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ATTORNEYS FOR APPELLANT:

JOHN P. REED
JONATHAN E. HALM
Abrahamson, Reed & Bilse
Hammond, Indiana

ATTORNEYS FOR APPELLEES:

DAVID J. BEACH
CARLY BRANDENBURG
Eichhorn & Eichhorn, LLP
Hammond, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JEFFREY KOCHIS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0909-CV-400
	)	
CITY OF HAMMOND, INDIANA, FIRE DEPARTMENT OF THE CITY OF HAMMOND, INDIANA, CHIEF DAVID HAMM, and BOARD OF PUBLIC WORKS & SAFETY OF HAMMOND, INDIANA,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Calvin D. Hawkins, Judge
Cause No. 45D02-0806-PL-124

January 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Jeffrey Kochis ("Kochis") appeals a grant of summary judgment in favor of the City of Hammond, Indiana, the Fire Department of the City of Hammond, Indiana, David Hamm, in his capacity as Fire Chief of the City of Hammond, Indiana, and the Board of Public Works & Safety of Hammond, Indiana (collectively, "Hammond") upon Kochis' complaint for reinstatement, alleging that he was demoted in violation of Indiana Code Section 36-8-3-4, which addresses police officer/firefighter discipline and demotion ("the tenure statute"). We reverse and remand for further proceedings.

Issue

Kochis presents a single issue for review: whether summary judgment was improperly granted to Hammond because the designated materials failed to establish as a matter of law that Hammond demoted Kochis under an economic exception to the tenure statute.

Facts and Procedural History

Kochis became a member of the Hammond Fire Department in 1982, and eventually attained the rank of Assistant Chief Drillmaster. An Assistant Chief serves below the ranks of Fire Chief and Deputy Chief, but above the ranks of Battalion Chief, Senior Captain, and Captain.

On January 1, 2004, Thomas McDermott, Jr. took office as the newly-elected mayor of the City of Hammond. Mayor McDermott appointed David Hamm to serve as Fire Chief and Patrick Moore, Jr. to serve as Deputy Chief. These appointments displaced two persons

who held "upper level policy making positions," the former Fire Chief, Martin Del Rio, and the former Deputy Chief, Michael Jakubczyk ("Jakubczyk").[1]

Fire Chief Hamm recommended to the Board that it demote Jakubczyk to the rank and position of Assistant Chief Drillmaster and demote Kochis from Assistant Chief Drillmaster to Captain (the position he held before his appointment to the Assistant Chief Drillmaster position). On January 15, 2004, the Board approved the recommendations.

On February 22, 2005, Kochis filed a complaint in the Lake Superior Court, alleging that he had been demoted without a charge of misconduct and without the statutory process contemplated by the tenure statute. He sought reinstatement, with back pay, to the position of Assistant Fire Chief Drillmaster. Hammond answered, and admitted that no charges had been lodged against Kochis, but asserted that Kochis had held an upper level policy-making position, from which he had been lawfully demoted.

Kochis moved for summary judgment; Hammond responded, abandoning the policy-making position argument to instead assert that the demotion decision was rooted in economics. Hammond asserted that each Assistant Chief position provided for in the budget was filled and it was not economically feasible to retain Kochis, together with Jakubczyk, at that level. Hammond also filed a cross-motion for summary judgment. On August 24, 2007, the trial court granted summary judgment to Hammond, upon finding that Indiana Code

[1] The parties agree that the positions were "upper level policy making positions" as specified in Indiana Code Section 36-8-1-12. With regard to such positions, Indiana Code Section 36-8-3-4(m) provides in relevant part as follows: "the executive may reduce in grade any member of the police or fire department who holds an upper level policy making position. The reduction in grade may be made without adhering to the requirements of subsections (b) through (1). However, a member may not be reduced in grade to a rank below that which the member held before the member's appointment to the upper level policy making position."

Section 36-8-3.5-11(d) required Hammond to return Jakubczyk to the specific position he held prior to his appointment as Deputy Chief. Kochis appealed.

