[Cite as *Blauvelt v. Hamilton,* 2009-Ohio-2801.]

IN THE COURT OF APPEALS OF OHIO

TWELFTH APPELLATE DISTRICT

BUTLER COUNTY

SCOTT N. BLAUVELT,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-07-174
	:	O P I N I O N
- vs -		6/15/2009
	:	
THE CITY OF HAMILTON,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV 2006 12 4525

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GRADY, J.

{¶1} The city of Hamilton (Hamilton) appeals from a final judgment of the common pleas court in an R.C. 2506.01 appeal to that court from an order of the Hamilton Civil Service Commission.

{¶2} Plaintiff-Appellee, Scott N. Blauvelt, was hired as an assistant law director by Hamilton's director of law, effective March 31, 2005. In a letter to Blauvelt dated March 23,

2005, the director of law stated that the position of assistant law director was "in the unclassified service."

{¶3} On October 4 or 5, 2006, approximately 18 months after his employment began, Blauvelt was seen on surveillance video-cameras walking naked through the Hamilton Municipal Building and the Butler County Government Center, after hours. Hamilton learned of a similar incident that occurred on September 5, 2006. Those incidents led to two actions adverse to Blauvelt.

{¶4} First, Blauvelt was charged with two counts of public indecency, R.C. 2907.09(A)(1). After those charges were dismissed and refiled, Blauvelt moved to dismiss, claiming a violation of his statutory speedy trial rights. The trial court granted the motion. On an appeal by the state, we affirmed the trial court. *State v. Blauvelt,* Butler App. No. CA2007-01-034, 2007-Ohio-5897.

{¶5} Second, Blauvelt was promptly placed on administrative leave by the director of law. The director of law terminated Blauvelt's employment by letter dated October 17, 2006, finding that Blauvelt violated the following regulations governing Hamilton's employees:

{¶6} "Administrative Directive 314, III, (2)(15) - unbecoming conduct which brings the City or the work unit into disrepute; or that which reflects discredit upon the employee; or, that which causes a negative effect upon the City's or work unit's effectiveness or efficiency;

{¶7} "Administrative Directive 314, III, (2)(15) - performance of illegal acts while on and/or off duty."

{¶8} Blauvelt appealed his termination to the Hamilton Civil Service Commission. The Commission dismissed Blauvelt's appeal on a finding that it lacks subject-matter jurisdiction to review the appeal because the position of assistant law director that Blauvelt held is in the unclassified civil service.

{¶9} Blauvelt filed an appeal from the Commission's order of dismissal to the court of

common pleas. The court reversed and vacated the Commission's order pursuant to R.C. 2506.04, finding that the position of assistant law director is in the classified civil service pursuant to the Hamilton City Charter. The court found that the charter provision prevails on principles of home rule over R.C. 124.11(A)(11), which places the position of assistant law director in the unclassified service. The court also ordered that Hamilton, because it had created an unclassified position in violation of its charter, is itself estopped from asserting as an affirmative defense that because Blauvelt accepted employment as an unclassified employee, he is estopped from arguing that the assistant law director position is a classified position. The court remanded the case to the Commission for proceedings on Blauvelt's appeal of his termination. Hamilton filed a notice of appeal to this court.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ERRED IN REVERSING THE DECISION OF THE HAMILTON CIVIL SERVICE COMMISSION THAT BLAUVELT WAS AN UNCLASSIFIED CIVIL SERVANT."

{¶12} Section 10, Article XV of the Ohio Constitution provides:

{¶13} "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

{¶14} In *Chubb v. Ohio Bur. of Worker's Comp.*, 81 Ohio St.3d 275, 277-278, 1998-Ohio-628, the Supreme Court wrote:

{¶15} "Ohio's civil service scheme is embedded in the Ohio Constitution and enacted in R.C. Chapter 124. Civil service employees are divided into classified and unclassified positions. Unlike unclassified employees, those employed in the classified service may be removed for good cause only according to the procedures enumerated in R.C. 124.34 and

related rules and regulations. The classified civil servant may appeal termination of employment whereas the unclassified employee is not affected by these statutory and regulatory procedures."

{¶16} R.C. 124.11(A)(11) provides that the position of assistants to city directors of law are in the unclassified service. However, Section 10:02 of Hamilton's charter provides:

{¶17} "The administrative service of the City is hereby divided into the classified and unclassified service as follows:

{¶18} "(A) the unclassified service shall include all the officers elected by the people; the City Manager; the Members of the Civil Service Commission; all directors of departments other than the Director of Civil Service; members of advisory boards appointed by the City Manager; a secretary to the Mayor, secretary to the City Manager, one secretary to each director of a department; and the City Clerk.

{¶19} "(B) The classified service shall comprise all positions not specifically included by this Charter in the unclassified service and shall be divided into a competitive class and a noncompetitive class.

{¶20} "(1) The competitive class shall include all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive tests.

{¶21} "(2) The noncompetitive class shall consist of all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character."

