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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

John Klug and Bob Barnard, individually,)
and John Klug and Bob Barnard, on Behalf)
of the and as Members of the Local)
Membership of the International Police)
Association (IUPA), Police Members and)
Pensioners,)

Plaintiffs/Appellants,)

vs.)

City of Minot,)

Defendant/Appellee.)

Supreme Court No.: 20100217
Ward County No.: 51-8-C-1990-1

APPEAL FROM THE DISTRICT COURT
WARD COUNTY, NORTH DAKOTA
NORTH WEST JUDICIAL DISTRICT
CIVIL NO.: 51-8-C-1990-1
THE HONORABLE M. RICHARD GEIGER, PRESIDING

BRIEF OF APPELLEE

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1.

STATEMENT OF THE ISSUES

1. Whether the City of Minot's Merger of the Police Pension Plan and the City Employee Pension Plan was a Legitimate Exercise of Its Home Rule Authority.

I. STATEMENT OF THE CASE

2. In July of 2008, the Minot City Council, at the recommendation of its actuary, voted to merge what were formerly separate pension plans for its employees. App. 52. Before the merger, Minot maintained separate pension plans for police officers and for other city employees. The plaintiffs in this action are Minot police officers who object to the merger. App. 4.

3. This action was commenced in December of 2008. App. 4-9. The Complaint alleges Minot violated N.D.C.C. Chapter 40-45, which deals with police pension plans. Id. On January 29, 2010, Minot moved for summary judgment. App. 14 a-b. Minot asserted it had authority pursuant to its Home Rule Charter and ordinances to merge the pension plans, regardless of the provisions of Chapter 40-45 R-33. It further argued, even assuming Chapter 40-45 could not be superseded, the merger did not “discontinue” the police pension and therefore was not in conflict with N.D.C.C. § 40-45-26 and 40-45-27. Id. Finally, Minot argued the plaintiffs lacked standing, as they have not been harmed.

4. On April 16, 2010, the District Court issued a Memorandum Decision holding “the City’s actions in merging the two plans was both authorized by its Home Rule Charter and in any event did not violate N.D.C.C. 40-45-26 and 40-45-27.” App. 277. Judgment of dismissal was entered on May 4, 2010. App. 284. Plaintiffs filed a Notice of Appeal on July 6, 2010. App. 286.

II. STATEMENT OF THE FACTS

5. Minot established pension plans for its police officers in 1937, and for other city employees in 1942. App. 32, 47. These plans were established

pursuant to N.D.C.C. Chapters 40-45 and 40-46, respectively. Id. The controversy in this case concerns the enactment in 2008 of Minot Ordinance No. 4131, which merged the police and city employee plans. App. 52.

6. Prior to enactment of Ordinance No. 4131, the pension plan for general city employees was codified in Article VII of the Minot Code of Ordinances and the pension plan for police employees was codified in Article VIII of the Minot Code of Ordinances. App. 66-89. More and more over the years since their adoption, the employee and police pension plans were operated similarly, and had similar returns, investments, and governing provisions. App. 101-104, 114-116.
7. Each year, Minot received actuarial valuation statements to assist the City Council in managing the plans. Exhibit G to Defendant's Motion for Summary Judgment, R-33. These evaluation reports contained a recommendation, based on actuarial data, as to how much should be contributed by the City to each plan for the following year. Id.
8. Beginning in 2004, the Minot City Council made the decision to contribute equally (percentage wise) to the police plan and the general employee plan, despite the actuary's recommendations. App. 101-104. The rationale behind this decision was fairness; it was decided that all employees should receive the same percentage retirement contribution as a part of their compensation. Id. However, actuarially the police pension plan did not require the same contribution as the city employee plan. Id. Consequently, from 2004-2008, the police pension plan acquired a "net pension asset" and the city employee plan acquired a "net pension liability." Id.