On appeal, this Court found that Hammond had not demonstrated its entitlement to summary judgment. Kochis v. City of Hammond, 883 N.E.2d 182, 189 (Ind. Ct. App. 2008) (hereinafter, Kochis I). First, the Court determined that the trial court had erred as a matter of law in finding that Hammond was required by Indiana Code Section 36-8-3.5-11 to return Jakubczyk to the particular position he held prior to his appointment as Deputy Chief. Id. at 186. Rather, assuming the statute's applicability,[2] it required only that Jakubczyk be returned to "the rank" previously held. See id. (citing Ind. Code § 36-8-3.5-11(d)). See also Ind. Code § 36-8-3-4(m) (addressing reduction in "a rank"). The Kochis Court then examined the designated record to determine the propriety of summary judgment, stating in relevant part:

> Here, the designated evidence before the trial court was scant indeed. As the parties confirmed during oral argument, there had been no discovery conducted. Thus, we have Kochis' complaint, with Chief Hamm's January 1, 2004, memorandum and the January 15, 2004, minutes of the Safety Board attached; and the affidavit of Kochis as to his tenure in the Department and demotion without benefit of the procedures required by statute. Also designated was Chief Hamm's affidavit stating that upon being relieved of his Deputy Chief position, Jakubczyk "asked to be returned to his former position"; that the Department budget "only provided for one Assistant Chief/Drillmaster"; and that "to return Jakubczyk to" his requested former

[2] Indiana Code Section 36-8-3.5-11(d) provides:

> The removal of a member from an upper level policymaking position is removal from rank only and not from the department. When the member is removed, he shall be appointed by the commission to the rank in the department that he held at the time of his upper level appointment or to any rank to which he had been promoted during his tenure in the upper level position. If such a rank is not open in either case, the member is entitled to the pay of that rank and shall be promoted to that rank as soon as an opening is available.

The Kochis Court questioned whether the statutory provision, found in Chapter 3.5 (providing for police and fire department merit systems) was applicable, inasmuch as the parties conceded that Hammond did not have a fire department merit system.

position, "the position had to be vacated," which move he "recommended" and the Safety Board approved. (App.61, 62). Chief Hamm's affidavit concludes by stating that "Kochis' demotion was not disciplinary" but rather a decision he "made because the City was required to return Jakubczyk to his former rank and grade, and the City only had the need and budget for one Assistant Chief/Drillmaster." (App.62).

Chief Hamm's affidavit falls short of establishing that the economic exception applies to Kochis' demotion. There was no designated evidence to support his assertion that the "City only had the need and budget for one Assistant Chief/Drillmaster," (App.62), and we have already determined that Hammond was not required to return Jakubczyk to the position of Assistant Chief/Drillmaster. The statutory provision for due process in the demotion of firefighters provides that "the executive may reduce any member of the ... fire department who holds an upper level policy making position," and that "reduction in grade may be made without adhering to" the statute's due process requirements, but the "member may not be reduced in grade to a rank below that which the member held before the member's appointment to the upper level policy making position." I.C. § 36-8-3-4(m). Thus, by law, Jakubczyk could not be reduced in grade to a rank below Assistant Chief. But the designated evidence does not establish how many such positions the Department held, or that no such position was vacant. There is also no designated evidence to support the assertion in Hammond's argument to the trial court that when Jakubczyk was placed in the Assistant Chief/Drillmaster position, Kochis was moved "to the next available slot down the ladder." (App.36).

Further, to establish that this is a demotion that fits within the economic exception, Hammond has presented no legislative enactments, Safety Board-adopted procedures, or official Department policies that apply to these circumstances. Pertinent questions arise as to the Department's budget, its manning table, its permanent ranks and so forth.

As the party moving for summary judgment, Hammond bore the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. . . . Hammond's designated evidence falls woefully short of making a prima facie showing that the demotion was one that fits within the economic exception. Because such remains as a genuine issue of fact, summary judgment should not have been granted to Hammond.

> Kochis also argues that his motion for summary judgment should have been granted. However, because we find that whether the economic exception applies here is a question of fact, his argument in this regard must also fail.

883 N.E.2d at 187-89 (internal citation omitted). The summary judgment order was reversed, and the matter was remanded for further proceedings. Id. at 189.

On remand, Hammond again moved for summary judgment, now asserting that its obligation to protect Jakubczyk's position arose from Indiana Code Section 36-8-3-4(m) as opposed to Indiana Code Section 36-8-3.5-11. Hammond undertook to remedy the deficiencies in the designated record with regard to the budget and manning tables by submitting the 2004 Hammond Fire Department Budget and Rules and Regulations of the Hammond Fire Department, together with supporting memoranda and affidavits.

Kochis filed a cross-motion for summary judgment.[3] The trial court heard argument on the cross-motions on July 31, 2009, and again granted summary judgment to Hammond. Kochis appeals.

Discussion and Decision

I. Standard of Review

We review a grant of summary judgment to determine whether there are genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law. Yates v. Johnson County Bd. of Comm'rs, 888 N.E.2d 842, 846 (Ind. Ct. App. 2008). We must construe all evidence in favor of the party opposing summary judgment, and all

[3] On appeal, he does not argue that he is entitled to summary judgment, but requests the reversal of the grant of summary judgment in Hammond's favor, so that Kochis "can present his claims for trial on the merits." Appellant's Brief at 20.

doubts as to the existence of a material issue must be resolved against the moving party. Id. at 847. We carefully review a grant of summary judgment in order to ensure that a party was not improperly denied his or her day in court. Reeder v. Harper, 788 N.E.2d 1236, 1240 (Ind. 2003). The fact that the parties made cross motions for summary judgment does not alter this standard of review. Decker v. Zengler, 883 N.E.2d 839, 842 (Ind. Ct. App. 2008), trans. denied.

II. Analysis

Hammond asserts that the tenure statute is wholly inapplicable to Kochis, because his demotion arose not from disciplinary matters but from budgetary constraints amounting to a recognized economic exception to the tenure statute. Kochis responds that Hammond has yet to factually demonstrate the existence of the economic exception, consistent with the direction of this Court in Kochis I.

"Demotion from rank is protected by the Fourteenth Amendment's due process guarantees if a statute creates a legitimate claim of entitlement to continue in that rank." State ex rel. Miecznikowski v. City of Hammond, 448 N.E.2d 1239, 1243-44 (Ind. Ct. App. 1983). Indiana Code Section 36-8-3-4(b) provides in relevant part that, "[e]xcept as provided in subsection (m), a member of the police or fire department holds office or grade until the member is dismissed or demoted by the safety board." Accordingly, the member enjoys a fixed tenure with a legally protected interest in the tenure and is '"not subject to be dismissed from the service except for cause, and then after a hearing on proper notice."' Kochis, 883 N.E.2d 187 (quoting Shira v. State, 187 Ind. 441, 119 N.E. 833, 834 (1918)). See also

Hilburt v. Town of Markleville, 649 N.E.2d 1036, 1040 (Ind. Ct. App. 1995) (recognizing that Ind. Code § 36-8-3-4 provides a right of permanent employment to police officers), trans. denied. The tenure statute specifies procedures to be implemented in effecting either a dismissal or demotion. See Ind. Code § 36-8-3-4(c)-(e). It further explicitly prohibits consideration of political affiliation in dismissal or demotion decisions. Ind. Code § 36-8-3-4(b).

The purpose of Section 4 is twofold: it is intended to protect police officers and firefighters and their office; it is also intended to enhance the public's interest in being protected by police departments and fire departments consisting of well-disciplined officers. Norris v. City of Terre Haute, 776 N.E.2d 923, 926 (Ind. Ct. App. 2002). The statute thus provides a mechanism for sanctioning police officers and firefighters upon a showing of cause, while at the same time ensuring that those subject to such sanctions are granted protections calculated to ascertain the truth of misconduct charges. Id. When a police officer or firefighter is charged with misconduct under Indiana Code Section 36-8-3-4(b), the statute's procedural safeguards are triggered, so as to prevent arbitrary, capricious, or politically motivated demotions or dismissals. Id.; see also Kochis, 883 N.E.2d at 187.

Nevertheless, the law has also long recognized an "exception" to the necessity of the due process procedures. See Shira, 119 N.E. at 834 (the exception encompassed a reduction in force for economic reasons, when the reduction was exercised in good faith, "where it appears that the dismissal was for the ultimate and actual purpose of creating a vacancy.") More recently, we have recognized the exception when a firefighter was demoted, as opposed

to dismissed, for economic reasons. Norris, 776 N.E.2d at 927.

The economic exception has been applied when firefighters were discharged by operation of an appropriation ordinance, Atkins v. Klute, 169 Ind. App. 206, 209, 346 N.E.2d 759, 762 (1976), when firefighters were demoted pursuant to a mayor-requested departmental reorganization for economic reasons, Miecznikowski, 448 N.E.2d at 1243, when a town marshal was dismissed when the town was unable to obtain liability insurance in the event he remained so employed, Small v. Bd. of Safety of Town of Monroeville, 513 N.E.2d 196 (Ind. Ct. App. 1987), when the adopted budget eliminated two deputy positions and two deputy marshals (who were the least-senior marshals) were dismissed, Pfifer, 684 N.E.2d at 578, and when a demotion occurred as part of budgetary cutbacks, Norris, 776 N.E.2d at 927.

The application of the economic exception doctrine "calls for a fact sensitive, qualitative analysis where no single factor can control." Small, 513 N.E.2d at 199. It has long been recognized that this exception is applicable when the personnel change is "position-directed" rather than "person-directed." Norris, 776 N.E.2d at 926 (citing Pfifer v. Town of Edinburgh, 684 N.E.2d 578, 582 (Ind. Ct. App. 1997), trans. denied). Moreover, this Court declined to apply a "mechanistic approach," and recognized the economic exception in a "unique" situation where a town was unable to procure comprehensive liability insurance so long as a particular member was employed, effectively bringing about a person-directed termination. Small, 513 N.E.2d at 199. Nonetheless, where such a person-directed termination is economically dictated, notice and hearing must be provided. See Id.

