

20100217

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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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,

v.

City of Minot,

Defendant/Appellee.

SUPREME COURT NO. 20100217

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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

APPELLANTS' BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. **DO MINOT'S POWERS UNDER ITS HOME RULE CHARTER SUPERSEDE THE PROCEDURAL PROTECTIONS AFFORDED TO MINOT POLICE OFFICERS AND PENSIONERS UNDER N.D.C.C. CHAPTER 40-45?**

STATEMENT OF THE CASE

This appeal presents the question of whether the City of Minot (“Minot”), operating under its Home Rule Charter, may legally discontinue its police pension plan in violation of the provisions of N.D.C.C. § 40-45-26 which provide that a police pension may only be discontinued by a city upon receipt of a petition requesting such discontinuance signed by sixty percent of the police employees and pensioners, and upon the subsequent adoption by the City of a resolution by a two-thirds vote stating that the plan is not desirable or workable.

As early as 1937, Minot adopted a police pension under N.D.C.C. Ch. 40-45. (Appendix (“A”) at 47.) A police pension under Chapter 40-45 is only available to members of a city’s police department. N.D.C.C. § 40-45-09.

As early as 1942, Minot adopted a pension plan for city employees, “other than policemen”, under N.D.C.C. Chapter 40-46. (A at 32.) A municipal employees’ pension under Chapter 40-46 is available to all employees of a city, except members of the police force and members of a firefighters relief association. N.D.C.C. § 40-46-01.

Minot continued the police pension until 2008 when Minot, by ordinance, discontinued the police pension. (A at 53.) At the same time Minot discontinued its municipal employees’ pension plan. (Id.) Minot created a new “merged” pension plan combining the police employees with all other municipal employees.¹ (Id.) Minot did

¹ Under Chapters 40-45 and 40-46, non-police employees cannot be members of a police pension and police officers cannot be members of a municipal employees’ pension. By combining the two pensions, Minot created a new pension plan which has members both police and non-police employees, such a plan is not authorized by either Chapters 40-45 or 40-46.

not follow the provisions of N.D.C.C. § 40-45-26 or § 40-46-23 for discontinuing the two plans. (Id.)

On December 8, 2008, Plaintiffs John Klug and Bob Barnard, individually, and on behalf of the Local Membership of the International Police Association (hereinafter referred to as “Klug”) sued Minot alleging Minot failed to comply with Chapter 40-45 when Minot discontinued its police pension. (A at 4.) Klug and Barnard are members of the police pension plan. Klug requested the Court order “a return to the separate nature and identity of the police pension.” (A at 9.)

Minot filed an Answer on January 29, 2010, denying its violated North Dakota law and requesting the Complaint be dismissed. (A at 10.)

Minot moved for summary judgment on February 1, 2010. (A at 14.) Minot argued that as a home rule city, it has the power to ignore state statutes, including the provisions of N.D.C.C. Chapters 40-45 and 40-46. Minot further argued the Complaint should be dismissed because Klug suffered no financial harm due to the changes to Minot’s pensions. (Id.)

Klug resisted the motion for summary judgment. Klug argued Minot’s status as a home rule city did not allow it to ignore the specific provisions concerning discontinuing pensions under Chapters 40-45 and 40-46 and therefore Minot acted illegally when it changed its pensions. Klug also argued that by “merging” the pensions, Minot converted funds from the police pension to the new municipal pension.

The District Court granted Minot’s motion for summary judgment. (A at 274.) The District Court concluded Minot’s home rule charter allowed it to ignore Chapters 40-45 and 40-46 and that the police pension was not discontinued when it was “merged” into

a new pension. (Id.) The Court also concluded Minot's actions did not impair or harm the police members' rights under their pension plan. (Id.)

Judgment was entered on April 16, 2010 and Notice of Entry of Judgment was served on May 6, 2010. (A at 284; 286.) Klug filed a Notice of Appeal on July 7, 2010. (A at 288.)

STATEMENT OF THE FACTS

Minot established a police pension under N.D.C.C. Ch. 40-45 as early as 1937. (A at 47.) It established a pension for other non-police municipal employees under N.D.C.C. Ch. 40-46 as early as 1942. (A at 32.)

