

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED
June 18, 1999
Cecil Crowson, Jr.
Appellate Court
Clerk

STATE OF TENNESSEE EX REL.,) C/A NO. 03A01-9810-CV-349
NEIL PLEMONS, MELANIE)
GOODWIN, DONNA GODDARD,) ROANE CIRCUIT
HOMER HARMON, DOUGLAS)
SMITH, WINDELL BULLARD,) HON. RUSSELL SIMMONS, JR.,
JERRY KERLEY, LARRY FUTRELL,) JUDGE
FRANK COLEY, DONALD)
SCANDLYN, JACK MATLOCK,)
JEFF MIZE, LUTHER MANNING,)
RALPH POTTER, and DARRELL)
GODARD,)
)
Plaintiffs-Appellants,)
)
v.)
)
HAROLD L.. WESTER, Mayor of the)
City of Harriman, Tennessee,) AFFIRMED
) AS
Defendant-Appellee.) MODIFIED

GERALD LARGEN, Kingston, for Plaintiffs-Appellants.

JON G. ROACH, WATSON, HOLLOW & REEVES, P.L.C., Knoxville, for Defendant-Appellee.

OPINION

Franks, J.

The Trial Judge dismissed plaintiffs' ouster petition filed against Harold L. Wester, the Mayor of the City of Harriman, and plaintiffs have appealed.

The Plaintiffs, a group of citizens of the City of Harriman, brought this action alleging that the Mayor had violated his oath of office. The defendant, having been elected as Mayor in 1995, has served in public office prior to that election, having been elected Mayor in 1983 and again in 1991, and having been elected to the City Council in 1971, 1973, 1977, and 1981.

During the entire period of time that defendant has served in a city office, he was and is an employee of the Harriman Utility Board (HUB). For the past 20 years, he has been a water plant operator for the Board. The Board was established by the city council under the provisions of the Municipal Electric Plant Law of 1935, codified at Tenn. Code Ann. § 7-52-101 *et seq.* Pursuant to the statute, the HUB has control over the electrical distribution system, and the water, sewer and natural gas systems. *See* Tenn. Code Ann. § 7-52-111. The Board employs the General Manager of the Utility, who employs the other employees.

Five members of the Board are appointed by the Mayor, with the approval of the city council. One of the Board members is also a city council member. When defendant appointed two of the board members, the vote of the city council on approval was a tie. The Mayor broke the tie by voting in favor of the candidate that he appointed.

The city council is empowered to abolish the HUB, and in fact has voted to so abolish the board, but defendant vetoed the ordinance abolishing the board. An attempt to over-ride the veto failed.

Each time defendant took public office, including the most recent time in 1995, he took the oath prescribed in Article V, Section 1 of the Charter of the City of Harriman, which provides:

Section 1. Oath of officers. Every officer elected or appointed under the provisions of this Act shall, before entering upon the duties of his office, take, subscribe, and file in the office of the city clerk, and [sic] oath in the following form: "I, _____, do solemnly swear that I am a citizen of the United States and of the State of Tennessee; that I will support the Constitution of the United States and of the State of Tennessee, and will faithfully and honestly perform the duties of the office of _____ to the best of my ability; that I have not and while holding said office will not have any direct personal interest in any contract with the city or any department or institution thereof, that I am nor [sic] indebted to the State, the County of Roane, or the City of Harriman, on account of any lawful tax against me now due and unpaid, and that I do not owe

the City of Harriman any past due and unpaid indebtedness; that I have not been convicted at any time of malfeasance in office, bribery, or other corrupt practices or crimes, and do not stand charged by the attorney-general of Roane County or indicted on account of alleged offense against the law. So help me, God.”

And every such officer or person who shall take and subscribe such oath, shall be guilty of perjury in case the oath shall be false or shall be violated, and shall be liable to indictment for perjury by any grand jury of Roane County, and upon conviction thereof shall be punished as now provided by law in case of perjury. If any person elected or appointed to office shall fail to qualify within the time herein provided, his election or appointment shall fail and the office be deemed vacant.

Article V of the City Charter also provides in relevant part:

Section 2. Officers not to have personal interest in city contracts. It shall be unlawful for any member of the city council or other officer to have any direct personal interest in any contract with the City of Harriman, or any of its departments or institutions, and any such contract wherein any such officer of the City of Harriman shall have any interest as aforesaid, adverse to the interest of the said City of Harriman, shall, at the option of the mayor or of the city council, be void, and each officer and every contractor under any contract so declared void, shall severally forfeit to the city a sum not exceeding one thousand dollars to be recovered in a civil action.

The Trial Judge concluded that defendant’s employment contract with HUB was not a the type of contract mentioned in the Oath. The Court further held, however, assuming the mayor’s employment was a contract, he would not be guilty of perjury because he did not possess the requisite intent to deceive by making false statements, thus he was not subject to a criminal indictment or official misconduct and could not be subject to ouster.

The Mayor, employed by HUB, has worked there during all the time he has served on the city council as Mayor. He never tried to hide his employment, and testified that he did not think his employment would prohibit him from serving on the city council or as Mayor.

The Charter of the City of Harriman prohibits city officials from having “any direct personal interest in any contract with the City of Harriman, or any of its departments or institutions, and any such contract wherein any such officer of the City

of Harriman shall have any interest as aforesaid, adverse to the interest of the said City of Harriman, shall, at the option of the mayor or of the city council, be void,”

The Mayor said in his oath that he did not and would not while holding said office “have any direct personal interest in *any contract* with the city or any department or institution thereof,”

The issue thus becomes whether, his employment with the HUB established a direct personal interest in any contract with the city or department thereof. It is not disputed that the HUB is a department of the city. When examining an act of legislation, the “primary rule of statutory construction is the intention of the legislative body. This intent is ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, and without any forced or subtle construction to limit or extend the import of the language.” *Dingman v. Harvell*, 814 S.W.2d 362, 366 (Tenn. App. 1991).