{¶22} A further provision of the Hamilton City Charter implicated by the issue presented is Section 18:08, captioned "Relations of this Charter to State Law," which states:

{¶23} "It is hereby declared to be the intention of the electors of the City of Hamilton that the civil service provisions and all other provisions of the Revised Charter shall prevail over State laws in conflict or inconsistent therewith, except in matters in which, and to the

extent that, the powers granted municipal corporations by the Constitution of Ohio are subordinated by the terms of that constitution to State law and no farther, and no State law shall derogate from or prevail over this Revised charter or any provision thereof, or over any ordinance or resolution of the City of Hamilton farther than is indispensably necessary in order to give effect to the Constitution of Ohio."

{¶24} Under the principles of home rule prescribed by Section 3, Article XVIII of the Ohio Constitution, in matters of local self-government, when there is a conflict between a municipal charter provision and a statute, the charter provision prevails where (1) the conflict appears by the express terms of the charter, and not by mere inference, and (2) the charter clearly and expressly states the areas where the municipality intends to supersede and override general state statutes. *State ex rel. Bardo v. City of Lyndhurst* (1988), 37 Ohio St.3d 106; *State ex rel. Regetz v. Cleveland*, 72 Ohio St.3d 167, 1995-Ohio-238. "As a result, municipalities enjoy the power to enact local legislation, as distinguished from matters of statewide concern, without regard to general laws on the subject, except to the extent this power is limited by the Constitution itself." *Fenton v. Enharo* (1987), 31 Ohio St.3d 69, 71, quoting *State ex rel. Kohl v. Dunipace* (1978), 56 Ohio St.2d 120, 121.

{¶25} The trial court found that because Section 10:02 of Hamilton's charter, which places assistant law directors in the classified service, expressly conflicts with R.C. 124.11(A)(11), which provides that the position is unclassified, and because the charter expresses an intention to prevail over conflicting state civil service laws, the charter provision necessarily prevails. However, for purposes of a home rule analysis a municipal charter provision concerning civil service operates to discontinue or supersede application of a conflicting general law as to that municipality only insofar as the charter provision complies with Section 10, Article XV of the Constitution. *State ex rel. Lentz v. Civil Service Commission* (1914), 90 Ohio St. 305, 310.

{¶26} Section 10, Article XV is the source of authority for the enactment of civil service laws and ordinances by the state and its cities. The permitted protected class of persons includes those who apply for and/or hold employment positions for which appointments and promotions are made "according to merit and fitness, to be ascertained, so far as practicable, by competitive examinations." Id. Such positions are generally identified as "classified." All others are "unclassified."

{¶27} Section 10:02(A) of Hamilton's charter identifies certain positions as unclassified. Section 10:02(B) provides that all others are classified, and it divides those between the competitive class and the noncompetitive class. Section 10:02(B)(1) defines the competitive class to include "all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive tests." Section 10:02(B)(2) defines the noncompetitive class to include "all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character."

{¶28} Because they are excluded from the category of positions in Section 10:02(B)(1) for which a competitive examination is "practicable," the noncompetitive positions identified by Section 10:02(B)(2) are outside the definition of classified positions established by Section 10, Article XV. The positions in Section 10:02(B)(2) are necessarily unclassified, notwithstanding the fact that they are among those generally identified by Section 10:02(B) of the charter as "classified."

{¶29} The Supreme Court dealt with this anomaly in *State ex rel. Ryan v. Kerr* (1932), 126 Ohio St. 26, and in *DeWoody v. Wood* (1940), 136 Ohio St. 575. In both cases, as in the present case, a city charter permitted the position of assistant law director to be among those positions generally identified as classified, and in both cases, as in the present case, the charter divided classified positions between competitive and noncompetitive categories.

{¶30} In *State ex rel. Ryan*, the charter expressly authorized the city law director to

designate assistants. Section 6.01 of Hamilton's charter contains a like provision. The charter in *DeWoody* contained no such express provision, but the court found that the duties of the law director which the charter imposed necessarily implied that authority.

{¶31} Addressing the city law director's exercise of his appointment authority, the *State ex rel. Ryan* court wrote:

{¶32} "The position of assistant director of law is necessarily a position of trust and confidence. The director of law must answer to the people for the shortcomings of his assistants. Is it the policy of the law that he should be permitted to select as his assistants those individuals in whom he has confidence-confidence in their ability, confidence in their honesty, confidence in their personality; or must he take unto himself a coterie of assistants tested by an examination that means nothing in so far as the fitness of the individual to perform the duties of the office is concerned?" Id. at 30.