Here, the parties agree that Hammond, in an effort to comply with the grade reduction

limitations of Indiana Code Section 36-8-3-4(m) as it allegedly related to another member, demoted Kochis without an allegation of misconduct or implementation of the statutory procedures of the tenure statute. Raising the economic exception, Hammond contended that its demotion decision was necessitated by budgetary constraints. Hammond further argued that the decision was position-based and Kochis was properly afforded no notice or hearing as would have been required by a person-directed demotion. Thus, Hammond, who admittedly failed to comply with the tenure statute but claimed an exception, was entitled to summary judgment only upon a showing that a fact-finder could reach but a single conclusion, that the demotion was position-based.

"An action is position-directed when the position itself disappears due to a determination by the public entity that it is no longer needed or affordable." Pfifer, 684 N.E.2d 578, 582 (citing Hartman v. City of Providence, 636 F.Supp. 1395 (D.R.I. 1986)). In sum, "[t]he dismissal of employees based upon the economic exception has historically been upheld when the legislative body, in good faith, eliminated positions with no intention of replacing the discharged employees." Id. at 582-83.

Here, the designated materials show that the Fire Department's 2004 budget provided funding for only seven Assistant Chiefs and that no such position was vacant when Jakubczyk requested reinstatement to the same. The Department made room for Jakubczyk by demoting Kochis, the least experienced Assistant Chief. The materials disclose no departmental reorganization, moving of operations, or elimination of a position to cut costs. There was no "exercise of plenary authority to eliminate positions." See id. at 581. Rather, a

continuing and unaltered position was taken from one person and given to another, in a chain of events set in motion by a change in administration. This contrasts with cases of position-directed dismissals or demotions, which have in common circumstances that originate in economic crisis or fluctuation in general.[4]

A need to restore a displaced policy maker to a former position, or otherwise comply with governing statutes, where applicable, does not necessarily equate to a financial hardship of such magnitude that it creates a need for "position-directed" change. Were we to adopt the argument advanced by Hammond, such would undermine the consistency and continuity objectives of the tenure statute, which include protection of police officers and firefighters and enhancement of the public's interest in protection. Norris, 776 N.E.2d at 926. Public elections regularly take place, and thus changes in administration and key policy making personnel regularly occur. It is possible that elections take place in the midst of budgetary constraints that are so severe that a department cannot comply with Indiana Code Section 36-8-3-4(m) and avoid a member's demotion.

Nonetheless, in claiming that financial circumstances do not permit both Jakubczyk and Kochis being employed at the same level, but insisting that Jakubczyk should have the position as a matter of statutory right, Hammond essentially seeks selective application of the provisions of Indiana Code Section 36-8-3-4. As opposed to claiming an economic exception that would take employment actions completely outside the statutory framework,

[4] In cases where the legislative body has acted to cut costs, the member is afforded some remedy, because he or she can file suit against the legislative body alleging that the action to eliminate the position was not taken in good faith. Pfifer, 684 N.E.2d at 584.

Hammond argues that, given the economic exigencies present, subsection (m) rank protection should apply to Jakubczyk while the notice and hearing protection of (c) would not apply to Kochis. However, a panel of this Court has previously observed that subsection (m) does not apply when the facts would support the economic exception. See Norris, 776 N.E.2d at 927 (observing that section 36-8-3-4(m) does not apply to a "position-directed personnel decision" of demotion and holding "such protections are available only when a firefighter is demoted for disciplinary reasons.").

As previously observed by this Court in the first appeal of this matter, applicability of the economic exception is a question of fact. Kochis, 883 N.E.2d at 189. If the economic exception does not apply, a firefighter is entitled to continue in his rank, and may not be demoted absent the due process protections of notice and a hearing, Indiana Code § 36-8-3-4. Furthermore, in the event of an economically-based but person-directed change, notice and hearing is required. Pfifer, 684 N.E.2d at 583.

Hammond failed to show the absence of factual issues concerning its economic situation in operating the fire department, such that a fact-finder could only conclude that the economic exception to Indiana Code Section 36-8-3-4 applied and that Kochis was not entitled to due process protections. As there exists a genuine issue of relevant fact, summary judgment was improvidently granted.

Reversed and remanded.

BAKER, C.J., and ROBB, J., concur.