An employment relationship, whether reduced to a written contract or not, is contractual in nature. *Hamby v. Genesco, Inc.*, 627 S.W.2d 373, 375 (Tenn. App. 1982). The City Charter prohibits “any contract,” without limitation, so long as the official has a direct personal interest in that contract. The natural consequence of an employment contract is that the person employed has a very direct and personal interest in that contract. Therefore, employing the natural and ordinary meaning of the language of the Charter, an employment contract falls within the City Charter’s category of a “direct personal interest in any contract.”

While the employment contract is a contract proscribed by the City Charter, the defendant’s action in taking the oath of office, in our view, does not justify his removal from office under the ouster statute. The ouster statute provides:

Every person holding any office of trust or profit, under and by virtue of any of the laws of the state, either state, county, or municipal, except such officers as are by the constitution removable only and exclusively by methods other than those

provided in this chapter, who shall knowingly or willfully commit misconduct in office, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state, or who shall in any public place be in a state of intoxication produced by strong drink voluntarily taken, or who shall engage in any form of gambling, or who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit such office and shall be ousted from such office in the manner hereinafter provided.

Tenn. Code Ann. § 8-47-101 (1993).

Our cases teach that an ouster suit should only be brought if “there is a clear case of official dereliction, as such a drastic statute should be invoked only in plain cases and not for purposes of inquisition.” *Vandergriff v. State*, 185 Tenn. 386, 206 S.W.2d 395, 397 (1937). *See also State ex rel. Leech v. Wright*, 622 S.W.2d 807, 818 (Tenn. 1981). The evidence of official dereliction should be clear and convincing. *State ex rel. Thompson v. Walker*, 845 S.W.2d 752, 759 (Tenn. App. 1992).

Official misconduct “must be of such a nature that the official could be indicted for a common law misdemeanor for misconduct in office.” *McDonald v. Brooks*, 215 Tenn. 535, 387 S.W.2d 803, 806 (1965).¹ However, “[p]ublic officials acting in good faith, who, through ignorance, error, or oversight, run counter to a charter provision or some law, do not subject themselves to indictment and removal from office at common law, and under similar circumstances could not be removed from office under the Ouster Law.” *State ex rel Citizens of Lawrenceburg v. Perkinson*, 159 Tenn. 442, 19 S.W.2d 254, 255 (1929).

The plaintiffs do not argue that the defendant committed willful misconduct in office, or that he willfully neglected to perform any duty of office.

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Plaintiffs pointed out that statutory law prohibits public officials from having certain conflicts of interest. *See* T.C.A. §12-4-101(a)(1). This issue is not properly before this Court under the ouster petition. *See* T.C.A. §29-35-101, and *State v. Ward*, 163 Tenn. 265, 43 S.W.2d 217, 218 (1931).

Instead, they argue that he is guilty of perjury because his oath was false, but they do not assert that he swore falsely intentionally.

The ouster statute, as applied to this case, requires a violation of a penal statute before an official may be ousted from office. The statute defining the offense of perjury provides:

- (a) A person commits an offense who, with intent to deceive:
 - (1) Makes a false statement, under oath;

Tenn. Code Ann. § 39-16-702 (1997).

Thus, the false statement must have been made with the intent to deceive. There is no evidence, and no party has asserted, that defendant made a false statement with the intent to deceive. Accordingly, defendant could not have committed the offense of perjury under the statute, and therefore has not committed an indictable offense which would trigger the ouster statute.

Plaintiffs argue however, that defendant committed a different offense of perjury, with that offense being defined in the City Charter. The Charter provides: “And every such officer or person who shall take and subscribe such oath, shall be guilty of perjury in case the oath shall be false or shall be violated, and shall be liable to indictment for perjury by any grand jury of Roane County, and upon conviction thereof shall be punished as now provided by law in case of perjury. . . .” Essentially, they argue that the Charter creates a separate crime of perjury, which is an indictable offense, and which does not require an intent to deceive.

While plaintiffs are correct that the “Legislature may forbid the doing of an act and make its commission criminal without regard to the intent of the doer,” *McKnight v. State*, 171 Tenn. 574, 106 S.W.2d 556, 557 (1937); *Hunter v. State*, 158 Tenn. 63, 12 S.W.2d 361, 362 (1928), this was not accomplished by the City Charter as it relates to this case. The Charter states that perjury can occur without intent if the oath is false, but it then refers to the State law with respect to perjury by its statement

that the offending person shall be punished upon conviction as provided now by law. Accordingly, an indictment for perjury and subsequent conviction, referred to in the Charter, must be pursuant to the State law on perjury.

Assuming, *arguendo*, the City Charter does provide a different offense called perjury, the Charter is not a penal statute. The ouster law only provides for ouster for any official “who shall commit any act constituting a violation of any penal statute involving moral turpitude.” Tenn. Code Ann. § 8-47-101. Since no penal statute was violated under this theory advanced by plaintiffs, the ouster statute is not applicable.

We affirm the Trial Judge’s dismissal of the ouster petition for the reasons given in this Opinion, and remand with the cost of the appeal assessed to the appellants.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

H. David Cate, Sp.J.