On November 7, 1972, Minot adopted a Home Rule Charter for the City of Minot. (A at 15-31.)

Minot continued to maintain the two pensions, under State statute, from at least 1942 until July 2008 when Minot enacted Ordinance 4131 which discontinued the police pension and the municipal employees' pension and created a new "merged" pension. (A at 112; 52; 53-65.)

Prior to adoption of Ordinance Number 4131, the pension plan for Minot general city employees (municipal employees' pension) was codified in Article VII of the Minot Code of Ordinances and the police pension was codified in Article VIII of the Minot Code of Ordinances. (A at 53.) Although separate pensions, prior to 2008, Minot operated the plans similarly. (A at 101.) The plans, however, over time, had different funding levels. (Id.) The police pension was better funded than the municipal employees' pension. The actuarial valuation reports obtained by Minot indicated contributions above recommended levels in the police pension and contributions below recommended levels in the municipal employees' pension. (A at 102; 195.) If Minot contributes more to one plan than the actuary recommends, than that plan has a net pension asset. If Minot contributes less to a plan, than that plan has a net pension liability. (Id.) At the time Minot enacted Ordinance Number 4131 the police pension had a net pension asset and the municipal employees' pension had a net pension liability. (Id.)

Minot discontinued the two separate plans and created a new “merged” plan so that it could apply the net pension asset in the police pension to offset the net pension liability in the municipal employees’ pension, rather than increase contributions to the municipal employees’ plan or reduce future benefits in the municipal employees’ plan. (A at 195-196.)

The enactment of Ordinance Number 4131 did not change the terms or benefits for police pension participants. (Compare A at 53-65 with A at 66-89.) It did not change the computation of pension amounts, eligibility requirements, vesting provisions, or payment provisions. (Id.)

Minot’s pensions are partially funded by the City and partially funded by participating employees. (A at 116.) If a plan has a net pension liability, that liability, likely, will have to be made up by increased contributions by Minot or by participants; or prospectively through decreased benefits. Similarly, if a plan has a net pension asset, that asset, likely will result in increased benefits or decreased contributions by Minot or by participants. (A at 195-196.) Members of the police pension knew they were over-contributing to the police pension, but agreed to do so to strengthen the financial health of the plan (A at 195-196.) The members believe their excess contributions are now being “converted” to protect the health of the municipal employees’ pension. (Id.) Additionally, if Minot is not bound by the provisions of Chapter 40-45, then the police members fear Minot will be able prospectively to change the benefit terms of the police pension, which under state law are unique to police officers.

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

Summary Judgment "is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if resolving factual disputes will not alter the result." Tarnavsky v. Rankin, 2009 ND 149, ¶ 7, 771 N.W.2d 578. Whether the District Court properly granted summary judgment is a question of law that this Court reviews de novo on the record. Id. Here, the questions before this Court are questions of law, subject to the de novo review standard.

II. MINOT'S POWERS UNDER ITS HOME RULE CHARTER DO NOT SUPERSEDE THE PROCEDURAL PROTECTIONS AFFORDED TO MINOT POLICE OFFICERS AND PENSIONERS UNDER N.D.C.C. CHAPTER 40-45.

The North Dakota Legislative Assembly has recognized that police officers should be treated differently than other municipal employees concerning pension benefits. Accordingly, the Legislative Assembly created two sections of code – one for police pensions and one for pensions for other municipal employees. Compare N.D.C.C. Ch. 40-45 and N.D.C.C. Ch. 40-46. In addition to creating different benefit terms for the two groups, the Legislative Assembly also afforded police officers procedural rights concerning the discontinuing of a police pension. N.D.C.C. § 40-45-26 provides:

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.

Under § 40-45-26, the members and pensioners of the pension plan must petition to discontinue the plan and the city must enact an ordinance by two-thirds vote before the plan can be discontinued. (Id.)

It is undisputed that the members and pensioners of the Minot police pension did not petition for discontinuance of the police pension. It is also undisputed that Minot discontinued its police pension when it enacted Ordinance 4131. Prior to enactment of Ordinance 4131, Minot had two pensions, a police pension under Chapter 40-45, which was limited to only police employees as required by statute; and a municipal employees' pension under Chapter 40-46, which included all non-police employees, as required by statute. Minot claims it did not discontinue either pension. Minot contends it "merged" the two pensions. A "merger," however, is not a legal option under Chapters 40-45 or 40-46 because those two chapters do not allow police officers to be members of a municipal employees' pension and do not allow non-police employees to be members of the police pension. Accordingly, regardless of how Minot attempts to classify its actions, the net affects of enactment of Ordinance 4131 are: 1) a discontinuance of the police pension from July 7, 2008 forward; 2) a discontinuance of the municipal employees' pension from July 7, 2008 forward; 3) the creation of a new pension covering all Minot employees from July 7, 2008 forward²; 4) the transfer of members, assets, and liabilities from the police pension to the new pension; and 5) the transfer of members, assets, and liabilities from the municipal employees' pension to the new pension.

² The new pension is not a Chapter 40-45 pension or a Chapter 40-46 pension because neither of those sections authorize a city to create a pension that contains both police employees and non-police employees.

Under N.D.C.C. § 40-45-26, before Minot can discontinue the police pension, or move police employees into a new pension, the members and pensioners must petition for the change and the City must adopt a resolution by two-thirds vote. Minot did not comply with these requirements, claiming that since it adopted its Home Rule Charter, its authority under the Charter supersedes the provisions of Chapter 40-45.

The North Dakota Constitution directs that the Legislative Assembly "shall provide by law for the establishment and exercise of home rule in counties and cities." N.D. Const. Art. VII, § 6. The Legislature has provided for home rule cities through the enactment of N.D.C.C. Ch. 40-05.1. A validly enacted home rule "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." N.D.C.C. § 40-05.1-05.

"Nevertheless, a home rule city's power to enact ordinances that supersede state law is not without limitation, because a home rule city's powers must be based upon statutory provisions." Sauby v. City of Fargo, 2008 ND 60, ¶6, 747 N.W. 2d 65; City of Fargo v. Malme, 2007 ND 137, ¶ 10, 737 N.W.2d 390. This Court has explained that "[c]ities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant." City of Bismarck v. Fettig, 1999 ND 193, ¶ 4, 601 N.W.2d 247. This Court has held the supersession provision in N.D.C.C. § 40-05.1-05 applies only to those powers enumerated in N.D.C.C. § 40-05.1-06, and those powers must also be included in the charter and be implemented by ordinance. Malme, at ¶ 11; Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980).

In Litten v. City of Fargo, this Court addressed whether "a home rule city, independent of the general laws relating to cities, [may] select its own form of government and decree its own procedure for changing the form of government." In answering the question in the negative, the Court reasoned:

It becomes somewhat evident that the language in § 40-05.1-05, NDCC, permitting a city ordinance to supersede state law where there is a conflict has reference only to those powers given to the city under § 40-05.1-06, because in certain instances the legislature specifically required compliance with the special laws. Subsection 11 of § 40-05.1-06, NDCC, specifically provides that the zoning, planning and subdividing outside the city limits may be as permitted by state law, and subsection 14 provides that the boundary limits of the city and the annexation and deannexation of territory must conform with state law. This clearly indicates that 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. It necessarily follows that in order to determine what broad powers were given to home rule cities we must examine the various provisions of § 40-05.1-06. 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.

Litten, 294 N.W. 2d at 632.

In City of Fargo v. Malme, 2007 ND 137 ¶ 13, 737 N.W.2d at 394, this Court, in ruling against Fargo's claim that its home rule charter superseded state law, explained that the rule of strict construction applies in defining a city's power:

[¶13] The rule of strict construction applies in defining municipal powers. GO Comm. ex rel. Hale v. City of Minot, 2005 ND 136, ¶ 8, 701 N.W.2d 865; Fettig, 1999 ND 193, ¶ 4, 601 N.W.2d 247; Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991); Haugland, 429 N.W.2d at 453. Any doubt as to the existence or extent of municipal powers must be resolved against the municipality. See

Meyer v. City of Dickinson, 451 N.W.2d 113, 115 (N.D. 1990); Dacotah Hotel Co. v. City of Grand Forks, 111 N.W.2d 513, 515 (N.D. 1961); Lang v. City of Cavalier, 59 N.D. 75, 228 N.W. 819, Syll. 3 (1930).

Here, nothing in State law, or in Minot's Charter supersedes the procedural protections afforded to members and pensioners of a police pension. Minot erroneously claims the following Charter powers allow it to ignore the provisions of Chapter 40-45: 1) to control its finances and fiscal affairs; 2) to provide for city officers, agencies, and employees, their selection, terms, powers, qualifications, and compensation; 3) 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 thereof; and 4) to exercise in the conduct of its affairs all powers usually exercised by a corporation. (A at 21; Home Rule Charter at Article 3 (b), (d), (g), and (m).) These powers essentially mirror the powers authorized by the Legislative Assembly to be adopted by home rule cities. See N.D.C.C. § 40-05.1-06. Nothing in the Century Code or the Minot Charter, however, grants any authority to enact an ordinance concerning the discontinuation of a police pension created under N.D.C.C. Ch. 40-45. On the other hand, the Legislative Assembly has explicitly limited all municipalities' ability to create and merge pension systems once a pension established by State statute is in effect. N.D.C.C. § 40-05-01(69) specifically allows all North Dakota cities to adopt by ordinance a city employee pension system "provided other pension systems allowed by statute are not in effect." Here, the police pension was in effect and it was created under State statute. As this Court has explained, under the rule of strict construction, if the power is not enumerated, "a strong presumption exists that the city will be governed by the laws generally applicable to cities."

It makes sense that the power Minot seeks to exercise is not contained in N.D.C.C § 40-05.1-06 or its Charter. The police pension was created under Chapter 40-45 and its discontinuance is therefore at all times governed by that section. That is the clear intent of the limiting language in N.D.C.C. § 40-25-01(69).

Further evidence that Minot's Charter does not control is the state-wide nature of police officer's benefits. One of the requirements for supersession of state law by a home rule charter is that the matter being superseded be of local concern and not state concern. N.D.C.C. §40-05.1-06. Here, the Legislative Assembly has explicitly recognized that police officers in the State of North Dakota should be treated differently than other municipal employees. N.D.C.C. Ch. 40-45; See also N.D.C.C. § 40-45-25. Hours of duty of police officers in cities over ten thousand population--Limitations—Exceptions; and N.D.C.C. § 65-01-15.1. Presumption of compensability for certain conditions of full-time paid firefighters and law enforcement officers. By so doing, the Legislative Assembly has elevated the question of police pensions adopted under Chapter 40-45 from being of local concern to being of state concern. This Court has never addressed this issue. Although the case law from other states is not unanimous, it does support a finding that police pensions are not a local issue. See Luhrs v. City of Phoenix, 83 P.2d 283, 286 (1938)(state has vital interest in city police forces); but see Ebald v. City of Philadelphia, 128 A.2d 352, 354 (1957)(police pension is related to personnel and administration and is a local matter). This Court should adopt the holding of the Luhrs case.

CONCLUSION

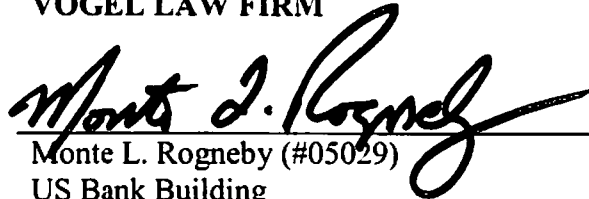
In regard to police pensions, this Court has previously explained that the police pension statute should be liberally construed to carry out its beneficial policy. Quam v. City of Fargo, 43 N.W.2d 292, 295 (N.D. 1950). Here, the procedural protections should

be liberally construed to protect Klug and his colleagues. Because Minot's Charter does not Supersede Chapter 40-45, this Court should reverse and remand with instructions that the District Court declare Ordinance Number 4131 illegal as a matter of law.

Respectfully submitted September ~~7th~~, 2010.

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