[Cite as *Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 2010-Ohio-5351.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94057

MUNICIPAL CONSTRUCTION EQUIPMENT OPERATORS' LABOR COUNCIL

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-621029

BEFORE: Stewart, J., McMonagle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: November 4, 2010

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MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Municipal Construction Equipment Operators' Labor Council ("union"), appeals from a judgment that declared the defendant-appellee, city of Cleveland, in compliance with a city charter provision for civil service testing. The union alleged that city workers had

been operating construction equipment without first undergoing testing and receiving civil service commission appointments as required by the city charter — in essence, that those workers had been doing jobs that fell within the job classification of union employees who had passed civil service testing in order to operate construction equipment. The court found that some city workers indeed operated construction equipment without being tested by the civil service commission for that function, but that the operation of construction equipment was so incidental to their job that it did not amount to a reclassification of the job without testing.

I

{¶ 2} The workers represented by the union in this case are construction equipment operators ("CEOs"). Broadly speaking, CEOs are divided into two groups, Group A and Group B, and they have the duty to operate, repair, and maintain heavy construction equipment, including mechanized hoes, loaders, bulldozers, and graders. All CEOs pass competitive civil service tests to demonstrate their ability to operate the construction equipment as a predicate to the position.

{¶ 3} The union discovered that certain city workers not within the CEO bargaining unit had been operating heavy construction equipment while carrying out their job duties, but had not passed the competitive tests required of Group A or B construction equipment operators. For example,

the union claimed that non-CEO workers in the city water department were excavating water pipes by operating backhoes. The union claimed that the city's practice of allowing non-CEOs to use heavy construction equipment violated Chapter 27, Section 132 of the Charter of the city of Cleveland. Section 132 requires appointment by the civil service commission to a position as the result of competitive testing:

{¶ 4} "No person shall be appointed or employed in the service of the City under any title not appropriate to the duties to be performed, and no person shall be transferred to or assigned to perform any duties of a position subject to competitive test unless he shall have been appointed to the position from which the transfer is made as a result of competitive test equivalent to that required for the position to be filled."

{¶ 5} The union sought declaratory and injunctive relief, asking the court to declare that the city violated its charter by using non-CEOs to perform tasks identified by the commission as appropriate for performance by construction equipment operators.[1] The city denied the allegations and argued that use of construction equipment traditionally fell within certain non-CEO job duties, noting that civil service statements of duties were

[1]The city and the union were parties to a collective bargaining agreement that contained a craft jurisdiction clause, but the agreement had expired and the parties had not yet agreed on terms for a new contract at the time the union filed this action.

descriptive only and not restrictive. The parties filed cross-motions for summary judgment, but the court denied both motions and set the matter for trial.

{¶ 6} At the conclusion of trial, the court issued a judgment entry in which it made the following findings:

{¶ 7} "According to the evidence, the City's CEO classified workers spend all of their employment hours on the operation, repair and maintenance of heavy equipment. Non-CEO workers use this equipment as an incidental matter and there was no evidence they repair or maintain it. CEO's are not being reassigned or required to do the work of other classifications. The evidence also did not establish that workers in other classifications are required to work alongside CEO classified employees operating, repairing and maintaining heavy equipment throughout their work hours. There is no evidence that the prohibition found in the first sentence of Section 132 is being violated."

{¶ 8} The court went on to find that non-CEO workers did engage in the incidental use of heavy construction equipment, but that "[t]he evidence showed this incidental use was clearly related to the usual duties of the non-CEO workers' civil service classifications." It found that if the incidental use did constitute a violation of the city charter, "the violation is not blatant or reasonably calculated to weaken the civil service system or overly frustrate

its purpose." Adopting an analogy first offered by the city, the court considered the case of a typist, who has a separate civil service classification: "Does the existence of this classification mean workers in other classifications cannot type or use typewriters to perform their work since that activity is spelled out in describing the typist class?" The court found no meaningful distinction between the two examples of incidental use.

II

{¶ 9} The union first complains that the court abused its discretion by restricting the time for each side to present its case to just one hour.

{¶ 10} There is nothing in the record to show that the union objected to the court's time limitation, nor did the union attempt to proffer into the record the substance of its witnesses' testimony. See Evid.R. 103(A)(2); *State v. Gilmore* (1986), 28 Ohio St.3d 190, 191-92, 503 N.E.2d 147. This failure precludes our review.

{¶ 11} In any event, the union managed to offer testimony from seven witnesses during the allotted time period. Those witnesses sufficiently stated the union's case that the city had allowed non-CEOs to operate construction equipment. And that case became considerably more focused in light of the city's stipulation that it did not competitively test any of its employees other than CEOs on the operation of construction equipment.

{¶ 12} Undoubtedly, the 30 or so witnesses that the union intended to question at the hearing were rendered redundant by the stipulation. On these facts, we cannot conclude that the court abused its discretion by restricting each side to one hour at the hearing.

III

{¶ 13} The union's primary argument is that the court erred by concluding that the city did not violate Section 132 of the city charter by having non-CEO city workers operating construction equipment without first being certified as CEOs. It maintains that a plain reading of the charter language permits no other conclusion and that the court's excepting "incidental" use of construction equipment by non-CEOs violates the plain meaning of the charter.

A

{¶ 14} Factual determinations made in the course of declaratory judgment actions are reviewed under an abuse-of-discretion standard. *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, at ¶14. However, to the extent that the court is required to interpret a statutory provision, that interpretation presents a question of law that we review de novo. See *State v. Wemer* (1996), 112 Ohio App.3d 100, 103, 677 N.E.2d 1258.

