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2014 IL App (3d) 130339-U

Order filed August 14, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

DONALD BARBER,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellant,)	Kankakee County, Illinois.
)	
v.)	
)	
VILLAGE OF BRADLEY, ILLINOIS,)	Appeal No. 3-13-0339
an Illinois Municipal Corporation, and)	Circuit No. 09-CH-502
VILLAGE OF BRADLEY POLICE AND)	
FIRE COMMISSION,)	
)	The Honorable
Defendants-Appellees.)	Kendall O. Wenzelman,
)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Receipt of a letter of retirement regarding an appointed position did not automatically create a vacancy for purposes of promotion under section 10-2.1-15 of the Illinois Municipal Code.
- ¶ 2 After receiving a notice of retirement from one of the two existing lieutenants for the Bradley Police Department (Bradley PD), which would become effective on June 30, 2009, the

police chief agreed with the budgetary request from the president of the Village of Bradley (the Village) to operate the police department, after the effective date of retirement on June 30, 2009, with one less lieutenant and without a deputy chief. On July 6, 2009, the chief advised the Village of Bradley Police and Fire Commission (the Commission) that he would be eliminating both positions due to budget considerations. On July 13, 2009, the Village approved a budget that eliminated funding for a deputy chief and one lieutenant. In July 2009, plaintiff Donald Barber had the highest score on the existing eligibility list for promotion to lieutenant, which expired in October 2009.

¶ 3 Plaintiff filed a complaint for injunction seeking to enforce the provisions of section 10-2.1-15 of the Illinois Municipal Code (Code) (65 ILCS 5/10-2.1-15 (West 2008)), which prohibits striking the names from the promotion eligibility list during a pending vacancy. After finding the lieutenant's notice of retirement did not create a vacancy, the trial court found in favor of defendants. Plaintiff appeals this decision by the trial court. We affirm.

¶ 4 **BACKGROUND**

¶ 5 On May 30, 2009, a lieutenant for the Bradley PD, Jeff Hackley, submitted a notice of his retirement, which would become effective on June 30, 2009. After reviewing the financial status of the Village, the village president decided to reduce the annual budget for the Village by eliminating Lieutenant Hackley's position, after June 30, 2009.

¶ 6 On October 23, 2009, plaintiff filed a "Complaint for Injunction" against both the Village and the Commission (collectively defendants), in the Kankakee County circuit court. Plaintiff's complaint asked the court to require the Village to appoint plaintiff to fill the purported vacancy, created by Lieutenant Hackley's retirement, because he was highest on the promotion eligibility list that expired on October 9, 2009. Plaintiff claimed he had a vested right to be appointed to

fill that vacancy. In the alternative, plaintiff asked the court to enter an order prohibiting defendants from invalidating the promotion eligibility list. Subsequently, plaintiff filed a “First Amended Complaint” on December 28, 2009. Plaintiff added a second count seeking continuing damages for lost income and benefits, based on the Village’s failure to promote him to the vacant lieutenant’s position, from the date of Lieutenant Hackley’s retirement until the date of his appointment to lieutenant.

¶ 7 The court held a bench trial on plaintiff’s first amended complaint, on October 30, 2012. Police Chief Steven Coy, Village Administrator Kimberly Dickens, and Village President Bruce Adams all testified at trial. Following the evidence and written arguments of counsel, the trial court took the matter under advisement. On March 15, 2013, the court filed a written “Memorandum of Decision,” and noted the primary issue before the court was whether a vacancy for a lieutenant’s position existed. In its written decision, the court made several findings of fact based on the evidence, as set forth below.

¶ 8 The deputy chief position was created by ordinance on June 23, 2003. The ordinance creating lieutenant positions was approved, on February 26, 2007, but did not designate the minimum or maximum number of lieutenant positions allowed for the Bradley PD. Initially, two lieutenants were appointed by promotion after the adoption of the 2007 ordinance.

¶ 9 The Village received the letter of resignation from Lieutenant Hackley, before the end of May 2009, with an effective date of retirement as of July 1, 2009.¹ At the time Lieutenant Hackley announced his retirement, plaintiff was one of three officers on the eligibility list for promotion to lieutenant.

¹ All other evidence in the record indicated the effective date of retirement was June 30, 2009.

¶ 10 According to the minutes from the Commission meeting, held on July 6, 2009, Chief Coy informed the Commission that Lieutenant Hackley's retirement went into effect on June 30, 2009. The chief also advised the Commission he intended to operate the police department without a deputy chief and with one less lieutenant after June 30, 2009.

¶ 11 On July 13, 2009, the Village adopted the budget and appropriation ordinance for the fiscal year, effective May 1, 2009, through April 30, 2010. Village President Adams testified that, due to budget deficits, the Village eliminated the deputy chief position and one of the two lieutenant positions from the 2009-2010 budget. In October 2009, plaintiff's name was stricken, along with all others, from the three-year promotional list.

¶ 12 The trial court found the Village could eliminate one lieutenant, without enacting an ordinance, since a finite number of lieutenants was not specified in the 2007 ordinance creating the position Hackley left due to his retirement. Relying on case law specific to appointed positions,² the court found that "a vacancy exists only at such time as the process for the declaration of a vacancy has been complied with." In the case at bar, the court found Police Chief Coy did not request that the lieutenant position be filled, therefore, a vacancy did not exist while plaintiff's name remained on the eligibility list. Consequently, defendants were in compliance with section 10-2.1-15 of the Code. 65 ILCS 5/10-2.1-15 (West 2008). The court entered a written order, finding in favor of defendants, on April 22, 2013. Plaintiff filed a timely notice of appeal.

² The court noted that many cases cited by plaintiff involved vacancies created, automatically, by resignations from elected positions, which were distinguishable from this case involving a resignation from an appointed position.

¶ 13

ANALYSIS

¶ 14

On appeal, plaintiff asserts that defendants should have been enjoined from removing his name from the promotional eligibility list, in October 2009, because a vacancy for a lieutenant existed at that time. Defendants claim Lieutenant Hackley's letter, announcing the effective date of his retirement, did not operate to create a vacancy. Thus, without an existing vacancy, the eligibility list, including plaintiff's name, properly expired after three years, according to law.

¶ 15

The issue on appeal requires this court to determine whether, on October 9, 2009, a "vacancy" existed for the position of lieutenant in the Bradley PD, as described in section 10-2.1-15 of the Code. 65 ILCS 5/10-2.1-15 (West 2008). Both parties agree section 10-2.1-15 of the Code controls the outcome of this case.

¶ 16

Section 10-2.1-15 of the Code, in part, provides:

¶ 17

"The [Commission], by its rules, shall provide for promotion in the fire and police departments on the basis of ascertained merit and seniority in service and examination, and shall provide in all cases, where it is practicable, that vacancies shall be filled by promotion. * * * The [Commission] shall strike off the names of candidates for promotional appointment after they have remained thereon for more than 3 years, provided there is no vacancy existing which can be filled from the promotional register." 65 ILCS 5/10-2.1-15 (West 2008)

We review *de novo* whether the trial court correctly applied the law to the historical facts as found by the circuit court. *Salazar v. Board of Education of Mannheim School District 83*, 292 Ill. App. 3d 607, 615 (1997).

¶ 18

This court addressed a similar issue in *Hammer v. City of Peoria Board of Fire and Police Commissioners*, 196 Ill. App. 3d 306 (1990). There, the trial court also had to determine

whether a vacancy existed for a lieutenant position, under section 10-2.1-15 of the Code, when a lieutenant in the Peoria Police Department was temporarily promoted to the rank of captain. *Id.* at 309. In *Hammer*, an express city ordinance prohibited the police commissioners from filling any vacancies, or making any promotions, within the police department “until requested in writing by the superintendent of police with the approval of the city manager to fill such vacancies or make such promotions.” *Id.* (quoting Peoria City Code § 28-4 (1975)). Based on the ordinance in that case, this court held a vacancy did not arise until the superintendent of police submitted a written request to fill a vacancy which was then certified and approved by the city manager. *Hammer*, 196 Ill. App. 3d at 309.

¶ 19 In the case at bar, the Village did not have a written policy or ordinance governing when a vacancy existed or whether vacancies must be filled by promotions from within the police department. Yet, on past occasions, the Village followed an undisputed protocol which was initiated by the chief’s request to fill a certain position by promotion. Thereafter, both the Commission and the Village had to approve the request for promotion.

¶ 20 In this case, the chief did not initiate any request for the commissioners to hire or promote a person to assume Lieutenant Hackley’s rank of lieutenant. Instead, the chief made it very clear to the Commission, on July 6, 2009, that he did not intend to operate his department with two salaried lieutenants or a deputy chief for budgetary reasons. Moreover, the 2009-2010 budget, passed by the Village on July 13, 2009, did not fund two full-time lieutenants beyond June 2009. Without the requisite funding, it is clear that the position was eliminated, by attrition, and a vacancy did not exist. Therefore, on October 9, 2009, plaintiff’s eligibility for promotion simply expired by operation of law.