9. The City's actuary gave the City two options for dealing with this problem. Exhibit I to Defendant's Motion for Summary Judgment, R-33. The first option was to merge the two plans and fund the merged plan per actuarial recommendations. Id. The second option was to contribute less money to the police plan and more money to the city employee plan. Id. Because of the desire to treat all employees equally, the City Council decided to merge the plans. Hence, the council passed Ordinance 4131. App. 52.

10. It is undisputed that under both the separate and now-merged plan, the terms with respect to vesting, eligibility and benefits for police officers remain exactly the same. Appellants' Brief, p. 6.

11. Minot has been a "home rule" city since 1972. App. 15. Minot's Home Rule Charter provides that all powers of the City are vested in its governing body, subject to limitations imposed by the state constitution, state law, and the Home Rule Charter. App. 21. It further provides that "the elected governing body shall enact local legislation, adopt budgets, determine policy, and prescribe the function of government to be performed under this charter by the city." Id. Minot's powers under its charter include "all powers granted to municipal corporations by the constitution and laws of [North Dakota] ..., together with all the implied powers necessary to carry into execution all powers granted." App. 21-22. The enumerated powers include the authority:

....

- b. To control its finances and fiscal affairs; to appropriate money for its purposes and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges and special assessments for benefits conferred, for its

public and proprietary functions, activities and operations, undertakings and improvements; to contract debts, borrow money, issue bonds, warrants and other evidences of indebtedness; to establish charges for any city or other services and to establish mill levy limitations, . . .

....

- d. To provide for city officers, agencies, and employees, their selection, terms, powers, qualifications, and compensation.

....

- g. To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.

....

- m. To exercise in the conduct of its affairs all powers usually exercised by a corporation.

....

The enumeration of particular powers by this charter shall not be deemed to be exclusive, and in addition to the powers enumerated herein or implied hereby, or appropriate to the exercises of such powers, it is intended that the city shall have and may exercise all powers which under the constitution and laws of this state, it would be competent for this charter specifically to enumerate.

Id. (emphasis added).

III. ARGUMENT

A. The City of Minot's Merger of the Police Pension Plan and the City Employee Pension Plan was a Legitimate Exercise of Its Home Rule Authority

- 12. The fundamental issue in this case is whether the statutes governing police pension plans (N.D.C.C. Chap. 40-45) prevent Minot from merging the police

pension plan with the plan applicable to other city employees. It is undisputed Minot has the authority, as a home rule city, to supercede state law on certain matters. N.D.C.C. § 40-05.1-05 (“The charter and the ordinances made pursuant to the charter in such matters supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict with the charter and ordinances and must be liberally construed for such purposes.”); see also City of Bismarck v. Fettig, 1999 ND 193, ¶ 4 n.1, 601 N.W.2d 247 (“A home rule charter allows a city to enact laws contrary to those of the state”).

13. The plaintiffs’ focus, both on appeal and below, is on N.D.C.C. § 40-45-26, which reads as follows:

40-45-26. Question of continuance of police pension plan. The governing body of a city having a police pension plan may discontinue such plan upon receipt of a petition requesting such discontinuance signed by sixty percent of the police employees and pensioners of the city as of the date of the filing of such petition and upon the subsequent adoption by the governing body of a resolution by two-thirds vote of the members present stating that the plan is not desirable or workable.

14. Plaintiffs argue since there was not a valid petition presented, the City was not allowed, under home rule, to “discontinue” the police plan. The district court found that: 1) the provisions of Chapter 40-45 were properly superseded by Minot’s Home Rule Charter; and 2) that even if Chapter 40-45 was not superseded, the police pension was not “discontinued” as envisioned by that statute. App. 277.
15. The relevant provisions of Minot’s Home Rule Charter are set forth in the Statement of Facts, above. These powers essentially mirror the powers authorized by the North Dakota Legislature to be adopted by home rule cities. See N.D.C.C.

§ 40-05.1-06 (2, 4, 7, 13) (allowing home rule cities to control finances and fiscal affairs, to select city officer and employee compensation, to adopt ordinances to carry out powers, and to exercise all powers usually exercised by a corporation). The intent of the legislature in allowing cities to enact home rule charters was to grant the people of cities the “full right of self-government in both local and city manners within the powers enumerated.” N.D.C.C. § 40-05.1-06. In home rule cities, the “statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters.” Id.

16. This Court has previously set forth the proper analysis in determining whether a home rule city may enact ordinances superseding certain state laws. This Court has held “the legislature intended the cities to exercise broad plenary powers in those items specified under § 40-05.1-06, except where specifically provided that these powers may be exercised only by conforming or complying with state law.” Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980) (emphasis added). “If the authority or power to enact an ordinance on a specific subject is not found in § 40-05.1-06 or in Ch. 40-05.1, or some other comparable statute, then a strong presumption exists that the city will be governed by the laws generally applicable to cities.” Id.

[A] city, whether home rule or otherwise, has no inherent power except as expressly granted or necessarily implied from the grant by the legislature and without such grant it has no more right than any other corporation to condemn property. This statement generally applies to any activity of the city. The power and authority of a city must be found either in a constitutional or statutory provision.

Id.

17. The supersession provision in N.D.C.C. § 40-05.1-05 applies to the powers enumerated in N.D.C.C. § 40-05.1-06, and those powers must be included in the charter and be implemented by ordinance. Sauby v. City of Fargo, 2008 ND 60, ¶ 6, 747 N.W.2d 65 (concluding at ¶¶ 7-10 that Fargo could not charge higher fines for traffic violations because the corresponding statute specifically stated crimes defined by state law shall not be superseded by city ordinance or by a city's charter).
18. In this case, Minot's charter specifically provides the power to control fiscal affairs, address employee compensation, and exercise all powers normally exercised by a corporation. It has enacted corresponding ordinances setting forth the pension plans of city employees and police employees. Accordingly, unless Minot does not have the power to enact ordinances regarding pensions, it has acted within its power and can supersede any provisions of state law.
19. Again, N.D.C.C. § 40-05.1-06 provides the enumerated powers a City may assume under home rule. Subsection (4) of that statute describes one of those powers as follows:
 4. To provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation. To provide for change, selection, or creation of its form and structure of government, including its governing body, executive officer, and city officers.
20. In Minot's Home Rule Charter, at Article 3(d), Minot assumed the authority "[t]o provide for city officers, agencies, and employees, their selection, terms, powers, qualifications, and compensation." App. 22.

21. Regulating and governing with respect to pension plans is inherently a matter of the compensation of the employees, a matter that affects the City's finances and fiscal affairs, and is certainly a power usually exercised by a corporation. City of Downey v. Bd. of Admin., Public Emp. Retirement Syst., 47 Cal.App.3d 621, 629 (Cal.App. 1975) ("It is clear that provisions for pensions relate to compensation . . .")

22. Indeed, the district court expressly found that pensions are components of "compensation," and therefore that Minot Ordinance 4131 was a proper exercise of Minot's home rule authority. The district court held:

By enumerating as one of its powers the authority to provide for city officers and employees, including their compensation, the city has the authority to establish and maintain pension plans for its city officers and employees, including its police. As stated in Quam v. City of Fargo, 43 N.W.2d 292, 296-297 (N.D. 1950):

A pension such as a police pension is not a gratuity. It is merely in the nature of an added salary allowance to public servants. State ex rel Haif v. Hauge, 38 N.D. 583, 591, 164 N.W. 289, 291, L.R.A. 1918 A 522. A pension such as this law contemplates is not a gratuity or a gift...[W]here, as here, services are rendered under such a pension statute, the pension provisions become part of the contemplated compensation for those services, and so in a sense a part of a contract of employment itself. [out-of-state case citations omitted]. The pension is not a reward for reentering the service in the police department. It is a belated extra payment for long and faithful service in the department. To that payment a person who has served the required length of time as provided by the ordinance is entitled.

App. 278-79.

23. The plaintiffs offer no authority or argument for why the district court erred in determining that merging the police pension was not authorized by N.D.C.C. § 40-05.1-06 and Minot's Home Rule Charter. Merging the pensions was clearly within Minot's authority to control its finances and fiscal affairs and to regulate the compensation of its officials.

24. It is true that the legislature can limit a city's home rule authority "because a home rule city's powers must be based upon statutory provisions." Sauby, ¶ 6, citing City of Fargo v. Malme, 2007 ND 137, ¶ 10, 737 N.W.2d 390. In Sauby, the statute Fargo sought to supersede (N.D.C.C. § 12.1-01-05) contained the following prefatory sentence: "Crimes defined by state law shall not be superseded by city or county ordinance or by home rule city's or county's charter or ordinance." Thus, the legislature has shown what it will do when seeking to prevent supersession. In this case, as the district court noted, N.D.C.C. Chapters 40-45 and 40-46 do not even mandate that pension plans be adopted by cities; rather these chapters merely provide a means for cities to do so. App. 281.

25. Again, the plaintiffs focus on N.D.C.C. § 40-45-26, quoted supra, which provides that a police pension may be "discontinued" upon receipt of a petition signed by police employees and pensioners. Appellants' Brief, p. 7. The plaintiffs' term this provision a "procedural protection" afforded to police officers. Id. The district court addressed this argument, noting that § 40-45-26 must be read in conjunction with § 40-45-27, entitled "Procedure upon discontinuance of police pension plan." That statute requires that upon "discontinuance" the governing body "shall proceed to liquidate the pension

fund” which “shall be accomplished by returning to each employee” that employee’s contributions. It cannot be reasonably argued that Minot’s police pension was “discontinued,” as envisioned by N.D.C.C. § 40-45-26, by this merger.

26. The legislative history of N.D.C.C. ch. 40-05.1 is in the record at App. 124-194. It further supports the conclusion that the City of Minot can supersede N.D.C.C. chs. 40-45 and 40-46 through its charter and enactment of ordinances. The enactment of home rule power by the legislature involved an extensive amount of debate and research. The legislative history indicates one of the questions posed during the consideration of the home rule legislation was whether a home rule city would be governed by the provisions of Title 40 of the North Dakota Century Code. See Minutes of the Subcommittee on Judiciary (March 18, 1968) App. 188. The comments indicate that a home rule city would be governed by Chapter 40 or portions thereof “if such were included in the Home Rule charter adopted by a particular city.” Id. In other words, the committee determined the provisions of Title 40 could be superseded by home rule cities, including N.D.C.C. chs. 40-45 and 40-46, which were in existence at the time the home rule legislation was passed.

27. Further support for Minot’s position in this case is found in the *Report of the North Dakota Legislative Research Committee, Forty-first Legislative Assembly, 1969*. The *Report* provides, in relevant part:

Simply defined, home rule is the authority of a city, under a State Constitution and laws, to draft and adopt a home rule charter and to thereafter govern itself under such charter and not under State law except where State law has general application to the citizens

of the entire State. Such authority, which liberates cities to devise forms of government and expand local self-government using local initiative, is distinguished from the “creature of the State” concept wherein legislative control over cities is exercised from the State Capitol by special Act or general law.

....

The Committee was most concerned with the scope and extent of the home rule powers to be granted and with scaling these powers to the cities’ needs. It was noted that the powers to be granted must relate to matters of city government and concern. Such matters generally include health, welfare, and safety of the inhabitants, generally a right to raise revenue to finance city services and duties, and to restrict monopolies in trade within its borders, the right to annex property, and the right to revert to a statutory form of government if home rule proves unsatisfactory.

It has been generally held that State laws pertaining to police powers bind home rule cities. That is, home rule cities can enact ordinances in police power areas as long as such laws are consistent with State general law. For example, a home rule city could not allow its liquor establishments to sell to minors. Neither could it allow sale of certain items on Sunday, Sunday sale of which is prohibited by State law.

....

A bill is therefore recommended which would give any city of 100 or more persons the authority to propose and adopt a home rule charter. The charter would be prepared and proposed by a charter commission appointed by the governing body of the city and adoption would be dependent upon a majority vote of the qualified electors of the city. Upon adoption, the home rule charter and any ordinance made pursuant to the charter would become the organic law of the city within its territorial jurisdiction, superseding conflicting general State laws in the area of city affairs. The bill delineates to the extent possible the broad powers which the home rule city may include in its charter and implement through ordinances. The powers include all of the powers now enjoyed by cities under State law. . . .

Report of the North Dakota Legislative Research Committee, Forty-First Legislative Assembly (1969), App. 191-92 (emphasis added).

28. Plaintiffs argue they should prevail because the pensions of Minot police officers are a matter of “statewide concern.” Appellants’ Brief, p. 12. The district court disagreed with this argument. App. 281. Internal fiscal matters and the “compensation” of city officials is specifically listed in N.D.C.C. § 40-05.1-06 as matters to which home rule can apply. This is a specific legislative indication that police pensions are a matter of local concern. Moreover, as the district court noted, if Minot’s status as a “regional economic, medical and governmental hub” made all Minot’s local fiscal matters of statewide concern, home rule would effectively be abolished in Minot and other cities in the state. App. 281. See also, Ebald v. City of Philadelphia, 128 A.2d 352, 354 (Pa. 1957) (“We are unable to see how disability compensation for Philadelphia firemen and policemen can be considered a substantive matter of state-wide concern. Certainly, the municipal employer, rather than the Commonwealth, has the more vital interest in the health, welfare, efficiency and morale of its personnel, and is more peculiarly suited to ascertain and meet their legitimate needs.”)
29. Finally, the district court correctly noted the plaintiff police officers have not been harmed by this merger. It is undisputed in this case that all of the benefits, eligibility requirements, vesting provisions and payment provisions of the police pension were unaffected by the merger. Appellants’ Brief, p. 6.
30. Minot’s police pension plan is and remains a “defined benefit” as opposed to a “defined contribution” plan. A defined benefit plan “consists of a general pool of assets rather than individual dedicated accounts. Such a plan, ‘as its name implies, is one where the employee, upon retirement is entitled to a fixed periodic

payment.”” Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999). In a defined benefit plan, the asset pool may be funded by employer or employee contributions, or a combination of both, and the employer typically bears the entire investment risk and, short of plan termination, the employer must cover any underfunding as the result of a shortfall that may occur from the plan’s investments. Id. On the other hand, if a defined benefit plan is overfunded the employer may reduce or suspend its contributions. Id. At 440. “Given the employer’s obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan’s general asset pool. Instead, members have a right to a certain defined level of benefits, known as ‘accrued benefits.’” Id. “Since a decline in the value of a plan’s assets does not alter accrued benefits, members similarly have no entitlement to share in a plan’s surplus-even if it is partially attributable to the investment growth of their contributions.” Id. At 440-41.

31. On this appeal, plaintiffs offer no argument as to how they were harmed by this merger, which is always a prerequisite to relief in the courts. They offer no support for the proposition that their plan was “discontinued” as envisioned by N.D.C.C. §§ 40-45-26 and 40-45-27. Finally, they offer no support for the proposition that Minot, as a home rule city, cannot manage its local fiscal affairs, including the compensation of its employees, even if the changes it deems necessary in its local fiscal wisdom are in conflict with state law. The well-reasoned decision of the district court should be affirmed.

IV. CONCLUSION

32. For the reasons stated herein, the City of Minot respectfully requests that the judgment of the district court dismissing plaintiffs' complaint in its entirety be affirmed.

Dated this 15th day of October, 2010.

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CERTIFICATE OF COMPLIANCE

33. The undersigned, as attorneys for the defendant/appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 3,787.

Dated this 15th day of October, 2010.

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CERTIFICATE OF SERVICE

34. I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was on the 15th day of October, 2010, emailed to the following:

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