{¶ 15} The issues raised on appeal concern the application of Section 132 of the city charter. In *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, at ¶10, the supreme court set forth basic principles of statutory construction:

{¶ 16} "We look to the plain language of the statute to determine the legislative intent. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. We apply a statute as written when its meaning is unambiguous and definite. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. Finally, an unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language. *Burrows*, 78 Ohio St.3d at 81, 676 N.E.2d 519."

B

{¶ 17} We agree with the court that the first clause of Section 132 has no application in this case — none of the employees in question had been appointed or employed in the city's service under any title not appropriate to the duties to be performed.

C

{¶ 18} The second clause of Section 132 states: "no person shall be transferred to or assigned to perform any duties of a position subject to

competitive test unless he shall have been appointed to the position from which the transfer is made as a result of competitive test equivalent to that required for the position to be filled."

{¶ 19} The court stated that the language of Section 132 "literally prohibits assigning and transferring employees to positions to do work in the employee's classification or to positions to do work for which they have not been competitively tested." It found, however, that "[n]o assigning or transferring of work is evidenced here" because no workers had been appointed or assigned "under a title not appropriate to the duties to be performed." It reasoned, for example, that city truck drivers who used front-end loaders to load trucks were still truck drivers despite their use of construction equipment on an incidental basis.

{¶ 20} We agree with the court that the city's practices did not amount to a transfer or assignment of employees to otherwise restricted civil service positions. Our conclusion is based on the distinction between the duties required by a job and the type of tools used to carry out those job duties.

{¶ 21} The city defined the CEO position in terms of the operation and maintenance of specific types of heavy construction equipment. The duties for both Group A and B CEOs were stated as: "to operate, maintain, repair, erect or dismantle, and perform other related duties in the operation of"

certain specified heavy construction equipment.[2] The Group A and B job duties were specific to the type of machinery to be operated and maintained by the CEOs, but they did not specify or otherwise limit the type of tools that CEOs were to use in the operation and maintenance of the specified heavy construction equipment. For example, a CEO was responsible for operating and repairing a crane, but there was no requirement that a CEO use a certain brand of crane or a certain type of tool when performing repairs on the heavy equipment.

{¶ 22} In the same manner, the city's job description for certain water department workers did not specify or otherwise limit water department workers in the types of tools that were to be used. A "water pipe repair" worker's duties are stated in part as: "excavates and backfills for repair work." The manner in which a water pipe repair worker excavates and backfills is not specified or otherwise limited by type or brand of tool. A water pipe repair worker could use a backhoe or a shovel when performing the specific task of excavating and backfilling.

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[2]These job descriptions were amended by the Civil Service Commission in 2007. Instead of defining the CEOs' job duties as the operation and maintenance of specific types of heavy construction equipment, the new job descriptions list the type of work to be performed without regard to the kind of equipment to be operated. For example, the Group A job description states in part: "Under general supervision, performs excavation and grading work to repair and maintain: channels to accommodate vehicular and pedestrian traffic such as, but not limited to, roads, streets, expressways, bridges, parking lots, alleys and sidewalks (excludes buildings)[.]" These new job descriptions were challenged by the union and are the subject of an appeal in a companion case, *Mun. Constr. Equip. Operators' Labor Council*, 8th Dist. No. 94605.

{¶ 23} The import of our conclusion, like that of the court below, is that the type of tool used to perform the specific job function is incidental to the assigned task and does not amount to an assignment or transfer of *duties* under Section 132. Even if a water pipe repair worker uses a backhoe to excavate a buried water pipe, that worker has not been appointed or employed as a construction equipment operator. In any event, a water pipe repair worker is engaged in the task of digging up, repairing, and reburying a water pipe as a primary job duty. This is not the same job as a CEO, who operates, maintains, and repairs heavy construction equipment.

{¶ 24} Our conclusion is consistent with the spirit of the civil service law. In *Cleveland Civ. Serv. Employees v. Cleveland*, 8th Dist. No. 79593, 2002-Ohio-586, we stated:

{¶ 25} "The spirit of the classified civil service law, as shown by the basic constitutional provision, is that appointments 'shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations.' *State ex rel. Higgins v. George* (1946), 147 Ohio St. 165, 168, 70 N.E.2d 370, citing Section 10, Article XV, Ohio Constitution. This is to effectuate the purpose of securing the maximum of efficiency and integrity in the public service; restraining persons occupying positions in the classified service from political activity; preventing discrimination for political, religious or racial reasons; and guaranteeing permanent tenure to persons in the

classified service. *State ex rel. Neffner v. Hummel* (1943), 142 Ohio St. 324, 329, 51 N.E.2d 900."

{¶ 26} The union's position that the city violated Section 132 would not lead to greater efficiency. As the court aptly noted, the union's narrow view of the issue would logically mean that the typist classification could effectively prevent any nontypist employee from using a keyboard to type an email. We must construe statutes to presume a just and reasonable result if possible, see R.C. 1.47, and to avoid absurd results. See *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, at ¶16. The union's position would open up virtually all job classifications to turf wars over jurisdiction, resulting in an inefficient use of city employees. There may be occasions when a violation of Section 132 is manifest, but this is not one of them. Any use of heavy construction equipment by non-CEOs as alleged in this case was purely incidental to their assigned duties and did not violate Section 132 of the city charter.

{¶ 27} We therefore overrule the union's second assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR