisions without collective bargaining and in violation of the Fair Labor Standards Act.

Finally, the law requires the Court to consider the language in the context of the whole agreement:

In considering an undefined term, the court considers the statute as a whole to give meaning to the term in harmony with other statutory provisions. Rules of construction do not apply when the language is clear and explicit. In interpreting statutes and ordinances, definitions contained within the act control the meaning of words used in that act. Courts must reasonably construe ordinances with reference to their purpose.

HJS Development, Inc. v. Pierce County ex rel., 148 Wn.2d 451, 470, 61 P.3d 1141 (2003).

An ambiguity will not be read into a contract where it can be reasonably avoided by reading the contract as a whole. Even though some of the words may be said to be ambiguous, if the terms of the contract taken as a whole are plain and unambiguous, the meaning should be deduced from the language alone without resort to parol evidence.

Universal/Land Const. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987).

In contradiction to the principles espoused above, the current interpretation creates ambiguity where there is none, and interprets the ambiguity against the employee when public policy favors rewarding long term public servants and construction of wage and hour benefits in favor of the employee. The City's erroneous practices violate basic principles of fairness, equity, and uniformity among public servants in contravention of state statute. RCW 41.58.040. The Appellee City made no effort to maintain its agreement with Mr. Price. He is entitled to the benefits and he should not have been sued by the City.

D. Ambiguity in An Employment Contract Drafted by the Employer Favors the Employee

When there is ambiguity in a contract or ordinance, the rules of construction differ. Under contract principles, any ambiguity is interpreted against the drafter. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 745 P. 2d 53 (1987). Under ordinance principles, any ambiguity is interpreted in favor of the government entity that must implement the public policy. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 949 P.2d 837 (1998). However, a municipality may be

regarded as a government entity only with respect to governmental powers granted by the state:

Although a Municipal Corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons.

Touchard v. Touchard, 5 Cal. 306, 1855 WL 749 (1855).

“But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, and when such a contract comes before a court the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons.”

Brown v. Sebastopol, 153 Cal. 704, 96 P. 363 (1908).

A municipality may not escape its obligations under a contract.

Scoccolo Const. Inc. v. City of Rento, 102 Wn. App. 611, 9 P.3d 886 (2000).

With regard to public employers, the courts have favored the employee when interpreting benefits provisions. Pension legislation is

liberally construed to favor beneficiaries under contract principles.

Hanson v. Seattle, 80 Wn.2d 242, 493 P.2d 775 (1972).

In this jurisdiction, pensions or retirement programs, whether public, established by collective bargaining, or voluntarily employer-funded, constitute deferred compensation for services rendered and are designed to promote continued and faithful service to the employer and economic security to employees. A pension agreement is contractual in nature, and the employer is obligated to pay the pension if an employee fulfills the specific conditions of the agreement. The rules of contractual construction are to be applied.

Frank v. Day's Inc., 13 Wn. App. 401, 404, 535 P.2d 479, 481-482 (1975).

In this matter the applicable rule of interpretation is the contract rule, rather than the ordinance rule because this case concerns an employment contract and employee benefits, not the administration of a public policy program unique to government. In its role as employer, the City is not entitled to special treatment. 1 McQuillan Mun. Corp. § 2.09 (3rd ed.). The City should not benefit from its ability to codify its employment agreements when other employers do not have such ability. There is no basis for deference to the City in the context of employment. The courts have favored the employee who has been promised benefits for committing to the service of the community:

The respondent has complied with the provisions of his contract. He has given twenty-five years of faithful service,

during which time he turned down many other opportunities for employment; and, in the meantime, these opportunities necessarily have diminished. Until he had established his right to receive a pension by fulfilling the conditions, he could show no injury to himself by subsequent legislative changes and consequently could not complain. By waiting until those conditions were fulfilled, he has not lost his right to assert that he has been deprived of his rights by that legislation.

Bakenhus v. City of Seattle, 48 Wn.2d 695, 703, 296 P.2d 536, 541 (1956).

Any ambiguity that could be read into the longevity and vacation provisions should be interpreted in favor of Mr. Price. The City has had complete control over the condition of Mr. Price's employment. He should be entitled to rely upon the representations made at the time of his hire, particularly given his dedicated years of service. Mr. Price is entitled to his complete benefit package.

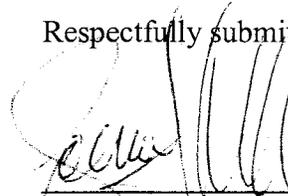
V. CONCLUSION

Appellee City of Tacoma, as a government employer, has a paramount duty to set an example for other employers. Its conduct should model good citizenship and fair dealing. The City does not have unlimited discretion to disregard and change its contractual obligations to its own employees. Particularly offensive is its decision to file a lawsuit against its own public servant, forcing him to individually bear the expenses of litigation, so that the City can save money. Appellee City of Tacoma

chose to recognize employees who dedicate their career in service to the public through longevity and vacation leave. Upon recognizing the disparity in what it promised and what it actually paid, the City altered its contract and sued the individual whistleblower. The Appellee City's actions are offensive, unreasonable and should not be endorsed by this Court. The Appellee City has breached its commitment to pay Appellant Mr. Price's longevity and vacation for each month it accrued and has violated his constitutional right to equal protection under the law. The trial court should be reversed and summary judgment granted in favor of Appellant Mr. Price.

DATED this 25th day of May, 2006.

Respectfully submitted,



Joan K. Mell (WSBA #21319)
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Attorneys for Appellant

I, Christine Morrow, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On May 25, 2006, I caused to be served a true and correct copy of the below listed document on all parties or their counsel of record, as follows:

- U.S. Mail Postage Prepaid
- ABC/Legal Messenger Service
- Personal Service -- Hand Delivered

TO: Ms. Cheryl F. Carlson, Assistant City Attorney
Tacoma City Attorney's Office, Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402

06 MAY 25 PM 2:38
STATE OF WASHINGTON
BY _____
CHERYL

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COURT RECORDS

The documents served are:

1. Brief of Appellant; and
2. this Declaration of Service.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and dated at Fircrest, Washington this 25th day of May, 2006.


CHRISTINE L. MORROW