

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT NASHVILLE

BILL KIGER, PAYNE C. GORDON, )  
BARBARA BRIDGES, CHARLES )  
CARMEN and JEAN HOLMES, in ) Davidson Chancery No. 90-3354-I  
their capacity as officers of the )  
Nashville Electric Service Employees ) Appeal No. 01A01-9511-CH-00501  
Association, Inc., )  
)  
Petitioners/Appellants )  
)  
VS. )  
)  
BETTY NIXON, DR. ALBERT BERRY, )  
JAMES JOHNSON, KEVIN )  
LAVENDER and TOM JACKSON, )  
in their capacities as members of the )  
Electric Power Board and the )  
Electric Employees Civil Service )  
and Pension Board of the )  
Metropolitan Government of )  
Nashville and Davidson County, )  
Tennessee, )  
)  
Respondents/Appellees. )

**FILED**

September 11, 1996

Cecil W. Crowson  
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE  
THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

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**AFFIRMED**

**ALAN E. HIGHERS, J.**

**CONCUR:**

**W. FRANK CRAWFORD, P.J., W.S.**

**DAVID R. FARMER, J.**

("NESEA"), who brought this action seeking to invalidate the decision of the Board of Directors ("Board") of the Nashville Electric Service ("NES") to outsource its data processing operations to a private sector vendor. Petitioners alleged that the Board exceeded its jurisdiction and violated certain provisions of the Metropolitan Charter. The trial court granted summary judgment in favor of the Board, holding that the Board's decision was within its jurisdiction and was supported by substantial and material evidence. It is from this judgment that petitioners have appealed.

In 1986, NES contracted with Seltman, Cobb, and Bryant ("SCB") to design, install, and implement a computer-based management information and data processing system. Following the installation of the system, NES began experiencing numerous problems with its data processing operations, such as overrun of charges and mismanagement by NES employees. In early 1990, Dudley Phillips, general manager of NES, retained the assistance of Walter Smiley, an outside consultant, to advise them as to how to resolve their operational difficulties. At a publicly-advertised meeting of the NES board in October 1990, Smiley stated that the problems had arisen from the inability of top NES management personnel to manage the data processing department and from lack of cooperation on the part of NES' data processing employees. Smiley recommended to the Board that NES outsource its data processing department to SCB. His recommendation was based on the fact that SCB employees currently held many key positions in the data processing department and the fact that SCB employees were already directing most of NES' personnel.

Following a discussion, the NES Board approved a letter of intent to negotiate a professional services contract with SCB to manage NES' data processing department.

The following day, Phillips prepared and circulated a bulletin to all data processing employees, which stated that the Board had decided to outsource its data processing department and that all employees of that department would be guaranteed a position with SCB at a salary and benefits level equal to or greater than their present salary and benefits.

On October 30, 1990, several officers of NESEA, a voluntary association comprised of non-supervisory NES employees, filed a complaint, alleging certain violations of the Charter of the Metropolitan Government of Nashville and the Open Meetings Act. On November 26, 1990, the petitioners moved to enjoin NES from entering into the outsourcing contract. The trial court denied the motion, holding that there existed a factual issue as to whether the Board had violated the Open Meetings Act and that NESEA possessed an adequate remedy at law.

On November 28, 1990, a special NES board meeting was held to consider the proposed contract between SCB and NES. At the meeting, Joe Martin, counsel for NES, clarified the employment status of current NES employees. He stated that any individual who accepted employment with SCB would be effectively resigning from NES. If any employee declined to accept employment with SCB, that individual would remain an NES employee, subject to the rules for employees regarding seniority and qualifications.

NES employees filed affidavits stating that on November 28, 1990, Phillips met with the data processing department and told them that the contract was going to be executed. Phillips stated that NES employees should seriously consider accepting employment with SCB because NES would no longer operate the data processing department. NES employees were each provided with a letter from SCB that announced approval of the outsourcing contract and offered employment to NES employees. Petitioners allege that neither NES nor SCB explained to the employees that they had the option of remaining employed at NES if they declined employment with SCB.

On December 1, 1990, the contract between SCB and NES was executed. As a result of this contract, the data processing operations of NES, which formerly had been handled by civil service employees, were assumed by SCB and its employees.

Thirty-six of the forty-two NES data processing employees accepted employment with SCB. Six employees declined employment with SCB and remained at NES. Following the execution of the contract, most of the data processing operations continued to be performed at the same location, and all former employees of NES received equal to

or better rates of compensation than they had received prior to the outsourcing contract.

The trial court granted summary judgment in favor of the Board, holding that petitioners' claims should have been brought under a common law writ of certiorari. The court allowed petitioners to so amend their petition, but granted summary judgment in favor of the Board with respect to their Open Meetings Act and competitive bidding claims on the basis that such claims could not properly be joined with a petition for writ of certiorari.

Petitioners filed an amended petition for writ of certiorari, alleging that the NES Board had acted illegally, had exceeded its jurisdiction, and had violated certain civil service provisions of the Metro Charter by constructively discharging its employees. Both parties filed motions for summary judgment. In support of its motion, the Board argued that NESEA lacked associational standing to bring the action, that the Board had the authority to outsource the data processing department, and that NES employees waived any right to relief that they may have had by voluntarily relinquishing their employment with NES.

Following oral argument on both parties' motions, petitioners filed a Supplemental Memorandum, alleging a basis for associational standing to bring the action.

The trial judge held that petitioners had the requisite standing to challenge the Board's decision, but granted summary judgment in favor of the Board. The trial judge stated in his Memorandum Opinion as follows:

On consideration of the record made before the NES Power Board and the cited provision of the Metropolitan Charter, the Court finds that the action of NES outsourcing its data processing department to SCB was legal, within its jurisdiction and supported by substantial and material evidence. Therefore, NES's motion for summary judgment is granted, and NESEA's motion for summary judgment is overruled.

\* \* \* \* \*

The employees in the data department had the option of accepting employment with SCB or remaining with NES. There were 43 employees in NES's data processing department. Six (6) NES employees elected to remain employed with NES. One (1) employee retired and immediately accepted employment with SCB. The remaining employees voluntarily resigned their positions with NES and accepted employment with SCB. (See Affidavit of Herbert W. Deberry, Exhibit C to respondents' Motion for Summary Judgment). The record clearly shows that the NES employees were not constructively laid-off or terminated from their employment. NES did not violate the Civil Service provisions of Appendix Three, Chapter 43 of the Metropolitan Charter.

Therefore, NESEA's motion for summary judgment is overruled, and NES's motion for summary judgment is granted.

\* \* \* \* \*

The decision of NES to out-source its data processing is supported by substantial and material evidence thus, the decision of NES is affirmed. NESEA's amended petition for writ of certiorari is dismissed.

Petitioners have raised two issues on appeal, which are: (1) whether the challenge to NES' decision must be brought pursuant to a common law writ of certiorari; and (2) whether the NES Board violated the Metro Charter's civil service provisions.

Conversely, the Board contends that petitioners lack standing to maintain the present action and that petitioners waived any objections they might have had to the outsourcing decision by resigning from NES and accepting employment with SCB. We decline to address the Board's second contention regarding waiver as we find it to be without merit.

The Board alleges that petitioners lack standing to bring a claim on behalf of the former NES data processing employees because the complaint failed to allege that either NESEA or any members of NESEA suffered any distinct injury caused by NES' decision to outsource. According to the Board, the only injury claimed by petitioners was the loss of civil service status, which is insufficient to confer standing because it is a mere conclusion of injury without any explanation of harm. The Board also alleges that NESEA lacks standing in its own right to maintain this action because the complaint failed to allege that the association itself suffered any injury. Finally, the Board argues that the relief that petitioners seek would not redress any alleged injury and is not available under a common law writ of certiorari.

Petitioners respond that the individual members of NESEA who worked in the data processing department had standing to institute the suit because they suffered the damage of termination of their employment from NES. Petitioners contend that NESEA itself suffered damages because the outsourcing decision eliminated dues-paying members of NESEA, which caused NESEA to suffer a decrease in both members and membership dues.

The trial court held that petitioners possessed the requisite standing to bring their claim alleging that the Board acted illegally and exceeded its jurisdiction. However, the court held that petitioners did not have standing to seek the reinstatement of the employees because such remedy is unavailable under a common law writ of certiorari.

Standing is a judicially-created doctrine employed by courts in determining whether a party is entitled to judicial relief. Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). In order to establish standing, a party must demonstrate to the court that:

(1) [I]t sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give.

Metropolitan Air Research Testing Authority, Inc. V. Metropolitan Govt. Of Nashville and Davidson County, 842 S.W.2d 611, 615 (Tenn. App. 1992).

Where a plaintiff's standing is brought into issue, the pertinent inquiry is whether the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Tennessee Environmental Council v. Solid Waste Disposal Control Bd., 852 S.W.2d 893, 896 (Tenn. App. 1992). As this court stated in Metropolitan Air Research, "[S]tanding often turns on the nature and source of the claim asserted. Thus, the inquiry requires a careful judicial examination of the complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." 842 S.W.2d at 615.

In their Amended Petition for Writ of Certiorari, petitioners alleged as follows:

11. In approving the SCB contract, the Power Board abolished and vacated all civil service positions (approximately forty-one) in its data processing department and transferred those positions which were necessary to the provision of NES electric services, to SCB. In addition to abolishing and vacating these positions and delegating its responsibilities to a third party, the Power Board effectively laid off or dismissed the employees filling those positions. . . .

\* \* \* \* \*

G. Finally, the Charter provides that 'No Civil Service Office, employment or position provided for or created under the provisions [of article 42] of the Charter may be vacated, except pursuant to and in conformity with the Civil Service provisions in this article.' Appendix III, Article 43, paragraph 19. The data processing positions at NES were clearly vacated by the adoption of the SCB contract in violation of the Charter provisions.

12. By outsourcing its data processing operations to SCB, and by eliminating those NES jobs forcing its civil service employees to become employees of SCB to retain their positions, by effectively laying off or dismissing its data processing department employees, and by replacing those employees with third party labor, NES abdicated, both in letter and spirit, its responsibilities under Articles 42 and 43 of the Charter, Appendix III, acted illegally, and exceeded its jurisdiction. The Charter gives no authority to the Power Board to outsource a department and delegate its duties as it did. Accordingly the Power [sic] exceeded its jurisdiction in adopting the SCB contract and that contract is void.

\* \* \* \* \*

WHEREFORE, premises considered, the Petitioners pray:

4. That the Court hold, after reviewing the record, the Charter provisions and other authorities, and the proof to be presented, that the Power Board acted illegally and exceeded its jurisdiction and violated the provisions of the Metropolitan Charter, Appendix III, Chapters 42 and 43, set forth above, in agreeing to outsource its entire data processing department to a third party.

4. [sic] That the Court reverse and hold void the actions of the Power Board...

5. That the Court order the displaced employees reinstated as if they had never been outsourced in violation of the Metropolitan Charter.

In the present case, the standing requirement imposes a duty upon petitioners to allege “a particularized injury concretely and demonstrably flowing from the action of the defendants which will be redressed by the remedy sought.” Tennessee Medical Assoc. V. Corker, No. 01-A-01-9410-CH00494, 1995 WL 228681 (Tenn. App. 1995)(quoting Lugo v. Miller, 640 F.2d 823, 827 (6th Cir. 1981)). Petitioners must demonstrate to this court that they suffered “a distinct and palpable injury.” Metropolitan Air Research, 842 S.W.2d at 615.

Petitioners alleged that the “Power Board effectively laid off or dismissed the employees.” The sole injury suffered by NES employees was the loss of civil service status. Petitioners have not alleged, nor have they suffered, any economic loss or loss of benefits that occurred as a result of the outsourcing decision. The question that arises is whether loss of civil service status alone is sufficient injury under the above-cited authority to confer standing upon petitioners.

In this case, we assume, without deciding, that petitioners possessed the requisite standing to maintain this action. Even upon this assumption, however, we are of the

opinion that petitioners' action must fail for the reasons set forth below.

Petitioners' first contention on appeal is that it was not necessary for them to have brought their action pursuant to a petition for common law writ of certiorari because the Board was not exercising a judicial or quasi-judicial function within the meaning of T.C.A. § 27-8-101. Accordingly, they argue, their Open Meetings Act claim was properly joined with their original complaint for declaratory relief.

T.C.A. § 27-8-101 provides:

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court there is no other plain, speedy, or adequate remedy.

In McCallen v. City of Memphis, 786 S.W.2d 633 (Tenn. 1991), the Court discussed the above statute in evaluating when an action must be brought pursuant to a petition for common law writ of certiorari, as opposed to an action for declaratory judgment. The Court in McCallen relied on the case of Fallin v. Knox County Board of Commissioners, 656 S.W.2d 338 (Tenn. 1983), in holding that the critical inquiry is whether the inferior board exercised either a legislative or an administrative function. Id. at 638. In the former case, an action for declaratory judgment is appropriate, while in the latter case, a petition for common law writ of certiorari is the proper method by which to challenge an administrative decision. Id. at 639. In evaluating whether a particular decision is properly characterized as legislative or administrative, the court stated that the "term administrative is used interchangeably with judicial or quasi-judicial" within the meaning of T.C.A. § 27-8-101. Id. at 638 (citing Fallin, 656 S.W.2d at 341). The court also stated that "a crucial test in distinguishing legislative from administrative acts is whether the action taken (resolution or ordinance) makes new law or executes one already in existence....In order to qualify as an administrative, judicial, or quasi-judicial act, the discretionary authority of the governmental body must be exercised within existing standards and guidelines." Id. at 639.

Because in McCallen, there existed pre-established guidelines requiring the city



council to exercise reasonable discretion in electing to grant approval to a proposed planned development, the council's decision to approve the planned development was an administrative decision. Id. at 640. Consequently, the Court held, the challenge to the council's decision should have been brought pursuant to a petition for common law writ of certiorari. Id.

The Board is, as petitioners concede, bound by the terms and limitations contained in the Metro Charter. The charter expressly delineates all of the powers and functions that the Board may, in its discretion, exercise. Thus, in accordance with the principles set forth in McCallen, it is our opinion that the Board's decision to contract with a private sector vendor for its data processing operations was an administrative function. Consequently, we agree with the trial court that petitioners were required to challenge the Board's decision pursuant to a petition for common law writ of certiorari, rather than an action for declaratory judgment. Petitioners' Open Meetings Act claim, which is an original action, may not properly be joined with a petition for writ of certiorari. Goodwin v. Metropolitan Board of Health, 656 S.W.2d 383, 387 (Tenn. App. 1983).

Petitioners argue that the Board's decision to outsource its data processing department violates two aspects of the Metro Charter. First, petitioners argue, outsourcing the department contravenes the Charter provisions requiring that NES operations be carried out by civil service employees. Second, petitioners argue that outsourcing the data processing department to SCB amounted to a constructive discharge of NES employees without compliance with the Charter's procedures for discharge.

The scope of review under a common law writ of certiorari is whether the inferior board has exceeded its jurisdiction or has acted illegally, arbitrarily, or fraudulently. McCallen, 786 S.W.2d at 638; Yokley v. State, 632 S.W.2d 123 (Tenn. App. 1981). In McCallen, the Court stated:

[T]he court should refrain from substituting its judgment for the broad discretionary authority of the local governmental body. An invalidation of the action should take place only when the decision is clearly illegal, arbitrary, or capricious.

Id. at 642.

The Court also noted that “courts are wary of unwarranted judicial intrusions into the performance of ordinary governmental activities.” Id. at 619.

Petitioners allege that the Board violated the following provisions of the Metro Charter by replacing NES civil servants with third party labor in contravention of the Charter’s mandate that such employees be civil servants:

7. Every position or employment by or with the electric power board of the metropolitan government shall be deemed to be a civil service position, and every employee of said board shall be deemed to be a civil service employee with the exception of temporary employees, and shall include the present employees of said board and all future employees, and all officers and agents, except that members of the electric power board of the metropolitan government, the general manager, assistant general manager, and the secretary are expressly excluded from the provisions hereof with reference to civil service, and none of said persons, nor the positions which they fill, shall be deemed or considered as under the provisions of civil service.

12. No employee of the electric power board of the metropolitan government, except temporary employees and provisional employees, shall be discharged, suspended for more than ten (10) days nor oftener than twice in any twelve (12) months, or otherwise punished except for just cause and after the filing of charges and trials as hereinbefore provided.

14. The said board shall establish a system of service ratings for the employees. Such service ratings and seniority shall be the principal factors in determining the order of promotion, layoffs, abolition of positions, and reemployment.

Provided, that no corresponding respective civil service office, employment or position provided for or created under the provisions of the preceding article of this Charter, may be vacated except pursuant to and in conformity with the civil service provisions of this article.

Conversely, the Board relies upon the following Charter provisions in support of its position that it possessed the authority to enter into the outsourcing contract:

That The Metropolitan Government of Nashville and Davidson County, in its corporate capacity is hereby authorized and empowered to:

6. To make contracts and execute instruments containing such covenants, terms and conditions, as in the discretion of the metropolitan government may be necessary, proper or advisable for the purpose of obtaining loans from any source, or grants, loans, or other financial assistance from any federal agency; to make all other contracts and execute all other instruments, which in its discretion, may be necessary, proper, or advisable, in or for the furtherance of the acquisition, improvement, operation and maintenance, of any electric plant

and/or distribution system, and the furnishing of electric service; and to carry out and perform the covenants, terms and conditions of all such contracts or instruments.

8. To do all acts and things necessary or convenient to carry out the powers expressly given in this article.

After reviewing the Charter provisions and the Board's actions in this regard, we do not find that the Board's decision to outsource its data processing department was clearly illegal, arbitrary, or capricious. The Board's decision stemmed from numerous operational difficulties that had occurred over the course of several years. The record reflects that the data processing operations were inefficient, mismanaged, and costly, resulting in numerous complaints from NES customers. NES employees were not terminated or laid off as a result of the outsourcing decision. Instead, the employees were well provided for and suffered no substantial loss of salary or benefits. The Board simply made a contract, which in its discretion, it felt was necessary and advisable for the improvement and operation of the data processing department. Pursuant to Article 42, § 6 of the Metro Charter, the Board did not act illegally or arbitrarily in making such a decision.

Petitioners' final contention is that the decision to outsource the department amounted to a constructive discharge of all data processing employees because the employees were never informed that they could remain at NES in the event that they declined to accept employment with SCB.

We find this contention to be without merit. The facts of the case *sub judice* do not support the elements of a claim for constructive discharge. Eckard v. Chattanooga State Technical Comm. College, No. 03A01-9106CH-220, 1991 WL 253305 (Tenn. App. Dec. 3, 1991) ("A finding of constructive discharge requires the determination that 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'") (quoting Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)).

Accordingly, we affirm the judgment of the trial court. Costs on appeal are taxed to petitioners.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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FARMER, J.