{¶33} The considerations the court addressed in *State ex rel. Ryan* led the court to conclude that the position of assistant law director is not one which it is practicable to fill by competitive examination, and therefore the position is not a civil service position subject to legal protections regarding appointment or promotion. *DeWoody* applied the rule announced in *State ex rel. Ryan*, and held:

{¶34} "Assistant directors of law and police prosecutors occupy a fiduciary relation to their principal, the director of law, and by reason thereof it is not practicable to ascertain their merit and fitness by competitive civil service examination." Id., syllabus by the court. The holdings in *State ex rel. Ryan* and *DeWoody* accord with the rule of *Fenton* that Section 3, Article XVIII, the "home rule" amendment, does not authorize local legislation which is limited by the Constitution itself. Further, and with regard to civil service laws in particular, any local legislation must comply with Section 10, Article XV of the Constitution. *State ex rel. Lentz*. Section 10, Article XV imposes a "merit and fitness" standard for the civil service, and permits

the use of competitive examinations in making those determinations, but only "as far as practicable." Because it is not "practicable" to use competitive examinations to appoint assistant law directors, per *State ex rel. Ryan* and *DeWoody*, municipalities are prevented by Section 3, Article XVIII from adopting local legislation affording those positions the protections of the classified civil service. As a result, decisions concerning appointment, promotion, and termination of assistant law directors are committed to the sound discretion of the city law director or other official responsible for the performance of assistant law directors in the city's employ. *State ex rel. Ryan*; *DeWoody*. Being thus limited by the Constitution, on a home rule analysis local legislation cannot "displace" a conflicting general law of the state placing those positions in the unclassified civil service. *State ex rel. Lentz*.

{¶35} We find that, their conflict notwithstanding, Section 10:02 of Hamilton's charter cannot displace or prevail over R.C. 124.11(A)(11). Therefore, per that section of the Revised Code, the position of assistant law director from which Blauvelt was terminated is in the unclassified civil service, and the Hamilton Civil Service Commission was correct in holding that it lacks jurisdiction to hear and determine Blauvelt's appeal to the Commission from his termination for that reason. The trial court therefore erred when it held that the Commission does not lack jurisdiction to hear Blauvelt's appeal of his termination.

{¶36} The first assignment of error is sustained.

{¶37} Assignment of Error No. 2:

{¶38} "THE TRIAL COURT ERRED IN FAILING TO HOLD THAT BLAUVELT WAS ESTOPPED FROM CLAIMING THE PROTECTIONS OF THE CLASSIFIED CIVIL SERVICE."

{¶39} Because our ruling sustaining the first assignment of error renders the merits of this assignment of error moot, we decline to decide the error assigned. App.R. 12(A)(1)(c).

Conclusion

{¶40} Having sustained the first assignment of error, we will reverse and vacate the final judgment of the court of common pleas from which this appeal was taken, and will order the judgment of the Hamilton Civil Service Commission reinstated.

BROGAN, J. concurs.

FAIN, J., concurs separately.

FAIN, J., concurring separately.

{¶41} I concur in both the judgment and the opinion of the court. I write separately merely to record my insufficient understanding of the reasoning underlying *State ex rel. Ryan v. Kerr, Dir. of Law* (1932), 126 Ohio St. 26, which I agree controls the outcome of the case before us.

{¶42} In *State ex rel. Ryan v. Kerr, Dir. of Law*, supra, the relator acknowledged that, like Blauvelt, he was not in the competitive class of the classified civil service, but asserted that he was in the noncompetitive class of the classified service.

{¶43} "There is no question that this provision [of the Cleveland City Charter] does divide the classified service into a competitive and non-competitive class, and relator claims he belongs to the non-competitive class of the classified service." Id. at 29.

{¶44} The opinion in *State ex rel. Ryan v. Kerr, Dir. of Law*, supra, then sets forth the excellent reasons for the proposition, which the relator in that case did not dispute, that he should not be in the competitive class of the classified civil service, because requiring a prospective assistant city prosecutor to take a competitive exam would be "approaching assinity." The opinion ignores the fact that no one was claiming that the position of assistant city prosecutor should be subject to the requirement of competitive exams; the relator, like

Blauvelt in the case before us, claimed that as a member of the noncompetitive class of the classified civil service, he was entitled to certain procedural protections before he could be removed from his position. Ignoring that claim, the Supreme Court of Ohio "holds that it is not practicable to ascertain the merit and fitness of an assistant police prosecutor by competitive examination – because of the unusual relationship between the director of law and such assistant prosecutor," and then gives judgment for the respondent law director, as if its holding regarding the practicability of a competitive examination was somehow relevant to the issue before it. Id. at 31.

{¶45} Although I do not understand the reasoning of the Supreme Court of Ohio in *State ex rel. Ryan v. Kerr, Dir. of Law*, supra, I am left in no doubt that it holds that an assistant city prosecutor is not subject to civil service protection, despite a provision of the city charter purporting to extend civil service protection to him or her. I cannot distinguish Blauvelt's situation from that of the assistant city prosecutor in *State ex rel. Ryan v. Kerr, Dir. of Law*, supra. Therefore, I join in the opinion and judgment of this court.

Hon. James A. Brogan, Hon. Mike Fain, and Hon. Thomas J. Grady, of the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.